Court File No. CV-18-593156-00CL

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

DOW JONES AND COMPANY, ROB COPELAND, JACQUIE MCNISH and JEFFREY MCFARLANE

Defendants

PLAINTIFFS' AIDE TO ARGUMENT
(ANTI-SLAPP MOTIONS OF THE DOW JONES DEFENDANTS AND JEFFREY MCFARLANE)

Justice T. McEwen
May 17-21, 2021

I. OVERVIEW

The WSJ Fraud Articles – Website Article (August 9, 2017 @ 3:32 PM ET)

MARKETS

Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers

Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers

A unit of the Toronto Police Service has begun its own inquiries into Catalyst. PHOTO: ZUMAPRESS.COM

By Rob Copeland and Jacquie McNish

Aug. 9, 2017 3:32 p.m. ET

TORONTO—At least four individuals have filed whistleblower complaints with Canadian securities regulators alleging fraud at a multibillion-dollar investment firm and its publicly traded lending arm, according to people familiar with the matter and documents reviewed by The Wall Street Journal.

Catalyst Capital Group Inc., one of Canada's largest private-equity firms, is accused in the complaints of artificially inflating the value of some of its assets and deceiving borrowers about the terms of loans it made. The complaints have prompted officials at the Ontario Securities Commission, the country's leading securities regulator, to make inquiries and question people familiar with Catalyst, according to the people and documents.

PLC, Tab 1, p. 1.

The WSJ Fraud Articles – Website Article (August 9, 2017 @ 9:53 PM)

THE WALL STREET JOURNAL.

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PLC, Tab 2, p. 4.

The WSJ Fraud Article – Printed Edition – Front Page (August 10, 2017)


THE WALL STREET JOURNAL.

What's News

France on Edge After Car Rams Group of Soldiers

North Korea, U.S. Clash Sharpens

Workers' Pace Dents Growth

Investors Question Oil Output In Big Field

Stock Swoons

FOR TECH INNOVATORS, FACEBOOK LOOMS LARGE

Oracle #1 SaaS Enterprise Applications Revenue

#1

#2

ORACLE

PLC, Tab 1, p. 10.

WSJ Fraud Articles – Print Edition – Front Page (August 10, 2017)

What's News

Business & Finance

Worker productivity rose modestly last quarter but showed little sign of breaking out of the sluggish trend that has held back economic growth. **A1**

◆ **Permian Basin investors** are questioning whether drillers in the oil field can keep production rising. **A1**

◆ **Canadian buyout firm** Catalyst and its lending arm have been accused of fraud in whistleblower complaints. **B1**

Stock Swoons

Shares of Canadian lender Callidus fell Wednesday after The Wall Street Journal reported whistleblowers have accused it and private-equity firm Catalyst of fraud. **B1**

Callidus Capital share price

16 Canadian dollars

Previous close

15

14

13

12

11

C$12.06

▼21.4%

10

10 11 noon 1 2 3 4

Note: C$1 = US$0.79

Source: FactSet

THE WALL STREET JOURNAL.

PLC, Tab 1, p. 11.

WSJ Fraud Articles – Print Edition – Front Page Business & Finance Section (B1 and B2)

TECHNOLOGY: NEW COMPUTER-HACKING METHOD USES DNA B4

BUSINESS & FINANCE

S&P 2474.02 ▼ 0.04% S&P FIN ▼ 0.08% S&P IT ▲ 0.03% DJTRANS ▲ 0.08% WSJ $DX ▼ 0.09% LIBOR 3M 1.316 NIKKEI (Midday) 19736.72 ▼ 0.02% See more at WSJ.Markets.com

Top Buyout Firm Scrutinized on Loans

Canada looks into complaints Catalyst inflated values and deceived borrowers

By Rob Copeland And Jacquie McNish

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3 A unit of the Toronto Police Service that specializes in financial crimes has separately begun its own inquiries, a department spokeswoman said.

4 The inquiries don't necessarily lead to an investigation.

5 Catalyst is led by Newton "Newt" Glassman, 53 years old, who has described his businesses as the "Goldman Sachs of Canada."

6 His private-equity firm, which oversees 6 billion Canadian dollars ($4.8 billion) for international clients, is one of the country's more aggressive investors, industry executives say. Catalyst mostly invests in high-interest loans to financially distressed firms such as casino game makers or biopharmaceutical companies, and sometimes takes control of the businesses if the loans aren't paid.

7 Company officials declined to comment before publication for this article.

Fund Raise

Canadian private-equity firm Catalyst Capital has been one of the most frequent fundraisers globally over the past decade.

Fund	Year	Amount raised
Catalyst I	2002	$246 million
Catalyst II	2004	$430 million
Catalyst III	2011	$1 billion
Catalyst IV	2013	$1 billion
Catalyst V	2015	$2.5 billion

Source: filings, investor documents THE WALL STREET JOURNAL.

8 In a statement following digital publication, company officials said they knew of no legitimate basis for any whistleblower complaint. The companies said they believe the whistleblowers are filing "deliberately misleading" reports with the OSC.

9 "Callidus believes that it is the actions of those individuals that warrants investigation," the statement said. Callidus Capital Corp. is the lending arm of Catalyst.

10 Under a program begun last year, Ontario regulators accept whistleblower submissions from any individual with original information about an alleged violation of securities law. Regulators dismiss many complaints without any inquiries, according to people fa-

Please see LOANS page B2

PLC, Tab 1, p. 12.

- *The Wall Street Journal* is an internationally renowned financial newspaper and claims that it is the largest paid subscription news site on the Internet

- Print and digital sales of *The Wall Street Journal* for the Americas on an average day in August totaled 2,470,000 copies.

PLC, Tab 52, p. 3.
PLC, Tab 54, p. 1.

II. Anti-SLAPP Motions Framework

- An anti-SLAPP motion is not a summary trial and the court must bear in mind the stage of proceedings (*Pointes Protection*, paras 49-51)
- Section 137.1 is not a new form of summary trial on the merits of a defamation action but is instead meant to provide an early and cost-effective means of ending litigation brought by a plaintiff to silence a party who has spoken on a matter of public interest (*Grist v TruGrp*, para 17)
- In addition to functioning as a screening mechanism, s.137.1 *CJA* must also ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it (*Bent*, para 52)

BOA, Vol I, Tab 1, paras 49-52.
BOA, Vol I, Tab 3, para 74.

- Anti-SLAPP Motion Judges should engage in only a limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more developed (*Pointes Protection*, para 52).
- The s. 137.1 analysis is not an adjudication of the merits of the underlying proceeding.
- If the motion record raises serious credibility issues or inferences to be drawn from competing primary facts, the motion judge must avoid taking a "deep dive" into the ultimate merits (*Subway Franchise Systems*, paras 54-55).

BOA, Vol I, Tab 1, paras 52, 71.
BOA, Vol I, Tab 4, paras 54-55.

III. An Expression Made By A Libel Defendant That Relates To A Matter Of Public Interest

- Section 137.1(3) *Courts of Justice Act:*

On motion by a person against whom a proceeding is brought, a judge shall, subject to a 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.

- The Defendants must satisfy the Motion Judge that this libel action arises from an expression made by each of them that relates to a matter of public interest.
- The expression should be assessed “as a whole”, and it must be asked whether “some segment of the community would have a genuine interest in receiving information on the subject” (*Pointes Protection*, para 27).
- Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about (*Bent*, para 29).

Sched. “B” to Plaintiffs’ Factum.
BOA, Vol I, Tab 1, para 27.
BOA, Vol I, Tab 3, para 30

- Activity that unfairly reduces competition is a matter of public interest, in the sense that justice requires that such actions be proscribed for the common good. But that does not mean that every occurrence of this type of misconduct is a matter of public interest, having significance to anyone other than the parties involved and the institutions established to resolve their disputes. If the nature of the expression is fundamentally a private dispute, s. 137.1 does not apply (*Grist v TruGrp*, para 23).
- Expression that *relates* to a matter of public interest must be distinguished from expression that simply *makes reference* to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under section 137.1(3) *CJA* (*Bent*, para 33).

BOA, Vol I, Tab 3, para 33.

- OSC Staff Notice 15-703 (Guidelines for Staff Disclosure of Investigations) state that “confidentiality minimizes potential harm to reputations of those to which the investigation relates if no proceedings are taken”.
- the OSC whistleblower program is a confidential process.
- Analogy to the inquiry conducted by a Justice of the Peace for informations sworn by private individuals alleging crimes (*Southam Inc v Ontario*, [1990] OJ No 1782, 1990 CarswellOnt 952 (CA))
- the WSJ Fraud Articles republish the fraud and other accusations in the confidential whistleblower complaints that are only at the intake/inquiries stage.
- the public may be curious about these matters, but complaints at the intake/inquiries stage do not relate to a matter of public interest.

PLC, Tab 67, para 2

IV. THIS LIBEL ACTION HAS SUBSTANTIAL MERIT

Section 137.1(4)(a)(i) *Courts of Justice Act*:

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

- The words "grounds to believe" plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a belief or conclusion that the legislated criteria have been met. In the context of a s. 137.1 motion, that basis or source must be anchored in the nature of the procedure and record contemplated by the legislative scheme. (*Pointes Protection*, para 36)

Sched. "B" to Plaintiffs' Factum.

- In determining whether there exist grounds to believe at the s. 137.1(4)(a) stage, courts must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising. Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the outcome has been adjudicated, rather than the likelihood of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence. (*Pointes Protection*, para 37)

- The motions judge looks to the three elements of a cause of action for libel, and whether there is a real prospect of success, not necessarily a demonstrated likelihood, but merely one which tends to weigh more in favor of the plaintiff (*Bent*, paras 90-92).

BOA, Vol I, Tab 3, paras 90-92.

The Three Elements Of A Libel Action

- A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages:

  (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

  (2) that the words in fact referred to the plaintiff; and

  (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed (*Grant v Torstar*, para 28)

- The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability (*Bent*, para 96).

BOA, Vol I, Tab 5, para 28.
BOA, Vol I, Tab 3, para 96.

Publication

- Copeland and McNish have admitted they published the WSJ Fraud Articles.

Reference

- The WSJ Fraud Articles expressly refer to the Plaintiffs.

PLC, Tab 4, pp. 47, 49.

DEFAMATORY MEANING

- The classic statement of the law is that words are defamatory if they tend to cause the plaintiff to be regarded by reasonable persons with hatred, contempt, fear, ridicule, dislike or disesteem.

  Words are thus defamatory if they impute improper and disrespectable conduct, even though a reasonable person might not regard that conduct with hatred, contempt, fear or ridicule. (*The Law of Libel in Canada*, 4th ed, Downard).
- Proof of actual reputational damage is not necessary given that actual harm to reputation is not required to establish defamation (*Bent*, para 95).

BOA, Vol IV, Tab 26, paras 81.
BOA, Vol I, Tab 3, para 95.

- A defamatory meaning is conveyed if the words could tend to lower a person in the estimation of right-thinking members of society.

  Defamatory meaning in the words may be discerned from all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented. (*Crookes v Newton*, para 39)

- The Court does not analyze the words as though it was carefully considering a written contract (*Leenen v CBC*, para 88).

BOA, Vol II, Tab 6, para 39.
BOA, Vol II, Tab 9, para 88.

- The Court must consider a publication as a whole and not dwell or concentrate on isolated passages. The entire article must be read; articles are to be considered together with any illustrations, pictures viewed with captions, and stories read with their headlines.

  Words that are not defamatory when viewed alone and in isolation may take on a defamatory meaning when the cumulative effect is viewed in context.

  It is the broad impression conveyed by the publication that must be considered and not the meaning of each individual word. More often the sting is not so much in the words themselves as in what an ordinary person will infer from them (*Brown on Defamation*, 2nd ed, § 5.3(1)(a)).

BOA, Vol IV, Tab 27, pp. 87-88.

Allegations of Criminal Or Unlawful Conduct

- Allegations of unlawful conduct or criminal conduct are very serious and potentially damaging to anyone's reputation (*Canadian Standards Association v PS Knight Co Ltd*, para 44).
- Expressions alleging criminal conduct are extremely damaging to a person's reputation (*Hobbes v Warner*, para 150).
- Implications of criminal conduct are likely to have a significant effect on one's reputation (*Kam v CBC*, para 107(a)).

BOA, Vol II, Tab 10, para 44.
BOA, Vol II, Tab 11, para 150.
BOA, Vol IV, Tab 24, para 107(a).

THE WORDS COMPLAINED OF AND THEIR MEANINGS (STINGS)

- The words complained of and their meanings regarding the Website Article are pleaded in paragraphs 31 and 34 of the Amended Statement of Claim.
- The words complained of and their meanings regarding the Print Article are pleaded in paragraphs 44-45 of the Amended Statement of Claim.

THE WORDS COMPLAINED OF – STING #1
(The Plaintiffs Engaged In Fraudulent Activities and Criminal Wrongdoing)

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PLC, Tab 1, p. 1.

THE WORDS COMPLAINED OF – STING #2
(The Plaintiffs Engaged In Financial Crimes)

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PLC, Tab 1, p. 1.

THE WORDS COMPLAINED OF – STING #3
(Violation of Ontario's Securities Laws)

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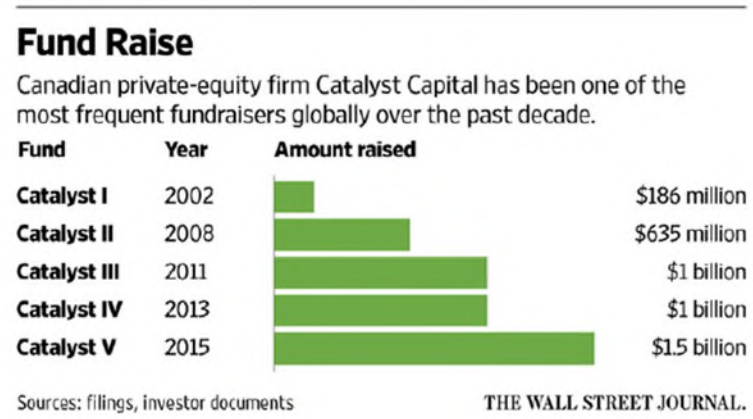
PLC, Tab 1, p. 1.

8



Under a program begun last year, Ontario regulators accept whistleblower submissions from any individual with original information about an alleged violation of securities law. Regulators dismiss many complaints without any inquiries, according to people familiar with the process. Those reports that merit a review are sent to the program's inquiries team, which conducts interviews and other research before deciding whether to open a formal investigation, the people said.

31 As part of its quarterly earnings, Callidus in May disclosed that its accounting practices were under review from the OSC. Mr. Glassman told analysts at that time that the review was "nothing extraordinary." He added, "If there was a significant issue with the Commission, I'm fairly certain the Commission would force us to disclose it."

PLC, Tab 1, pp. 2-3.

THE WORDS COMPLAINED OF – STING #4 (Catalyst Deceived Borrowers)

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20 One of those borrowers is Jeff McFarlaine.

21 Mr. McFarlaine is the former chief executive of computer distributor Xchange Techology Group, known as XTG….

PLC, Tab 1, pp. 1-3.

False Fact #3-Catalyst Deceived Borrowers

- The WSJ falsely reported that Catalyst "deceived borrowers" in the deck and paragraph 2

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PLC, Tab 1, p. 1.

- At no time did XTG borrow money from Catalyst

- Less than 4 hours prior to publication, Copeland and McNish did not know that XTG borrowed from Callidus, not Catalyst

Sent: Wed, 9 Aug 2017 12:05:06 -0400
Subject: Can you check this
From: "Copeland, Rob" <rob.copeland@wsj.com>
To: Jacquie McNish <Jacquie.McNish@wsj.com>

He said his company began borrowing from Catalyst in late 2012 after the lender purchased its $11.6 million loan from a U.S. bank.

