

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL  
CORPORATION

Plaintiffs

and

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

Defendants

A N D B E T W E E N

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

and

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION,  
NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON,  
EMMANUEL ROSE, B.C. STRATEGY LTD. d/b/a BLACK CUBE, B.C. STRATEGY UK  
LTD. d/b/a BLACK CUBE, and PSY GROUP INC.

Defendants by Counterclaim

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**FACTUM OF CATALYST DEFENDANTS**  
**(Anti-SLAPP Motion Pursuant to section 137.1 *Courts of Justice Act*)**

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Date: May 3, 2021

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Counterclaim**

TO: **SERVICE LIST**

## TABLE OF CONTENTS

<b>PART I – OVERVIEW</b> .....	<b>1</b>
<b>PART II – FACTS</b> .....	<b>2</b>
A.    THE CATALYST DEFENDANTS.....	2
B.    THE AUGUST 2016 WRITTEN STATEMENT (AUGUST 19, 2016).....	2
C.    THE OCTOBER 2016 PRESS RELEASE (OCTOBER 13, 2016) .....	5
D.    THE FIRST INVESTOR LETTER (AUGUST 14, 2017).....	6
E.    THE MARCH 2018 INVESTOR LETTER (MARCH 19, 2018).....	8
F.    WEST FACE AND BOLAND’S DAMAGES ALLEGATIONS.....	9
(a)    West Face’s Mismatched Hedge Fund Structure.....	10
(b)    West Face’s Poor Performance.....	11
(c)    The West Face Distressed Fund.....	12
<b>PART II - ISSUES</b> .....	<b>13</b>
<b>PART III - LAW AND ARGUMENT</b> .....	<b>14</b>
A.    THE PRINCIPLES RELATING TO ANTI-SLAPP MOTIONS AND THE LAW OF DEFAMATION.....	14
B.    THE PROCEEDING BASED ON CATALYST’S EXPRESSIONS DOES NOT HAVE SUBSTANTIAL MERIT AND THE CATALYST HAS VALID DEFENCES .....	15
(a)    The August 2016 Written Statement .....	15
(i)    Fair Comment .....	16
(ii)   Responsible Communication .....	17
(iii)  Failure to Provide Notice under the Libel and Slander Act .....	18
(b)    The October 2016 Press Release.....	18
(i)    Fair Comment .....	18
(c)    The First Investor Letter.....	19
(i)    Fair Comment Defence.....	20
(ii)   Qualified Privilege.....	20
(iii)  Responsible Communication .....	21
(d)    The March 2018 Investor Letter .....	22
(i)    Fair Comment Defence.....	22
(ii)   Qualified Privilege.....	23
(iii)  Responsible Communication .....	23
(iv)   Failure to Provide Notice under the Libel and Slander Act .....	23
C.    PUBLIC INTEREST BALANCING .....	24
(a)    The Public Interest Regarding the Expressions in Issue .....	24
(b)    No Established Harm Suffered by West Face.....	24
<b>PART IV - RELIEF SOUGHT</b> .....	<b>25</b>

## PART I – OVERVIEW

1. West Face has brought claims of defamation in respect of four expressions made by Catalyst Capital Corp. (“**Catalyst**”):

- (a) a written statement by a spokesperson of Catalyst, published in an August 19, 2016 *National Post* article (the “**August 2016 Written Statement**”);
- (b) a press Release by Catalyst issued on October 13, 2016 (the “**October 2016 Press Release**”);
- (c) a letter sent by Catalyst to certain Limited Partners to Funds managed by Catalyst dated August 14, 2017 (the “**First Investor Letter**”);
- (d) a confidential investor letter sent on March 18, 2018 by Catalyst to certain of its Limited Partners, portions of which were published on April 18, 2018, by the *Globe and Mail* (the “**March 2018 Investor Letter**”)

2. The expressions in issue are not defamatory and are protected by the defences of fair comment, qualified privilege, responsible communication, and statutory limitation defences under the *Libel and Slander Act*.<sup>1</sup> Further, there is no evidence that West Face has suffered harm as a result of expressions in issue.

3. West Face has also brought claims in defamation against the Defendants by Counterclaim (collectively, the “**Catalyst Defendants**”) in relation to internet blog postings that Catalyst denies publishing (the “**Blog Postings**”).<sup>2</sup>

4. This anti-SLAPP motion seeks to have West Face’s defamation claims against the expressions made by Catalyst dismissed. There are grounds to believe West Face’s claims have no substantial merit, that there are valid defences, and that the alleged harm does not outweigh the public interest in the expressions.

