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

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. 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

FACTUM OF THE MOVING PARTIES / DEFENDANTS, CLARITYSPRING INC. AND NATHAN ANDERSON
(Motion pursuant to s. 137(1) of the *Courts of Justice Act*)

May 5, 2021

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PART I - INTRODUCTION

1. The moving party, Nathan Anderson ("Anderson"), is a fraud researcher who uncovered potential securities fraud, accounting irregularities and other corporate malfeasance by the plaintiffs. Anderson's detailed findings were set out in whistleblower submissions that were submitted by his company, ClaritySpring Inc. ("ClaritySpring", and together with Anderson, the "Anderson Defendants"), to the Ontario Securities Commission ("OSC") and the U.S. Securities and Exchange Commission ("SEC"), pursuant to their respective whistleblower programs. Anderson subsequently provided copies of the whistleblower submissions and underlying source material to Rob Copeland ("Copeland"), a journalist at the Wall Street Journal.

2. As was confirmed in correspondence between the plaintiffs and securities regulators, which the plaintiffs vigorously resisted producing until they were finally ordered to do so by the court, the OSC and the SEC shared most of the areas of concern raised in the whistleblower submissions, and required the plaintiffs to take remedial action to address those concerns. This validates the opinions and conclusions expressed in the whistleblower submissions.

3. This is a strategic lawsuit against public participation ("SLAPP") and should be dismissed pursuant to s. 137.1(3) of the *Courts of Justice Act*. There is little question that the purpose of this action is to silence Anderson from speaking about issues that the OSC and SEC have confirmed are of regulatory concern, and to send a message to those who might consider doing so in the future.

4. The expressions in this case clearly related to matters of public interest. The whistleblower reports and other documentation provided to Copeland relate to potential securities fraud and other corporate malfeasance by a publicly-traded company and its

controlling affiliate, one of Canada's most prominent private equity firms. This is precisely the type of expression that should be protected by s. 137.1 of the *Courts of Justice Act*.

5. It cannot be said that the claims against the Anderson Defendants have substantial merit or that the Anderson Defendants have no valid defences, particularly in light of the views expressed by the OSC and SEC. The Anderson Defendants have valid defences of fair comment, qualified privilege and responsible communication. With respect to the conspiracy claim, the evidence does not and cannot support the allegation that the Anderson Defendants participated in any "short and distort" attack. There is no evidence supporting any of the other causes of action alleged by the plaintiffs.

6. Finally, the public interest in allowing these claims to proceed falls far short of outweighing the public interest in protecting the expression at issue.

PART II - THE FACTS

A. Anderson's Background

7. Anderson is a professional whistleblower and short-seller residing in New York City. He is the Chief Executive Officer of ClaritySpring.[1] After completing a university degree in 2006, Anderson spent eight years working in hedge funds and private equity, leading capital sourcing and due diligence efforts.[2] While working for a merchant bank, Anderson discovered several hedge funds and private equity funds that he suspected were engaging in fraudulent practices. In 2014, he made his first whistleblower submission to the SEC, which resulted in the successful prosecution by the SEC of a hedge fund called RD Legal Capital, LLC. Anderson

[1] Affidavit of Nathan Anderson sworn November 8, 2019 at para 3 ("Anderson Affidavit"), Motion Record of the Anderson and Clarity Spring Inc. ("MRAND"), tab 2, p. 13.
[2] Anderson Affidavit at paras. 4-9, MRAND, tab 2, pp. 13-14.

continued to work on whistleblower cases over the following years, and by late 2016, he and ClaritySpring had completed approximately 12 whistleblower cases.[3]

8. During the period relevant to this proceeding, the focus of Anderson's activities was the preparation and delivery of whistleblower reports to securities regulators, and not short-selling.[4] Regulatory agencies like the SEC and the OSC have whistleblower programs that offer potentially lucrative whistleblower awards to persons who provide information that results in a successful regulatory prosecution.[5] Anderson would occasionally short-sell as a means to fund his ongoing whistleblower activities, but it would be on a case-by-case basis and typically in negligible quantities.[6] It was only after the relevant period that Anderson's business evolved and his short-selling activities increased.[7]

9. Anderson's fraud research has resulted in numerous companies and executives being investigated and/or prosecuted by the SEC for securities fraud and other corporate malfeasance.[8]

B. The Whistleblower Submissions

i. Origin and Preparation

10. In late 2016, Anderson discovered a Twitter account called "StopTheScandal" that posted a number of tweets about the plaintiffs' business practices. Anderson thought the matter merited further investigation, so he contacted the individual who controlled that Twitter

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[3] Anderson Affidavit at paras 9-10 and 15, MRAND, tab 2, p. 14.
[4] Supplementary Affidavit of Nathan Anderson, sworn August 20, 2020 at para. 5, ("Anderson Supplementary Affidavit"), Supplementary Motion Record of Anderson and ClaritySpring ("SMRAND"), tab 1, p. 583.
[5] Anderson Affidavit at para. 12, MRAND, tab 2, p. 15.
[6] Anderson Supplementary Affidavit at para. 5, SMRAND, tab 1, p. 583.
[7] Anderson Supplementary Affidavit at para. 8, SMRAND, tab 1, p. 584.
[8] Anderson Affidavit at para. 17, MRAND, tab 2, pp. 16-17.

account.[9] The individual behind that Twitter account (now known to be Darryl Levitt ("Levitt")) suggested that Anderson contact certain Callidus borrowers and guarantors, ultimately leading to his introduction to Levitt, Jeffrey McFarlane ("McFarlane"), Gerald Duhamel ("Duhamel") and Richard Molyneux ("Molyneux"). The information Anderson received from these individuals suggested to him that Callidus' lending practices were highly unethical.[10]

11. Anderson proceeded to conduct independent research to investigate the plaintiffs' business practices. Anderson's investigation was extensive. He reviewed thousands of documents including, but not limited to: bankruptcy, receivership and other court documents; *Personal Property Security Act* and *Uniform Commercial Code* lien filings; internet search results; financial disclosures and other public filings of Callidus and other relevant companies; Catalyst investor letters and presentations; and other Catalyst fund materials.[11]

12. Anderson spoke to numerous individuals with direct knowledge of the relevant circumstances, including Callidus borrowers, former employees of the plaintiffs, Catalyst investors, Catalyst counterparties, and members of Canada's financial services sector. Among the sources who provided information confirming various aspects of the plaintiffs' wrongdoing were the former CFO of Catalyst, Chester Dawes, and the former CEO of Callidus, Sam Fleiser.[12]

13. To help fund the research and preparation of the whistleblower submissions, Anderson took on investors, who contributed time or money in exchange for a share of any whistleblower award. Molyneux invested $20,000 for a 2% share. Levitt was given a 10% share for

[9] Anderson Affidavit at paras. 18-19, MRAND, tab 2, pp. 18-19.
[10] Anderson Affidavit at paras. 18-19, MRAND, tab 2, pp. 18-19.
[11] Anderson Affidavit at paras 20-21, MRAND, tab 2, pp. 19-20.
[12] Anderson Affidavit at paras 19-20, MRAND, tab 2, p. 19; Anderson Supplementary Affidavit at para 27, SMRAND, tab 3, pp. 594-595.; Spreadsheet of Anderson Contacts, Brief of Transcripts and Answers to Undertaking of Anderson and ClaritySpring ("Anderson Transcript Brief"), tab 1B.

contributing information. Other investors were third parties with no personal involvement in these matters. This agreement was confined to the preparation of whistleblower complaints that would be submitted to relevant whistleblower programs.[13]

14. Ultimately, Anderson prepared two whistleblower submissions: a main submission, dated May 22, 2017,[14] and a supplemental submission, dated May 30, 2017[15] (together, the "Whistleblower Submissions"), which were submitted to the OSC. In or around the same time, Anderson delivered similar versions of the Whistleblower Submissions to the SEC.[16]

15. In the Whistleblower Submissions, Anderson concluded that it appeared the plaintiffs had engaged in a scheme to artificially inflate the value of assets and obscure asset impairments. It appeared to him that the plaintiffs were playing a "shell game" with impaired assets to mislead investors as to the value of assets within the enterprise.[17]