I'm on the phone with someone who now says XTG began borrowing from Callidus, not Catalyst. Can you check receivership docs

PLC, Tab 9.

THE WORDS COMPLAINED OF – STING #5 (Catalyst Overpaid Callidus $34 Million for XTG/the Integrity of Callidus's Accounting Around XTG)

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24 In September 2015, Callidus recorded the Xchange investment as an asset for sale at C$66.9 million in a quarterly earnings report.

25 Then in March 2016, Catalyst transferred C$101 million to Callidus for Xchange, "an amount equal to the total outstanding principal plus accrued and unpaid interest," filings show.

26 In December 2016, Catalyst told its investors that the Xchange stake was only worth a fraction of what it had paid that March, triggering losses on two of its funds, according to one of the whistleblower complaints and documents reviewed by the Journal.

27 Mr. McFarlane confirmed he filed one of the whistleblower complaints. His complaint, and one other, alleges that the Catalyst funds overpaid Callidus to acquire the Xchange investment, and delayed and underreported potential losses. "I have serious concerns about the integrity of Callidus's accounting around XTG", Mr. McFarlane said.

PLC, Tab 1, p. 3.

False Fact #1 – Catalyst Funds Overpaid Callidus for XTG

- The WSJ Fraud Articles falsely reported that the Catalyst Funds overpaid Callidus to acquire XTG.
- Paragraph 24 of the Website Article reports:

In September 2015 Callidus recorded the Xchange investment as an asset for sale at C$66.9 million in a quarterly earnings report.

- The "carrying value" of XTG as of September 2015 was C$66.9 million.

Paragraph 25 reports:

Then in March 2016, Catalyst transferred C$101 million to Callidus for Xchange, "an amount equal to the total outstanding principal plus accrued and unpaid interest", filings show.

PLC, Tab 1, p. 3.

- The amount of the “gross loan receivable” as of March 2016 was C$101.3 million. Jeffrey McFarlane then tells readers in paragraph 27 that Catalyst overpaid Callidus:

  Mr. McFarlane confirmed he filed one of the whistleblower complaints. “His complaint and one other”, alleges that Catalyst Funds overpaid Callidus to acquire the XTG investment, and delayed and underreported potential losses. “I have serious concerns about the integrity of Callidus’s accounting around XTG,” Mr. McFarlane said.

- The “carrying value” of an asset for sale is different and separate from a “gross loan receivable”.
- Any comparison of the “carrying value” of an asset for sale and the “gross loan receivable” is a false comparison.
- Readers were not informed that the C$101 million was the gross loan receivable and that the C$66.9 million was the carrying value of XTG.

PLC, Tab 1, p. 3.
PLC, Tab 6, paras 160, 174-183.

- During cross-examination, McNish agreed that in September 2015, Callidus accurately recorded the Xchange investment as an asset for sale at C$66.9 million.
- When questioned about paragraph 25, McNish testified that it was her “understanding that in March 2016 Callidus had recorded the Xchange investment as an asset held for sale at Canadian $101 million”.
- This is an egregious false fact – the C$101 million was not the carrying value of XTG as of March 2016.

PLC, Tab 7, pp. 71-72, qq. 261-265, 268.

- *The Wall Street Journal* reported an apples to oranges comparison and falsely informed readers that Catalyst overpaid Callidus for XGT by C$34 million (C$101 million minus C$66.9 million).
- Catalyst made the C$101 million payment it was contractually obligated to make to Callidus under the Catalyst Guarantee for the gross loan receivable of XTG (a fact that was omitted from the WSJ Fraud Articles).
- Jim Riley explained in his affidavit (paragraphs 175-176) the amount that Catalyst was obligated to pay under the Guarantee and set out the amounts that made up the C$101 million.

PLC, Tab 6, paras 175-176.

THE WORDS COMPLAINED OF – STING #6 (Catalyst Artificially Inflated Its Assets)

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26 In December 2016, Catalyst told its investors that the Xchange stake was only worth a fraction of what it had paid that March, triggering losses on two funds, according to one of the whistleblower complaints and documents reviewed by the Journal.

PLC, Tab 1, p. 1, 3.

False Fact #2-Catalyst Artificially Inflated The Value Of Some Of Its Assets

- The WSJ falsely reported that Catalyst "artificially inflated the value of its assets" in the deck and paragraph 2

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PLC, Tab 1, pp. 1, 3.

- Jim Riley explained in his affidavit that the Catalyst Funds initially carried XTG at Callidus' carrying value, subsequently evaluated XTG's value as at December 31, 2016, and wrote the value down:

> 186. After paying Callidus the amounts required under the Guarantee (through a reduction of the subordinated credit facility owing by Callidus to the Catalyst Funds), the Catalyst Funds took control of XTG. Catalyst Funds initially carried XTG at Callidus' carrying value (expressed in USD) as in the Consolidated Financial Statements For the Years Ended December 31, 2015 and 2014. As part of the Catalyst Funds year-end financial statement preparation process, they evaluated XTG's value as at December 31, 2016, and wrote XTG's value down to USD $9,398,000 at that time. The financial statements for the Catalyst Funds are prepared under the Accounting Standards for Private Enterprises ("ASPE"). Our year-end financial statements were reviewed by KPMG, whose audit opinion was unqualified.

PLC, Tab 8, para 186.

THE WORDS COMPLAINED OF – STING #7 (Catalyst Improperly Seized XTG)

MARKETS

Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers

Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers

A unit of the Toronto Police Service has begun its own inquiries into Catalyst. PHOTO: ZUMAPRESS.COM

By Rob Copeland and Jacquie McNish

9 Some but not all of the filers of the Catalyst whistleblower complaints have worked at companies that borrowed money from Mr. Glassman's firms, and later had their businesses seized, said people familiar with the matter. Some are involved in litigation with Catalyst, the people said. Some of the complaints involve a series of loans to a small technology distributor, while others focus on other investments and the firm's accounting.

19 His companies sometimes file multiple lawsuits against borrowers believed to have violated the terms of their loans.

20 One of those borrowers is Jeff McFarlane.

21 Mr. McFarlane is the former chief executive of computer distributor Xchange Technology Group, known as XTG. He said his company began borrowing from Callidus in late 2012 after the lender purchased its $11.6 million loan from a U.S. bank.

False Fact #5 – Catalyst Seized XTG

- The WSJ falsely report that Catalyst seized XTG (paras 9, 19-21):

9 Some but not all of the filers of the Catalyst whistleblower complaints have worked at companies that borrowed money from Mr. Glassman's firms, and later had their businesses seized, said people familiar with the matter. Some are involved in litigation with Catalyst, the people said. Some of the complaints involve a series of loans to a small technology distributor, while others focus on other investments and the firm's accounting.

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20 One of those borrowers is Jeff McFarlane.

21 Mr. McFarlane is the former chief executive of computer distributor Xchange Technology Group, known as XTG. He said his company began borrowing from Callidus in late 2012 after the lender purchased its $11.6 million loan from a U.S. bank.

PLC, Tab 1, p. 2.

- Firstly, McFarlane was not a borrower – he was only a guarantor (XTG was the borrower).
- Secondly, Catalyst did not "seize" the XTG business. Justice Morawetz (as he then was) appointed the Receiver, approved the Callidus Asset Purchase Agreement of XTG, and found inter alia:
  (1) "The record establishes that the XTG debtors are insolvent"
  (2) "I accept the submissions of counsel to Callidus that the appointment is both just and convenient as it will…permit the XTG Group's business operations to continue, and prevent significant loss of jobs."
- Justice Morawetz's Vesting Order approved the sale of XTG to a subsidiary of Callidus on the basis of its Stalking Horse Offer. Credit bids and stalking horse offers are regularly approved by the Courts and are not seizures.

PLC, Tab 12.
PLC, Tab 6, paras 10, 17.
PLC, Tab 13.

THE WORDS COMPLAINED OF – STING #8 (Illegally or Wrongfully Delayed or Underreported Potential Losses in Respect of the XTG Investment)

MARKETS

Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers

Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers

A unit of the Toronto Police Service has begun its own inquiries into Catalyst. PHOTO: ZUMAPRESS.COM

By Rob Copeland and Jacquie McNish

27 Mr. McFarlane confirmed he filed one of the whistleblower complaints. His complaint, and one other, alleges that Catalyst funds overpaid Callidus to acquire the Xchange investment, and delayed and underreported potential losses. "I have serious concerns about the integrity of Callidus's accounting around XTG," Mr. McFarlane said.

False Fact #4 – Catalyst Delayed and Underreported Potential Losses

- The WSJ falsely reported in paragraph 27 that Catalyst delayed and underreported losses:

"Mr. McFarlane confirmed he filed one of the whistleblower complaints. His complaint, and one other, alleges that Catalyst funds overpaid Callidus to acquire the Xchange investment, and delayed and underreported potential losses. "I have serious concerns about the integrity of Callidus's accounting around XTG," Mr. McFarlane said."

- Jim Riley's affidavit explains that the restructuring took longer than anticipated to avoid adverse U.S. tax consequences:

[140] Following receipt of the Court's approval of the sale, the Receiver and Callidus undertook a complex restructuring and right-sizing of XTG's business. This restructuring took longer to achieve than originally anticipated. The main reason for the delay was to avoid adverse U.S. tax consequences for Callidus, namely, the possibility of a "tax inversion".

[141] A tax inversion occurs when a corporation restructures itself so that a corporate parent company is replaced by a foreign parent company, and the original parent company becomes a subsidiary of the foreign parent; thus moving its tax residence to the foreign country. Callidus' concern was that it might become a US taxpayer as a result of this transaction.

PLC, Tab 1, p. 3.
PLC, Tab 10, paras 140-141.

- Catalyst closed the purchase of XTG March 30, 2016 (effective December 30, 2015) as explained by Jim Riley's affidavit:

[186] After paying Callidus the amounts required under the Guarantee (through a reduction of the subordinated credit facility owing by Callidus to the Catalyst Funds), the Catalyst Funds took control of XTG. Catalyst Funds initially carried XTG at Callidus' carrying value (expressed in USD) as in the Consolidated Financial Statements For the Years Ended December 31, 2015 and 2014. As part of the Catalyst Funds year-end financial statement preparation process, they evaluated XTG's value as at December 31, 2016, and wrote XTG's value down to USD $9,398,000 at that time. The financial statements for the Catalyst Funds are prepared under the Accounting Standards for Private Enterprises ("ASPE"). Our year-end financial statements were reviewed by KPMG, whose audit opinion was unqualified.

PLC, Tab 8, para 186.

- McFarlane testified during cross-examination that he was denied access to XTG's accounting and financial records in October 2013 and that he had no involvement in KPMG's audits.
- McFarlane's Statement in paragraph 27 regarding "the integrity of Callidus's accounting around XTG" has no basis in fact because he had no involvement in KPMG's audits and no access to XTG's accounting and financial records.

PLC, Tab 11, pp. 99-100, qq. 354-360.

Are the Words Complained of Capable of having a Defamatory Meaning?

- Two distinct questions must be answered in order to determine if a statement is defamatory: (i) are the words capable of having a defamatory meaning which is a question of law for the trial judge, and if so; (ii) are the words in fact defamatory which is a question for the trier of fact.

- The Court of Appeal for Ontario held in *Baglow v Smith*:

  the courts have recognized that the threshold over which a statement must pass in order to be capable of being defamatory of a plaintiff is relatively low… the question whether a statement is in fact defamatory has long been considered the purview of a trier of fact. Whether impugned words are defamatory of an individual in fact is the type of decision better made on the basis of a full factual record with cross-examinations and possibly expert testimony.

BOA, Vol II, Tab 8, para 24.

- For the purposes of an anti-SLAPP motion, it is submitted that the Motions Judge can only decide whether the words complained of are capable of being defamatory in that a determination of whether the words are in fact defamatory requires a full factual record and would be a “deep dive” that is not permitted in an anti-SLAPP motion.

- Nevertheless, the words complained of are both capable of being defamatory and are in fact defamatory of the Plaintiffs.

V. ADDITIONAL FALSE FACTS

False Fact #6 – The PNC Bank Loan

- Paragraph 21 of the Website Article falsely states: “He [McFarlane] said his company began borrowing from Callidus in late 2012 after the lender purchased its $11.6 million loan from a U.S. bank.”
- XTG’s loan from the PNC Bank was US $23.9 million, not $11.6 million.
- McNish did not dispute that Callidus purchased PNC’s US$23.9 million loan to XTG for US$11.6 million and did not dispute the fact that Callidus forgave US$12.3 million of that loan (facts omitted from the WSJ Fraud Articles).

PLC, Tab 1, p. 2.
PLC, Tab 14, pp. 1-3, 5.

False Fact #7 – Company Officials Wouldn't Comment for the Article

- The Website Article falsely states that "Company officials wouldn't comment for this article."

- A true statement would have been "company officials declined to provide comment for publication" in that readers were not informed that the day before publication, the Plaintiffs met with Copeland and McNish to educate them about XTG and the accounting.

PLC, Tab 1, pp. 1, 5, 12.

- On the morning of the day of publication, senior editor Dennis Berman asked “how can we summarize the response of Glassman/the companies”:

From: Dennis Berman <dennis.berman@wsj.com>
Sent: Wed, 09 Aug 2017 09:51:43 +0000
Subject: Re: CATALYST for review
To: "Rogow, Geoffrey" <geoffrey.rogow@wsj.com>, Daniel Fitzpatrick <dan.fitzpatrick@wsj.com>, "Heller, Jamie" <Jamie.Heller@wsj.com>, "Barr, Colin" <Colin.Barr@wsj.com>

Geoff: This looks pretty solid. A few questions: How can we summarize the response of Glassman/the companies. Is there a blanket statement such as:
Mr. Glassman and representatives of his companies declined to comment on the record. They did agree to review materials for this story and provide general feedback.

Kind of strange, but something that captures what happened would be helpful.

- The “helpful” information was not reported and readers were left with the impression that the Plaintiffs were evasive, uncooperative, and had something to hide.

PLC, Tab 15.

VI. NO VALID DEFENCES

Legal Framework

- “Grounds to believe” means something more than mere suspicion, but less than proof on a balance of probabilities. (*Pointes Protection*, para 40)
- The Defendants must first put in play the defences they intend to present, and then the burden effectively shifts to the plaintiffs, who bear the statutory burden.
- This calls for an assessment of whether there is *a* basis in the record and the law – taking into account the stage of the proceeding – to support a finding that the defences put in play do not tend to weigh *more* in the Defendants’ favour. (*Bent*, para 103)
- A determination that a defence “could go either way” in the sense that a reasonable trier could accept it or reject it, is a finding that a reasonable trier could reject the defence. (*Subway Franchise Systems*, para 56)

BOA, Vol I, Tab 1, para 40.
BOA, Vol I, Tab 3, para 103.
BOA, Vol I, Tab 4, para 56.

VII. THE TRUTH DEFENCE

Statement of Defence

- The Dow Jones Defendants have pleaded the truth or justification defence at paragraph 34 of the Statement of Defence.

- None of the alleged true facts listed in paragraph 34 plead that the stings of the libel (the meanings) are true.

- For instance, paragraph 34(a) pleads that it is true that four individuals filed whistleblower complaints with Canadian securities regulators. The Dow Jones Defendants do not plead that it is true that the Plaintiffs engaged in fraudulent activities or criminal wrong doing. Paragraphs 34(a) – (bb) do not mention the word “fraud”.

PLC, Tab 4, pp. 51-54.

