

ONTARIO

SUPERIOR COURT OF JUSTICE

Clerk's Stamp

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. c.o.b. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY AND JOHN DOES #4-10

Defendants

**AMENDED AND RESTATED
STATEMENT OF DEFENCE AND COUNTERCLAIM
OF
KEVIN BAUMANN**

1. This Statement of Defence is delivered by the defendant, Kevin Baumann, in response to the Fresh As Amended Statement of Claim dated July 19, 2019 (the "SOC").
2. This Statement of Defence adopts the same naming conventions used in the SOC, except as may be varied herein.
3. In response to paragraph 29 of the SOC, Mr. Baumann lives in Bluffton, Alberta.

4. Mr. Baumann denies all of the allegations contained in the SOC.
5. This action is an improper and misguided effort to intimidate Mr. Baumann and other Defendants into silence with respect to the Plaintiffs' wrongful, heavy handed and illegal business practices designed to profit at the expense of their own borrowers.

There was no Conspiracy

6. Mr. Baumann denies there was a Conspiracy to cause economic harm to the Plaintiffs, as defined at paragraph 87 of the SOC and later said, at paragraph 182(a), to have been "particularized" at paragraph 90 of the SOC, and as otherwise referred to at paragraph 39 of the SOC as a "conspiracy" with a lower case 'c'.
7. In the alternative, if there was a Conspiracy, Mr. Baumann was not a participant.
8. Mr. Baumann never entered into any agreement with anyone to injure the Plaintiffs. Nor did he ever take any steps together with others the predominant purpose of which was to harm the Plaintiffs. He held no common design with any other Defendants, as alleged in the SOC, and he took no acts in combination, in concert, or by agreement with others.
9. Any similarities in the Defendants' legal positions arise from the same or similar misconduct employed by the Plaintiffs in their dealings with the respective Defendants.
10. Mr. Baumann specifically denies that he ever used unlawful means to harm the Plaintiffs, whether alone or in conjunction with others, and that he ever offered to fund any of the other Defendants in their litigation with the Plaintiffs.

11. Mr. Baumann further denies he had any knowledge that others might use unlawful means to harm the Plaintiffs, or that he held any common design with them, as alleged in the SOC.

No Defamation or Injurious Falsehood

12. Mr. Baumann denies doing or saying anything which constitutes defamation, and further denies the Plaintiffs' claim for damages on that basis, as claimed at paragraph 1(a) of the SOC.
13. In particular, Mr. Baumann denies that he defamed Callidus by re-tweeting any tweets (as alleged at paragraph 59 of the SOC), by spreading rumours through the Bay Street Rumour Mill (as alleged at paragraph 90 of the SOC), by filing false Whistleblower complaints to the OSC and SEC (as alleged in paragraphs 77 and 90 of the SOC), by leaking such complaints to the media or police (as alleged in paragraph 90 of the SOC), or otherwise.

Baumann admits of filing 11 truthful submissions with Canadian Securities regulators. Baumann believes the OSC agreed that Callidus' yield enhancement scheme was unlawful. Within Callidus' Q2 2018 quarterly release Callidus stated that at the recommendation of the OSC it would no longer be booking non realized yield enhancements. This decision removed Callidus' ability to oppress future borrowers and unlawfully seize assets.

Baumann admits to filing a complaint with Toronto Police.

On May 21, 2019 Baumann retained additional Calgary Counsel and an additional Forensic Specialist to evaluate and investigate all conduct relating to the various claims. The mandate was to obtain Preservation Orders and access to certain Callidus email accounts to confirm the unlawful conduct Baumann and other Callidus

borrowers from Texas to Alberta which Baumann and others believe has been utilized. Unfortunately this endeavor would not be completed prior to Callidus being privatized in early November.

From evaluation and investigation it was recommended that an extensive submission be made to the RCMP Commercial Crimes. A complaint against Callidus relating to fraud, theft over and Bankruptcy Act offences was submitted and confirmed received by the RCMP K Division Federal Policing on October 3, 2019. The individual who conducted the investigation and submission on behalf of Baumann has proper credentials and is known in Alberta as a leading investigator.

14. No statements made by Mr. Baumann about the Plaintiffs were defamatory either in their ordinary meaning or by innuendo, or capable of bearing any defamatory meaning with respect to the Plaintiffs, whether alleged or at all.
15. All statements made by Mr. Baumann about the Plaintiffs were made in good faith and without malice and reflected his honest assessment of the facts. To the extent any such statements were defamatory, which is denied, they were published on occasions of absolute or qualified privilege.
16. Mr. Baumann exercised reasonable diligence and judgement in publishing statements about the Plaintiffs and all such statements were justified and true or substantially true or were fair comments or responsible communications on matters of public interest.
17. Mr. Baumann denies that he is liable for any injurious falsehood with respect to the Plaintiffs.
18. Mr. Baumann denies that he ever (i) entered into any agreement with others to injure the Plaintiffs by communicating injurious falsehoods, (ii) took any steps together

with others the predominant purpose of which was to harm the Plaintiffs through the communication of injurious falsehoods, and (iii) held any common design with any other Defendants to act in combination, in concert, or by agreement with them to maliciously communicate injurious falsehoods about the Plaintiffs as part of a Conspiracy or otherwise.

No Breach of Securities Act and No Unjust Enrichment

19. Mr. Baumann was never enriched at all, whether justly or unjustly, and never participated in or obtained any gain from any Conspiracy or the alleged short positions taken by the Wolfpack Conspirators in Callidus Shares.
20. Further, Mr. Baumann had no knowledge of any short attack and held no common design with others to carry out the alleged short attack as part of a larger Conspiracy.
21. Mr. Baumann played no role in the publication of the Article alleged to have precipitated the alleged short attack.
22. Mr. Baumann denies that he did anything that violates s. 126.1 and 126.2 of the *Securities Act*. Mr. Baumann further denies that he had any knowledge that others might do such things or that he held any common design with others to do such things through any Conspiracy.

No Intentional Interference with Economic Relations

23. Mr. Baumann did not deceive any third parties (as alleged at paragraph 193 of the SOC) and did not interfere with the Plaintiffs' economic relations (as alleged at paragraph 194 of the SOC).

24. Mr. Baumann committed no unlawful acts against any third parties and held no intention to cause economic harm to the Plaintiffs, whether alone or in common with others.
25. Mr. Baumann denies any liability for the tort of intentional interference with economic relations.

No Confidential Documents, Information, or Communications

26. Mr. Baumann denies being in possession of, or sharing, any confidential documents or information of the Plaintiffs (as alleged in paragraph 84 of the SOC). Any non-confidential documents distributed by Baumann were provided by the Plaintiffs or were public documents filed with regulators.
27. Mr. Baumann denies that he shared or circulated any non-public material information with anyone (as alleged at paragraph 124 of the SOC).
28. Mr. Baumann denies that any communications he had with any of the other Defendants were ever directed towards the furtherance of any Conspiracy. To the extent that he spoke with any of the other Defendants about matters concerning the Plaintiffs, such communications were merely concerned with learning from others about their similar experiences in dealing with the Plaintiffs. Mr. Baumann denies that he was in close, frequent or unlawful contact with any of the Defendants.

Other

29. Mr. Baumann denies that he caused or contributed to the damages alleged by the Plaintiffs in any way.

30. Mr. Baumann denies the Plaintiffs have identified any legal basis to recover the accounting and disgorgement claimed at paragraph 1(b) of the SOC and the investigation costs claimed at paragraph 1(g) of the SOC.
31. Mr. Baumann denies the Plaintiffs are entitled to any punitive or aggravated damages, as claimed at paragraph 1(h) of the SOC.
32. Some or all of the allegations in the SOC duplicate allegations made against Mr. Baumann in an action filed against him by Callidus in the Court of Queen's Bench of Alberta as Court File No. 1701-14167. Accordingly, the within action as against Mr. Baumann ought to be stayed or struck out as an abuse of process.

Disposition Sought

33. Mr. Baumann seeks the dismissal of the Plaintiffs' claim against him with costs in his favour on a full or substantial indemnity basis and the continuance of his counterclaim.

COUNTERCLAIM

Baumann reserves the right to amend his Counterclaim.

34. The Defendant, Kevin Baumann, claims as against the Defendants by Counterclaim, The Catalyst Capital Group Inc, Callidus Capital Corporation, Scott Sinclair and Sinclair Range Inc.
 - a) Damages in the sum of 35.6 million dollars against the Defendants by Counterclaim The Catalyst Capital Group Inc, The Callidus Capital Corporation, Scott Sinclair, and Sinclair Range Inc for loss of assets including Breach of Contract, willful misconduct, deception and fraudulent conduct

toward Baumann, MNP the Receiver of Alken Basin Drilling Ltd and The Office of Superintendent of Bankruptcy.

It was a condition that Baumann meet with Glassman the head of Catalyst prior to closing Alken's loan funding. Considering Callidus is technically financially defunct and Catalyst management including Glassman intervened in the complete management of Callidus and Alken's loan, Catalyst attracted a duty of care to Baumann and Alken and is responsible for damages in the amount of 35.6 million dollars.