16. The main submission was 28 pages in length and was extensively cited to documents and reports that were attached as exhibits. The overwhelming majority of the documents that were cited in the report originated from Catalyst or Callidus, and included Callidus' public filings and Catalyst investor fund materials. Reliance on such source materials was important to Anderson because he wanted to ensure, to the best of his ability, that the Whistleblower Submissions were accurate and reasonably supported, to maintain his credibility as a whistleblower.[18] Moreover, Anderson urged the OSC to contact former employees of the

[13] Anderson Affidavit at para. 28, MRAND, tab 2, p. 22; Whistleblower Proposal, MRAND, tab 2N, pp. 354.
[14] OSC Whistleblower Submission, May 22, 2017 ("OSC WB Submission"), MRAND, tab 2I, p. 236.
[15] OSC Supplemental Whistleblower Submission, May 30, 2017 ("OSC Supplemental WB Submission"), MRAND, tab 2J, p. 271.
[16] Anderson Affidavit at para. 25, MRAND, tab 2, p. 21.
[17] Anderson Affidavit at para. 24, MRAND, tab 2, p. 21.
[18] Anderson Affidavit at para. 26, MRAND, tab 2, p. 21.

plaintiffs who were likely to have information that would corroborate his findings, so the regulators could independently verify his analysis.[19]

ii. Summary of Content

17. The Whistleblower Submissions had the overarching theme that, in Anderson's view, it appeared the plaintiffs were employing various measures to mislead investors. This theme was exemplified through his analysis of certain assets.

Xchange Technology Group LLC ("XTG")

18. XTG was a company controlled by McFarlane that was a borrower of Callidus. Over time, its debt ballooned until the principal and interest owing exceeded $100 million, multiple times its original loan. Meanwhile, XTG's financial condition continued to deteriorate until 2016, when Callidus required Catalyst to assume the XTG loan for C$101.3 million (far more than the impaired asset was worth) pursuant to a guarantee that Catalyst had given in the context of Callidus' IPO in 2014.[20]

19. Anderson made two primary points in the Whistleblower Submissions:

(a) Because Catalyst purchased the XTG loan for more than it was worth, Callidus could represent to investors that it was made whole on the troubled XTG deal.

(b) There appeared to be a discrepancy in the reporting of the sale transaction by Callidus and Catalyst. Callidus publicly reported that Catalyst had acquired the XTG loan for C$101.3 million. Meanwhile, Catalyst's investor materials showed that the "Total Capital Invested" in XTG was only US$54.8 million. Anderson noted that both could not be true.[21]

20. The plaintiffs do not meaningfully challenge Anderson's analysis of this issue. Catalyst's Managing Director, James Riley ("Riley"), stated that the discrepancy related to the deduction

[19] OSC WB Submission at pp. 7-8, MRAND, tab 2I, pp. 246-246.
[20] OSC WB Submission at pp. 9-11, MRAND, tab 2I, pp. 247-249.
[21] OSC WB Submission at pp. 10-12, MRAND, tab 2I, pp. 248-250.

of prior payments made under the guarantee for losses disclosed by Callidus, bringing the balance down to US$54.8 million.[22] However, this explanation is expressly contradicted by the definition of "Total Capital Invested" in Catalyst's investor materials.[23]

Bluberi Group Inc. ("Bluberi")

21. Bluberi was a company controlled by Duhamel that first became a borrower of Callidus in 2012. Over the following years, Callidus increased Bluberi's credit line even though its financial condition was deteriorating. In February 2016, Bluberi sought creditor protection, and Callidus ultimately gained control of Bluberi through a restructuring process.[24]

22. In 2016, Callidus valued the Bluberi asset at $110.7 million using so-called "unrecognized yield enhancements". An unrecognized yield enhancement is a forward-looking, non-IFRS measure that purports to increase the enterprise value of an asset. Because unrecognized yield enhancements are forward-looking and non-IFRS, they are not included in Callidus' financial statements and are not subject to the scrutiny of an auditor.[25]

23. To justify the reported $110.7 million carrying value, Callidus cited "significant new business from a large diversified gaming company in Canada that is ***commonly controlled*** by the Catalyst Capital Group Inc." Callidus stated that it and the "commonly controlled enterprise" were "***able to reach an agreement*** for deployment of 7,000 slot machines".[26] That commonly controlled gaming company was Gateway Casinos, which had only 6,700 gaming machines in total. Anderson questioned the assertion that there was an agreement to manufacture and sell

[22] Affidavit of James Riley, sworn May 29, 2020 ("Riley Libel Affidavit") at para 185.
[23] Anderson Supplementary Affidavit at paras 34-41, SMRAND, tab 3, pp. 599-601.
[24] OSC WB Submission at pp. 13-16, MRAND, tab 2I, pp. 251-254.
[25] Transcript from the cross-examination of James Riley held October 27, 2020 ("Riley Transcript (October 27, 2020)"), qq. 847-849, pp. 276-277, Anderson Transcript Brief, tab 2, pp. 335-336.
[26] OSC WB Submission at pp. 16-17, MRAND, tab 2I, pp. 254-255; Anderson Supplementary Affidavit at para 39, SMRAND, tab 3, pp. 600-601.

7,000 gaming machines to a company that did not even own that many machines, and alleged that this was mere cover for Callidus to justify a $100 million markup of an otherwise failed position.[27]

24. The OSC shared Anderson's concerns about Callidus' use of non-IFRS yield enhancements generally, and specifically its valuation of the Bluberi position. In a July 2017 letter to Callidus, the OSC identified a number of "deficiencies", including a failure to identify the material factors and assumptions supporting the unrecognized yield enhancements that formed part of the $110.7 million valuation. As the OSC noted in its letter, in fact there was no agreement to deploy 7,000 electronic gaming machines, rendering Callidus' representations to that effect untrue.[28]

25. Unrecognized yield enhancements were the source of significant friction between Callidus and the OSC. The OSC was not satisfied with the manner in which unrecognized yield enhancements were presented in Callidus' public disclosures, raising concerns that Callidus' disclosures on unrecognized yield enhancements were potentially misleading and failed to satisfy Callidus' continuous disclosure obligations.[29] As a result, Callidus was repeatedly placed on the OSC's Refilings and Errors List. The following statement in a July 2018 letter from the OSC captures their frustration at dealing with this issue:

> *This would be the fourth time since May 3, 2017 that the Company will have been placed on the Refilings and Errors List for refiling its continuous disclosure and the third time since August 10, 2017 that the Company will have been placed on the Refilings and Errors List in connection with its disclosure of forward-looking information.* ***The frequency and nature of the Company's refilings are concerning and may suggest a culture of non-compliance. The continuing failure by an issuer to meet its***

[27] OSC WB Submission at pp. 16-17, MRAND, tab 2I, pp. 254-255.
[28] Letter from the OSC to Callidus, dated July 27, 2017, Anderson Transcript Brief, tab 2D, p. 577.
[29] See correspondence from the OSC to Callidus at tabs 2B, 2C, 2D, 2F, 2G and 2H of the Anderson Transcript Brief.