The Elements

- To succeed on the defence of justification, a defendant must adduce evidence showing the statement was substantially true.

The burden on the defendant is to prove the substantial truth of the '"'sting', or main thrust, of the defamation".

The defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true. (*Bent*, para 107)

BOA, Vol I, Tab 3, para 107.

- Repeating a libel has the same legal consequences as originating it. This rule reflects the law's concern that one should not be able to freely publish a scurrilous libel simply by purporting to attribute the allegation to someone else. (*Montour v Beacon Publishing*, para 14)

- By repeating that the whistleblowers have accused the Plaintiffs of fraud, the Dow Jones Defendants have themselves accused the Plaintiffs of fraud

BOA, Vol III, Tab 12, para 14.

No Valid Truth Defence

- None of alleged true facts that are pleaded in paragraph 34 of the Statement of Defence plead the truth of the meanings pleaded by the Plaintiffs. On this basis alone, there are grounds to believe that there is no valid basis for the truth defence.
- In addition, none of the stings of libel are true. The WSJ Fraud Articles are rife with false facts.
- Further, a resolution of whether the numerous meanings of the words complained of are substantially true will require findings of credibility and require a deep dive which the Motions Judge is not allowed to do in an anti-SLAPP motion.
- There are grounds to believe that the Dow Jones Defendants will not be able to prove the truth of the stings of the defamatory statements in the WSJ Fraud Articles.

VIII. THE FAIR COMMENT DEFENCE

Statement of Defence

- Paragraph 35 of the Statement of Defence pleads:

  To the extent any of the Words Complained Of are or include expressions of opinion or comments, the Dow Jones Defendants state that in their plain and ordinary meaning and in their full and proper context, they are fair comment, made in good faith and without malice on matters of public interest. They constitute opinions that a person could honestly hold based on facts presented in the Online Article, the Print Article and the Copeland Tweets, or that are generally known by the public, that are substantially true.

PLC, Tab 4, p. 55.

The Elements of the Fair Comment Defence

- The Supreme Court of Canada set down the elements of the fair comment defence in *WIC Radio Ltd v Simpson*:
  - the comment must be on a matter of public interest;
  - the comment must be based on fact;
  - the comment, though it can include inference of fact, must be recognizable as comment;
  - the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?
  - the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice, in the sense of improper motive. The defendant must prove the four elements of the defence before the onus switches back to the plaintiff to establish malice.

BOA, Vol III, Tab 15, paras 1, 52.

- The fair comment defence is only available if the facts are sufficiently stated or otherwise known to the readers, so that the readers can make up their own minds on the editorial comment.
- If the factual foundation is unstated in the article, or unknown, or turns out to be false, the fair comment defence is not available (*WIC Radio Ltd v Simpson*, para 31; *Canadian Standards Association v PS Knight Co Ltd*, para 51).
- The requirement to state true facts means that the commentator cannot omit to state important or material facts that would falsify or alter the complexion of the facts stated in the commentary (*Creative Salmon Company Ltd v Staniford*, para 61)

BOA, Vol III, Tab 15, para 31.
BOA, Vol II, Tab 10, para 51.
BOA, Vol III, Tab 16, para 61.

Comment vs. Fact

- "Comment" includes "deduction, inference, conclusion, criticism, judgement, remark or observation which is generally incapable of proof" (*WIC Radio Ltd v Simpson*, para 26).
- In *Thompson v Cohodes*, Justice Kristjanson rejected the defence of fair comment because the sting that someone has participated in a fraud is an allegation of fact (paras 27-28)
- The quote from Jeffrey McFarlane in para 27 of the Website Article is not a comment in that the "integrity of Callidus's accounting around XTG" is capable of proof. KPMG LLP audited XTG's accounting and provided a clean audit opinion. McFarlane's statement is false.
- "Deceived borrowers" is a fact.
- "Artificially inflating the value of assets" is a fact.
- "Overpaying" for the purchase of an asset is a fact.

BOA, Vol III, Tab 15, para 26.
BOA, Vol III, Tab 13, paras 27-28.
PLC, Tab 1, p. 3.

No Valid Fair Comment Defence

- The Statement of Defence fails to plead and identify the words complained of that are comment (vs. facts).
- The Statement of Defence also fails to plead the true factual foundation for the comments.
- The rolled-up plea in paragraph 35 of the Statement of Defence provides the court with no basis to find the defence is even available, let alone valid.

- In addition, there are grounds to believe there is no valid defence of fair comment because:
  - the words complained of are fact not comment,
  - there is no true factual foundation underlying any alleged comment that is stated in the WSJ Fraud Articles, and
  - the defence is defeated by malice.

IX. The Responsible Communication Defence

Statement of Defence

- Paragraph 38 of the Statement of Defence pleads:

  The Words Complained Of constitute responsible communication on matters of public interest. Copeland and McNish diligently conducted a fair and thorough investigation, including but not limited to taking the steps outlined in paragraphs 6-14 above. Prior to the publication of the Print Article and the Online Article by the WSJ, and the Copeland Tweets by Copeland, Copeland and McNish provided the Plaintiffs and their representatives with multiple opportunities to provide comments and responses to the subjects reported in the Words Complained Of. The Plaintiffs declined to provide comment for publication before publication of the Online Article. Following the publication of the Online Article, the Plaintiffs publicly issued a statement, concerning the Online Article, components of which were promptly incorporated into both the Online Article and the Print Article.

PLC, Tab 4, p. 56.

The Elements

- The Supreme Court of Canada set down the elements of the responsible communication defence in *Grant v Torstar*:
  - the publication must be on a matter of public interest;
  - the defendant must show the publication was responsible; in that he or she was diligent in trying to verify the allegations, having regard to all the relevant circumstances.

BOA, Vol I, Tab 5, para 98.

- The following factors are to be considered in determining whether a defamatory communication on a matter of public interest was responsibly made:
    i. the seriousness of the allegation;
    ii. the public importance of the matter;
    iii. the urgency of the matter;
    iv. the status and reliability of the source;
    v. whether the plaintiff's side of the story was sought and accurately reported;
    vi. whether inclusion of the defamatory statement was justifiable;
    vii. whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage");
    viii. other considerations.

(*Grant v Torstar Corp* , at paras 111-122).

BOA, Vol I, Tab 5, paras 111-122.

- “Where a trier could reasonably conclude that the defendants did not conduct a sufficiently diligent investigation… a trier could reasonably conclude that the defence of responsible communication would not succeed” (*Subway Franchise Systems v CBC*, para 57).

BOA, Vol I, Tab 4, para 57.

1. Seriousness of the Allegation

- The degree of diligence in verifying the allegation should increase in proportion to the seriousness of its potential effects on the person defamed. Publication of the kinds of allegations considered the most serious (such as corruption or other criminality on the part of a public official) demand more thorough efforts at verification than will suggestions of lesser mischief (*Grant v Torstar Corp*, para 111).
- Fraud is one of the most egregious securities regulatory violations (*Re Lehman Cohort Global Group Inc*, para 86).
- In *Thompson v Cohodes,* Justice Kristjanson held that an allegation that a plaintiff has committed fraud is a very serious charge (para 33).

BOA, Vol I, Tab 5, para 111.
BOA, Vol III, Tab 17, para 86.
BOA, Vol III, Tab 13, para 13.

2. Public Importance

- Inherent in the logic of proportionality is the degree of the public importance of the communication's subject matter (*Grant v Torstar*, para 112).

- There was no public importance in a story about unproven fraud allegations in confidential whistleblower complaints by a professional whistleblower and by aggrieved former CEO's of companies that borrowed from Callidus.

- These whistleblower complaints were only at the intake/inquiries stage and should never have been reported to the world at large.

BOA, Vol I, Tab 5, para 112.

3. Urgency

- The question is whether the public's need to know required the Defendants to publish when they did (*Grant v Torstar,* para 113).

- The only urgency that the Dow Jones Defendants faced was competitive pressure from Reuters News

- A journalist's desire to "scoop" the competition and rush to print is irresponsible and malicious.

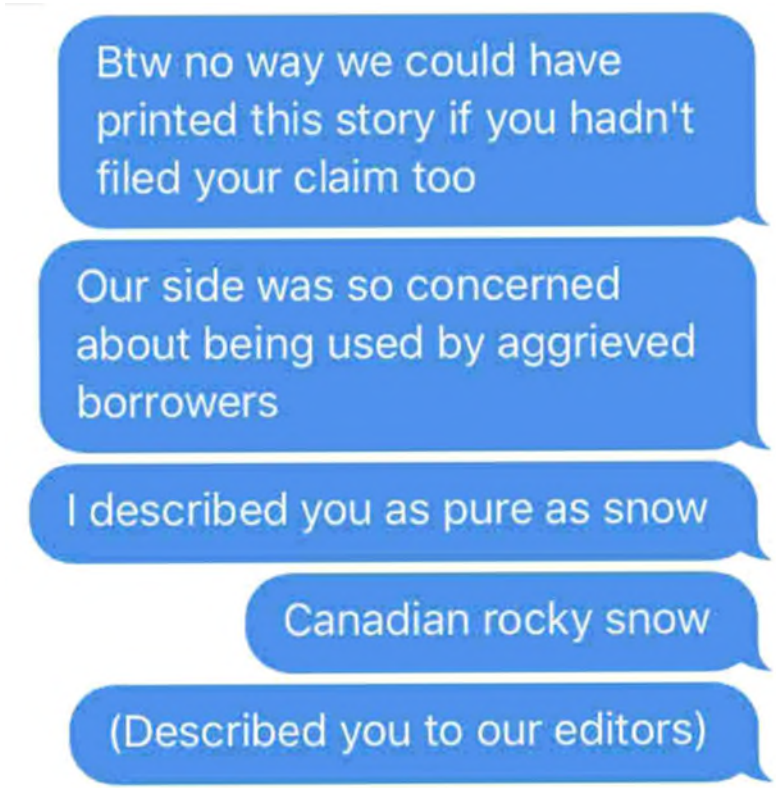
BOA, Vol I, Tab 5, para 113.

4. Status and Reliability of the Source

- Some sources of information are more worthy of belief than others. The less trustworthy the source, the greater the need to use other sources to verify the allegations" (*Grant v Torstar,* para 114).
- McNish was told by a confidential source that Kevin Baumann is "crazier than a soup sandwich". McNish passed this information onto Copeland by describing Kevin Baumann as "a complete nutter".
- The lead paragraph states that "at least four individuals have filed whistleblower complaints," one of whom was Kevin Baumann. McNish never reviewed Baumann's complaint and Copeland was not positive that he viewed Baumann's complaint.
- Two primary sources for the WSJ Fraud Articles were biased and agenda driven: McFarlane (the aggrieved former CEO of XTG who was "at war" with the Plaintiffs) and Anderson (who profited from his short positions in Callidus' stock).

BOA, Vol I, Tab 5, para 114.
PLC, Tab 16, p. 1-5.
PLC, Tab 1, p. 12.

- Shortly after the Website Article was published, Copeland texted Anderson:



PLC, Tab 2, p. 61.

- Although “Copeland’s side” was concerned about being used by aggrieved borrowers, they nevertheless published unproven fraud accusations by three aggrieved borrowers / whistleblowers (Jeffrey McFarlane, Darryl Levitt, and Kevin Baumann).
- Anderson’s whistleblower complaint contained numerous instances in which he was guessing (it appears”; “it is unclear”; “purportedly”) and contained qualified statements (“based on the review of available documentation”; “allegedly”).

5. Whether Plaintiffs' Side of the Story Was Sought and Accurately Reported

- The Plaintiffs' side of the story was not accurately reported
  - <u>The Plaintiffs' "Compelling Explanation" About The Value Of The XTG Loan</u>
    - The Plaintiffs tried to educate the Dow Jones Defendants about the accounting around XTG during a meeting held the day before publication.
    - Copeland sent Anderson a text after his August 8, 2017 meeting with representatives of the Plaintiffs saying: "Jacqui is actually so pissed".

PLC, Tab 2, p. 54.

- When asked what she was pissed about, McNish testified:

  … during the interview they offered a very compelling explanation, Mr. Riley, Mr. Reese, as to why the value of the XTG loan had increased. They told us that they had made additional investments, loaning of money to XTG to help recover the business, to help rebuild its business, which made a lot of sense to me. We wanted to include it. They didn't want us to … they didn't want to go on the record … It would help explain all the questions around XTG."

- McNish also testified:

  "With the very specific explanation that they offered as to why the reporting the dollar value that they reported on the XTG holding increased. It was very compelling, and I didn't understand why they wouldn't want to go on the record with that."

- Although the Plaintiffs "very compelling explanation" about XTG's accounting made a lot of sense to McNish, the Dow Jones Defendants nevertheless published McFarlane saying that he had "serious concerns about the integrity of Callidus's accounting around XTG".

PLC, Tab 18, pp. 1-2, 4-5.
PLC, Tab 1, p. 3.

2)Callidus' Statement Regarding The Allegations In The Wall Street Journal

- Callidus released a full page statement regarding the Website Article.
- The updated Website Article (published at 9:53 PM on August 9th) and the Print Article only reported three sentences from that full page Callidus Statement.

PLC, Tab 19, p. 1.
PLC, Tab 1, pp. 5, 12.

- Copeland considered this Callidus Statement to be “unbelievably lame” and omitted to report a major part of the Plaintiff’s side of the story:

(1) “…Callidus is particularly concerned that the Wall Street Journal chose to publish these allegations after a comprehensive briefing held with them on August 8, 2017. For example, as part of that meeting it was made clear that the treatment of the Catalyst guarantee for Callidus loans made to Xchange Technology Group was in accordance with all applicable accounting requirements.”

(2) “… It is extraordinary that the press has been given copies of confidential whistleblower reports that neither Callidus nor Catalyst has ever seen. This is an effort by short sellers and others who are attempting to manipulate the market by making false allegations”.

(3) “… so that they can leak them to the press in the hope that the press will publish the allegations. As a result, the media and the public markets are misled and the legitimate OSC whistleblower process is exploited for personal advantage, and to do damage to the market value of Callidus, and to the reputation, operations and investments of its majority shareholder, Catalyst.”

PLC, Tab 2, p. 36.
PLC, Tab 19, p. 1.

6. Whether Inclusion Of The Defamatory Statement Was Justifiable

- The need to include a particular statement may be taken into account in deciding whether the communicator acted responsibly (*Grant v Torstar Corp*, para 118).
  - Financial Crimes Unit
- There was no need to include paragraph 3 that says "A unit of the Toronto Police Services that specializes in financial crimes has separately begun its own inquiries, a department spokeswoman said."
- McNish informed a confidential source that she was trying to be "scrupulous" in "talking to people with direct knowledge of… investigations by the… Toronto Corporate Crimes Division...."

  The inclusion of an alleged statement from a Toronto Police Communications spokeswoman was not justifiable without interviewing Detectives Gail Regan and Diane Kelly of the Financial Crimes Unit who were dealing directly with the complainants. These Detectives were never interviewed even though Copeland knew that whistleblowers Levitt, McFarlane and Baumann were in communication with them.

  2) Toronto Police Car Photo
- There was no need to include a photograph of a Toronto Police car parked in front of the Metropolitan Toronto Police Headquarters building

  3) Unproven Fraud Accusations
- There was no need for the inclusion of unproven fraud and other accusations made in OSC whistleblower complaints at the intake/inquiries stage.

BOA, Vol I, Tab 5, para 118.
PLC, Tab 1, p. 1.
PLC, Tab 20, p. 58.
PLC, Tab 21.
PLC, Tab 27.