- b) 32 million dollars relating to the unlawful yield enhancement Catalyst and Callidus gained from Baumann and Alken.
- c) 1.6 million dollars relating to Baumann's shareholders loan which Sinclair, Catalyst and Callidus concealed from the Court.
- d) 2 million dollars relating to expenditures relating to the various Callidus Claims.

Attached is the Alberta Claims, Counterclaims and endorsements.

The Corporate Opportunities

- 35. On or about March 24, 2016 Sinclair made MNP aware of a potential agreement between Alken and a Kuwaiti consulting company to cooperate in securing contracts in Egypt to drill wells (the "MOU"). On or about March 28, 2016 Sinclair provided MNP with a Memorandum of Agreement between Alken and Petro Staff International regarding a potential contract with "Egyptian Authorities" to drill wells in Egypt (the "First MOA"). On or about April 12, 2016 Sinclair provided MNP with a Memorandum of Agreement between Alken and PTSME Company regarding the drilling in Egypt (the "Second MOA").

36. Sinclair executed both files in the First MOA and the Second MOA on behalf of Alken on March 23, 2016 and entered into the MOU on behalf of Alken on a date which is unknown to Baumann. Although Sinclair ostensibly acted on behalf of Alken in entering into the MOU and negotiating and executing the First MOA and the Second MOA, he took these actions as the agent of Callidus and without the knowledge of Baumann. The corporate opportunities evidenced by the First MOA, the Second MOA and the MOU are referred to collectively herein as the “**Corporate Opportunities**”.
37. Sinclair, as the agent of Callidus, pursued the Corporate Opportunities and negotiated and entered into the First MOA, the Second MOA and the MOU immediately prior to and during the period of the receivership and the marketing of Alken’s assets. The Corporate Opportunities were developed using Baumann’s and Alken’s 30-years of expertise, funds, corporate strategy and confidential information.
38. A spreadsheet was prepared by or at the direction of Callidus or Sinclair as its agent during this time period which set out the value of the Corporate Opportunities (the “**Spreadsheet**”). However, at the direction and behest of Callidus or Sinclair as its agent, the only disclosure of the Corporate Opportunities which was made in the advertising and sale process was a limited and selective degree of disclosure made to six (6) parties which had previously signed confidentiality agreements, all of which were only interested in Alken’s equipment.
39. Had the First MOA, Second MOA and MOU and spreadsheet been fully disclosed to the parties with an interest in pursuing the Corporate Opportunities, this would have significantly increased the value of Alken’s assets available for sale in the receivership process, and correspondingly decreased the amount for which Callidus could pursue Baumann under the Guarantee. To the best of Baumann’s information

and knowledge, the Corporate Opportunities and the goodwill of Alken were not appraised and no consideration was paid by Altair for the same.

40. The existence of the Corporate Opportunities and Spreadsheet was not disclosed to Baumann until after the Vesting Order was issued. Copies of the First MOA, Second MOA, MOU and Spreadsheet have never been provided to Baumann despite his requests and demands as the current President and majority shareholder of Alken.
41. Since the closing of the transaction approved by the Vesting Order, Callidus has been pursuing the Corporate Opportunities through its wholly-owned subsidiary, Altair, with involvement and assistance of Sinclair, either personally or through Sinclair Range. In or about August 2016, Callidus reported a \$32,000,000 “yield enhancement” in connection with one of its loans in the period from March 1, 2016 to June 30, 2016 and indicated that it had helped an unnamed company go into an “additional business” which would allow it to realize potentially billions of dollars in revenue. Baumann believes this loan to be the Credit Agreement, the unnamed company to Alken, and the “additional business” to be the Corporate Opportunities”.

Date: November 5, 2019

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Self-represented

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**THE CATALYST CAPITAL GROUP
INC et. al. Plaintiffs**

WEST FACE CAPITAL INC et. al. Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT
TORONTO**

**AMENDED STATEMENT OF DEFENCE
AND COUNTERCLAIM
(of the defendant, Kevin Baumann)**

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Court File Number 1501-05314
 Court COURT OF QUEEN'S BENCH OF ALBERTA
 Judicial Centre CALGARY
 Plaintiff by Counterclaim KEVIN BAUMANN
 Defendants by Counterclaim CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, ALTAIR WATER AND DRILLING SERVICES LTD. and SINCLAIR RANGE INC.

Form 24
 (Rule 3.67)
 CLERK OF THE COURT
 FILED
 JAN 09 2018
 JUDICIAL CENTRE OF CALGARY

And
 Court File Number 1501-05769
 Court COURT OF QUEEN'S BENCH OF ALBERTA
 Judicial Centre CALGARY
 Plaintiff by Counterclaim KEVIN BAUMANN
 Defendants by Counterclaim CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, ALTAIR WATER AND DRILLING SERVICES LTD. and SINCLAIR RANGE INC.

Document AMENDED COUNTERCLAIM

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Lawyers for the Plaintiff by Counterclaim, Kevin Baumann
 File No.: ^ 68058.001

AMENDED this 09 day of JANUARY 2018 Pursuant to Rule 3.67 dated the 09 day of JAN, 2018

CLERK OF THE COURT

NOTICE TO DEFENDANTS BY COUNTERCLAIM

You are being sued. You are a defendant by counterclaim.

Go to the end of this document to see what you can do and when you must do it.

NOTE: State below only facts and not evidence [Rule 13.6]

Statement of facts relied on:

1. The Defendant Kevin Baumann ("Baumann" or the "Plaintiff by Counterclaim") repeats each and every allegation of fact contained in his Statements of Defence in

Queen's Bench Action Nos. 1501-05314 and 1501-05769, which Actions were commenced by Callidus Capital Corporation ("**Callidus**").

(I) The Parties

2. Baumann is an individual businessman residing in Bluffton, Alberta. Until his resignation on April 21, 2015 at the insistence of Callidus, he was President, officer, and director of Alken Basin Drilling Ltd. ("**Alken**" or the "**Company**") which was founded in 1982 and purchased by Baumann in or about February, 2013.
3. Alken is a private company that ^ provided water well drilling and associated services to oil and gas producers across Western Canada until its undertaking, property and assets were sold as described herein.
4. At all material times hereto, Baumann held 60 common shares and 1,602,688 Series 1 Preferred Shares in Alken collectively amounting to 60% of the Company's shares.
5. Callidus is an Ontario corporation in the business of high risk distressed debt lending. Callidus extended a loan to Alken pursuant to an agreement dated and effective as of March 31, 2014 (the "**Credit Agreement**"), under which Callidus granted certain credit facilities to Alken bearing an aggregate credit limit of \$28,500,000.00 at an interest rate of 18% (21% default rate) (the "**Credit Facilities**").
6. Scott Sinclair ("**Sinclair**") is an individual who resides in Toronto, Ontario. Until September 29, 2016 Sinclair ^ was the Managing Director of an Ontario corporation named Range Corporate Advisors Inc. ("**Range**"). On April 21, 2015, Sinclair was appointed ^ the President of Alken. Sinclair remained the President of Alken until May 4, 2016, as described in more detail below.
7. Sinclair Range Inc. ("**Sinclair Range**") is a company which was formed on or about September 29, 2016 as a result of the merger of a number of other companies, including Range. Accordingly, Sinclair Range is the legal successor to Range. At all material times hereto, Sinclair was the President of Sinclair Range.
8. Altair Water and Drilling Services Ltd. ("**Altair**") is a wholly-owned subsidiary of Callidus, and acquired the undertaking, property and assets of Alken as described herein. At all material times hereto, Sinclair was the President of Altair.
9. As further detailed below and as will be further particularized at the trial of this Action, by virtue of Callidus' placement of Sinclair within Alken, Sinclair and Callidus together, or Callidus through Sinclair acting as its agent, either personally or through Range, were the legal and de facto controlling mind(s) or principal(s) of Alken from April 21, 2015 through May 4, 2016.
10. Callidus[^], Sinclair, Altair and Sinclair Range are collectively referred to herein as the "**Defendants by Counterclaim**".

(II) Callidus' Negligent or Fraudulent Misrepresentation Induced Baumann

11. Historically, Alken obtained traditional operating capital and financing from Servus Credit Union ("**Servus**") under various credit facilities and loan agreements. In or about the Fall of 2013, Baumann was introduced to certain Callidus representatives.

Shortly thereafter Alken sought a commercial loan from Callidus in the form of certain credit facilities.

12. Callidus advertised its credit facilities as bearing few, if any, covenants, and as being tailored to companies in financial distress.
13. In reliance on Callidus' representations that it provided financial flexibility to distressed companies, Alken severed its relationship with Servus and commenced negotiations with Callidus.
14. Negotiations between Alken and Callidus were primarily conducted by Baumann on behalf of Alken, and by James Hall ("Hall"), Craig Boyer ("Boyer"), Mark Wilk ("Wilk"), Newton Glassman ("Glassman") and Dustin White ("White") on behalf of Callidus. Hall, Boyer, and Wilk were, at all material times hereto, Vice-Presidents at Callidus.
15. During negotiation of the Credit Agreement, Callidus, through its representatives Hall, Boyer, Wilk, Glassman and White and otherwise, represented to Baumann and Alken, among other things, that:
 - (a) the Credit Facilities would not require as security personal guarantees of Baumann or the other Alken shareholders;
 - (b) the Credit Facilities were designed to provide companies in distressed situations or in shifting markets – Alken's precise circumstances – with considerable financial flexibility; and
 - (c) the reason their loans bore interest rates as high as 18-20% per year was that they did not require personal guarantees as collateral and they provided considerable financial flexibility in exchange.