> ***underlying disclosure obligations calls into question the commitment of its directors and/or its executive officers to act in good faith in the preparation of the required regulatory filings and whether this continuing course of conduct may be contrary to the public interest.*** *We may refer the most recent breaches of NI 51-102 to Staff of the Enforcement Branch for further regulatory action.*[30] [emphasis added]

26. Shortly thereafter, Callidus ceased its use of unrecognized yield enhancements.[31]

Cross-Fund Ownership

27. In the Whistleblower Submissions, Anderson identified potential conflicts of interest arising from Catalyst's cross-fund ownership. Multiple Catalyst-controlled funds (Funds II, III and IV) all own shares in the same asset (Callidus). This results in a situation where earlier funds can exit their share position prior to (and at the expense of) later funds. In these circumstances, the ownership interest of Funds III and IV "artificially supports" the investments by Fund II investors.[32]

28. The SEC shared Anderson's concerns about the conflicts of interest that arise from cross-fund ownership (amongst numerous other concerns with the plaintiffs' conduct). Indeed, the precise scenario predicted by Anderson – that Fund II would benefit at the expense of Funds III and IV – actually occurred during the 2017 fiscal year. According to Callidus' 2017 audited financial statements, Fund II realized gains of approximately $106 million on its shares of Callidus, with no realized gains for Funds III and Fund IV. The SEC observed that "Fund II's interest benefitted from both the equity and debt financing provided by the subsequent Funds'

[30] Letter from the OSC to Callidus, dated July 16, 2018 at p. 3, Anderson Transcript Brief, tab 2H, p. 595.
[31] An August 13, 2018 entry on the Refilings and Errors List indicates: "The Company has discontinued disclosure of unrecognized yield enhancements in light of comments expressed by the OSC." SMRAND, tab 3G, p. 709.
[32] OSC WB Submission at pp. 19-21, MRAND, tab 2I, pp. 257-259.

investments, and as a result, Fund II exited its investments at a substantial profit."[33] The SEC also identified a number of other conflicts of interest in the Catalyst/Callidus structure.[34]

Gateway Casinos ("Gateway")

29. Gateway was a Catalyst asset that purported to be one of the largest gaming companies in Canada. In the Whistleblower Submissions, Anderson identified a disconnect between valuations prepared by Catalyst and by Gateway's co-owner, Tennenbaum Capital Partners ("Tennenbaum"), for the year ending December 31, 2016. While Catalyst marked up its Gateway positions by about 50%, Tennenbaum marked down the same position by 16.4%. Anderson noted that "such a material divergence in the valuations of the exact same positions by two private equity funds was troubling at best".[35]

30. The plaintiffs have identified no factual inaccuracies in Anderson's treatment of Gateway, merely suggesting that the difference might be attributable to certain events that occurred in 2016.[36] This meek explanation fails to account for the fact that the two valuations were for the same period, and therefore would be expected to include the same inputs.

Therapure Biopharma Inc. ("Therapure")

31. Therapure was an integrated biopharmaceutical company owned by the Catalyst funds. In 2016, Catalyst had plans to proceed with an IPO, which ultimately was aborted. At the time of the aborted IPO, Catalyst valued Therapure at approximately C$1 billion. In the

[33] Letter from the SEC to Catalyst, Exhibit A, p. 2 of 22, Anderson Transcript Brief, tab 2J, p. 612.
[34] *Ibid.*
[35] OSC WB Submission at pp. 25-26, MRAND, tab 2I, pp. 263-264.
[36] Affidavit of James Riley, sworn May 29, 2020 ("Riley Conspiracy Affidavit") at paras 282-287.

Whistleblower Submissions, Anderson noted Therapure's historical poor performance, and questioned Catalyst's purported valuation of Therapure.[37]

32. In response to Anderson's analysis, the plaintiffs state that Therapure's valuation was supported by a deal with a Chinese biotechnology company that was announced after the filing of the Whistleblower Submissions (and subsequently fell apart).[38] No such deal was disclosed in the prospectus for the aborted IPO, which was the basis for Anderson's conclusion that the valuation was excessive.[39]

33. The SEC adopted Anderson's concerns about the historical poor performance of Therapure, and what the SEC concluded were misleading statements to investors about Therapure's performance – even going beyond the specific context of the aborted 2016 IPO.[40] Catalyst acknowledged that its disclosures to investors regarding the performance of Therapure "were at times too limited" and committed to updating its disclosures to investors and generally improving the quality of its disclosures going forward.[41]

SFX Entertainment Inc. ("SFX"), Sherwood Hockey Inc. ("Sherwood"), and Satmex

34. In the Whistleblower Submissions, Anderson reached a number of conclusions regarding three entities SFX, Sherwood and Satmex. The plaintiffs have disputed the correctness of those conclusions:[42]

(a) SFX was an electronic dance company. Anderson noted that it appeared Catalyst Fund V may have bought out Fund IV's position in SFX, thereby shifting the risk to new Catalyst investors. In response, the plaintiffs clarify that both Fund IV and Fund V invested in SFX, and both realized their

[37] OSC WB Submission at pp. 27-28, MRAND, tab 2I, pp. 265-266.
[38] Riley Conspiracy Affidavit at paras 290-292.
[39] Anderson Supplementary Affidavit at para. 60, SMRAND, tab 3, p. 607.
[40] SEC exit letter, Exhibit A, at pp. 10-13.
[41] Catalyst letter to SEC
[42] Anderson Supplementary Affidavit at paras 47-50, 54-56, 61-62, SMRAND, tab 3, pp. 603-608.

investments in SFX upon SFX's bankruptcy in February 2016.[43] Anderson's analysis was based on the best information he had at the time, which was limited to documents for Fund IV. He was careful to qualify his statement, stating only what "appears" to have happened, thereby inviting third parties and the OSC to independently view the underlying documents and/or conduct further investigation.[44]

(b) Sherwood was a borrower of Callidus, but when it defaulted on its loan in 2011, Callidus assumed 100% of its equity. In 2014, a company called Gracious Living Corp. ("Gracious") acquired Sherwood for the precise cost of Callidus' position. Gracious was formerly owned by a Catalyst Fund I portfolio investment. In the circumstances, Anderson questioned whether this was an arms-length transaction, as well as whether any net cash traded hands. Riley disputed that the transaction was not arms-length, but he acknowledged Callidus' prior relationship with Gracious' parent, and that Callidus lent money to Gracious on condition that it simultaneously send back the money through the Sherwood sale.[45]

(c) Satmex was a telecommunications company that underwent a restructuring in 2011. The Whistleblower Submissions contained an allegation that Gabriel de Alba ("de Alba"), a partner of Catalyst, was involved in the restructuring and that his family was reported as controlling 51% of Satmex. Anderson questioned whether de Alba's role in the involvement was a conflict of interest. In his response, Riley stated that de Alba had little to no involvement in the restructuring, and was merely invited to become a director. Riley stated de Alba's participation at Satmex was known to Catalyst and did not give rise to any conflict issues. Anderson's conclusions were based on media reports that de Alba's family would control 51% of the company after the restructuring deal, and that de Alba was present at the signing ceremony for the restructuring. Given de Alba's specific background in restructuring telecommunications deals, it was reasonable for Anderson to conclude he was involved in Satmex's restructuring and not merely invited to become a director after the fact.[46]

35. In summary, Anderson's conclusions in the Whistleblower Submissions were correct, substantially correct, or reasonable given the information that was available to him. The validity and/or reasonableness of his conclusions are validated by the securities regulators having shared many of his concerns.

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[43] Riley Conspiracy Affidavit at para. 280.
[44] Anderson Supplementary Affidavit at paras 54-56, SMRAND, tab 3, pp 605-606.
[45] Anderson Supplementary Affidavit at paras 47-50, SMRAND, tab 3, pp 603-604.
[46] Anderson Supplementary Affidavit at paras 61-62, SMRAND, tab 3, p 608.

C. Wall Street Journal Article

36. Anderson provided copies of the Whistleblower Submissions and the source exhibits to Copeland, a journalist at the Wall Street Journal. Copeland ultimately wrote an article on Catalyst and Callidus, which first appeared on the Wall Street Journal website in the afternoon of August 9, 2017 (the "WSJ Article"). The article then appeared in the print edition of the Wall Street Journal the next day.

37. Anderson had no input into the timing of the publication of the WSJ Article, and did not know in advance when the article would be published. His short-selling on the morning of August 9, 2017 was related not to the WSJ Article, but to the release of Callidus' second quarter earnings scheduled for August 10, 2017, which Anderson correctly anticipated would reveal unfavourable results given his assessment of the performance of the company.[47]

D. The Action and the Anti-SLAPP Motions

38. In November 2017, Catalyst and Callidus commenced this action. In the action, the plaintiffs make claims in defamation, civil conspiracy, injurious falsehood, intentional interference with economic relations, and breach of the Ontario *Securities Act*, arising out of Anderson and ClaritySpring's provision of the Whistleblower Submissions to Copeland and the subsequent publication of the WSJ Article, which referred to allegations made in the Whistleblower Submissions.