7. Reportage

- The Dow Jones Defendants have pleaded reportage at paragraph 39 of the Statement of Defence regarding a statement allegedly made by a Toronto Police Service spokeswoman that is published in the third paragraph of the Website Article and the Print Article.
- Reportage is an exception to the repetition rule
- The repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity. This exception to the repetition rule is known as reportage.

PLC, Tab 4, p. 56.
BOA, Vol I, Tab 5, para 120.

- If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made (*Grant v Torstar Corp*, para 120).

BOA, Vol I, Tab 5, para 120.

- The ultimate question is whether the publication was responsible in the circumstances. (*Grant v Torstar*, para 121).
- Reportage is not a stand alone defence – the presence of reportage is merely one of the responsibility factors (*Wilson v Canwest*, paras 11, 21).
- The Defendants have not established the presence of reportage:

  The WSJ Fraud Articles: (i) do not identify the Toronto Police spokeswoman (previous drafts of paragraph 3 of the WSJ Fraud Articles did identify her as Megan Gray); (ii) do not state that the truth of her statement has not been verified; (iii) do not set out both sides of the dispute fairly; and (iv) do not provide the context in which the Toronto Police Financial Crimes Unit has separately begun its own inquiries.

BOA, Vol I, Tab 5, para 121.
BOA, Vol III, Tab 18, paras 11, 21.
PLC, Tab 22.

8. Other

- Other factors to consider in determining whether the publication was responsible are the numerous false facts in the WSJ Fraud Articles (Factum paras 54-67) and the omissions from the WSJ Fraud Article (Factum paras 150-160);
- In addition, Copeland and McNish did not have copies of all four whistleblower complaints reported in the WSJ Fraud Articles
- The lead paragraph of the WSJ Fraud Articles reports that there are "at least" four whistleblower complaints. The Website Article referred to whistleblower complaints over ten times. Yet Copeland and McNish did not have copies of all four complaints to verify the truth of the allegations, including the factual basis for their fraud accusations.

BOA, Vol I, Tab 5, paras 122-125.
PLC, Tab 23, p. 2.
PLC, Tab 21.

- McNish testified:

  Q 420: Okay. So as of publication date on August 9, 2017, did you have in your possession an actual copy of the four complaints by those four individuals?

  A: I am only aware of two that I saw.

  …

  A 421: Actually I should only say one, Nathan Anderson.

- Copeland testified:

  A 250: I believe that we had some, but not all, of those complaints. And when I said "had", I should say that we had viewed as opposed to had possession.

  A 252: My recollection is that I had viewed Jeff McFarlane's complaint, as to the other two complaints, I am not positive whether I had viewed them or not.

  Q 253: And that would be Mr. Levitt and Mr. Baumann?

  A: Correct.

- The failure to review all four whistleblower complaints and independently verify the truth of the fraud and other accusations in all four of those complaints was grossly irresponsible.

PLC, Tab 23, p. 2.
PLC, Tab 21.

No Valid Responsible Communication Defence

- In assessing the factors above, there are grounds to believe that the publication of the WSJ Fraud Articles was irresponsible.
- Further, the responsible communication defence is not available to the Dow Jones Defendants because they were malicious.

X. THE QUALIFIED PRIVILEGE DEFENCE

Statement of Defence

- Paragraph 37 of the Statement of Defence pleads:

  The Words Complained Of were published in good faith, without malice, on an occasion of qualified privilege. They relate to matters of public interest referred to above. The Dow Jones Defendants had a duty and interest in having the results of their newsgathering published, including the Words Complained Of, in the context of the Print Article, the Online Article and the Copeland Tweets, and the public had a corresponding interest in receiving that information from the Dow Jones Defendants, and specifically Copeland and McNish, both investigative journalists with the WSJ.

PLC, Tab 4, pp. 55-56.

Elements of the Qualified Privilege Defence

- Qualified privilege applies to the occasion upon which a communication is made. An occasion is privileged if the person making the communication has an interest or duty – legal, social, or moral – in making the communication to the person to whom it is made, and if that person has a corresponding interest or duty in receiving the communication (*Hill v Church of Scientology*, para 143).

- The threshold for privilege remains high. Privilege is "grounded" not in free expression values but in the social utility of protecting particular communicative occassions from civil liability (*Bent*, para 124).

BOA, Vol III, Tab 19, para 143.
BOA, Vol I, Tab 3, para 124.

- Qualified privilege protects only communications that are reasonably appropriate to the discharge of the duty said to have created the occasion of privilege. (*Botiuk*, paras 78-80)

- The privilege will also be lost if the articles were published to an excessively wide field of recipients who have no interest in receiving the information

- The Supreme Court of Canada held in *Grant v Torstar*, (para 37): "It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege".
- The defence is "rarely available for widely circulated publications"(*Lascaris*, para 36).

- The Motions Judge cannot choose to accept a defendant's evidence over the plaintiff's evidence in a section 137.1 motion (*Bent*, per Coté, J. para 138)

BOA, Vol II, Tab 7, paras 78-80.
BOA, Vol I, Tab 5, para 37.
BOA, Vol IV, Tab 20, para 36.
BOA, Vol I, Tab 3, para 138.

No Valid Defence of Qualified Privilege

- Qualified privilege does not extend to the publication of uncorroborated allegations of criminal wrongdoing to the general public, as opposed to law enforcement or investigative authorities (*Canadian Standards Association v P.S. Knight*, para 58).

- On this basis alone, there are grounds to believe there is no valid qualified privilege defence.

BOA, Vol II, para 58.

- A precise characterization of the “occasion” is essential as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused (*Bent*, at para 122).

- The Statement of Defence fails to plead the alleged occasion for publishing unproven fraud and other accusations made against the Plaintiffs.

- Without a precise characterization of the occasion, there are grounds to believe there is no valid defence of qualified privilege.

BOA, Vol I, Tab 3, para 122.

- The Dow Jones Defendants did not have a duty – legal, social or moral – to publish the WSJ Fraud Articles.

- The over 2.4 million readers to whom the WSJ Fraud Articles were published (the world at large) did not have a corresponding interest or duty to receive the defamatory statements.

- Lastly, the qualified privilege defence is defeated by the Defendants' malice.

- There are grounds to believe there is no valid qualified privilege defence.

XI. Sub-section 3(1) *Libel and Slander Act* Defence

Statement of Defence

- The Dow Jones Defendants plead sub-section 3(1) of the *Libel and Slander Act*:

> [40] To the extent that the Words Complained of refer to proceedings of the public authorities, including the investigation conducted by the TPS [Toronto Police Service] and the receipt of whistleblower complaints by the OSC [Ontario Securities Commission], they are a fair and accurate report on such proceedings, and are entitled to the privileges provided in that regard at common law and under s. 3(1) of the *Libel and Slander Act*.

PLC, Tab 4, p. 56.

No Valid Defence

- Subsection 3(1) of the *Libel and Slander Act* states:

  A fair and accurate report in a newspaper or in a broadcast of any of the following proceedings that are open to the public is privileged, unless it is proved that the publication thereof was made maliciously: … the proceedings of any administrative body that is constituted by any public authority in Canada …

- The TPS and the OSC inquiries are not “proceedings”.

- Nor are TPS and OSC inquiries open to the public.

- This statutory defence is also defeated by malice.

- There are grounds to believe that there is no valid defence.

Sched. “B” to Factum.

XII. MALICE

Legal Principles

- Malice defeats the fair comment defence and the qualified privilege defence
- The responsible communication defence is unavailable to a defendant who acts maliciously (which is irresponsible)

- In *Leenen v Canadian Broadcasting Corp*, Justice Cunningham (as he then was) issued a leading decision on what constitutes malice:

1) malice is commonly understood as spite or ill will towards someone. Malice is also established by showing that the defendant either knew he/she was not telling the truth or was reckless in that regard (paras 140-141);
2) the reporting of one side of the story, the deliberate refrain by the defendants from making important further inquiries and, the omission of highly significant information contrary to the story's thesis is evidence of malice (paras 150-162);
3) the failure of the defendant to provide the plaintiff with a fair opportunity to defend against the defamatory allegations is evidence of malice (paras 145-149);
4) the reliance on information from a biased source is evidence of malice. A biased source includes a disgruntled employee or persons with axes to grind against the plaintiff; (paras 178-181);

BOA, Vol II, Tab 9, paras 140-141, 145-162, 178-181.

5) the defendants' dismissive, disdainful and biased attitude towards the plaintiff is evidence of malice (para 181);

6) the failure to present a fair portrayal of the plaintiff is malice. Selectivity in reporting is malicious (paras 174-175);

7) evidence of malice may be intrinsic or extrinsic. Extrinsic evidence consists of evidence apart from the statements themselves from which the trier of fact can infer some improper motive and a court will look at the conduct of the defendant throughout the course of events both before and after the defamatory publication (para 143);

8) even one piece of evidence is enough to find malice so long as one piece of evidence proves the existence of an ongoing improper state of mind towards the person defamed by one or more of the defendants (para 146).

BOA, Vol II, Tab 9, paras 143, 146, 174-175, 181.

- The evidence of the malicious conduct of the Dow Jones Defendants is papable:

1. the Toronto Police car photograph – the “kill shot”
2. failure to interview the Financial Crimes Unit’s police officers
3. sensationalism – The “Exclusive” deserves “Good Play”
4. bias and Spite – The “Great WSJ Scoop”
5. bias and Spite – Callidus’s “Shares Tankinggggg”
6. bias and Spite towards Newton Glassman
7. reliance on a biased source – professional short-seller Nathan Anderson
8. copeland tipped Anderson
9. plaintiffs denied an opportunity to review the whistleblower complaints to defend themselves
10. plaintiffs denied an opportunity to defend themselves from McFarlane’s fraud accusations
11. rush to Print - competitive pressure by Reuters News
12. no apology or retraction
13. republication of the Website Article

1. The Toronto Police Car Photo – The "Kill Shot"

THE WALL STREET JOURNAL.

MARKETS

Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers

Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers

A unit of the Toronto Police Service has begun its own inquiries into Catalyst. PHOTO: ZUMAPRESS.COM

By
Rob Copeland and
Jacquie McNish
Updated Aug. 9, 2017 9:53 pm ET

PLC, Tab 1, p. 1.

- Copeland agreed that the Dow Jones Defendants could have taken a photograph of the signs outside the Callidus or Catalyst offices
- Reuters News published a photo of the Catalyst office that was taken on July 6, 2017

PLC, Tab 24, pp. 1-2.

The Photograph Reuters News Published

REUTERS World Business Markets Breakingviews Video More

AN HOUR AGO AN HOUR AGO

AMERICAS-TEST-2

MARCH 23, 2018 / 9:41 AM / UPDATED 3 YEARS AGO

Special Report: Private equity star's picks shine, until cash-out time

By Lawrence Delevingne, John Tilak

NEW YORK/TORONTO (Reuters) - Canadian financier Newton Glassman has long told his private equity firm's clients that his big bet on casinos would yield a financial jackpot.

A sign shows the entrance to the offices of the Catalyst Capital Group Inc. in Toronto, Ontario, Canada July 6, 2017. Picture taken July 6, 2017. REUTERS/Chris Helgren

PLC, Tab 24, p. 2.

- Of the 32 paragraphs of the Website Article, only one sentence refers to the Toronto Police.
- Why then did *The Wall Street Journal* give such prominence to a photograph of a Toronto Police car parked in front of the Metropolitan Toronto Police Headquarters building?
- Answer – to heighten the impression that the Plaintiffs were engaged in fraudulent and criminal activities, illegalities, and wrongdoing.
- At no time did a Toronto Police officer contact anybody at Catalyst or Callidus about the Whisteblowers' fraud accusations
- The inclusion of the Toronto Police car photograph was a "kill shot" aimed at the Plaintiffs' reputations – it worked.

2. Failure to Make Inquiries – The Financial Crimes Unit's Police Officers

- McNish told a confidential source:

"…but the one thing we're trying to be is [*sic*] scrupulous about as possible is talking to people with direct knowledge of what we believe to [be] investigations by the OSC, the Toronto Corporate Crimes Division, and possibly the RCMP as well."

- The Detectives in the Financial Crimes Unit who had the direct knowledge about the complaints were Gail Regan and Diane Kelly (who were prior sources).
- Copeland and McNish knew this fact and never interviewed them.

PLC, Tab 20, p. 58.
PLC, Tab 26, para 18.

- In addition, McNish and Copeland failed to contact two Ontario Securities Commission officials who had been previous sources for unrelated stories – Cam Watson (Enforcement Branch and Joint Serious Offences Team) and Michael Hutchinson (Manager, Joint Securities Intelligence Unit).

PLC, Tab 27, pp. 2-5.

3. The Exclusive Deserves Good Play - Sensationalism

- Two minutes after publishing the fraud article on the WSJ website, a senior editor of *The Wall Street Journal* sent an email: "Exclusive. Deserves good play."

From: "Adams, Russell" <russell.adams@wsj.com>
Sent: Wed, 9 Aug 2017 15:33:53 -0400
Subject: CATALYST is pubbed
To: ReachHomepage <ReachHomepage@wsj.com>, ReachSocial <reachsocial@dowjones.com>, "Copeland, Rob" <Rob.Copeland@wsj.com>, Jacquie McNish <Jacquie.McNish@wsj.com>

Exclusive. Deserves good play.

Canadian Private-Equity Giant Accused by Whistleblowers of Fraud

Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers

Summary: Authorities are looking into complaints from whistleblowers who say Catalyst Capital Group and its publicly traded lending arm artificially inflated the value of some of its assets and deceived borrowers about the terms of loans.

Link: https://www.wsj.com/articles/canadian-private-equity-giant-accused-by-whistleblowers-of-fraud-1502307145reach

Social:

'Goldman Sachs of Canada' is accused by whistleblowers of fraud

Canadian authorities are looking into fraud allegations against a $6 billion private-equity firm

Canadian private-equity giant led by "Newt" Glassman faces accusations of fraud

PLC, Tab 28.

- The “exclusive” fraud article was given “good play” – it was disseminated to over 2.4 million readers internationally through multiple *Wall Street Journal* platforms.

4. “The Great WSJ Scoop” - Bias Spite

- reporters and their editors sent out Tweets that promoted and linked their great “Scoop”.
- all of their Tweets included a link to the Fraud Article and all but one included the photograph of the Toronto Police car.
- Canadian Bureau Chief Sara Muñoz Tweeted “Great WSJ Scoop“:

PLC, Tab 29.

- Canadian Bureau Chief Muñoz emailed McNish @ 4:14pm: “Congrats! Heard anything from them?
- McNish replied @ 4:20pm: “they are complaining that we also wrote about Catalyst when it was their impression we were only writing about Callidus. Stock is down 23%. Story is currently most read on website according to Parsley nerd Rob Copeland.” (emphasis added.)

Sent: Wed, 9 Aug 2017 16:20:23 -0400
Subject: Re: story is pubbed
From: "McNish, Jacquie" <jacquie.mcnish@wsj.com>
To: Sara Munoz <sara.munoz@wsj.com>

they are complaining that we also wrote about Catalyst when it was there impression we were only writing about Callidus. Stock is down 23%. Story is currently most read on website according to Parsley nerd rob copeland

Jacquie McNish
The Wall Street Journal
o: 416-306-2031
c: 647-224-7554

On Wed, Aug 9, 2017 at 4:12 PM, Sara Munoz <sara.munoz@wsj.com> wrote:

Congrats! Heard anything from them?

PLC, Tab 29, p. 5.

Copeland sent out three Tweets

Tweet #1:

- “Goldman Sachs of Canada” is accused of fraud. Exclusive…”

PLC, Tab 29, p. 12.