(the "Representations")

Baumann relied on the Representations. But for the Representations, Baumann, as Alken's President, would not have sought debt financing from Callidus.

16. However, at the eleventh hour, and in breach of its representations and its duty of care to Baumann, Callidus suddenly changed its position and required personal guarantees from all of Alken's shareholders.
17. In breach of its representations and its duty of care to Baumann, Callidus demanded a personal guarantee from Baumann bearing a limit of \$6,000,000.00.
18. In further breach of its representations and its duty of care to Baumann, Callidus also demanded a mortgage of real property then in Baumann's name, which was appraised at \$6,000,000.00.
19. In further breach of its representations and its duty of care to Baumann, Callidus demanded a pledge of all of Baumann's shares in Alken in favour of Callidus, as further security for Alken's indebtedness to Callidus under the Credit Agreement.
20. Alken was not in a position to negotiate. The parties occupied grossly unequal positions of bargaining strength. Alken was distressed, had terminated its previous

credit facilities in reliance on Callidus' representations, and required immediate access to working capital to meet its suppliers', customers', and payroll demands failing which it would not be able to continue as a going concern. In these circumstances, Callidus exerted undue influence in procuring the personal guarantee, mortgage, and share pledge of Baumann.

21. As a result, on March 31, 2014, in reliance on Callidus' representations and induced thereby, Baumann caused Alken to enter the Credit Agreement with Callidus, whereby Baumann was personally liable pursuant to the personal guarantee associated with the Credit Agreement.
22. The Credit Agreement was executed by Baumann on behalf of Alken, and by David Reese, Chief Operating Officer of Callidus, and James Riley, Director and Secretary of Callidus.
23. Pursuant to a guarantee dated March 31, 2014 between Callidus and Baumann, Baumann guaranteed all obligations of Alken to Callidus under the Credit Agreement to a limit of \$6,000,000.00 (the "**Guarantee**").
24. By a mortgage dated March 31, 2014, and registered at the Land Titles Office for Red Deer County, Alberta, on April 8, 2014, as Instrument No. 142 102 977, Baumann mortgaged to Callidus certain lands (the "**Lands**") having been appraised at \$6,000,000.00 (the "**Mortgage**").
25. Pursuant to a pledge and security agreement (the "**Pledge and Security Agreement**") dated March 31, 2014, Baumann pledged certain collateral, including, among other things, all of his present and future rights, title, and interest in and to his shares in Alken (the "**Collateral**"). On or about May 15, 2014, following the amalgamation of Alken with 1711760 Alberta Ltd., another company Baumann owned, a further pledge and security agreement (the "**Acknowledgement**") was formed under which the initial share pledge to Callidus pursuant to the Pledge and Security Agreement was confirmed (collectively, the Pledge and Security Agreement and Acknowledgement are referred to as the "**Pledge and Security Agreements**").
26. A special relationship giving rise to a duty of care existed between Callidus and Baumann because:
 - (a) Callidus had a direct financial interest in the transaction in respect of which the Representations were made;
 - (b) Callidus and/or its representatives possessed special skill, judgment, or knowledge pertaining to debt financing;
 - (c) the advice or information constituting the Representations was provided in the course of Callidus' business;
 - (d) the Representations were given deliberately, in the context of commercial negotiations, and not on a social occasion; and,
 - (e) the Representations were given in response to a specific enquiry or request by Baumann.

27. Callidus' breach of the Representations resulted in a breach of its duty of care.
28. These breaches improperly induced Baumann to execute the Credit Agreement as Alken's representative, prevented Baumann from protecting his personal position, increased Baumann's personal liability contrary to the understanding between the parties, jeopardized his shareholdings in the Company, and harmed his position as a creditor to the Company by virtue of various shareholder loans he provided.
29. Callidus made the Representations fraudulently or negligently, as may be proven at the trial of this Action, in order to induce Baumann to cause Alken to enter into the Credit Agreement with Callidus with a view of profit and the prospect of assuming control or the assets of Alken at a liquidated price, as further detailed below and as will be further particularized at the trial of this Action.

(III) Callidus' Breach of Fiduciary Duty

30. Contemporaneous with the execution of the Credit Agreement, a fiduciary relationship arose and has persisted as between Callidus and Baumann, and as between Callidus and Alken. This relationship arose from the terms of the Credit Agreement and the nature of Callidus' performance under it, and as will be further particularized at the trial of this Action.
31. Pursuant to the Credit Agreement:
 - (a) the monies made available thereunder were for use by Alken to:
 - (i) provide working capital;
 - (ii) payout its existing credit facilities; and
 - (iii) reduce its indebtedness to certain debenture holders;
 - (b) Alken made a number of covenants, representations and warranties, and assumed certain reporting obligations to Callidus regarding its finances;
 - (c) Callidus ^ had significant discretion regarding the disbursement of funds available under the Credit Facilities, but such discretion was to be used in a commercially reasonable manner;
 - (d) Callidus' loan ^ was secured by, among other things, a first ranking security interest in all the assets of Alken, which were ascribed a forced liquidation value of \$21,490,110.00 by an appraiser selected by Callidus; and
 - (e) Baumann is a personal guarantor of all obligations of Alken to Callidus to a limit of \$6,000,000.00.
32. In such circumstances:
 - (a) Callidus as lender had scope for exercise of significant discretion and power;
 - (b) Callidus ^ in fact did unilaterally exercise that power or discretion in a commercially unreasonable and unconscionable manner so as to affect Baumann's and Alken's legal and practical interests; and

- (c) Baumann and Alken were peculiarly vulnerable to or at the mercy of Callidus.
33. In 2014-2015 Alken's operations were under significant liquidity pressures. Baumann, as Alken's President, had understood that in entering the Credit Agreement, Callidus intended to provide sufficient operating liquidity to increase operational revenues, and ultimately stabilize and improve Alken's working capital position. Instead, Callidus "drip fed" capital increases, while accumulating high interest charges and fees.
34. Between March 31, 2014 and in or about March 2015, and as contemplated by the Credit Agreement, Alken made multiple funding requests to draw on available monies from the Credit Facilities. Several of these requests were rejected by Callidus contrary to the terms of the Credit Agreement. The effect of these rejections was to prejudice Alken's relationships with its customers and suppliers, and further deteriorate its operations.
35. Collectively, the repeated and arbitrary denials of Alken's proper funding requests:
- (a) resulted in a deterioration of Alken's relationships with its customers and suppliers, which led to loss of work commitments and potential contracts;
 - (b) caused Alken to have increasing difficulty in servicing its debt to Callidus and its debenture holders; and
 - (c) ultimately stymied Alken's ability to recapitalize and pay out Callidus.
36. To date, Alken has paid Callidus in excess of \$3,936,550.44 in interest and fees purportedly accrued under the Credit Agreement.
37. Callidus' failure to perform under the Credit Agreement and advance to Alken monies properly available under the Credit Facilities resulted in harm to:
- (a) Alken, in the form of, among other things, its operations significantly deteriorating and its share value dropping; and
 - (b) Baumann, by exposing him to potential liability as the personal guarantor under the Credit Agreement, by deteriorating the value of his equity in Alken, by jeopardizing his ownership of his Alken shares, and by harming his position as a creditor to the Company by virtue of various shareholder loans he provided.
38. In the result, Baumann states that Callidus breached the terms of the Credit Agreement and breached its fiduciary duty to Baumann and caused him damages.
39. Callidus also committed breaches of the Pledge and Security Agreement, and additional breaches of its fiduciary duty to Baumann, as described in more detail below.

(IV) Sinclair is Callidus' Agent

40. As the relationship between Alken and Callidus deteriorated following Alken's improperly and repeatedly denied requests for funding under the Credit Facilities, Callidus recommended that Sinclair be hired by Alken.

41. Callidus represented to Baumann that Sinclair would be an asset to the Company, that he was familiar with Callidus loan structures, and that he would liaise between Alken and Callidus. Baumann relied on these representations.
42. On December 3, 2014, Sinclair was retained by Alken pursuant to an engagement letter (the "**Engagement Letter**") executed that same day by Baumann and Michael Baumann on behalf of Alken.
43. The Engagement Letter provides, among other things, that Sinclair's services to Alken were to include:
 - (a) advising the Company generally;
 - (b) helping the Company manage its short term liquidity shortfall by assisting in the development and execution of an agreeable liquidity plan;
 - (c) helping the Company to turnaround its operations and financial performance by assisting in the development and execution of an agreeable turnaround plan;
 - (d) helping the Company prepare materials and a plan to attract new investment capital or debt to payout Callidus; and
 - (e) helping the Company with its business and strategic communications.
44. Pursuant to the Engagement Letter, Sinclair's fees for such services included an "Initial Work Fee" in the amount of \$20,000.00, due and payable in advance of his commencing work, and a "Monthly Work Fee" of \$15,000.00. Alken has paid Sinclair these amounts.
45. Baumann states and the fact is that Sinclair never performed the services Alken contracted him for.
46. Sinclair did not liaise on behalf of Alken. Sinclair did not assist in the development of any restructuring or other plan. Alken repeatedly submitted funding requests to Callidus through Sinclair – as Alken was advised by Callidus to do – but to no avail.
47. On or about January 31, 2015, Alken issued a termination letter to Sinclair terminating his engagement with Alken.
48. On or about February 19, 2015, following discussions with Callidus and on their urging, Sinclair was reinstated by verbal agreement. Following this, Sinclair continued to neglect the services the Engagement Letter contemplated him providing, while effectively acting as agent to Callidus, either personally or through Range.
49. Baumann states and the fact is that Callidus forced Sinclair upon Baumann and Alken knowing full well that Sinclair would act not as a dispassionate intermediary between the parties, but rather as Callidus' agent, either personally or through Range, to effect Callidus' *de facto* control over Alken and its assets.
50. Sinclair also acted as the agent of Callidus, either personally or through Range, as set forth in more detail below.