39. These anti-SLAPP motions were first brought in November 2019. Since that time, there has been a substantial amount of document production. In or around December 2019, the parties exchanged affidavits of documents, with productions totalling over 175,000 documents. Further productions were delivered over the next year and a half, including documents that

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[47] Transcript from the cross-examination of Nathan Anderson, held November 20, 2020, qq. 625-635, pp. 196-199 ("Anderson Transcript"), Anderson Transcript Brief, tab 1, pp. 198-201.

were produced pursuant to orders of Justices McEwen and Boswell. Weeks of cross-examinations on affidavits have been completed. The evidentiary record available to the plaintiffs is significantly more fulsome that it typically would be for anti-SLAPP motions, which generally are brought at a preliminary stage of the proceeding.

PART III - ISSUES, LAW AND ARGUMENT

40. The sole issue on this motion is whether this action ought to be dismissed as against the Anderson Defendants pursuant to s. 137.1 of the *Courts of Justice Act*.

41. With respect to the test to be applied on a s. 137.1 motion and the principles applicable to the elements of that test, Anderson and ClaritySpring rely on the legal principles as set out in the Moving Party Defendants' Joint Memorandum of Law.[48]

A. The proceeding arises from an expression that relates to a matter of public interest

i. The expressions at issue[49]

42. The allegations made against Anderson and ClaritySpring in this proceeding centre on three expressions by Anderson and ClaritySpring:

(a) The delivery of the Whistleblower Submissions to the OSC and SEC;

(b) The delivery of the Whistleblower Submissions to Copeland; and

(c) ClaritySpring's short-selling activity in respect of Callidus.

43. With respect to (a) and (b), the delivery of the written Whistleblower Submissions to the OSC, SEC and Copeland fits within the broad definition of "expression" in the statute and case law.[50] The conveying of information through a written document would meet this definition.[51]

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[48] *Courts of Justice Act*, RSO 1990, c C.43, ss 137.1(3)-(4); Joint Memorandum of Law of Copeland et al., dated May 3, 2021 ("Joint Memo of Law").
[49] Joint Memo of Law at paras 7-16.

44. With respect to (c), ClaritySpring's short-selling activity, the case law makes clear that conduct alone may constitute expression for the purposes of s. 137.1.[52] ClaritySpring's short-selling was a manifestation and expression of the belief that Callidus' share price was inflated and in need of correction, and an extension of the concerns with the management and public disclosures of Callidus and Catalyst as expressed in the Whistleblower Submissions after months of extensive research. Such conduct is a form of expression that is worthy of protection within the scheme of s. 137.1.

ii. The matter of public interest engaged[53]

45. The Whistleblower Submissions, and by extension ClaritySpring's short-selling, relate to the management and public disclosures of Callidus, a public company at the relevant time, and Catalyst, a prominent private equity firm. These issues engage matters of public interest.

46. Expression pertaining to commercial issues, such as a company's business practices and management, have previously been recognized as relating to matters of public interest.[54] For example, in *Thompson v Cohodes*, the CEO of a publicly-traded corporation brought a defamation action against a former hedge fund manager and short-seller who was frequently critical of the public corporation on his Twitter account and had made an imputation of fraud

[50] *CJA*, s 137.1(2). See also *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 at para 25: "The term "expression" is defined broadly in s. 137.1(2) of the *CJA* itself: "In this section, 'expression' means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity." This is not in need of further clarification, as the text makes it abundantly clear that "expression" is defined expansively."

[51] Written expression has frequently been recognized as "expression" for the purposes of s. 137.1. See, for example, *Nanda v McEwan*, 2020 ONCA 431, where statements in text message chat groups, posters and flyers constituted expression; *Levant v Day*, 2019 ONCA 244, leave to appeal to SCC ref'd 2019 CanLII 101530 (SCC), where Twitter postings were held to constitute expression; and *Mazhar v Farooqi*, 2020 ONSC 3490, where the expressions at issue included complaints made in a letter to a community organization.

[52] See *Paramount v Johnston*, 2018 ONSC 3711 at para 31: "The definition of 'expression' in s. 137.1 is very broad and would include a communication that is made privately, involves just conduct, or is one-sided advocacy."

[53] Joint Memo of Law at para 8-16.

[54] *Bradford Travel and Cruises Ltd. v Viveiros,* 2019 ONSC 4587 at paras 31-33

against the CEO. The Ontario Superior Court specifically found that management of a publicly traded corporation was a matter of public interest for the purposes of s. 137.1.[55]

B. The proceeding does not have substantial merit and there are valid defences

47. Catalyst and Callidus make claims as against the Anderson Defendants in defamation, civil conspiracy, injurious falsehood, intentional interference with economic relations, and breach of the Ontario *Securities Act*. As detailed below, not only do these claims fail to meet the "substantial merit" threshold required for an anti-SLAPP motion, the claims have no merit whatsoever. In any event, viable defences are available to the Anderson Defendants.

48. The Anderson Defendants rely on the Moving Party Defendants' Joint Memorandum of Law with respect to the legal elements of each claim asserted by the plaintiffs, and of each defence advanced by the Anderson Defendants.

i. Defamation[56]

49. The defamation claim against the Anderson Defendants centers on (1) delivery of the Whistleblower Submissions to Copeland, and (2) publication of the WSJ Article itself.[57]

No Substantial Merit

50. The delivery of copies of the Whistleblower Submissions to Copeland was not defamatory, as the documents did not and could not have lowered the plaintiffs' reputation in the eyes of a reasonable person receiving the communication. Copeland is a veteran journalist at the Wall Street Journal. Someone in Copeland's position would not have had his views of the reputation of the plaintiffs lowered, or affected at all, by virtue of receiving the information. Copeland's evidence is that his investigation of the plaintiffs involved not only discussion and

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[55] *Thompson v Cohodes*, 2017 ONSC 2590 at para 12.
[56] Joint Memo of Law at paras 24-26.
[57] Fresh as Amended Statement of Claim dated July 19, 2019 at paras 178-185, MRAND, tab 2V, pp. 544-551.

receipt of documents from sources such as Anderson, but also reviewing publicly and privately available documentation, researching court documents, speaking to law enforcement and seeking information from the plaintiffs directly.[58] Copeland's views about the plaintiffs would not have been altered by the receipt of statements from one source. His views also would not have been affected by the allegations of fraud. Rather, as a journalist, he would have reviewed and critically assessed the information he received as a whole, and come to his own independent conclusions. As a journalist at the Wall Street Journal, he would have been mindful that his reporting would need to be balanced, and his work was reviewed particularly rigorously in light of the plaintiffs' aggressively litigious history.[59] In this context, delivery of the Whistleblower Submissions to Copeland cannot be regarded as defamatory.

51. With respect to the WSJ Article itself, the plaintiffs allege that the Anderson Defendants published the impugned words in the WSJ Article.[60] Importantly, the plaintiffs do not plead that the WSJ Article was a republication of the Whistleblower Submissions.

52. Anderson was no more than a source for the WSJ Article. He did not write or publish the WSJ Article. He had no role in its preparation or publishing, and no control over or input into the content of the WSJ Article (including what, if anything, from the Whistleblower Submissions was to be included). He did not review a copy of the article prior to publication, and had no control over or knowledge about the timing of its publication.[61]

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[58] Affidavit of Robert Copeland affirmed November 9, 2019 at para 8 ("Copeland Affidavit"), Copeland MR, tab 2, pp. 18-19.
[59] Copeland Affidavit at paras 11 and 28, Copeland MR, tab 2, pp. 20 and 24-25.
[60] Fresh as Amended Statement of Claim dated July 19, 2019 at paras 178-185, MRAND, tab 2V, pp. 544-551.
[61] Anderson Affidavit at para 33, MRAND, tab 2, pp. 23-24. Anderson's evidence on this point is consistent with the evidence of Copeland. See Copeland Affidavit at para 45, Copeland MR, tab 2, pp. 30-31.

53. Liability in defamation does not arise where an individual merely contributes information to an article, with no involvement in the publication process or approval of the final product. There must be some affirmative act on the part of the defendant which demonstrates that he or she participated in the publication.[62]

54. In any event, Anderson denies that the WSJ Article is defamatory, and relies on the submissions of Copeland on that point.