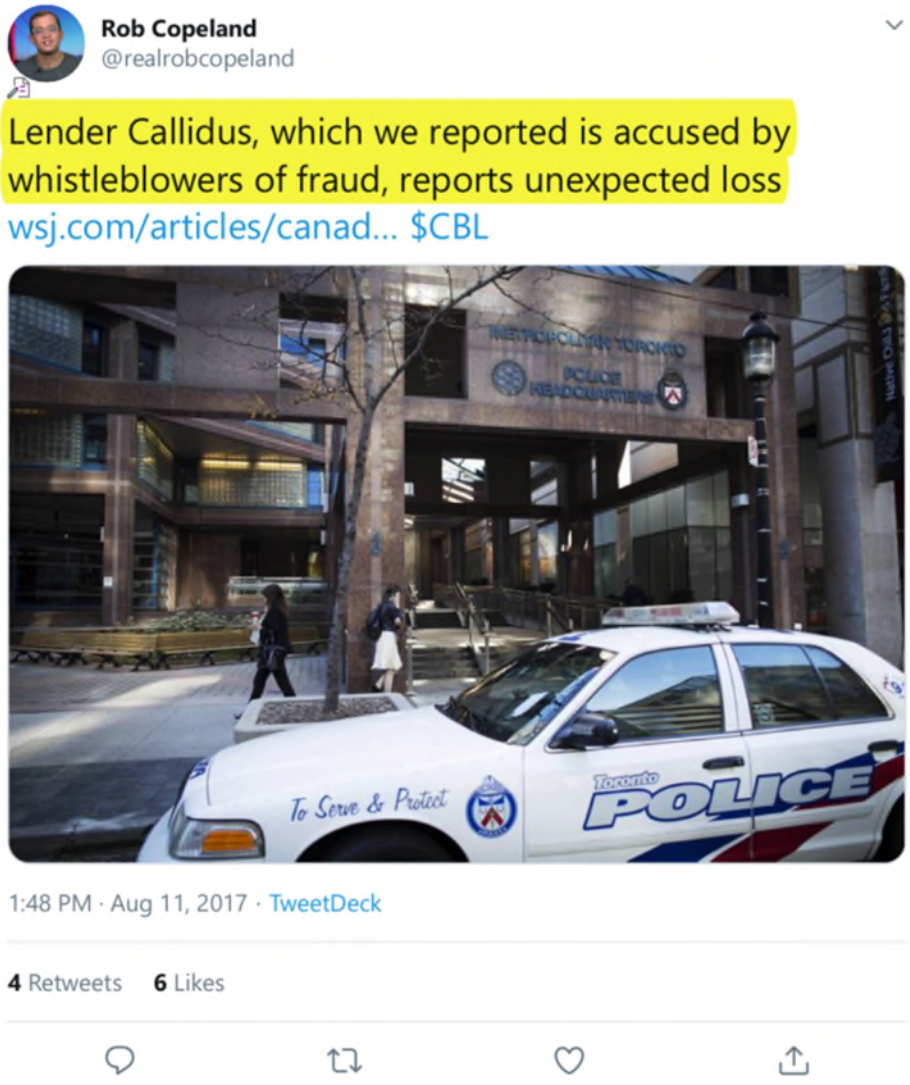
Tweet #2

- Shares fall 21% for Callidus Capital

PLC, Tab 29, p. 14.

Tweet #3

- Lender Callidus, which we reported is accused by whistleblowers of fraud, reports unexpected loss



PLC, Tab 29, p. 17.

5. Callidus' Shares Tankinggggg – Bias & Spite

- Minutes after the TSX closed trading, Copeland texted Anderson:

PLC, Tab 2, p. 59.

- Copeland proposed updating the story and moving the line “the stock dropped 19% after the story pubbed”, more prominently in the story
- The 9:53 pm updated story moved the line “Callidus shares are down 19%” from the last paragraph (para 32) to paragraph 16

Sent: Wed, 9 Aug 2017 16:27:58 -0400
Subject: Stock change
From: "Copeland, Rob" <rob.copeland@wsj.com>
To: Russell Adams <Russell.Adams@wsj.com>, Geoffrey Rogow <geoffrey.rogow@wsj.com>, Jacquie McNish <Jacquie.McNish@wsj.com>

The stock dropped 19% after the story pubbed. Was down 21% for the day, down 35% for the year.
I propose updating story and moving line more prominently as such:

...Catalyst funds own a majority of Callidus's public shares and some senior executives work concurrently at both firms.

Callidus shares dropped 19% Wednesday afternoon to C$12.06 after The Wall Street Journal reported on the whistleblower inquiries. The stock fell 21% on the day overall and is down 35% this year.

PICKUP: Catalyst is ranked...

(And then cut the kicker line which had stock price)

--
Rob Copeland
REPORTER

PLC, Tab 30.
PLC, Tab 1, p. 7.

6. Bias and Spite Towards Newton Glassman

- Copeland depicted Newton Glassman to be a “skeeve”

Sent: Tue, 1 Aug 2017 13:09:57 -0400
Subject: Re: story
From: "Copeland, Rob" <rob.copeland@wsj.com>
To: "Reagan, Brad" <brad.reagan@wsj.com>

Ah yes will fix that.
Dennis wanted "less about what a skeeve this guy is" which was not the first time a story of mine has received that feedback

PLC, Tab 31.

- Copeland considered charitable donations made by Newton Glassman as “sleazy”

[00:25:07]

I heard a lot about the money that Glassman has donated to charity over the years, but that’s fine. I just said we’ve got to have the full picture. Tell me what else --

ROB: That’s just a sleazy -- I can say that because I’m sitting in New York. That’s a really sleazy defense.

PLC, Tab 32, p. 117.

- Copeland “loves a good burning trash can” marked “CBL” (the trading symbol for Callidus on the TSX)

PLC, Tab 2, p. 21.

- In a phone conversation with McNish, Copeland said:

(1) “The lead that I would love to write at some point is Newton Glassman frequently tells associates he is a billionaire… Period. He is not. Period.”

(2) “And the first story is how do we communicate really succinctly just how hated he [Glassman] is?”

PLC, Tab 32, pp. 104. 106.

- McNish has met Newton Glassman once.
- In a discussion with Copeland about a *Globe and Mail* article that described Newton Glassman as a soft-spoken man who has a touch of cherub in him, McNish's reaction to the *Globe* story was:

JACQUIE MCNISH: Oh, my God, [PH] this is going to barf. This was written by a guy who's now -- it was written by a guy at the Globe who's now in PR and they referred to him as a soft spoken man who has a touch of a cherub in him. Oh, my God.

ROB COPELAND: Oh, my God.

JACQUIE MCNISH: Oh, my God.

ROB COPELAND: Only if he killed a cherub --

[02:51:31]

JACQUIE MCNISH: Oh, my God.

ROB COPELAND: -- and ate him.

JACQUIE MCNISH: For breakfast.

ROB COPELAND: Yeah. Like --

JACQUIE MCNISH: Oh, my God. I remember reading this thinking, you know, the Globe just [PH]

PLC, Tab 34, p. 227.
PLC, Tab 32, p. 107.

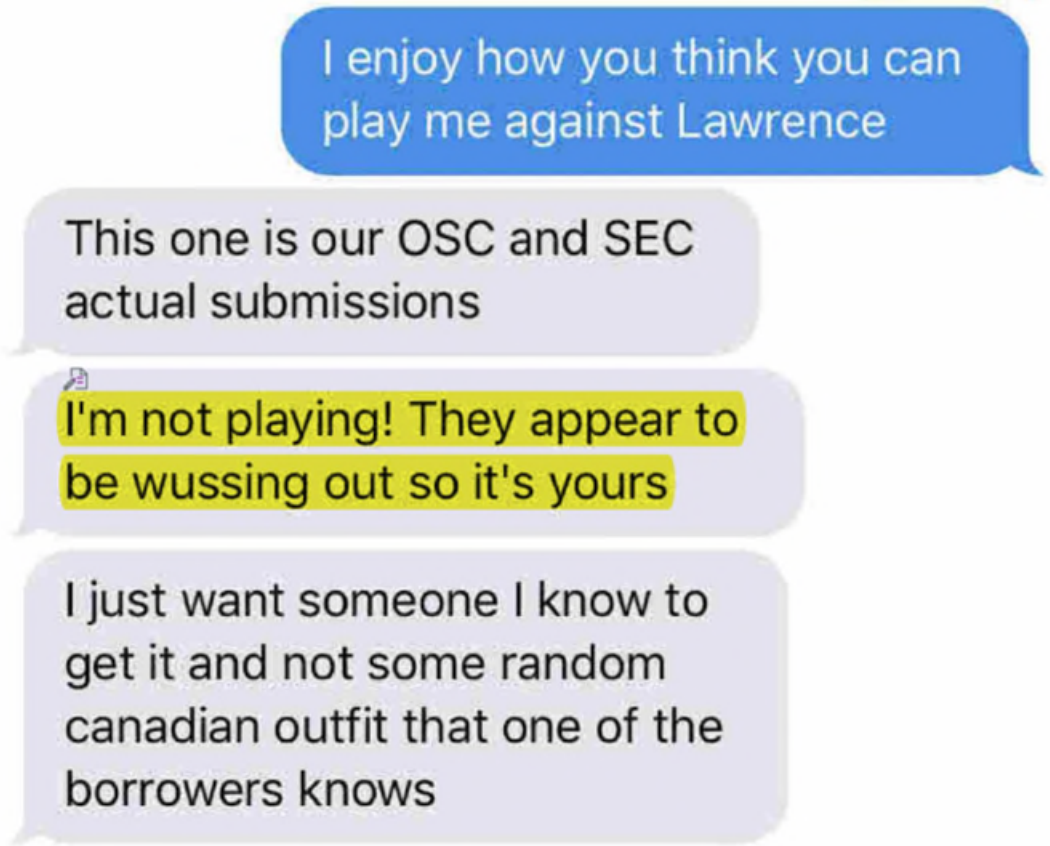
- McNish was gathering personal information about Newton Glassman, including: new wife; divorce case; custody; never passed the bar exam; his cottage property; his residential property
- Copeland sent an email to the WSJ Research Team requesting a background check on Newton Glassman:

  "Would be particularly nice to get a price on his Bahamas house, but that's perhaps a dream."

PLC, Tab 33, pp. 48-49, 53, 59.
McNish and Copeland CXM Brief, Tab A-55. Emphasis added.

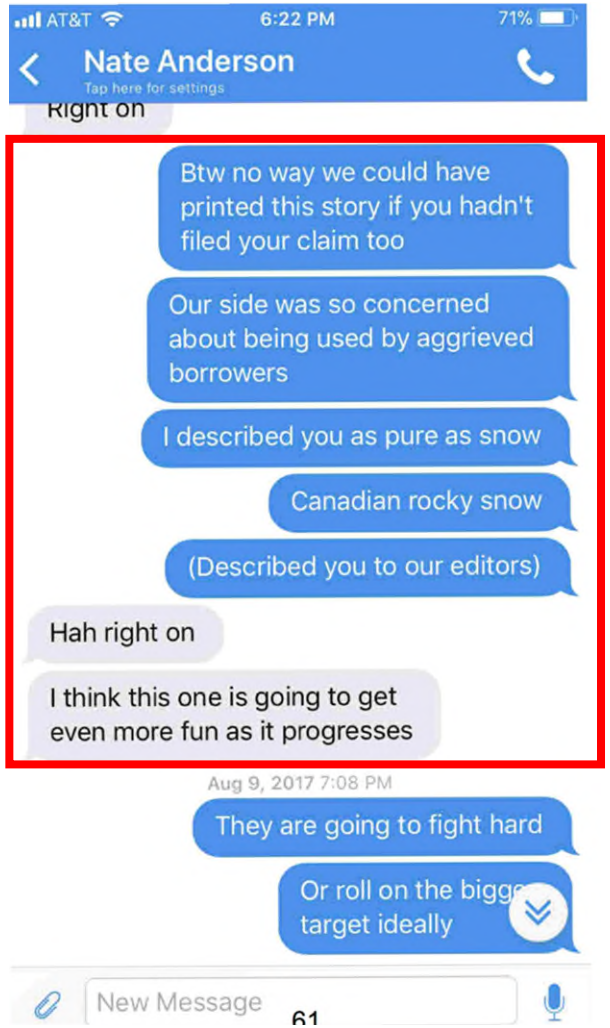
7. Reliance On A Biased Source – Nathan Anderson

- Nathan Anderson is a professional short-seller
- Anderson takes out short positions in companies he targets in his whistleblower complaints and profits after his false fraud accusations are published by the media such as *The Wall Street Journal*
- Anderson provided his whistleblower complaint to Reuters News, The Wall Street Journal and freelance reporter Bruce Livesey
- When Anderson gave up shopping his whistleblower complaint to Reuters News, he moved onto Copeland:



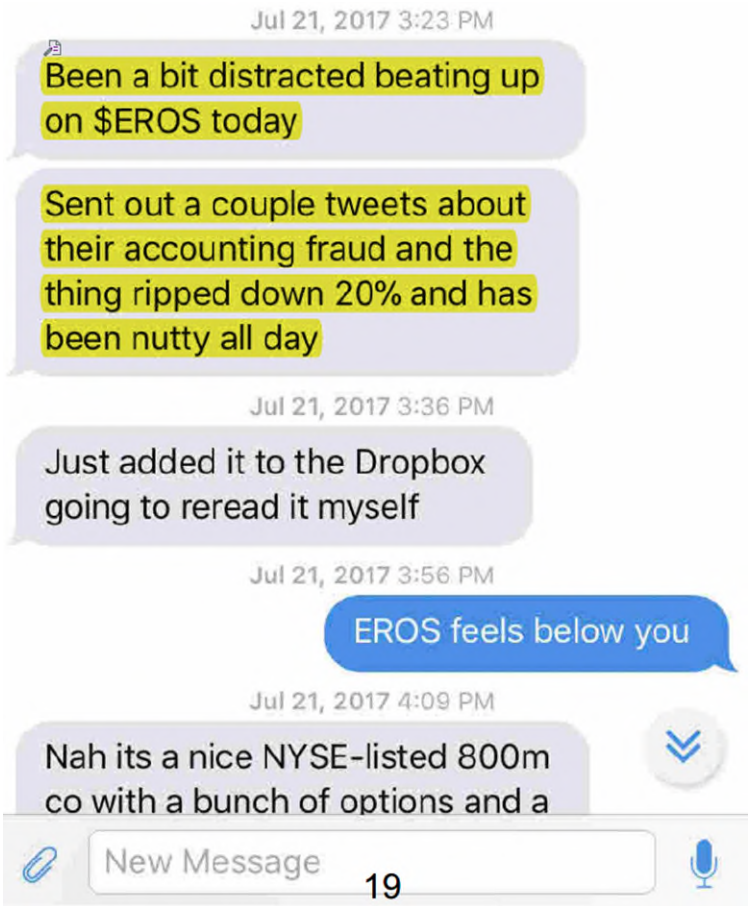
Anderson CXM Transcript, pp. 89-90, qq. 207-209.
PLC, Tab 2, p. 2.