(V) Callidus' and Sinclair's Oppressive Conduct

51. On March 18, 2015, Callidus sent a letter to Alken, demanding immediate payment of Alken's indebtedness to Callidus. The letter cited the distressed state of the Alberta economy amongst the reasons for demanding repayment of the loan. Alken was unable to immediately satisfy the demand. At the time of this demand, Alken was not in default or otherwise in breach under the Credit Agreement.
52. On April 21, 2015, Baumann resigned from his position as President of Alken at the insistence of Callidus, though he remained the Company's majority shareholder. Baumann's resignation was communicated to Callidus that same day.
53. That same day, Sinclair was appointed President of Alken. This finalized Callidus' efforts to install Sinclair as its agent within Alken and solidified its play to assume *de facto* or legal control of the Company.
54. The effect of Callidus' actions was to systematically deteriorate the value of Alken for its sole benefit and, having manoeuvred to assume control of the Company through the placement of Sinclair, Callidus ^ then sought to consolidate its position by engaging in oppressive conduct against Baumann, the Company's owner, majority shareholder, and shareholder creditor.
55. On May 26, 2015, Callidus, through its counsel, improperly demanded from Baumann his interest in and to his shares in Alken pursuant to the Pledge and Security Agreements. Baumann resisted the demand.
56. Baumann states and the fact is that Callidus demanded Baumann relinquish his shares in Alken to assume total and wrongful control of the Company.
57. Baumann advances this claim pursuant to Part 19 of the *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended from time to time (the "ABCA").
58. Baumann is a "complainant" within the meaning of s. 239(b)(ii) of the ABCA.
59. The actions of Callidus and Sinclair in respect of the conduct of the business and affairs of Alken are oppressive, unfairly prejudicial, and unfairly disregarded the interests of Baumann as security holder.
60. As a result of these oppressive acts, Callidus and Sinclair have caused serious harm and prejudice to Alken as well as to the rights and interests of Baumann as a security holder and creditor of the company.
61. Baumann is entitled to immediate relief from Callidus and/or Sinclair under the ABCA in order to remedy and redress past, present and ongoing oppression.
62. Particulars in this regard include the following:
 - (a) the Defendants by Counterclaim's actions in repeatedly and improperly denying Alken's requests for funding under the Credit Facilities deteriorated the value of Alken to the sole benefit of Callidus and to the detriment of Baumann by making it increasingly difficult for Alken to service its debt to Callidus and thereby increasing the personal liability to Baumann;

- (b) Callidus forced Sinclair upon Baumann and Alken knowing full well that Sinclair would act not as a dispassionate intermediary between the parties, but rather as Callidus' agent to effect Callidus' *de facto* control over Alken and its assets;
- (c) following Baumann's forced resignation from the Company, Sinclair was immediately instated as President, notwithstanding his lack of independence from Callidus and his being Callidus' agent;
- (d) in his capacity as President, Sinclair (or, through him, Callidus) repeatedly ignored Baumann's requests for information regarding the financial status of the Company, notwithstanding Baumann's share equity;
- (e) in his capacity as President, Sinclair (or, through him, Callidus) repeatedly denied Baumann's requests to convene a shareholder meeting;
- (f) Callidus purported to exercise its rights under the Pledge and Security Agreements, execution of which Callidus obtained through its negligent and/or fraudulent misrepresentations, to improperly obtain Baumann's shares in Alken; and
- (g) such further particulars as may be proven at the trial of this Action.

(VI) The Receivership Process

- 63. Following his forced resignation as President of Alken on April 21, 2015, Baumann was barred from having any involvement in Alken or even setting foot on the Company's premises. His requests for financial records and information about the operations of the Company were ignored and went unanswered, despite the fact that he continued to be the majority shareholder of the Company and the guarantor of its Company's debts to Callidus under the Credit Agreement.
- 64. In or about May of 2015, Baumann advised Sinclair that he had been contacted by several individuals interested in purchasing Alken. Sinclair made no attempt to pursue those opportunities, but instead continued to operate the Company as the agent of Callidus, either personally or through Range, until after Callidus put the Company into receivership in April of 2016.
- 65. Despite Baumann's repeated demands to liquidate Alken during this timeframe, Sinclair continued to operate the company as the agent of Callidus, either personally or through Range. On April 1, 2016, MNP Ltd. ("MNP" or the "Receiver") was appointed by the Court as the Receiver of the undertaking, property and assets of Alken. The application for the appointment of the Receiver was made by Callidus and supported by an affidavit sworn by Boyer, who was Vice-President of Callidus at the time.
- 66. MNP had acted as financial advisor to Alken for a brief period of time immediately prior to its appointment as Receiver. On March 21, 2016 MNP initiated a process for the sale of Alken's assets (the "Sales Process").

67. Sinclair, as the agent of Callidus, was MNP's sole or primary point of contact in its role as financial advisor to Alken, and directed or instructed MNP with respect to the Sales Process.
68. At the request of Callidus, the Receiver was appointed with the limited mandate of completing the Sales Process. Sinclair, as the agent of Callidus, continued to operate Alken and to direct or instruct MNP with respect to the Sales Process during the receivership.
69. After its appointment, the Receiver engaged in a limited advertising process with respect to Alken's assets. In this regard, the Receiver took some cursory steps to advertise the assets and relied on Sinclair's representations that he would market the assets of the Company to his allegedly extensive buyer's list.
70. The Sales Process was extremely short. The initial deadline for offers to purchase was April 13, 2016 and this was subsequently extended to April 18, 2016 – less than one month from the date MNP initiated the Sales Process.
71. Only four offers were submitted to the Receiver in accordance with the Sales Process. Three of these offers were auction proposals and one was an en bloc offer to purchase submitted by Callidus.
72. The Receiver recommended acceptance of the Callidus offer, which was structured such that Altair, a wholly-owned subsidiary of Callidus, would be the vehicle through which Callidus would acquire the undertaking, property and assets of Alken.
73. Altair was incorporated on April 28, 2016 to constitute this vehicle. Callidus is the sole shareholder of Altair, Sinclair is the President and Chief Operating Officer of Altair, and Kevin Schmidt, a former Alken employee, is the Vice-President of Altair. At the time of Altair's incorporation, its sole director was Boyer. At present, its directors are David Reese, President and Chief Operating Officer of Callidus, and Jim Riley, Secretary of Callidus.
74. On May 4, 2016, the Alberta Court of Queen's Bench granted an Approval and Vesting Order approving the sale of Alken's assets to Altair and vesting Alken's right, title and interest in and to such assets in Altair (the "Vesting Order"). The sale was effectively a credit bid for the entire amount of Alken's debt to Callidus less \$4,500,000, which was the approximate principal amount allegedly due and owing under the Guarantee.
75. The purchase and sale of the transaction approved by the Vesting Order was completed on June 8, 2016.

(VII) The Corporate Opportunities

76. On or about March 24, 2016 Sinclair made MNP aware of a potential agreement between Alken and a Kuwaiti consulting company to cooperate in securing contracts in Egypt to drill wells (the "MOU"). On or about March 28, 2016 Sinclair provided MNP with a Memorandum of Agreement between Alken and Petro Staff International regarding a potential contract with "Egyptian Authorities" to drill wells in Egypt (the "First MOA"). On or about April 12, 2016 Sinclair provided MNP with a Memorandum

of Agreement between Alken and PTSME Company regarding the drilling of wells in Egypt (the "Second MOA").