Valid Defences are Available to Anderson and ClaritySpring

55. The Anderson Defendants rely on the defences of fair comment, responsible communication and qualified privilege.

Fair Comment[63]

56. As detailed previously in this factum, the impugned communications were on matters of public interest, namely the business practices, conduct, management, and activities of regulated and public companies.

57. The conclusions expressed in the Whistleblower Submissions are based on facts referred to in the documents. The Whistleblower Submissions were extensively cited to documents and reports, which were attached to the submissions as exhibits, along with a chart indicating the source of each exhibit.[64] Collectively, the Whistleblower Submissions were supported by over 200 citations, referencing documents such as court records, Catalyst's own marketing materials, audits, and external sources including news and public records.[65] These

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[62] *Nazerali v Mitchell*, 2015 BCSC 2560 at para 31, citing *Brown on Defamation*, loose-leaf edition (Carswell, 1994) at 7-26 – 7-27. This principle was also expressed by the Supreme Court of New South Wales in *Dank v. Whittaker* (No. 1), [2013] NSWSC 1062 at para 22.
[63] Joint Memo of Law at para 25(c).
[64] Anderson Affidavit at paras 24 and 26, MRAND, tab 2, p. 21.
[65] Anderson Supplementary Affidavit at para 24, SMRAND, tab 3, pp. 589-590.

underlying facts and documents were substantially true: Anderson had reason to believe, and honestly did believe, they were reliable for the purposes for which they were used,[66] and 56 of the exhibits to his Whistleblower Submissions have been admitted as authentic by the plaintiffs.[67]

58. The comments made in the Whistleblower Submissions could honestly be made on the basis of the underlying facts. Significantly, the SEC and the OSC shared most of the concerns raised in the Whistleblower Submissions. The SEC embarked on a lengthy process that, in the words of Catalyst's counsel, "stand out in terms of both breadth and depth".[68] Ultimately, after their extensive reviews, the SEC and OSC both identified numerous deficiencies in Catalyst and/or Callidus' disclosure to their investors that reflected many of the exact concerns that were raised in the Whistleblower Submissions.[69] As noted in paragraph 25, above, the OSC, frustrated with Callidus' lack of compliance with its continuous disclosure obligations, questioned whether Callidus' directors and officers were acting in good faith and whether there was a general "culture of non-compliance" at Callidus.[70] These are damning statements from a regulator.

59. As a result of these concerns, the OSC requested that Callidus amend its disclosure of forward-looking information, placed Callidus on its Refilings and Errors list, and threatened

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[66] Anderson Supplementary Affidavit at para 25, SMRAND, tab 3, pp. 590-594.
[67] Request to Admit dated November 28, 2019, SMRAND, tab 3B, pp. 667-679; Response to Request to Admit dated December 18, 2019, SMRAND, tab 3C, pp. 681-683.
[68] Letter from Catalyst's counsel to SEC, dated March 15, 2018 at p. 2, Anderson Transcript Brief, tab 2I, p. 599.
[69] See Letter from SEC to Catalyst, dated May 11, 2018, Letter from OSC to Callidus, dated February 23, 2017, Letter from OSC to Callidus, dated March 8, 2017, Letter from OSC to Callidus, dated April 23, 2018, Letter from OSC to Callidus, dated July 16, 2018, Anderson Transcript Brief, tabs 2J, 2B, 2C, 2G and 2H.
[70] Letter from OSC to Callidus, dated July 16, 2018 at p. 3, Anderson Transcript Brief, tab 2H, p. 595.

further regulatory action, including potential enforcement proceedings.[71] Catalyst likewise committed to certain "action plans" to address the concerns raised by the SEC.[72]

60. Finally, the comment in the Whistleblower Submissions was not actuated by malice. Because malice also may defeat defences other than fair comment, submissions on the absence of malice appear later in a separate section of this factum.

Qualified Privilege[73]

61. The Anderson Defendants prepare whistleblower and research reports, and communicate with the media in respect of them, to further both moral and financial interests.

62. Anderson has a moral interest in seeking to expose improper conduct and in bringing to light fraudulent practices by members of the investment industry.[74] He made his first whistleblower submission after encountering what he regarded as fraudulent practices by hedge funds and private equity funds.[75] Having uncovered such practices, he had an interest in exposing them, and felt a moral duty to do so. Indeed, Anderson considers his "brand" to be identifying and exposing fraud.[76] Anderson understood that the media play an important role in the process of vetting and exposing fraud and, for that reason, he delivered a copy of the Whistleblower Submissions to Copeland.[77]

63. Anderson also had a financial interest in communicating the Whistleblower Submissions to Copeland from a potential whistleblower award and from his short-selling

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[71] Letter from OSC to Callidus, dated February 23, 2017, Letter from OSC to Callidus, dated March 8, 2017, Letter from OSC to Callidus dated July 27, 2017, Email from OSC to Callidus, August 14, 2017, Letter from OSC to Callidus, dated December 19, 2017, Letter from OSC to Callidus, dated July 16, 2018, Anderson Transcript Brief, tabs 2B, 2C, 2S, 2E, 2F and, 2H.
[72] Letter from Catalyst's counsel to SEC, dated June 11, 2018, Anderson Transcript Brief, tab 2K.
[73] Joint Memo of Law at para 25(d).
[74] Anderson Affidavit at paras 9, 11 17, 27, MRAND, tab 2, pp. 14, 16 and 22.
[75] Anderson Affidavit at para 9, MRAND, tab 2, p. 14.
[76] Anderson Transcript at q. 47, pp. 25-26, Anderson Transcript Brief, tab 1, pp. 27-28.
[77] Anderson Affidavit at paras 30-31, MRAND, tab 2, p. 23.

activity.[78] A financial interest meets the requirements of the defence of qualified privilege.[79] In any event, that Anderson stood to gain financially from his preparation of the Whistleblower Submissions, and from the public reporting of the findings resulting from his research efforts, does not negate his interest in bringing to light fraudulent conduct, particularly where it was in his interest to ensure that his findings were substantiated and as accurate as possible.[80]

64. Correspondingly, Copeland had an interest in receiving the information. Copeland is a reporter at a news publication reporting on matters of public interest, and was specifically researching alternative investments for potential publications, which led him to learn of issues relating to the business and accounting practices of the plaintiffs.[81] He conducted a diligent investigation, in accordance with the Wall Street Journal's journalistic standards, and had an interest in receiving information about the plaintiffs' activities from sources. Indeed, these journalistic interests in part underlie the rationale for protecting journalist-source relationships by *Wigmore* confidential source privilege.[82]

65. In light of the above circumstances, the occasion of the delivery of the Whistleblower Submissions to Copeland engages a qualified privilege. This is a valid defence available to the Anderson Defendants.

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[78] Anderson Affidavit at paras 12-14, 30-31, MRAND, tab 2, pp. 15-16, 23.
[79] *RTC Engineering Consultants Ltd v Ontario (Ministry of the Solicitor General and Correctional Services)*, 2002 CanLII 14179 at para 16 (Ont CA). See also *Sandu v Fairmont Hotels and Another*, 2014 ONSC 5919 at para 47.
[80] Anderson Affidavit at para 26, MRAND, tab 2, p. 21.
[81] Copeland Affidavit at para 7, Copeland MR, tab 2, p. 18.
[82] See, for example, *R v National Post*, 2010 SCC 16 at para 33: "In *Lessard* and *New Brunswick*, the Court accepted that freedom to publish the news necessarily involves a freedom to gather the news. We should likewise recognize in this case the further step that an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment."

Responsible Communication[83]

66. The Anderson Defendants rely on the submissions of Copeland with respect to whether the WSJ Article itself meets the requirements of the responsible communication defence.

67. With respect to the provision of the Whistleblower Submissions to Copeland, the impugned communication was on a matter of public interest, as detailed above.