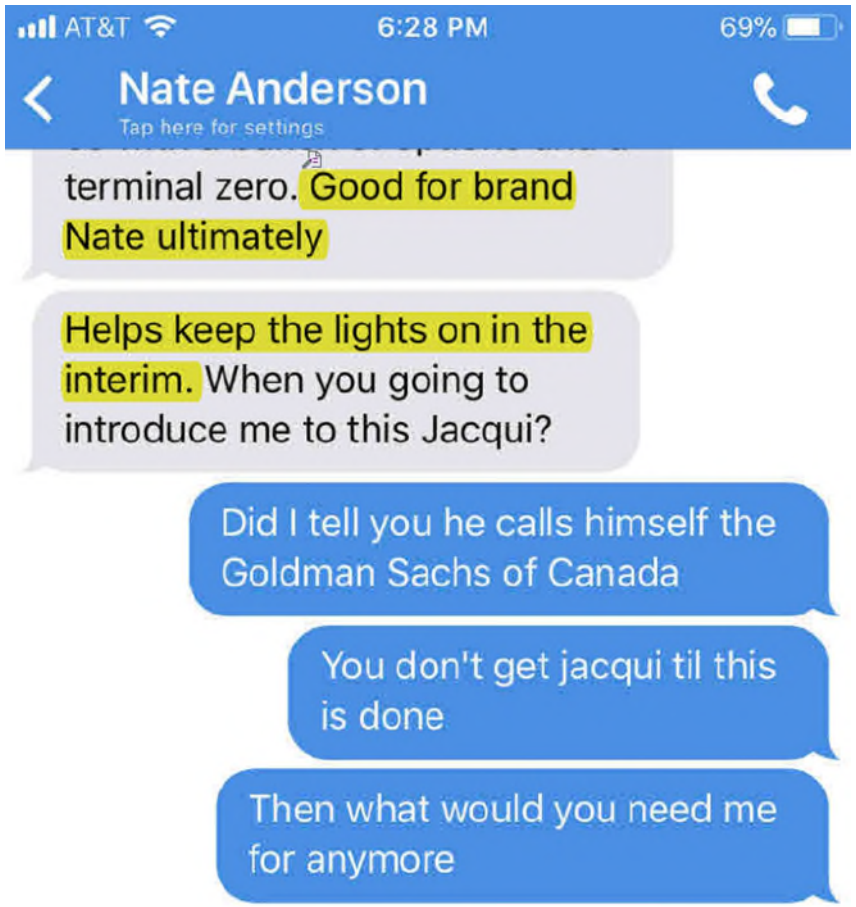
- Copeland told his editors that Anderson was pure as Canadian Rocky mountain snow:
- Anderson was not as pure as Canadian Rocky Mountain snow



PLC, Tab 2, p. 61.

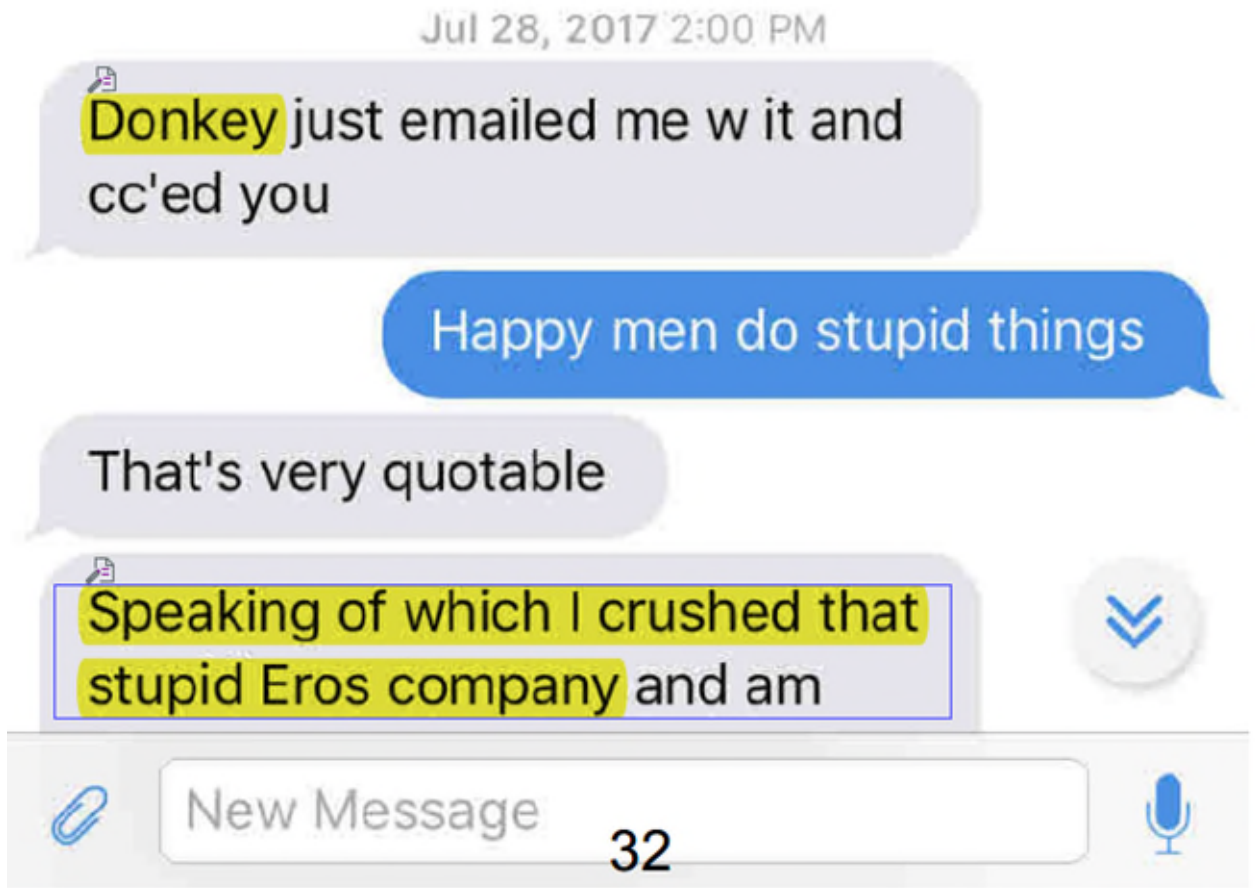
- Anderson had a text exchange with Copeland about a company called Eros, in which he held short positions – It was “good for brand Nate” and “helps keep the lights on:





PLC, Tab 2, pp. 19-20.

- A week later, Anderson texted Copeland that he crushed that stupid Eros company!



PLC, Tab 2, p. 32.

- Anderson testified that he was accurately quoted in a post publication *Wall Street Journal* articles headlined “How Nikola Stock Got Torched by a Short Seller” with a deal “Report by Nathan Anderson’s Hindenberg Research alleging Improprieties sent electric – truck startup’ shares plunging”:

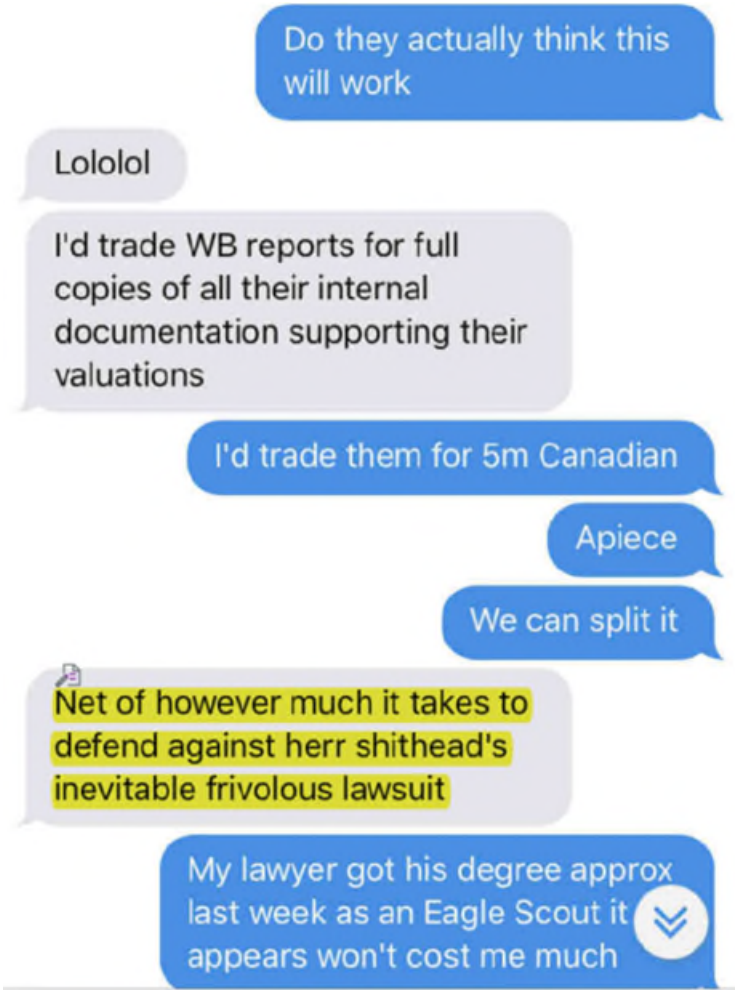
> “I know people can lose their jobs, their careers” he says. “People will lose money, I’ll be threatened with lawsuits”…
>
> He won’t say how much he has made shorting Nikola. “It’s been a big win,” Mr. Anderson says. “We are short and still are short.”

PLC, Tab 70, pp. 3-4.

- In an article headlined: “The Dark Side Money Bankrolling Activist Short-Sellers and the Insiders trying to Expose It (November 30, 2020 – Michelle Celarier) Anderson acknowledged that he had a balance sheet partner for the Nickola short.
- Now that he’s famous for the Nikola short, Anderson says he gotten more than 50 leads a week “from all over the place”
- Anderson says there is no shortage of money wanting to get in on his action – “we’ve had dozens of offers”

Plaintiffs’ Suppl. Submission Brief, Tab 13, pp. 397-398.

- Anderson referred to Newton Glassman as “herr shithead”



PLC, Tab 2, p. 30.

- Post publication, Anderson texted Copeland to say: “I actually know <u>the next one we crack and it will be epic</u>”

- Post-publication Copeland told Anderson he would get another big story out of [this]:

DOW000892-0001

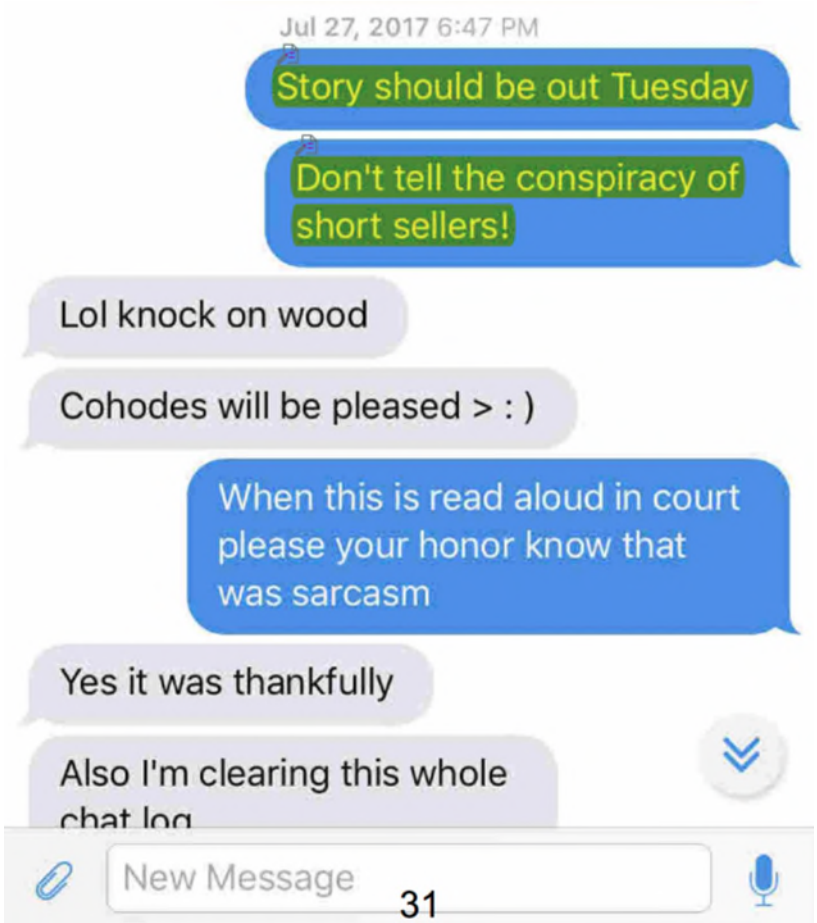
PLC, Tab 2, pp. 60, 62.

8. Copeland Tipped Anderson

- Copeland tipped Anderson about when the fraud article was going to be published contrary to News Corp.'s *Insider Trading Policy* and the Dow Jones & Company *Code of Conduct*

PLC, Tab 35, p. 3.

- Copeland texted Anderson “Story should be out Tuesday”:

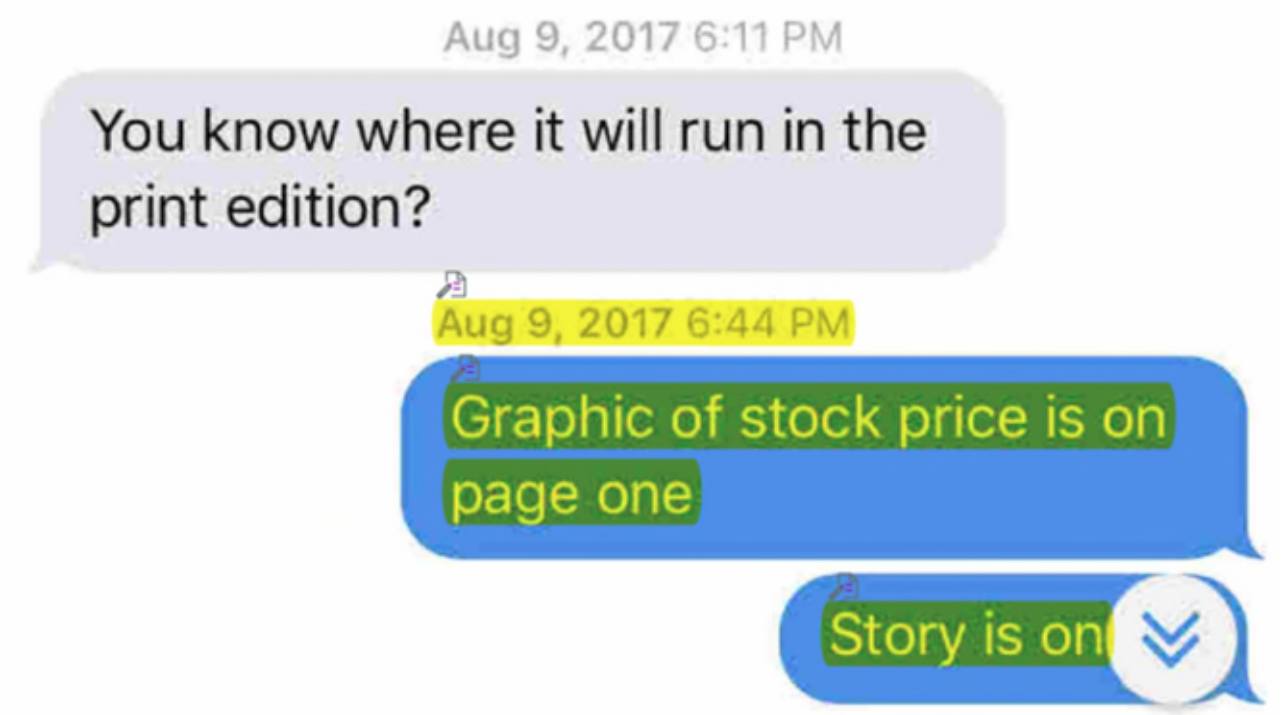


PLC, Tab 2, p. 32.

- Prior to publication, Copeland texted Anderson that he “never had to lift harder to get a story out”

PLC, Tab 2, p. 58.