77. Sinclair executed both the First MOA and the Second MOA on behalf of Alken on March 23, 2016 and entered into the MOU on behalf of Alken on a date which is unknown to Baumann. Although Sinclair ostensibly acted on behalf of Alken in entering into the MOU and negotiating and executing the First MOA and the Second MOA, he took these actions as the agent of Callidus and without the knowledge of Baumann. The corporate opportunities evidenced by the First MOA, the Second MOA and the MOU are referred to collectively herein as the "Corporate Opportunities".
78. Sinclair, as the agent of Callidus, pursued the Corporate Opportunities and negotiated and entered into the First MOA, the Second MOA and the MOU immediately prior to and during the period of the receivership and the marketing of Alken's assets. The Corporate Opportunities were developed using Baumann's and Alken's 30-years of expertise, funds, corporate strategy, and confidential information,
79. A spreadsheet was prepared by or at the direction of Callidus or Sinclair as its agent during this time period which set out the value of the Corporate Opportunities (the "Spreadsheet"). However, at the direction and behest of Callidus or Sinclair as its agent, the only disclosure of the Corporate Opportunities which was made in the course of the advertising and sale process was a limited and selective degree of disclosure made to six (6) parties which had previously signed confidentiality agreements, all of which were only interested in Alken's equipment.
80. Had the First MOA, Second MOA, MOU and Spreadsheet been fully disclosed to parties with an interest in pursuing the Corporate Opportunities, this would have significantly increased the value of Alken's assets available for sale in the receivership process, and correspondingly decreased the amount for which Callidus could pursue Baumann under the Guarantee. To the best of Baumann's information and knowledge, the Corporate Opportunities and the goodwill of Alken were not appraised and no consideration was paid by Altair for the same.
81. The existence of the Corporate Opportunities and Spreadsheet was not disclosed to Baumann until after the Vesting Order was issued. Copies of the First MOA, Second MOA, MOU and Spreadsheet have never been provided to Baumann despite his requests and demands as the current President and majority shareholder of Alken.
82. Since the closing of the transaction approved by the Vesting Order, Callidus has been pursuing the Corporate Opportunities through its wholly-owned subsidiary, Altair, with the involvement and assistance of Sinclair, either personally or through Sinclair Range. In or about August of 2016, Callidus reported a \$32,000,000 "yield enhancement" in connection with one of its loans in the period from March 1, 2016 to June 30, 2016 and indicated that it had helped an unnamed company go into an "additional business" which would allow it to realize potentially billions of dollars in revenue. Baumann believes this loan to be the Credit Agreement, the unnamed company to be Alken, and the "additional business" to be the Corporate Opportunities.

(VIII) Management of Alken During the Receivership Process

83. As noted above, Sinclair operated Alken as the agent of Callidus, either personally or through Range, between April 21, 2015 and May 4, 2016. During this short time, Alken's indebtedness to Callidus increased by approximately \$8,000,000 and its total indebtedness to all creditors increased by over \$11,000,000. The funds loaned by Callidus to Alken during this period were above and beyond the maximum amounts set out in the Credit Agreement, and contrary to sound financial logic or wisdom.
84. Baumann states, and the fact is, that Sinclair, as the agent of Callidus, ran the Company into the ground during this time period so that Callidus could put the Company into receivership and accomplish the following objectives:
- (a) call on the Guarantee, foreclose on the Lands and obtain a deficiency judgment against Baumann; and
 - (b) wrongfully appropriate the Corporate Opportunities through its wholly-owned subsidiary, Altair.
85. In the alternative, Sinclair and Callidus operated Alken in a commercially unreasonable manner and unnecessarily increased the amount of the debt with willful or reckless disregard for the interests of Alken, its shareholders or the guarantor, Baumann. As a result, Baumann has suffered damages.
86. During the time Sinclair operated Alken as the agent of Callidus, no financial statements were prepared for the Company and the necessary corporate filings for the Company were not attended to. In particular, no financial statements were prepared for the fiscal years ending March 31, 2015 and March 31, 2016.

(IX) Additional Breaches and Wrongful Conduct of Callidus and Sinclair

87. On May 26, 2015, Callidus purported to invoke its rights under the Pledge and Security Agreement, advising Baumann that:
- (a) he had no right to vote or take any other action with respect to any of the Collateral, including his shareholdings in Alken;
 - (b) Callidus was entitled to vote and take all other action with respect to the Collateral, including his shareholdings in Alken; and
 - (c) Pursuant to an irrevocable power of attorney set out in section 7.10 of the Pledge and Security Agreement (the "Power of Attorney"), he had irrevocably authorized and appointed Callidus as his true and lawful attorney to do any acts relating to the Collateral, including his shareholdings in Alken.
88. From that date until the date of the Vesting Order, all actions taken by or on behalf of Alken were taken at the direction of Callidus pursuant to the Power of Attorney. This included, but was not limited to, all actions taken by Sinclair as the agent of Callidus.
89. In or about May or June of 2015, Callidus appointed Sinclair as the sole director of Alken pursuant to the Power of Attorney.

90. As Baumann's true and lawful attorney under the Power of Attorney, Callidus owed Baumann a fiduciary duty and was obligated to act with the utmost loyalty and good faith in exercising his rights as the majority shareholder of Alken.
91. In taking the actions set out above, including but not limited to directing Sinclair to take the actions set out therein or knowing that he was taking such actions as its agent, Callidus was in a conflict of interest and breached the fiduciary duties which it owed to Baumann under the Power of Attorney.
92. Utilizing the Power of Attorney, its wholly-owned subsidiary Altair, and the receivership process, Callidus and its agent, Sinclair, conspired to misappropriate the Corporate Opportunities from Alken, intentionally interfered with Alken's economic relations by misappropriating the Corporate Opportunities, and perpetrated a civil fraud on Alken and Baumann, thereby causing damages to Baumann as the majority shareholder of Alken and the guarantor of its indebtedness to Callidus.
93. Callidus has employed similar schemes, in some cases also involving Sinclair, to wrongfully and fraudulently obtain control of assets of other borrowers and guarantors and reap significant profits for itself when those assets are resold.
94. The conduct of the Defendants by Counterclaim as aforesaid was and is in deliberate, flagrant, contumelious and high-handed violation of the rights of Baumann as the majority shareholder of Alken and the guarantor of its indebtedness to Callidus. Such conduct is deserving of sanction by an award of punitive, exemplary or aggravated damages.

(X) Callidus Breached its Duty of Honest Contractual Performance

95. It is a term of the Credit Agreement and the Pledge and Security Agreements, express or implied, that the Parties shall conduct themselves at all times in good faith, and engage in fair and honest dealing.
96. In breach of the Credit Agreement and the Pledge and Security Agreements, Callidus failed to conduct itself in good faith and has failed to engage fairly and honestly with Baumann in relation to its performance under the Credit Agreement and the Pledge and Security Agreements, including but not limited to the purported invocation of its rights under the Pledge and Security Agreement as aforesaid.
97. The Plaintiff by Counterclaim pleads and relies upon the *Unconscionable Transactions Act*, RSA 2000, c U-2.

(XI) Real and Substantial Connection to Alberta

98. A real and substantial connection exists between the subject matter of this claim and Alberta, based on the following:
 - (a) The claim relates to an oppressive action and breaches of various duties as described above, all of which were committed in Alberta;
 - (b) The claim relates to an Alberta company; and
 - (c) The claim relates to damages sustained in Alberta.

Place of Trial

99. The Plaintiff by Counterclaim proposes that the trial of this Action be held at the Calgary Courts Centre in the City of Calgary, in the Province of Alberta.
100. The trial of this Action will take less than 25 days.
101. The Plaintiff by Counterclaim further proposes that this Action be tried as a consolidated Action with Court of Queen's Bench Action No. 1501-05314, Court of Queen's Bench Action No. 1501-05769 and Court of Queen's Bench Action No. 1610-001573, (collectively, the "Instant Actions"), the basis for consolidation being that:
 - (a) the Instant Actions involve the same transaction and events;
 - (b) the parties in the Instant Actions are identical; and
 - (c) the Instant Actions involve common issues of law and fact.

Remedy sought:

102. Relief against Callidus for negligent or fraudulent misrepresentation.
103. An Order setting aside or varying the Guarantee, Mortgage, and Pledge and Security Agreements.
104. Damages against the Defendants by Counterclaim, and each of them, for breach of fiduciary duty and breach of honesty.
105. Damages against Callidus, Sinclair and Altair for misappropriation of the Corporate Opportunities, conspiracy, civil fraud and intentional interference with economic relations.
106. An accounting and disgorgement of all income and profits made and received by the Defendants by Counterclaim as a result of the wrongful and fraudulent conduct referred to above.
107. An order setting off damages payable by Callidus herein against any damages which may be ordered to be paid to Callidus in connection with its claim in this action.
108. Relief from the oppressive, unfairly prejudicial and unfairly disregarding conduct of the Defendants by Counterclaim ^ .
109. Damages resulting from the oppressive, unfairly prejudicial and unfairly disregarding conduct of the Defendants by Counterclaim.
110. Punitive, exemplary or aggravated damages in an amount to be determined by this Honourable Court;
111. An Order granting that all legal costs and expenses incurred be allowed to the Plaintiff by Counterclaim on a solicitor and client basis.
112. An Order:

- (a) to effect the consolidation of the Instant Actions; and
- (b) requiring the taking of such steps and the doing of such things as are required to effect the consolidation of the Instant Actions.

113. Such further and other relief and Orders this Honourable Court deems just and proper in the circumstances.

NOTICE TO THE DEFENDANT(S) BY COUNTERCLAIM

You only have a short time to do something to respond to this counterclaim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

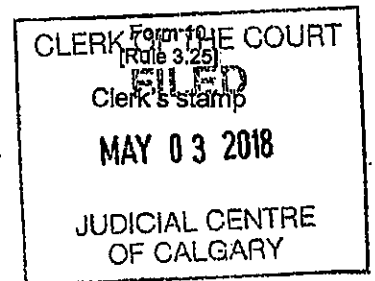
2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice to counterclaim in the Office of the Clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice to counterclaim on the plaintiff(s) by counterclaim's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice to counterclaim within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) by counterclaim against you after notice of the application has been served on you.