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<sup>1</sup> Reply and Defence to the West Face Counterclaim para 104, Exhibit 2 to the Affidavit of James Riley sworn on December 5, 2019 (the “**Riley Moving Affidavit**”)

<sup>2</sup> Riley Moving Affidavit para 22(f); Fourth Fresh as Amended Statement of Defence and Counterclaim, Exhibit 1 to the Riley Moving Affidavit (“**West Face Counterclaim**”)

## **PART II – FACTS**

### **A. THE CATALYST DEFENDANTS**

5. Catalyst is a Canadian private equity firm specializing in investments in distressed and undervalued situations.<sup>3</sup> Callidus Capital Corp. (“**Callidus**”) is an asset-based lender that provides financing to companies that cannot access traditional lending sources. Callidus traded on the TSX from April 2014 to November 2019.<sup>4</sup>

6. Catalyst and Callidus have statutory and fiduciary obligations to keep investors informed of matters concerning the management, conduct and performance of Catalyst, Callidus, the investment Funds managed by Catalyst, and of any other material matters.<sup>5</sup>

### **B. THE AUGUST 2016 WRITTEN STATEMENT (AUGUST 19, 2016)**

7. The August 2016 Written Statement was made by Catalyst following a decision of Justice Newbould in an action commenced by Catalyst against a former employee, Brandon Moyle, and West Face (the “**Moyle Action**”).<sup>6</sup>

8. The Moyle Action involved a claim brought by Catalyst against Mr. Moyle alleging he obtained Catalyst confidential information and provided it to West Face, in furtherance of West Face’s efforts to acquire shares of a telecom company called WIND Mobile Corp. (“**WIND**”).<sup>7</sup> Catalyst was competing for WIND with a group of investors including West Face (the “**West Face Consortium**”). The West Face Consortium was ultimately successful in acquiring WIND.

9. In his Reasons for Judgment, Justice Newbould dismissed the Moyle Action, finding that Mr. Moyle did not in fact transmit any confidential information to West Face and that Catalyst had not

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<sup>3</sup> Riley Moving Affidavit para 8

<sup>4</sup> Riley Moving Affidavit para 12

<sup>5</sup> Riley Moving Affidavit para 11, 17 and 21

<sup>6</sup> Riley Moving Affidavit para 62

<sup>7</sup> Riley Moving Affidavit para 63

suffered any loss by reason of any alleged breach of confidence by Mr. Moyses, even if it had occurred.<sup>8</sup>

10. West Face issued a News Release setting out its views about Justice Newbould's decision in the Moyses Action, which was also included in a *National Post* article published on August 19, 2016. The *National Post* article reports that West Face was "grateful for the vindication the judge provided".<sup>9</sup> Boland was quoted as saying that the "reasons for the complete dismissal of the case make clear the lawsuit launched by Catalyst was without merit."<sup>10</sup>

11. Catalyst issued a written statement in response to Justice Newbould's Reasons for Decision, and sent the August 2016 Written Statement to the *National Post*. West Face complains about the following words from the August 2016 Written Statement that appeared in the *National Post* immediately before the comments of West Face from the West Face Press Release:<sup>11</sup>

"Additional evidence [had] come out since the Moyses Litigation that [supported] the new case that alleges conspiracy and breach of contract. We are deeply disappointed by the decision and the severe indications of possible bias by Judge Newbould. We believe that he did not give fair consideration to all the evidence presented, ignored contradictory statements made by the defendants that are part of the court record and delivered a judgement containing clear misstatements of fact."

12. The "additional evidence" referred to in the August 2016 Written Statement consists of emails between members of the West Face Consortium,<sup>12</sup> which revealed that the owner of WIND ("VimpelCom") and its advisor UBS had shared detailed information relating to the status and terms of Catalyst's bid, and the internal steps being taken by VimpelCom during the period of Catalyst's exclusivity, in breach of the contractual obligations of confidentiality and exclusivity which were owed to Catalyst.<sup>13</sup> This documentation was not known or disclosed to Catalyst prior to the Moyses Action,<sup>14</sup>

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<sup>8</sup> Reasons for decision of Justice Newbould at trial dated August 18, 2016, Exhibit 37 to the Riley Moving Affidavit

<sup>9</sup> Riley Moving Affidavit para 72; National Post article published August 19, 2016, Exhibit 29

<sup>10</sup> Riley Moving Affidavit para 73; National Post article published August 19, 2016, Exhibit 29

<sup>11</sup> Riley Moving Affidavit para 62; West Face Counterclaim, para 129, Exhibit 1 to the Riley Moving Affidavit