- Copeland answered Anderson's question about where the story would run in the print edition the following day:



PLC, Tab 2, p. 60.

- Copeland's tipping contravened News Corp's *Insider Trading and Confidentiality Policy*:

Prohibitions for All Employees:

> ***No Tipping.*** No employee shall disclose ("tip") material, non-public information to any other person where such information may be used by such person to his or her benefit by trading in the securities of the company to which such information relates, nor shall an employee make any recommendations or express any opinions as to trading in the Company's securities to any other person on the basis of material, non-public information.

- Information is generally deemed to be "material" if there is a substantial likelihood a "reasonable investor" would rely on it including to purchase, sell or hold a security to which the information relates…

PLC, Tab 35, p. 4.

- Prior to publication, Anderson sent Copeland his *Broken Bridge Research* report "Callidus Capital Corp (TSE: CBL: Opaque Portfolio, Questionable Disclosure, Buyer Beware" (July 2017)
- The Disclosure statement in the Broken Bridge report stated:

  "As of the publication date of this report Contributors to the research in this report and others that we have shared our research with (collectively, the "Investors") have short positions in the stock of the company covered herein and stand to realize gains in the event the price of the stock decreases. Following publications of the report, the Investors may transact in the securities of the company covered herein." (emphasis added.)

PLC, Tab 49, p. 12.

- Anderson's affidavits filed in support of his anti-SLAPP motion both state that Anderson provided the *Broken Bridge* report to Copeland. Copeland confirmed on cross-examination that the statements made by Anderson in his affidavits about the Broken Bridge report were accurate.
- Copeland knew that Anderson held short positions in Callidus' shares prior to publication
- Anderson held short positions in Callidus' shares the day of publication and closed them out minutes before the TSX closed trading that day.

PLC, Tab 50.

- Copeland's tipping also contravened the *Dow Jones Code of Conduct* which prohibits the use of forthcoming news to assist a third party (such as Anderson) in buying or selling securities directly or indirectly, based on that information:

Confidential Information

Similarly, the use of Dow Jones property of this sort – i.e., forthcoming news, information, or advertising – as a basis for any investment decision is strictly prohibited. No employee with knowledge of any such forthcoming material may, prior to publication, buy or sell securities or in any way encourage or assist any other person in buying or selling securities, directly or indirectly, based on that information. These strictures should continue in force until the third trading day after the content or advertisement appears in a Dow Jones publication or news service.

PLC, Tab 36, p. 14.

9. Plaintiffs Were Denied An Opportunity To Review The Whistleblower Complaints

- The whistleblowers and their complaints are referred to over ten times in the WSJ Fraud Articles, including the headline and lead paragraph.
- Prior to publication, Plaintiffs' counsel made a number of requests to be provided copies of the whistleblower complaints so they could defend themselves. The Dow Jones Defendants refused to provide copies.
- The WSJ Fraud Articles make reference to "documents reviewed". The Dow Jones Defendants refused to provide copies of the "documents".

PLC, Tab 37, pp. 4, 8, 15.
PLC, Tab 1, pp. 1-3, 12-13.

10. Plaintiffs Were Denied An Opportunity To Defend McFarlane's Fraud Accusations

- McNish admitted on cross-examination that during the August 8, 2017 meeting with representatives of the Plaintiffs to discuss XTG, she never told them about McFarlane's quote published in paragraph 27 of the Website Article (" the integrity of Callidus's accounting around XTG") nor the specific fraud accusations McFarlane made in his whistleblower complaint.
- When asked why they didn't put questions to these representatives at the August 8th meeting about the fraud accusations McFarlane made in his whistleblower complaint, McNish answered: "We didn't feel we needed to."

PLC, Tab 38, pp. 90, 92.
PLC, Tab 39, pp. 87-88.

11. Rush to Print - Competitive Pressure From Reuters News

- McNish informed Copeland that she had good news and bad news. The “bad news” was that Reuters News was asking the exact same questions as they were.

PLC, Tab 40, p. 114.

- Copeland emailed his editors about the “competitive pressure” and his “fantasies” that the article be eligible to publish in two days:

On Tue, Jul 25, 2017 at 11:44 AM, Munoz, Sara <sara.munoz@wsj.com> wrote:

Thanks, well done. Glassman sounds like a real piece of work, Jacquie says he even sued his own father.

On Tue, Jul 25, 2017 at 9:15 AM, Copeland, Rob <rob.copeland@wsj.com> wrote:

This is 700 words. We will give Catalyst the facts today and give them til end of day to get an on the record statement to us.
There is still competitive pressure; in my fantasies, we edit this ourselves today, it goes to legal tomorrow and it's eligible to run Thursday morning online

PLC, Tab 41.

- On the morning of the publication of the Website Article, Copeland informed his editors that Reuters “were close”:

From: "Copeland, Rob" <rob.copeland@wsj.com>
Sent: Wed, 9 Aug 2017 10:30:32 -0400
Subject: Reuters called a v good source on Catalyst for first time in a few weeks
To: Geoffrey Rogow <geoffrey.rogow@wsj.com>, Jacquie McNish <Jacquie.McNish@wsj.com>

Asked v specific clarifying questions, said they were close

- The fraud article was published later that afternoon

PLC, Tab 42.

12. No Apology or Retraction

- The Dow Jones Defendants have never apologized to the Plaintiffs.
- The Dow Jones Defendants have never retracted their defamatory statements.
- The Dow Jones Defendants never took down the fraud article from *The Wall Street Journal*'s website.

13. Republication Of The August 9, 2017 Article

- The conduct of the defendants before and after the time of publication may be taken into account in assessing general damages.
- On August 11, 2017, Copeland repeated the fraud accusations in an article headlined “Canadian Lender Callidus, Accused of Fraud By Whistleblowers, Posts Loss”.
- In a more recent act of spite, the Dow Jones Defendants republished the August 9, 2017 fraud article by hyperlinking it in an article authored by McNish (about Justice Boswell’s privilege decision) and published on *The Wall Street Journal*’s website on March 31, 2021.

BOA, Vol III, Tab 13, para 36.
PLC, Tab 43.
PLC, Tab 44.

XIII. OMISSIONS

- The omission of significant facts contrary to the story's thesis is evidence of malice and can impact the availability of the fair comment defence (*Leenen v CBC*, para 150; *Creative Salmon Company*, para 61).

BOA, Vol II, Tab 9, para 150.
BOA, Vol III, Tab 16, para 61.

1. KPMG's Audits

- Readers were not informed that the "firm's accounting" (para 9) or "the integrity of Callidus's accounting around XTG" (para 27) was audited by KPMG LLP.
- Although McNish knew and did not dispute that KPMG audited Callidus' financial statements, the WSJ Fraud Articles omitted to inform readers that KPMG issued unqualified audit opinions and specifically, that the KPMG audits raised no concerns about the accounting around XTG.
- When asked why that fact was omitted from the Article, McNish answered: "It was not the focus of our story" and "This story was not about the auditors. It was about Callidus and how they reported it."

PLC, Tab 1, pp. 2-3.
PLC, Tab 45, p. 72.
PLC, Tab 46, p. 93.

2. Jeff McFarlane and XTG

- Jeff McFarlane is the only whistleblower identified in the WSJ Fraud Articles.
- Copeland's notes record that McFarlane "went to war" with the Plaintiffs but this fact was omitted.
- The WSJ Fraud Articles also omitted to inform readers that McFarlane was shopping his whistleblower complaint to the media such as Reuters News and *The Wall Street Journal*.

PLC, Tab 47, p. 4.

- The Website Article omits to report any of the findings made by Justice Morawetz (as he then was) who appointed the Receiver, approved the Callidus Asset Purchase Agreement of XTG, and issued the Vesting Order regarding XTG.
- Although readers are told “McFarlane was the former chief executive” of XTG, they were not informed that Justice Perell found that “the XTG Group, then under management of a court appointed Receiver, dismissed McFarlane as an employee”.

PLC, Tab 12.
PLC, Tab 6, paras 10, 17.
PLC, Tab 10, para 139.
PLC, Tab 13.
PLC, Tab 1, p. 3.
BOA, Vol IV, Tab 21, para 6.

- During a phone conversation McNish said to Copeland:

> "And yes, we both know that Greg Boland and West Face have got a crusade against Glassman, but so be it."

- Yet, the Article omitted to inform readers that McFarlane was communicating with Mr. Boland (a competitor of Catalyst) about the Plaintiffs as well as Callidus' accounting around XTG
- Nor are readers informed that McFarlane sought finances from West Face Capital to end "the BS with Callidus".

PLC, Tab 32, p. 117.
PLC, Tab 48.

- The WSJ Fraud Articles depicted McFarlane as the victim.

- The Dow Jones Defendants omitted to inform readers that McFarlane was an aggrieved former Chief Executive who was looking for retribution against the Plaintiffs.

3. Whistleblowers With Axes to Grind

- the Website Article refers to the whistleblower complaints over 10 times, including in the lead paragraph that reports there are at least 4 whistleblowers.
- readers are not informed of the fact that 3 of the whistleblowers were aggrieved former officers of companies that borrowed from Callidus.

- readers are not informed that the fourth whistleblower was Nathan Anderson, a professional short-seller who shorts shares in the companies he targets in his whistleblower complaints.
- Prior to publication, Anderson sent Copeland a copy of a report he prepared in July 2017 that disclosed that Anderson held short positions in Callidus's shares and that he stood to realize gains in the event that the price of the stock decreased.
- Copeland knew that Anderson held short positions in Callidus' shares and that Anderson stood to gain financially in the event the share price decreased. This fact was omitted from the WSJ Fraud Articles.

PLC, Tab 49.
PLC, Tab 50.

4. The Catalyst Guarantee

- The Website Article reports at paragraph 23 that when Callidus went public in 2014, Catalyst, its majority shareholder, agreed to cover future losses on loans including Xchange.
- There is no mention of the Catalyst Guarantee that contractually obligated Catalyst Funds to cover the $101 million gross loan receivable for XTG.
- An explanation for this omission is found in an email Copeland sent to McNish:

From: "Copeland, Rob" <rob.copeland@wsj.com>
Sent: Tue, 8 Aug 2017 21:26:41 -0400
Subject: we've got to mention the guarantee somehow
To: Jacquie McNish <Jacquie.McNish@wsj.com>

We can't just...not, as in this current version.
Much as I'd like to!

--
Rob Copeland
REPORTER

- In the end, Copeland's preference to not mention the Catalyst Guarantee prevailed.

PLC, Tab 1, p. 3.
PLC, Tab 51.

XIV. THE SERIOUS HARM SUFFERED BY THE PLAINTIFFS OUTWEIGHS PROTECTING THE WSJ FRAUD ARTICLES (Section 137.1(4)(b)*CJA*)

1. Legal Principles

- It is at the balancing stage where judges can "scrutinize what is really going on in the particular case before them" and "assess how allowing individuals or organizations to vindicate their rights through a lawsuit … affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy" (*Pointes Protection*, para 81).

- In weighing whether the public interest in letting the action proceed outweighs the public interest in the expression, "reputation is one of the most valuable assets a person or a business can possess (*Pointes Protection*, para 69).

BOA, Vol I, Tab 1, paras 69, 81.

- Harm is not limited to monetary harm, and neither type of harm is more important than the other. Nor is harm synonymous with the damages alleged. The text of the provision does not depend on a particular *kind* of harm, but expressly refers only to *harm* in general" (*Pointes Protection*, para 69).

- The weighing of the public interests is the crux or core of the section 137.1 *CJA* analysis. The stated objective is to quickly identify and deal with strategic lawsuits, and ensure abusive litigation is stopped but legitimate actions can continue (*Pointes Protection*, para 82).

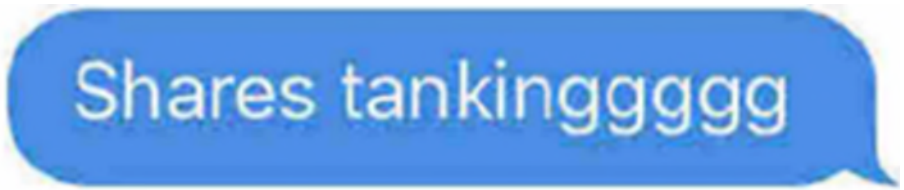
BOA, Vol I, Tab 1, paras 69, 82.

- The Plaintiffs need not *prove* harm or causation, but must simply provide evidence for the Motion Judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link…no definitive determination of harm or causation is required (*Pointes Protection*, para 71).
- A section 137.1 motion is not an adjudication on the merits: for example, in a defamation action, harm (and therefore general damages) is presumed. Importantly, though, no definitive determination of harm or causation is required (*Pointes Protection*, para 71).
- A fully developed damages brief is not required (*Bent*, para 145)

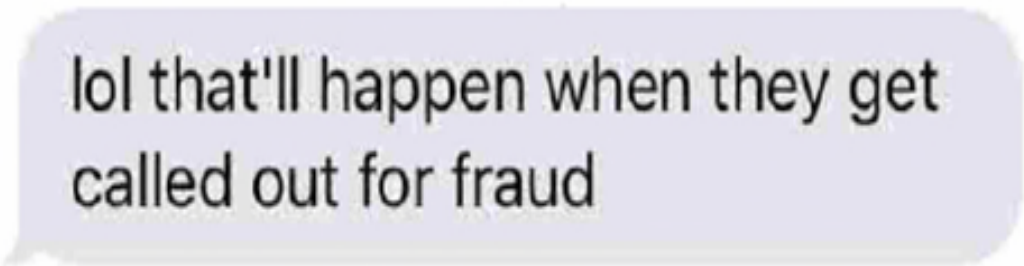
BOA, Vol I, Tab 1, para 71.
BOA, Vol I, Tab 3, para 145.

2. The WSJ Fraud Articles Caused Harm To The Plaintiffs

- Copeland sent a text to Nathan Anderson on August 9, 2017 @ 4:17 PM



- Anderson replied:



PLC, Tab 2, p. 59.

- During cross-examination Anderson agreed that a *Wall Street Journal* story accusing a company of fraud will cause the share price to go down:

Q. 248 – So why would a *Wall Street Journal* story accusing a public company of fraud cause its shares to tank, Mr. Anderson?

A. – I think fraud, when exposed, is not generally helpful to the share price of the companies that get called out for it.

Q. 249 – You would put it a little stronger, wouldn't you, than not generally helpful? It would cause shares to tank, as Mr. Copeland texted you, correct? That is the expectation; shares are going to tank?

A. – I think if an article exposes fraud on a company, it is likely that the shares will go down.

- Anderson also agreed that a media report that Toronto Police were making inquiries or investigating Callidus or Catalyst for fraud could have an impact on the share price.

Anderson CXM Transcript, pp. 96, 103-104, qq. 227, 248-249.

- Copeland was cross-examined about his “shares tankinggggg” text

- When Copeland was asked why he added four “g’s” to the word tanking, he answered that he was a “colloquial texter” and a “casual texter”.

PLC, Tab 2, p. 59.
PLC, Tab 58.

- Copeland sent a Tweet at 4:37 PM on August 9, 2017 that “shares fall 21% for Callidus Capital, majority owned by PE giant Catalyst Capital, after @WSJ reports alleged fraud.”

- Copeland agreed that the reaction to the Website Article was that the Callidus shares fell 21% that day:

  Well, it seems like a reasonable conclusion because of how quickly the share price fell after we published the story.

- When asked “do you agree that your article caused Callidus shares to tank?” Copeland answered: “I think I answered you before that the shares fell directly after the publication of the article”.

PLC, Tabs 59-61.