Court File Number 1801- 063979
Court COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre CALGARY
Plaintiff ALKEN BASIN DRILLING LTD.
Defendants CALLIDUS CAPITAL CORPORATION, SCOTT
SINCLAIR, ALTAIR WATER AND DRILLING
SERVICES LTD. and SINCLAIR RANGE INC.



Document STATEMENT OF CLAIM

Address for Service and Contact Information of Party Filing this Document Scott Venturo Rudakoff LLP
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Lawyers for the Plaintiff, Alken Basin Drilling Ltd.
File No.: 68058.003

NOTICE TO DEFENDANTS:

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Statement of facts relied on:

(a) The Parties

1. The plaintiff, Alken Basin Drilling Ltd. (**Alken** or the **Company**), is a company incorporated pursuant to the laws of the Province of Alberta. Alken was founded in 1982. At all material times hereto, the majority shareholder of Alken was Kevin Baumann (**Baumann**), who held 60% of the shares of the Company.

2. Alken is a private company that provided water well drilling and associated services to oil and gas producers across Western Canada until its undertaking, property and assets were sold as described herein.
3. The defendant Callidus Capital Corporation (**Callidus**) is a company incorporated pursuant to the laws of the Province of Ontario. Callidus is in the business of high risk distressed debt lending.
4. The defendant Altair Water and Drilling Services Ltd. (**Altair**) is a company incorporated pursuant to the laws of the Province of Ontario. Altair is a wholly-owned subsidiary of Callidus, and acquired the undertaking, property and assets of Alken as described herein.
5. The defendant Scott Sinclair (**Sinclair**) is an individual who resides in or around Toronto, Ontario. From April 21, 2015 through May 4, 2016 Sinclair was the President of Alken. At all material times hereto, Sinclair has been the President and Chief Operating Officer of Altair. Until September 29, 2016 Sinclair was the Managing Director of an Ontario corporation named Range Corporate Advisors Inc. (**Range**).
6. The defendant Sinclair Range Inc. (**Sinclair Range**) is a company incorporated pursuant to the laws of the Province of Ontario. Sinclair Range was formed on or about September 29, 2016 as a result of the merger of a number of other companies, including Range. Accordingly, Sinclair Range is the legal successor to Range. At all material times hereto, Sinclair was the President of Sinclair Range.
7. At all material times hereto, Sinclair was the directing and guiding mind of Range and Sinclair Range, and those companies were his *alter egos*.
8. Callidus, Altair, Sinclair and Sinclair Range are collectively referred to herein as the **Defendants**.

(b) The Credit Agreement

9. Callidus extended a loan to Alken pursuant to an agreement dated and effective as of March 31, 2014 (the **Credit Agreement**), under which Callidus made certain credit

facilities available to Alken bearing an aggregate credit limit of \$28,500,000 at an interest rate of 18% (21% default rate) (the **Credit Facilities**).

10. It was an express or implied term of the Credit Agreement that Callidus was required to conduct itself at all times in good faith and engage in fair and honest dealings with Alken.
11. The Credit Facilities were made available for use by Alken pursuant to the Credit Agreement to provide working capital, pay out its existing credit facilities, and reduce its indebtedness to certain debenture holders.
12. In conjunction with the Credit Agreement, Callidus required Baumann to enter into a pledge and security agreement (the **Pledge and Security Agreement**), pursuant to which Baumann pledged certain collateral, including but not limited to his present and future rights, title and interest in and to his shares in Alken, as security for the Credit Facilities being made available to Alken.
13. Pursuant to an irrevocable power of attorney set out in section 7.10 of the Pledge and Security Agreement (the **Power of Attorney**), Baumann irrevocably authorized and appointed Callidus as his true and lawful attorney to do any acts relating to the Collateral, including his shareholdings in Alken.
14. As described in more detail below, Callidus exercised its discretion and power under the Credit Agreement unilaterally, in bad faith, and in a commercially unreasonable and unconscionable manner so as to impair Alken's legal and commercial interests.
15. Between March 31, 2014 and approximately March 2015, Alken made multiple funding requests under the Credit Agreement so as to draw on the Credit Facilities. Several of these requests were rejected by Callidus contrary to the terms of the Credit Agreement.
16. Callidus' failure or refusal to perform its obligations under the Credit Agreement and advance monies to Alken properly available under the Credit Facilities constituted breaches of the Credit Agreement and resulted in significant damages to Alken, particulars of which will be proven at the trial of this action.

(c) The Engagement Letter

17. The relationship between Alken and Callidus deteriorated as a result of Alken's repeatedly and improperly denied requests for funding under the Credit Facilities.
18. In or about late 2014, Callidus began to insist that Alken hire Sinclair. In so doing, Callidus represented to Alken that Sinclair would be an asset to the Company, that he was familiar with Callidus' loan structures, and that he would liaise with Callidus on behalf of Alken. Alken relied on these representations to its detriment.
19. In fact, Callidus was aware that Sinclair would act not as a dispassionate intermediary between the parties, but rather would act as Callidus' agent, either personally or through Range, to effect *de facto* control over Alken and its assets, as described in more detail below.
20. On December 3, 2014, Sinclair, through his *alter ego* Range, was retained by Alken pursuant to an engagement letter (the "**Engagement Letter**"), which constituted an agreement between Sinclair and Alken.
21. The Engagement Letter provided, among other things, that Sinclair's services to Alken were to include:
 - (a) advising the Company generally;
 - (b) helping the Company manage its short term liquidity shortfall by assisting in the development and execution of an agreeable liquidity plan;
 - (c) helping the Company to turnaround its operations and financial performance by assisting in the development and execution of an agreeable turnaround plan;
 - (d) helping the Company prepare materials and a plan to attract new investment capital or debt to pay out Callidus; and
 - (e) helping the Company with its business and strategic communications.

22. It was an express or implied term of the Engagement Letter that Sinclair was required to conduct himself at all times in good faith and engage in fair and honest dealings with Alken.
23. Alken states and the fact is that Sinclair never performed the services for which Alken contracted him. In particular, Sinclair did not liaise with Callidus on behalf of Alken. Nor did he assist in Alken in developing a liquidity or turnaround plan. Although Alken repeatedly submitted funding requests to Callidus through Sinclair, these were denied as described above.

(d) Callidus Assumes Control of Alken

24. On March 18, 2015, Callidus sent a letter to Alken demanding immediate payment of all amounts owing under the Credit Agreement. At the time of this demand, Alken was not in default under the Credit Agreement or otherwise in breach of the Credit Agreement. Alken was unable to immediately satisfy this demand.
25. Callidus subsequently took the following actions, thereby assuming *de facto* control of Alken:
 - (a) On April 21, 2015, Callidus required Baumann to resign his position as President of Alken and appointed Sinclair as President of the Company in his stead.
 - (b) On May 26, 2015, Callidus obtained control of Baumann's shares in Alken pursuant to the Pledge and Security Agreement.
 - (c) In June of 2015, after Baumann advised Sinclair and Callidus that Baumann intended to hold a shareholders' meeting to replace Sinclair as President, Callidus invoked a Power of Attorney contained in the Pledge and Security Agreements to appoint Sinclair as the sole director of Alken.
26. Sinclair remained President and the sole director of Alken until May 4, 2016 in order to assist Callidus in effecting its "loan to own" scheme, as described in more detail below.

27. Callidus directed and controlled Alken from April 21, 2015 through May 4, 2016 by means of Sinclair acting as its agent, either personally or through Range.
28. In the alternative, Callidus and Sinclair collectively directed and controlled Alken from April 21, 2015 through May 4, 2016, with Sinclair doing so either personally or through his *alter ego* Range. During this time, Sinclair damaged Alken's reputation in the industry by incurring significant accounts payable with various service providers which he had no intention of paying.
29. Thereafter, Callidus and its agent Sinclair, either personally or through his *alter ego* Range, breached their duties of confidentiality and misused Alken's confidential information in order to misappropriate and capitalize on its corporate opportunities, including the Corporate Opportunities, as defined and described in more detail below.
30. Furthermore, Sinclair, while acting as the agent of Callidus or otherwise working for the benefit of Callidus, breached the terms of the Engagement letter by causing Alken to pay himself an excessive salary and reimburse himself for exorbitant and unsubstantiated expenses which were not permitted by the Engagement Letter.
31. Sinclair also breached his fiduciary duties to Alken by acting in the best interests of Callidus instead of Alken. Sinclair was financially motivated to follow the instructions of Callidus in order to secure his position as President of Altair and secure future work from Callidus through his *alter ego* Range and later through his *alter ego* Sinclair Range.
32. The foregoing breaches of contract and breaches of fiduciary duties of Callidus and Sinclair resulted in the demise of Alken and the loss of its corporate opportunities, including the Corporate Opportunities, as defined and described in more detail below.

(e) The Receivership Process

33. On April 1, 2016, upon the application of Callidus, MNP Ltd. (the **Receiver**) was appointed by the Alberta Court of Queen's Bench as the Receiver of the undertaking, property and assets of Alken.