68. As set out in detail above, Anderson was more than reasonably diligent in the steps he took to validate the accuracy of the statements and information in the Whistleblower Submissions. He reviewed thousands of documents and communicated with over 30 sources, including former employees of the plaintiffs, borrowers of Callidus, investors of Catalyst and others.[84] The thousands of documents he reviewed were the primary basis of the analysis and conclusions contained in the Whistleblower Submissions. Most of the documents cited in the Whistleblower Submissions originated from the plaintiffs.

69. In addition, Anderson's communication of the Whistleblower Submissions was limited to professional journalists such as Copeland, whom he knew would apply their own critical eye and journalistic standards before further distributing his findings. When providing the Whistleblower Submissions to Copeland, Anderson expected him or others at the Wall Street Journal to conduct their own due diligence in determining whether, and to what extent, they could rely on the information contained in the submissions.[85] There was no distribution or communication from Anderson of his findings and conclusions to the public at large. Anderson knew that any content in the Whistleblower Submissions would not be published before being carefully vetted by Copeland and the Wall Street Journal in the context of their own

[83] Joint Memo of Law at para 25(b).
[84] Anderson Affidavit at para 21, MRAND, tab 2, p. 20.
[85] Anderson Supplementary Affidavit at para 23, SMRAND, tab 3, p. 589.

investigative efforts, and in conjunction with the Wall Street Journal's high journalistic standards and rigorous review process.[86]

No Evidence of Malice

70. There is no evidence of malice on the part of Anderson or ClaritySpring in respect of the impugned communications. There is no evidence that Anderson or ClaritySpring had knowledge that the impugned statements were not true, or had reckless indifference as to their truth or falsity. As noted above, Anderson took extensive steps to verify the basis of his allegations.[87] It was in Anderson's interest to ensure his allegations were accurate to the best of his ability,[88] and he did so.

71. Further, there is no evidence whatsoever of any malicious intent on the part of Anderson and ClaritySpring in preparing the Whistleblower Submissions and delivering them to the OSC and SEC. Anderson engaged in that activity for his own interests, moral and financial: his dominant purposes were exposing wrongful conduct in the capital markets, and hopefully financial profit should his work lead to a successful regulatory prosecution. Anderson had no prior knowledge of or link to Catalyst or Callidus before preparing the Whistleblower Submissions: Anderson had never met or heard of Glassman, or heard of Callidus, before he began his whistleblower work, so there is no basis to consider that he might have had any motives other than his own moral and financial self-interest.[89]

72. The fact that ClaritySpring engaged in short-selling with respect to Callidus also is not evidence of malice. Anderson and ClaritySpring's dominant purpose in short-selling was their

[86] Anderson Affidavit at para 30, MRAND, tab 2, p. 23.
[87] Anderson Affidavit at para 21, MRAND, tab 2, p. 20.
[88] Anderson Affidavit at para 26, MRAND, tab 2, p. 21.
[89] Anderson Supplementary Affidavit at para 16, SMRAND, tab 3, p. 586.

own financial gain, to finance their ongoing whistleblower activity.[90] In any event, the short-selling in connection with whistleblower work was in relatively minor amounts, resulting in relatively small profits;[91] if Anderson or ClaritySpring had been motivated by a desire to harm the plaintiffs, this would have been an extremely inefficient way to do so. There is no evidence that they coordinated their short-selling activity with any other defendant. Anderson's unchallenged evidence is that he did not discuss his short-selling activities with anyone.[92]

73. In support of their position that Anderson and ClaritySpring acted with malice, the plaintiffs primarily rely on the tone of comments that were made in text message between Anderson and Copeland. Those comments must be read in the context of the relationship between Anderson and Copeland. They have known each other since approximately 2012 or 2013, and frequently communicated with each other in a joking and sarcastic manner.[93]

74. The plaintiffs specifically point to text messages between Anderson and Copeland, in relation to Callidus, about how there can be negative effects on share price when a company gets "called out for fraud".[94] They also have noted text messages referring to Newton Glassman, Catalyst's principle, using particular nicknames.[95] Such comments are not evidence of any malice targeted at Callidus, but simply a manifestation of the long-time relationship and casual communication style of Anderson and Copeland. Indeed, Anderson regularly made similar comments about companies and people other than the plaintiffs in the

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[90] Anderson Affidavit at para 16, MRAND, tab 2, p. 16; Anderson Supplementary Affidavit at para 7, SMRAND, tab 3, p. 584.
[91] Anderson Supplementary Affidavit at para 7, SMRAND, tab 3, p. 584; Interactive Brokers Activity Statement of ClaritySpring Inc. for the period June 21, 2017 to June 20, 2018 [redacted], SMRAND, tab 3A, pp. 618-665.
[92] Anderson Affidavit at para. 29, MRAND, tab 2, p. 29.
[93] Anderson Supplementary Affidavit at paras 13 and 16, SMRAND, tab 3, p. 586.
[94] Riley Libel Affidavit at paras 257, 382-383 and 440, reproducing text messages dated August 9, 2017 and attached as Exhibit 9 thereto.
[95] Anderson Transcript, q. 14-17, pp. 11-13, Anderson Transcript Brief, tab 1, pp. 13-15.

same time period. For example, on July 21, 2017, Anderson sent text messages to Copeland stating "Been a bit distracted beating up on $EROS today" and "Sent out a couple tweets about their accounting fraud and the thing ripped down 20% and has been nutty all day".[96] On August 9, 2017, Anderson told Copeland that he knew the next case they would "crack", noting "it will be epic".[97] Sarcasm, colloquialisms and nicknames were common in Anderson's communications, about a variety of people, both related and unrelated to the plaintiffs – for example, in one text message to Copeland, Anderson referred to Jeffrey McFarlane, another defendant in this action, as "donkey".[98] Anderson and Copeland's text message conversations cannot reasonably be viewed as evidence of any particular malice as against Catalyst or Callidus.

ii. Civil conspiracy[99]

75. The plaintiffs allege that Anderson and ClaritySpring, among others, engaged in a conspiracy to harm the plaintiffs. They allege that the core components of the conspiracy included (1) filing false whistleblower reports to securities regulators, (2) sharing those whistleblower allegations with members of the media, with a view to the ultimate release of a media report about Catalyst and/or Callidus, and (3) short-selling.[100] No conspiracy can be founded on these actions.

76. None of these core components constitutes an "unlawful act":

(a) Filing false whistleblower reports with a securities regulator is not unlawful, as such communications are protected by absolute privilege and therefore not actionable.[101] In any event, the Whistleblower Submissions were not

[96] Exhibit 9 to Riley Libel Affidavit, p. 10.
[97] Exhibit 9 to Riley Libel Affidavit, p. 33.
[98] Anderson Transcript, qq. 6-8, pp. 8-9, Anderson Transcript Brief, tab 1, pp. 10-11.
[99] Joint Memo of Law at paras 33-35.
[100] Fresh as Amended Statement of Claim dated July 19, 2019 at para 90, MRAND, tab 2V, p. 510.
[101] *Fraleigh v RBC Dominion Securities Inc.* 2009 CanLII 92109 (ON SC) at paras 31-35; *Hung v Gardiner*, 2003 BCCA 257 at paras 30-37.

false. There was no incentive for Anderson and ClaritySpring to submit false or misleading information to securities regulators, as a whistleblower award would only be available if a prosecution succeeded based on information provided by a whistleblower.[102]

(b) Providing the Whistleblower Submissions to Copeland was not unlawful, for the reasons detailed above in respect of the plaintiffs' defamation claims.

(c) Short-selling is not unlawful. It is "a legitimate trading practice which contributes to market liquidity and price efficiency", and "contributes to the price discovery process by providing an opportunity for negative views about the issuer to be reflected in the price of a security thereby limiting overvaluation and biased price increases."[103] Short-selling will only be unlawful where it engages an offence set out in the *Securities Act*, typically fraud or market manipulation (i.e. ss. 126.1 and 126.2 of the *Securities Act*. There is no factual foundation for any allegation of fraud or market manipulation. Anderson and ClaritySpring released no false or misleading information to the market, engaged in no "naked short selling", and short-sold in such minor amounts that it could not have meaningfully impacted Callidus' share price.[104]

(d) To the extent the alleged breaches of ss. 126.1 and 126.2 of the Securities Act relate to communications by the Anderson Defendants to Copeland, such activity occurred wholly in the United States and, by persons residing in the United States to a person residing in the United States. Provisions of the *Securities Act* are not applicable to that conduct, which occurred outside the regulatory jurisdiction of the Ontario government.[105]

77. The plaintiffs also rely on the torts of injurious falsehood and intentional interference with contractual relations, as purported "unlawful acts". As detailed in the sections of this factum pertaining to those particular pleaded causes of action, these cannot amount to "unlawful acts" in the circumstances of this case.