- The Front Page of the Print Article carried a graphic “Stock Swoons” that stated:

Stock Swoons
Shares of Canadian lender Callidus fell Wednesday after The Wall Street Journal reported whistleblowers have accused it and private-equity firm Catalyst of fraud. **B1**

PLC, Tab 1, p. 11.

- Copeland was not aware of any new information between 3:32 PM (when *The Wall Street Journal* published the Website Article) and 4 PM (when the markets closed) that would have caused the Callidus shares to fall 21% that day, August 9, 2017.

PLC, Tab 62.

3. The Serious Harm

(i) The Impact Of Fraud Accusations Published Internationally To Over 2.4 Million Readers

- Allegations of unlawful conduct or criminal conduct are very serious and potentially damaging to anyone's reputation (*Canadian Standards Association v PS Knight Co.*, para. 44).
- Expressions alleging criminal conduct are extremely damaging to a person's reputation (*Hobbes v Warner*, para. 150).
- Implications of criminal conduct are likely to have a significant effect on one's reputation (*Kam v CBC*, para 107(a).
- According to Anderson "most due-diligence pros in the industry stop caring when they get even a whiff of fraud because they know its uninvestigable and just move on."

BOA, Vol II, Tab 10, para 44.
BOA, Vol II, Tab 11, para 150.
BOA, Vol IV, Tab 24, para 107(a)
PLC, Tab 55.

(ii) NERA Economic Consulting Expert Report

- The Plaintiffs' damages expert is Vinita Juneja of NERA Economic Consulting and Chair of NERA's Global White Collar Investigations Enforcement Practice.
- Ms. Juneja's expert report estimates the harm to Callidus due to the WSJ Articles and concluded:

(1) Callidus' share price fell between C$2.86 and C$3.19, at a minimum, because of the WSJ Articles;

(2) the harm to Callidus was at least approximately C$144 million to C$161 million.

PLC, Tab 63, pp. 2-3.

(iii) Mark Sunshine's Report

- Mark Sunshine (CEO of MA Sunshine Capital), who has over 35 years of experience in financial advisory services, including commercial lending and collateral management, describes in his report the harm caused by the WSJ Fraud Articles:

(1) …if a lender is tagged by *the Wall Street Journal* as being accused of fraud, accounting misstatements, financial crimes, securities law violations and deceptive lending practices, a lender, like Callidus, would be put into an untenable competitive position.

(2) *The Wall Street Journal*'s reporting, complete with a color photograph of a Toronto police cruiser, would significantly diminish a lender's chances of competing for new loans.

PLC, Tab 64, p. 2.

(iv) The WSJ Is The Largest Paid Subscription News Site On The Internet

- *The Wall Street Journal* is an internationally renowned financial newspaper and claims that it is the largest paid subscription news site on the Internet.
- According to Copeland, *The Wall Street Journal* is "the world's pre-eminent financial news publication."
- When *The Wall Street Journal* attacks a target, that is an attack by one of the largest media platforms in the world.

PLC, Tab 52, para 3.
PLC, Tab 53.

(v) Over 2.4 Million Copies Sold

- Print and digital sales of *The Wall Street Journal* for the Americas on an average day in August 2017 totaled 2,470,000 copies.
- The Dow Jones Defendants disseminated the WSJ Fraud Articles to an international readership through a number of its channels: the Dow Jones Institutional News Service; *The Wall Street Journal's* website; Factiva; Market Talk; Market Alerts; the Pro Private Equity Newsletter.
- The #1 search result from a Google search on the words "Catalyst fraud" today remains the Website Article published on August 9, 2017.

PLC, Tab 54, p. 1.
PLC, Tab 56.

(vi) The Reactions Of Investors

- The Plaintiffs received numerous telephone calls and emails about the *WSJ* Fraud Articles from persons residing throughout North America (e.g. Ontario, Ohio, New York, Illinois and California).

- For example, Christopher Rossi, Director of Private Equity and Real Estate, of Parkwood, located in Cleveland, Ohio emailed:

  > We received your response regarding the WSJ Article. We are getting questioned by our board and audit committee on this (they saw the article), so I think it would be helpful to have a call to go into this in more detail.

PLC, Tab 65, paras 395-408.
PLC, Tab 66.

(vi) The August 11, 2017 Earnings Call

- Callidus held its Q2 2017 earnings call on August 11, 2017 which had a higher participation than usual. Subsequently, Wells Fargo and National Bank (who were on the earnings call) subsequently declined to renew credit facilities extended to the Funds.
- Jim Riley's evidence is that "In a confidence business such as lending, being accused of fraud and other improprieties to over a million readers of the Wall Street Journal on its website and Front Pages was a devastating blow."

PLC, Tab 65, para 391.
PLC, Tab 57, para 438

4. The Weighing Of The Public Interests

- The *quality* of the expression and the *motivation* behind it are relevant to the section 137.1(4)(b) *CJA* public interest analysis (*Pointes Protection*, para 74).

BOA, Vol I, Tab 1, para 74.

(i) OSC Confidentiality Minimizes Potential Harm To Reputations

- The WSJ Fraud Articles were a repetition of unproven fraud and other accusations by whistleblowers that were only at the OSC's intake/inquiries stage.
- OSC Staff Notice 15-703 (Guidelines for Staff Disclosure of Investigations) state that "confidentiality minimizes potential harm to the reputations of those to whom the investigation relates if no proceedings are taken."
- The OSC never took enforcement action against the Plaintiffs.

PLC, Tab 67, para 2.

(ii) Copeland Had No Reason To Include Unproven Fraud Allegations in WSJ Publications

- Copeland's August 17, 2020 affidavit stated that he was aware that the Plaintiffs were alleging that there was a conspiracy that included perhaps some of the whistleblowers and the short selling of securities of Callidus Capital. Copeland affirmed that: "At the time, I viewed that allegation as unproven at best. I certainly had no reason to include such allegations in the WSJ Publications."
- Yet, Copeland agreed during cross-examination that "on the date of the publication of the articles in issue in these actions, the allegations in the whistleblower complaints were also unproven."

PLC, Tab 68, para 15.
PLC, Tab 69.

- Although Copeland considered the Plaintiffs' allegations about a conspiracy of short-sellers and whistleblowers as "unproven at best" and not publishable, the unproven fraud and other allegations in the whistleblower complaints were published on the Front Pages of *The Wall Street Journal*.
- The expression (WSJ Fraud Articles) falls at the lowest end of the protection deserving spectrum.

(iii) No Chill

- This is not a case in which the Plaintiffs are vindictively or strategically attempting to silence the Defendants.
- The WSJ Fraud Articles seriously harmed the reputations and businesses of Callidus and Catalyst. The purpose of this action is to restore these reputations and to rectify the damages caused to the businesses by the WSJ Fraud Articles.

- This libel action in no way discourages individuals from filing whistleblowers complaints with securities regulators which are protected by absolute privilege.

- But those complaints enjoy no such privilege when they are shopped to the media for publication to the world at large for financial benefit or for revenge.

- Nor does this libel action discourage individuals from speaking with journalists as alleged.
- Anderson testified that the conspiracy action has not deterred him from filing whistleblower complaints or from speaking with journalists or from shorting companies

Anderson CXM Transcript, pp. 53-54, qq. 109-112.

- Post-publication *The Wall Street Journal* has published two articles about Nathan Anderson's short-selling reports regarding Nikola Corp. and Lordstown Motors.
- Both articles gratuitously report that "Anderson and a reporter for The Wall Street Journal are among the more than 20 defendants in a lawsuit brought by private-equity firm Catalyst Capital Group and Callidus Capital Corp. alleging a short-selling conspiracy unrelated to a 2017 article about Catalyst. A Journal representative has said the news organization is confident in the fairness and accuracy of its reporting."
- Mr. Anderson says "We stand by our research on the subjects 100%".

PLC, Tab 70, p. 3.
PLC, Tab 72, p. 4.

- In addition, on March 31, 2021, *The Wall Street Journal* republished the August 9, 2017 article in issue in this action by hyperlinking it in an article authored by McNish about Justice Boswell's privilege ruling in the Wolf Pack action.
- There is no power imbalance. The Dow Jones Defendants are not taking the position in their anti-SLAPP motion that Dow Jones, as the publisher of the WSJ Publications, is at a financial disadvantage compared to the Plaintiffs.

PLC, Tab 44.
PLC, Tab 71, pp. 2-3.

(iv) Conclusion

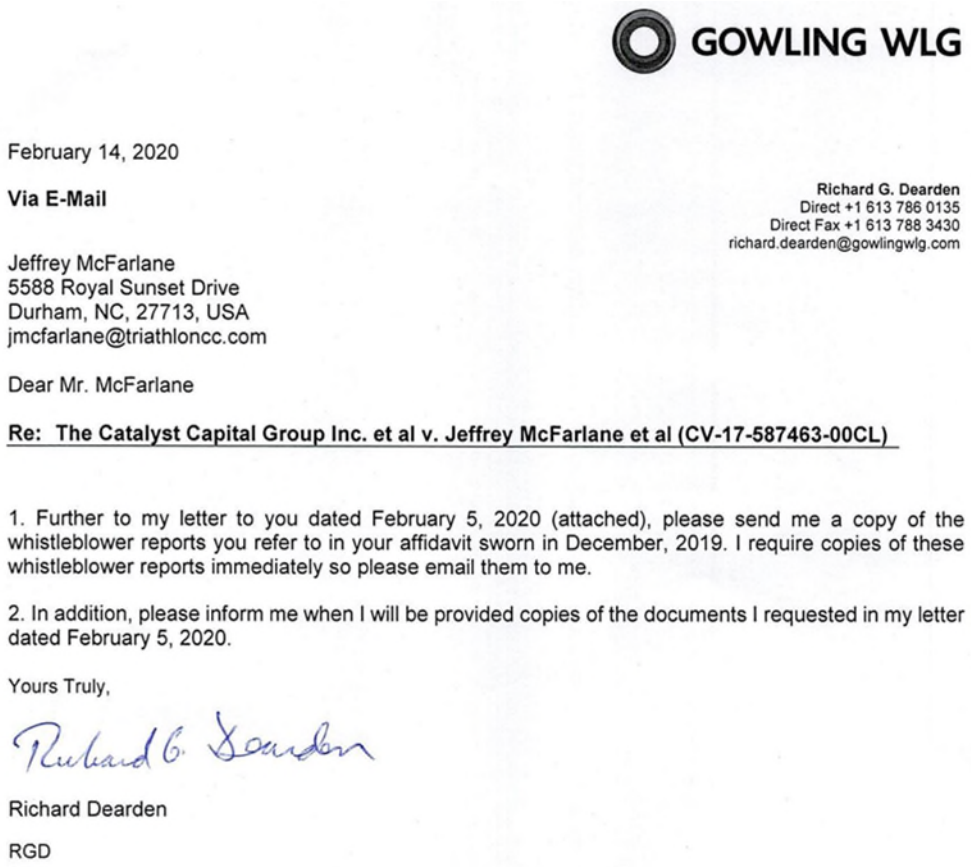
- In *Thompson v Cohodes,* Justice Kristjanson held that: “an unsupported allegation of committing fraud or participation in fraud against a specific individual relating to alleged actions a decade earlier, when he was a lawyer, leads me to conclude that the public interest in permitting Thompson to proceed with his libel action outweighs the public interest in protecting Cohodes’s expression.”
- Justice Kristjanson also held that the value of a statement that the plaintiff committed or participated in fraudulent conduct was low.
- There is ample evidence supporting an inference of likelihood that the WSJ Fraud Articles caused serious harm to the Plaintiffs.

BOA, Vol III, Tab 13, paras, 3, 40.

XV. JEFFREY McFARLANE'S ANTI-SLAPP MOTION

1. The Expression

- Jeffrey McFarlane's December 2019 Affidavit states that his "expression" is his opinion included in *The Wall Street Journal* article and his OSC Whistleblower complaint.
- In February 2020, counsel for the Plaintiffs wrote McFarlane and requested a copy of McFarlane's whistleblower complaint referred to in his affidavit.
- McFarlane refused to produce his OSC Whistleblower complaint claiming absolute privilege.



GOWLING WLG

February 14, 2020

Via E-Mail

Richard G. Dearden
Direct +1 613 786 0135
Direct Fax +1 613 788 3430
richard.dearden@gowlingwlg.com

Jeffrey McFarlane
5588 Royal Sunset Drive
Durham, NC, 27713, USA
jmcfarlane@triathloncc.com

Dear Mr. McFarlane

Re: The Catalyst Capital Group Inc. et al v. Jeffrey McFarlane et al (CV-17-587463-00CL)

1. Further to my letter to you dated February 5, 2020 (attached), please send me a copy of the whistleblower reports you refer to in your affidavit sworn in December, 2019. I require copies of these whistleblower reports immediately so please email them to me.

2. In addition, please inform me when I will be provided copies of the documents I requested in my letter dated February 5, 2020.

Yours Truly,

Richard G. Dearden

Richard Dearden

RGD

PLC, Tab 73, para 12.
PLC, Tab 74, p. 1.
PLC, Tab 75.

- Counsel for the Plaintiffs asked McFarlane again during his cross-examination in November 2020 to produce a copy of his OSC whistleblower complaint – McFarlane refused, claiming absolute privilege

Q. And I am asking you again to produce a copy of your OSC Whistleblower Submission which is the subject of your anti-SLAPP motion.

R/F A. I will stand by the privilege position I have taken on that.

PLC, Tab 76.

- Absolute privilege applies to McFarlane's whistleblower complaint as filed with the OSC, but McFarlane enjoys no such privilege over his whistleblower complaint that he disseminated to Reuters News, *The Wall Street Journal* and others.
- Because the Court has no evidence of this "expression", McFarlane's motion must be dismissed regarding his whistleblower complaint.

2. <u>The Defences (WSJ Fraud Articles)</u>

- McFarlane has not filed a separate Statement of Defence for this libel action. His Statement of Defence is filed in response to the Fresh as Amended Statement of Claim (July 19, 2019) which is the "Wolf Pack" action.
- Defamation matters are pleaded at paragraphs 12 and 27(b) (fair comment), 26 (denies saying anything defamatory), 27 (communications with OSC were true), 27(c) (qualified privilege), and 28 (communications with journalists were true).
- As regards McFarlane's "expression" in the WSJ Fraud Articles, the submissions regarding the Dow Jones Defendants' anti-SLAPP motion apply equally to McFarlane's anti-SLAPP motion.

McFarlane Statement of Defence, paras 12, 26, 27(b)-(c).

3. Malice

- McFarlane “went to war” with the Plaintiffs.
- In an email to a West Face Capital official, McFarlane said that West Face financing would also provide a “fringe benefit” of “Beating Callidus” and that “Inside of two years the BS with Callidus should be behind us”.
- McFarlane’s desire for vengeance against Newton Glassman is demonstrated by his email to short-sellers Wes Voorheis and Anderson: “Nathan, meet Wes. We discussed Wes briefly on Thursday and his shared interest in seeing this individual face justice”. The “individual” he is referring to is Newton Glassman. Voorheis (a co-defendant in the conspiracy action) held short positions of over 1 million Callidus’ shares in August 2017.
- McFarlane worked the media to get this fraud accusations published as retribution against the Plaintiffs for “seizing” his company. McFarlane had an axe to grind and grind it he did.

PLC, Tab 47, p. 4.
Copeland Transcript, pp. 155-156, q. 373.
PLC, Tab 48.
PLC, Tab 77.
PLC, Tab 79.

Order Sought

- The Plaintiffs request that the anti-SLAPP motions of the Dow Jones Defendants and Jeffrey McFarlane be dismissed.
- Pursuant to the section 137.1(8) *Court of Justice Act*, the Plaintiffs request costs as appropriate in the circumstances, or alternatively, costs in the cause.