34. On April 28, 2016, Altair was incorporated at the instance of Callidus, with Callidus being the sole shareholder of Altair, a Callidus officer being the sole director of Altair, and Sinclair being the President and Chief Operating Officer of Altair. To the present date, Altair remains a wholly-owned subsidiary of Callidus and entirely under the control of Callidus.
35. On May 4, 2016, the Alberta Court of Queen's Bench granted an Approval and Vesting Order approving the sale of Alken's assets to Altair and vesting Alken's right, title and interest in and to such assets in Altair (the **Vesting Order**). The purchase and sale transaction approved by the Vesting Order was completed on or about June 8, 2016.
36. Callidus utilized the receivership process, the assistance of Sinclair, and its wholly-owned subsidiary, Altair, to acquire the undertaking, property and assets of Alken and misappropriate Alken's corporate opportunities, including the Corporate Opportunities, as defined and described in more detail below.

(f) The Corporate Opportunities

37. Subsequent to Sinclair's appointment by Callidus as President of Alken, he developed certain corporate opportunities for Alken at the direction of Callidus, or alternatively with the knowledge of Callidus, by utilizing the Company's 30-years of expertise, funds, corporate strategy, and confidential information to negotiate at least two agreements on behalf of the Company with certain Egyptian and Kuwaiti entities for the drilling of wells in Egypt (the **Corporate Opportunities**).
38. Sinclair valued the Corporate Opportunities at over \$200,000,000 and advised Callidus accordingly.
39. In or about March and April of 2016, Sinclair executed the agreements embodying the Corporate Opportunities. At the direction of Callidus, or alternatively with the knowledge of Callidus, Sinclair subsequently informed the Receiver of these agreements at a time and in a fashion that was calculated to ensure that the Corporate Opportunities would not be disclosed to parties which would have an

interest in pursuing them, but rather would accrue to the benefit of Callidus through the acquisition of Alken's assets by Altair in the receivership process.

40. As a result of the actions of Sinclair as aforesaid, the only disclosure of the Corporate Opportunities which was made in the course of the receivership process was a limited and selective degree of disclosure made to six (6) parties which had previously signed confidentiality agreements, all of which were only interested in Alken's equipment.
41. Although Sinclair purported to act on behalf of Alken in securing the Corporate Opportunities, he actually did so as the agent of Callidus and for the sole benefit of Callidus through its wholly-owned subsidiary, Altair.
42. Since the closing of the transaction approved by the Vesting Order, Callidus has been pursuing all of Alken's corporate opportunities, including the Corporate Opportunities, through its wholly-owned subsidiary, Altair, with the involvement and assistance of Sinclair, either personally or through his *alter ego* Sinclair Range.
43. In or about August of 2016, Callidus publicly reported a \$32,000,000 "yield enhancement" in connection with one of its loans in the period from March 1, 2016 to June 30, 2016, indicating that it had helped an unnamed company go into an "additional business" which would allow it to realize potentially billions of dollars in revenue. Alken states, and the fact is, that the loan in question is the Credit Agreement, the unnamed company is Alken, and the "additional business" is the Corporate Opportunities.

(g) Breaches and Wrongful Acts of the Defendants and Damages Sustained by Alken

44. In taking control of Alken and utilizing Altair and the receivership process, as described in more detail above, Callidus and its agent, Sinclair, committed the following breaches and wrongful acts:
 - (a) Callidus breached the Credit Agreement.
 - (b) Callidus breached its duty of honest contractual performance in connection with the Credit Agreement.

interest in pursuing them, but rather would accrue to the benefit of Callidus through the acquisition of Alken's assets by Altair in the receivership process.

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(g) Breaches and Wrongful Acts of the Defendants and Damages Sustained by Alken

44. In taking control of Alken and utilizing Altair and the receivership process, as described in more detail above, Callidus and its agent, Sinclair, committed the following breaches and wrongful acts:
 - (a) Callidus breached the Credit Agreement.
 - (b) Callidus breached its duty of honest contractual performance in connection with the Credit Agreement.

- (c) Sinclair breached the Engagement Letter.
 - (d) Sinclair breached his duty of honest contractual performance in connection with the Engagement Letter.
 - (e) Callidus and Sinclair misappropriated the Corporate Opportunities from Alken.
 - (f) Callidus and Sinclair conspired to wrongfully deprive Alken of the Corporate Opportunities.
 - (g) Callidus and Sinclair intentionally interfered with Alken's economic relations by wrongfully depriving it of the Corporate Opportunities.
 - (h) Callidus and Sinclair wrongfully converted the Corporate Opportunities to the use and benefit of Altair without the consent of Alken.
 - (i) Callidus and Sinclair perpetuated a civil fraud upon Alken.
45. As a result of the aforesaid breaches and wrongful acts on the part of Callidus and Sinclair, Alken has been wrongfully deprived of the value of the Corporate Opportunities. Accordingly, it has suffered and will continue to suffer damages in an amount to be proven at trial, which is presently estimated to be no less than \$200,000,000, being the value of the Corporate Opportunities as calculated by Sinclair himself.
46. Further or in the alternative, any revenues, benefits and profits which have accrued to Altair as a result of the Corporate Opportunities have been derived as a direct result of the wrongful actions and breaches of Callidus and Sinclair as aforesaid. Accordingly, the Corporate Opportunities, including all income, benefits and profits derived therefrom, are impressed with a constructive trust in favour of Alken.
47. As constructive trustee, Altair is obligated to account to Alken for all income, benefits and profits made and received as a result of its wrongful use of the Corporate Opportunities, and to disgorge and pay to Alken all such income, benefits and profits received.

48. All monies in the nature of income, benefits and profits made and received by Callidus, Sinclair and Sinclair Range as a result of the aforesaid breaches and wrongful acts are similarly imposed with a constructive trust in favour of Alken and are required to be disgorged and paid to Alken.
49. Altair has been unjustly enriched, without juristic reason, by the Corporate Opportunities and the income, benefits and profits which it has derived therefrom as a result of the breaches and wrongful acts referred to above, and Alken has suffered a corresponding deprivation.
50. Callidus has employed similar "loan to own" schemes, in some cases also involving Sinclair, to wrongfully obtain control of assets of other borrowers and reap significant profits for itself when those assets are resold.
51. The conduct of the Defendants as aforesaid was and is in deliberate, flagrant, contumelious and high-handed violation of Alken's rights, and is deserving of sanction by an award of punitive, exemplary or aggravated damages.

(h) Real and Substantial Connection to Alberta

52. A real and substantial connection exists between the subject matter of this claim and Alberta, based on the following:
 - (a) The claim relates to contracts which were executed in Alberta;
 - (b) The claim relates to breaches of contract which were committed in Alberta;
 - (c) The claim relates to breaches of duties which were committed in Alberta;
 - (d) The claim relates to torts which were committed in Alberta;
 - (e) The claim relates to an Alberta company; and
 - (f) The claim relates to damages sustained in Alberta.

(i) Place of Trial

53. The Plaintiff proposes that the trial of this action be held at the Calgary Courts Centre in Calgary, Alberta.

54. The trial of this action will take less than 25 days.

Remedy sought:

55. Alken seeks the following relief as against the Defendants, jointly and severally:

- (a) Damages in an amount to be proven at the trial of this action, but which is presently estimated to be at least \$200,000,000;
- (b) An accounting of all income, benefits and profits made and received by the Defendants as a result of the breaches and wrongful acts referred to above;
- (c) An order that the Defendants disgorge to Alken all income, benefits and profits made and received as a result of their use of the Corporate Opportunities;
- (d) Punitive, exemplary or aggravated damages in the amount of \$5,000,000 or such other amount to be determined by this Honourable Court;
- (e) Interest on all amounts awarded pursuant to the *Judgment Interest Act*, R.S.A. 2000, c. J-1, as amended;
- (f) Costs on a solicitor-client basis or otherwise, as this Honourable Court may direct; and
- (g) Such further and other relief and Orders this Honourable Court deems just and proper in the circumstances.

NOTICE TO THE DEFENDANTS

You only have a short time to do something to defend yourself against this claim:

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

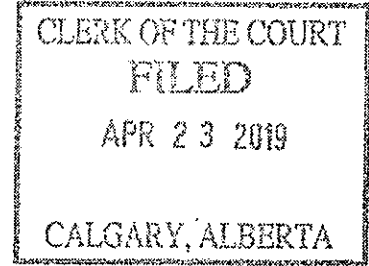
You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of Queen's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiffs against you.

Court of Queen's Bench of Alberta

Citation: Baumann v Callidus Capital Corporation, 2019 ABQB 281



Date:
Docket: 1801 09078
Registry: Calgary

Between:

Kevin Baumann

Applicant

- and -

Callidus Corporation and James Riley

Respondents

**Endorsement
of the
Honourable Mr. Justice P.R. Jeffrey**

Background

[1] On May 3, 2018, a company called Alken Basin Drilling Ltd (“Alken”) sued the Respondent Callidus for fraud, for breach of a credit agreement, and for misappropriating Alken’s opportunities (the “Claim”). On May 15, 2018, Alken discontinued the Claim. This application seeks its reinstatement. Different persons purported to control Alken at those times. At issue is which was a valid act of Alken.