78. Further, there is no evidence of any agreement involving the Anderson Defendants to injure the plaintiffs. The only agreement was to prepare and deliver the Whistleblower

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[102] Anderson Supplementary Affidavit at para 22, SMRAND, tab 3, p. 589.
[103] CSA Consultation Paper 25-403 *Activist Short Selling*, Canadian Securities Administrators (3 December 2020), p. 4.
[104] Anderson Supplementary Affidavit at para 7, SMRAND, tab 3, p. 584; Interactive Brokers Activity Statement of ClaritySpring Inc. for the period June 21, 2017 to June 20, 2018 [redacted], SMRAND, tab 3A, pp. 618-665.
[105] *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40 at para 50: "It is well established that a province has no legislative competence to legislate extraterritorially."

Submissions to securities regulators, which was entered into by the Anderson Defendants and others including Levitt, Molyneux and other third party investors. This agreement pertained to conduct that is covered by absolute privilege and is not actionable.

79. While Anderson communicated with a number of other defendants, they were, in substance, his sources of information and documents as he conducted research into Catalyst and Callidus.[106] Anderson did not even provide copies of the Whistleblower Submissions to several of the individuals he is alleged to have conspired with, including McFarlane and Baumann.[107] These communications do not disclose the existence of any agreement to harm the plaintiffs, but rather the research process engaged in by a fraud researcher. Riley admitted on cross-examination that there is nothing wrong with a member of the public researching the conduct of a public company, and that such a person "should absolutely" take steps to verify the accuracy of information received, including by reading available documents and speaking to knowledgeable persons; indeed, Catalyst itself conducts research on public companies for its own purposes.[108]

80. Similarly, with respect to ClaritySpring's short-selling activity, there is no evidence that Anderson told anyone of the details surrounding his intention to short-sell Callidus, let alone coordinated the timing of his short-selling with anyone.[109]

81. Even if there was an agreement, the predominant purpose of any such agreement, in respect of the Anderson Defendants, was financial self-interest and not to cause harm to the

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[106] Anderson Transcript, qq. 388-391, pp. 141-142, Anderson Transcript Brief, tab 1, pp. 143-144.
[107] Anderson Transcript, qq 212-213, p. 91, Anderson Transcript Brief, tab 1, p. 93.
[108] Riley Transcript (October 27, 2020), qq. 1005-1020, pp. 327-330, Anderson Transcript Brief, tab 2, pp. 386-389.
[109] Copeland Affidavit at para 45, Copeland MR, tab 2, p. 31.

plaintiffs or any of its directors and officers, whom Anderson never met or even heard of prior to beginning his whistleblower work.[110]

iii. Injurious falsehood[111]

82. There is no merit to the plaintiffs' injurious falsehood claim. The statements made by Anderson and ClaritySpring were not substantially false: they were allegations, informed opinions and conclusions resulting from detailed analysis of underlying factual documents. Indeed, the SEC and OSC shared many of the concerns articulated by Anderson and ClaritySpring. The statements were not widely disseminated, and they were not made with malice. They also were not calculated to induce persons not to deal with Catalyst or Callidus; rather, they were intended to expose what Anderson and ClaritySpring viewed as unethical or illegal conduct, and to hopefully lead to a financial reward. Such conduct does not engage the tort of injurious falsehood.

iv. Intentional interference with economic relations (unlawful means tort)[112]

83. The plaintiffs assert that this tort is engaged because Anderson and ClaritySpring "deceived" vague third parties, including market participants, investors and borrowers of the plaintiffs, into believing that Catalyst and Callidus were engaged in fraudulent and/or unethical accounting and business activities.[113] There is no basis on which such conduct would be actionable by any of these third parties. None of the impugned conduct of Anderson or ClaritySpring was "directed" at any of them: they provided the Whistleblower Submissions to securities regulators and certain media reporters, not any of these third parties. Further, the allegations made by Anderson and ClaritySpring in the Whistleblower Submissions were their

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[110] Anderson Supplementary Affidavit at para 16, SMRAND, tab 3, p. 586.
[111] Joint Memo of Law at paras 27-28.
[112] Joint Memo of Law at paras 30-32.
[113] Fresh as Amended Statement of Claim dated July 19, 2019 at para 193, MRAND, tab 2V, p. 555.

own conclusions, arising from their own investigative efforts; reliance on those unproven allegations, even if they had been disseminated by Anderson and ClaritySpring, by a third party would not be actionable.

84. Further, the impugned conduct of Anderson and ClaritySpring was not intended to cause harm to Catalyst or Callidus. Rather, as noted elsewhere in this factum, Anderson and ClaritySpring were motivated by their own self-interest, including financial self-interest in the form of seeking whistleblower awards and short-selling profits. There is no merit to this claim.

C. The balancing of interests favours protection of the moving party's expression

85. At this stage of the anti-SLAPP analysis, Catalyst and Callidus must establish that there are grounds to believe that "the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression".

i. The harm likely to be or have been suffered by the responding party as a result of the moving party's expression

86. Catalyst and Callidus must establish (i) the existence of harm suffered by them, and (ii) that the harm suffered was caused by the impugned expression. Evidence is required in respect of both of these prongs.[114] The evidence must be such that there is "credible and compelling evidence of harm that appears reasonably likely to be proved at trial".[115]

87. The plaintiffs assert that they suffered harm in the form of lower Callidus share prices, lost revenues, loss of goodwill, loss of market capitalization, and impairment of their ability to

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[114] *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 at para 71.
[115] *Able Translations Ltd. v Express International Translations Inc.*, 2016 ONSC 6785 at para 83, aff'd 2018 ONCA 690.

conduct and grow their business, implement strategic plans, and secure capital.[116] In short, this encompasses two main categories of harm claimed, related to (a) a drop in share price, and (b) reputational damage resulting in an inability to generate new loan business. Neither is a supportable ground of harm here.

88. First, none of this alleged harm was suffered by Catalyst. Catalyst is not a public company, and is not the operating company of the lending business. At no time was Catalyst even a shareholder of Callidus; only the Catalyst Funds, separate entities not named as parties in this proceeding, held Callidus shares.[117] Catalyst has suffered no harm whatsoever.

89. Callidus' drop in share price is not harm suffered by Callidus. There is a legal distinction between damages suffered by a company, and damages suffered by a company's shareholders for a reduction in share price. While a drop in share price may cause harm to shareholders who hold shares in the company, as their property is less valuable, there is no inherent harm to the company itself. The plaintiffs have provided no evidence of any specific harm suffered by them as a result of the drop in Callidus' share price.

90. Beyond the alleged drop in share price, the plaintiffs have provided no evidence supporting any of their other claims of harm. They have provided no more than bald assertions as to alleged lost opportunities, in an affidavit sworn by Catalyst's Managing Director.[118] The law is clear that in the anti-SLAPP analysis, harm pleaded by a plaintiff ought not to be taken at face value; bald assertions of harm in the evidence likewise are insufficient. There must be sufficient evidence for the motion judge to draw an inference of likelihood.[119] The plaintiffs

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[116] Fresh as Amended Statement of Claim dated July 19, 2019 at para 194, MRAND, tab 2V, p. 555.
[117] Riley Transcript (October 27, 2020), qq. 802-812, pp. 266-267, Anderson Transcript Brief, tab 2, pp. 325-326.
[118] Riley Libel Affidavit at paras 438-446.
[119] *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 at para 71.

baldly assert that their reputation and goodwill have been harmed, yet provide no evidence supporting the quality or value of their reputation or goodwill prior to the impugned acts, compared to the value of their reputation or goodwill after.[120] They baldly assert that they suffered a loss in market capitalization, but provide no evidence of their market capitalization before or after the impugned acts. They state that their ability to generate new loans has been impaired, but provide no supporting evidence beyond statements in an affidavit. The plaintiffs simply have not provided sufficient evidence to meet their burden on an anti-SLAPP motion.