[2] Callidus had been Alken’s primary lender. The Claim alleges, essentially, that Callidus “jacked-up” Alken’s debt to trigger its default, placed it in Receivership, and then via a wholly owned subsidiary bought all Alken’s assets and opportunities at a discount.

[3] Callidus had applied for Alken to be placed in receivership, successfully. The receivership resulted in a Court approved sale of all Alken's assets to a wholly owned subsidiary of Callidus, Altair Water and Drilling Services Ltd. ("Altair"). Some months later this Court discharged the Receiver.

[4] The Applicant Baumann caused Alken to commence the Claim. He owned the majority of Alken's shares before the receivership; he continues to own a controlling interest now.

[5] To commence the Claim, Baumann notified corporate registry that he was Alken's director. Then he revived Alken's status at corporate registry; it had not made its filings.

[6] Callidus says that Baumann did not have the authority to proclaim himself director of Alken or, therefore, to have it commence the Claim. Callidus says it alone had the power to vote Baumann's shares in Alken, pursuant to a power of attorney granted to it by Baumann some time earlier, as part of a further share pledge agreement (the "Power of Attorney"). Callidus previously triggered its right to vote Baumann's shares, and did so, after Alken defaulted on its loan from Callidus. Callidus says that it continues to be solely entitled to vote those shares. It says, in effect, that its rights under the Power of Attorney have not ended, lapsed or expired.

[7] So, after Callidus was served with Alken's Claim against it, Callidus notified corporate registry that a Mr. Riley (the second named Respondent in this application) had been installed as its new sole director, thereby replacing Baumann (the "Director Change"). Riley then retained new counsel for Alken and instructed that new counsel to discontinue the Claim. The new lawyer did so (the "Discontinuance").

[8] The sale of Alken's assets did not generate enough funds to repay all that Callidus claims it is due. There remains, it alleges, a deficiency. Callidus sued Baumann on his personal guarantee of Alken's obligations to Callidus (the "Guarantee Action"). Baumann has defended that action, alleging a change to the risk profile of the guarantee and, as a consequence, opposing the enforceability of the guarantee. Baumann also counter-claimed, alleging essentially the same things as Alken alleges in the Claim.

[9] The Guarantee Action continues in litigation before this Court.

The Application

[10] Baumann asks the Court to set aside the Director Change and the Discontinuance (the "Impugned Steps"). Baumann says that Callidus did not have authority to replace him as sole director of Alken or, in any event, to authorize the Discontinuance. Baumann says the Power of Attorney and the broader share pledge agreement were no longer in effect at the time, after the completion of the receivership of Alken and the conveyance of all Alken's assets to Altair.

[11] He says further that Callidus was "high handed" when it discontinued the Claim and, further, it usurped the authority of the Court. Baumann asks the Court to declare him the legitimate director of Alken.

Decision

[12] I grant the application in part. I set aside the Discontinuance and I suspend the ability of Riley to direct the affairs of Alken pending agreement of the parties or further order of the Court. I decline the remaining relief requested.

[13] I decline the remaining relief and only suspend the authority of Riley as director, for the same reason I grant the request to set aside the Discontinuance. Coming to the contrary conclusion on any of those matters would deny one of the parties access to procedural fairness on the issue.

[14] The validity of the Impugned Steps is a foundational issue in the Claim. By the Discontinuance, Callidus has achieved its preferred trial outcome, without the bother of the trial. More critically, Alken's allegations have been silenced without opportunity for their hearing.

[15] The validity issue can be heard fairly to all parties, then determined, in the normal course of litigation of the Claim. It cannot be determined fairly to all parties unless the Discontinuance is set aside. To *not* set aside the Discontinuance would be to deny Alken and the stakeholders it represents (under Baumann's understanding of his status *viz à viz* Alken) their day in court on that issue. It would be to allow Callidus to win on the issue of its authority to vote Baumann's shares, in the Alken Claim, without ever having to prevail on the issue in court. The effect would be to end forever the Alken Claim without fair process around a foundational issue. It would amount to the court endorsing Callidus' unilateral action with the effect that it would avoid any accountability for its allegedly illegal actions. It would effectively amount to a striking of the Claim without Callidus having to satisfy the requisite test.

[16] The validity of the Impugned Steps, Callidus says, can be litigated in the Guarantee Action. That may be, but Alken is not a party to the Guarantee Action; Alken's interests and its legal position are not coincident with Baumann's.

[17] The validity of the Impugned Steps cannot be resolved on this record. Such determinations require consideration of the validity of antecedent events, a sufficient record of which is not before the Court.

[18] Callidus raises many seemingly valid reasons for why I should dismiss this application. It says any cause of action alleged in the Claim was sold to Altair in the receivership. It says the court decisions and events in the receivership, following notice of them to Baumann, foreclose Baumann's conduct. It says Alken's Claim was commenced improperly. It says Baumann improperly assumed the director role of Alken. It says its right to vote Baumann's shares has continued throughout because Baumann remains in default of his guarantee of Alken's debt to Callidus, despite demand. It says the Claim may be filed too late.

[19] Again, determining these issues requires findings on prior events between the parties, which is not fairly feasible on this record. Further, many of these arguments succeed only if Baumann's allegations in the related claim fail. But they should have opportunity to be heard first. These are issues for the Court to determine, not to be circumvented by Callidus continuing the very conduct challenged in the lawsuit itself. If Baumann is correct, then Alken and its proper stakeholders are entitled to their day in Court as the Claim is prosecuted. Their day in court will

determine whether Baumann is correct. Absent the relief I grant, those (potential) Alken stakeholders would be denied opportunity to be heard, denied the fair process court litigation entails for such disputes. Callidus would be permitted to behave as Alken alleges with impunity. Put in the extreme, an exception will have been found to the rule of law.

[20] This record does not permit a determination on such questions fairly at this stage. It does not permit a determination of which party enjoyed the requisite authority to vote Baumann's shares in Alken, and to direct Alken in respect of its Claim, at the relevant times. It does not permit any disposition summarily, which is effectively the request of each.

[21] For the same reasons, this record also does not permit a determination of Baumann's allegation that the effect of the various security agreements in play would grant it "an absolute shield in their dealings with" the debtor Alken, as described in the case relied upon by Baumann: *1239745 Ontario Ltd v Bank of America Canada*, [1999] OJ No 3178 (Ont SCJ) at para 74.

[22] Just as not setting aside the Impugned Steps would be to end the entire Claim without Alken having opportunity to be heard on the questions around the validity of those Steps, under Baumann's understanding of it, so too would it be unjust for the Court to now declare Baumann to be the legitimate director. These issues are for trial, or at least for determination following a process in which procedural fairness operates. Similarly, I have declined to rule Callidus' approach as either high-handed or an usurpation.

What has not been decided

[23] This application arises in the context of a complex web of related litigation. My findings and conclusions pertaining to this application are not to be taken as deciding or estopping anything else, directly or collaterally, in those other related contexts, including the Claim and the Guarantee Action. My findings and conclusions are for purposes of the narrow issue on this application alone. For example, and without limiting the generality of the foregoing, this decision is not a determination of:

- a. Who currently enjoys validly the authority of "director" over the affairs of Alken, if any of the contenders, or who did at any particular time;
- b. Whether Callidus' rights to vote Baumann's shares expired following some event within the receivership or upon its conclusion;
- c. Whether there was ever any valid event of default and if so whether it was continuing;
- d. Whether the Power of Attorney was limited in scope, specifically only to ensure Baumann's shares were voted to ensure Alken complied with the covenants in the security it granted Callidus;
- e. Whether the Alken Claim was validly commenced;
- f. Whether any cause of action alleged in the Claim existed prior to the sale of assets to Altair via the receivership;

- g. Whether any cause of action alleged in the Claim was included in the assets sold in the receivership process to Altair;
- h. Whether the Claim is a collateral attack on one or some of the Orders in the receivership; and
- i. Whether the Claim is out of time under limitations legislation.

[24] A finding on such issues is not necessary for the proper determination of this application. More critically, a finding on a sufficient number of these issues to be dispositive of this application is not possible on this record and at this preliminary stage, while still being procedurally fair to the parties.

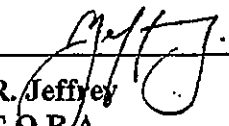
Conclusion

[25] For the reasons above, I set aside the Discontinuance and suspend the ability of Riley to direct the affairs of Alken. Neither Riley or Baumann may direct Alken, without prior written agreement of the parties or further order of the Court.

[26] The passing of time shall not count against Alken for limitations purposes and for purposes of litigation deadlines in the Rules of Court and for corporate registration purposes, commencing from the date Callidus discontinued the Claim until the time the issue of who may instruct its litigation counsel is determined.

[27] Baumann is entitled to his party and party costs of this application plus any costs incurred in reinstating the Claim in this Court.

Heard on the 21st day of February, 2019 and the 8th day of April, 2019.
Dated at the City of Calgary, Alberta this 23rd day of April, 2019.



P.R. Jeffrey
J.C.Q.B.A.

Appearances:

Eugene J. Bodnar
for the Applicant

Kyle T. Gardiner
for the Respondents