91. Even if the plaintiffs had provided sufficient evidence to support their claimed harm, that harm was not caused by the conduct of the Anderson Defendants. While Callidus' share price did drop following the release of the WSJ Article (which, as detailed above, is not attributable to the Anderson Defendants), market efficiency dictates that the share price ought to have recovered on the release of responsive or corrective information, such as Callidus' statement released on the evening of August 9, 2017 (the same date on which the WSJ Article came out).[121] Anderson himself believed that the Callidus share price would rise once Callidus released a response to the WSJ Article, which was why he initially closed out all of ClaritySpring's short positions following the initial release of the WSJ Article during the afternoon of August 9.[122] However, the share price did not recover, because the very next day after the publication of the WSJ Article, Callidus reported a net loss of CAD $25.8 million for its second quarter, which ended on June 30, 2017 – and therefore had no relation to the WSJ Article. This amounted to a loss of 51 cents per share resulting from write-downs in its loan

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[120] Courts have held that a drop in share value is not a reflection of a loss in goodwill; evidence is required. See, for example, *Adroit Resources Inc. v HMTQ (British Columbia)*, 2010 BCCA 334 at paras 66-67, leave to appeal to SCC ref'd 2011 CanLII 6309 (SCC).

[121] Callidus Capital Statement titled "Callidus Statement Regarding Allegations in *The Wall Street Journal*" dated August 9, 2017, Exhibit 40 to Riley Libel Affidavit.

[122] Anderson Transcript, qq. 618-625, pp. 195-196, Anderson Transcript Brief, tab 1, pp. 197-198.

portfolio, a substantial difference from analysts' expectation of a profit of 12 cents per share.[123] Any continued or maintained losses were caused not by the WSJ Article, but by Callidus' own poor performance.

92. Indeed, Callidus' own executives have not considered poor media treatment to be a cause of Callidus' business difficulties, which long pre-dated the WSJ Article, instead placing the blame squarely on Callidus' own business practices:

(d) In a February 2019 strategic review of Callidus, the company's interim CEO, Patrick Dalton, acknowledged that Callidus had been facing business difficulties for the prior three years, dating back to before the Whistleblower Reports and WSJ Article. He characterized Callidus as "in crisis" and "no longer viable as a public company" without significant changes. He identified significant cash flow concerns, valuation concerns, and portfolio concerns, which he attributed to (1) unachievable realizations due to aggressive valuations, "doubling down" on underperforming investments, and high fees, and (2) unsuccessful corporate actions including a dilutive share repurchase and dividend program. He further noted that Callidus had not produced positive cash flow for "several years", and concluded that Callidus had grown too aggressively after its initial public offering in 2014. Of note, he acknowledged that <u>new deal origination was virtually halted in 2016</u>.[124]

(e) In an affidavit sworn in September 2019 in the context of Callidus' going private transaction, an independent director of Callidus, David Sutin, detailed a number of factors which had caused Callidus' operating and financial performance to "decline significantly" from September 2016 on. He made no mention of external factors such as media reports of whistleblower filings, instead squarely blaming Callidus' bad loans, poor operating performance, and personnel issues.[125]

(f) During Callidus' Annual Special Meeting of Shareholders in July 2019, Callidus' President and Chief Operating Officer, David Reese, explained that the company's issues were related to poor performance, specifically denying the impact of litigation. He also acknowledged that losing out on new loans is simply part of the business, noting that losing the so-called

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[123] Anderson Supplementary Affidavit at para 67, SMRAND, tab 3, p. 611; Article titled "Canadian Lender Callidus, Accused of Fraud By Whistleblowers, Posts Loss; Callidus shares drop after quarterly report misses analyst forecasts" dated August 11, 2017, SMRAND, tab 3O, p. 876.
[124] Callidus Capital Corporation Strategic Review & Remediation Plan dated February 25, 2019, Anderson Transcript Brief, tab 2A.
[125] Affidavit of David Sutin sworn September 12, 2019 at para 15, SMRAND, tab 3M, pp. 822-824.

> "beauty contest" is "no different than when we were doing very well, we lose it from time to time".[126]

93. Based on the above, Callidus has failed to establish the existence of harm, and the causation of that harm, with sufficient evidence.

ii. The balancing exercise

94. Where harm has been established, the motion judge must balance that harm against the corresponding public interests in protecting the impugned expression.

95. As noted above, no harm caused by the impugned acts of Anderson and ClaritySpring has been established. As such, it is unnecessary to move to the balancing stage of the anti-SLAPP test.

96. Alternatively, only minimal harm has been shown to be caused by the impugned expressions, and is far outweighed by the public interests in protecting the impugned expression. There is significant public interest in permitting public debate and discussion on the management of public and regulated companies, and particularly in revealing conduct by such companies that is potentially in breach of securities laws. The particular expressions at issue are deserving of protection: they were not without foundation or irresponsibly spread to the public, but rather were subject to extensive due diligence, and only disseminated after verification and review through quality control processes. Indeed, the Whistleblower Submissions themselves have <u>never</u> been disseminated to the broader public. This is precisely the type of public debate that ought to be encouraged, not stifled. In such circumstances, the public interests in protecting the expression outweigh any evidence of harm to the plaintiffs.

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[126] Transcript of Callidus' Annual Shareholder Meeting held July 2019, SMRAND, tab 3N, pp. 868-870.

PART IV - ORDER REQUESTED

97. The moving parties, Anderson and ClaritySpring, respectfully request an order dismissing the action as against them pursuant to s. 137.1 of the *Courts of Justice Act*, with costs on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of May, 2021.

Lucas E. Lung / Rebecca Shoom
Lerners LLP

Lawyer for the Defendants,
ClaritySpring Inc. and Nathan Anderson

SCHEDULE "A"
LIST OF AUTHORITIES

1. *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22
2. *Nanda v McEwan*, 2020 ONCA 431
3. *Levant v Day*, 2019 ONCA 244, leave to appeal to SCC ref'd 2019 CanLII 101530 (SCC)
4. *Mazhar v Farooqi*, 2020 ONSC 3490
5. *Paramount v Johnston*, 2018 ONSC 3711
6. *Bradford Travel and Cruises Ltd. v Viveiros,* 2019 ONSC 4587
7. *Thompson v Cohodes*, 2017 ONSC 2590
8. *Nazerali v Mitchell*, 2015 BCSC 2560
9. *Dank v Whittaker (No. 1)*, [2013] NSWSC 1062
10. *RTC Engineering Consultants Ltd v Ontario (Ministry of the Solicitor General and Correctional Services)*, 2002 CanLII 14179 (Ont CA)
11. *Sandu v Fairmont Hotels and Another*, 2014 ONSC 5919
12. *R v National Post*, 2010 SCC 16
13. *Fraleigh v RBC Dominion Securities Inc.* 2009 CanLII 92109 (ON SC)
14. *Hung v Gardiner*, 2003 BCCA 257
15. CSA Consultation Paper 25-403 *Activist Short Selling*, Canadian Securities Administrators (3 December 2020)
16. *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40
17. *Able Translations Ltd. v Express International Translations Inc.*, 2016 ONSC 6785, aff'd 2018 ONCA 690
18. *Adroit Resources Inc. v HMTQ (British Columbia)*, 2010 BCCA 334, leave to appeal to SCC ref'd 2011 CanLII 6309 (SCC)

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, RSO 1990, c C.43

Definition, "expression"

137.1 (2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

THE CATALYST CAPITAL GROUP INC., et al.
Plaintiffs

and

WEST FACE CAPITAL INC., et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM of the MOVING PARTIES / DEFENDANTS, CLARITYSPRING INC. and NATHAN ANDERSON
(Motion pursuant to s. 137(1) of the *Courts of Justice Act*)

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