<sup>12</sup> Exhibits 31 to 36 of the Riley Moving Affidavit

<sup>13</sup> Riley Moving Affidavit para 75

<sup>14</sup> Riley Moving Affidavit para 74

and in fact was only disclosed by West Face approximately 18 months after the Moyse Action was commenced.<sup>15</sup>

13. Indeed, in his reasons for decision in the Moyse Action, Justice Newbould stated that the information about when Catalyst's offer for WIND was going to the VimpelCom board for approval "likely came ... from an advisor to [a member of the West Face Consortium] who may have obtained it from UBS".<sup>16</sup>

14. The legal dispute over the acquisition of WIND's shares involving the ownership of a fourth Canadian wireless provider and the users of publically regulated spectrum was a matter of public interest.<sup>17</sup> The August 2016 Written Statement's commentary regarding a judicial decision and the status and merits of Catalyst's claims regarding the WIND acquisition were of significant interest to its investors and potential investors.<sup>18</sup>

15. The August 2016 Written Statement set out Catalyst's beliefs regarding potential errors in and possible grounds of appeal from the recently released trial decision of Justice Newbould. The grounds advanced were set out in the materials filed with the Court of Appeal which were referred to in the August 2016 Written Statement.<sup>19</sup>

16. West Face did not serve a Notice of Libel regarding the August 2016 Written Statement or the *National Post* article,<sup>20</sup> on either the Catalyst Defendants or Postmedia (the publisher of the *National Post*). West Face also did not commence a libel action against Postmedia.<sup>21</sup>

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<sup>15</sup> Riley Answers to Undertakings Item 9 (Q. 147)

<sup>16</sup> Riley Moving Affidavit para 92; Justice Newbould's Reasons for Decision in the Moyse Action, Exhibit 37 to the Riley Moving Affidavit

<sup>17</sup> Riley Moving Affidavit para 95

<sup>18</sup> Riley Moving Affidavit para 95

<sup>19</sup> Riley Moving Affidavit para 93 and 94

<sup>20</sup> Riley Moving Affidavit para 69 and 70

<sup>21</sup> Riley Moving Affidavit para 69-71

**C. THE OCTOBER 2016 PRESS RELEASE (OCTOBER 13, 2016)**

17. Catalyst issued the October 2016 Press Release in response to a press release issued by West Face earlier that day commenting on Justice Newbould's costs decision (the "**West Face Press Release**").<sup>22</sup> The West Face Press Release was titled "Court awards over \$1.5 million against Catalyst Capital in lawsuit with West Face and Brandon Moyse; West Face launches catalystitigation.com website".<sup>23</sup> The West Face Press Release states in part:

"West Face Capital Inc. announced today that Justice Newbould of the Superior Court of Justice in Ontario has awarded costs of \$1.2 million to West Face, on a substantial indemnity basis...

Justice Newbould's cost endorsement noted that the lawsuit was driven by Catalyst CEO Newton Glassman, who "was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else." Justice Newbould also found that Mr. Glassman "was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed."

...

West Face believes that the Catalyst and Callidus claims in each of these proceedings are without merit and is vigorously defending each of these proceedings."<sup>24</sup>

18. The West Face Press Release also announced that West Face launched a new website at [www.catalystitigation.com](http://www.catalystitigation.com).<sup>25</sup> Members of the public are invited to sign up to be notified of West Face's most recent additions to the site.<sup>26</sup>

19. Catalyst's October 2016 Press Release was titled "Catalyst Capital Group Comments on West Face Statements".<sup>27</sup> The lead paragraph states: "The Catalyst Capital Group Inc. ("Catalyst"), Canada's second-largest independent private equity firm, today commented on recent statements by West Face Capital Inc. regarding ongoing litigation related to its acquisition of WIND Mobile Corp. and the short attack at Callidus Capital Corporation".<sup>28</sup>

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<sup>22</sup> Riley Moving Affidavit para 99

<sup>23</sup> Riley Moving Affidavit para 99; West Face October 13, 2016 Press Release, Exhibit 43 to the Riley Moving Affidavit

<sup>24</sup> Riley Moving Affidavit para 100; West Face October 13, 2016 Press Release, Exhibit 43 to the Riley Moving Affidavit

<sup>25</sup> Riley Moving Affidavit para 102

<sup>26</sup> Riley Moving Affidavit para 156

<sup>27</sup> Riley Moving Affidavit para 97

<sup>28</sup> Riley Moving Affidavit para 97



20. West Face claims that the following statements in the October 2016 Press Release are defamatory:

“We can understand the increasing pressure that West Face has experienced due to its questionable and potentially unlawful actions around its acquisition of WIND and activities regarding Callidus Capital that has resulted in numerous inquiries from current and prospective investors, service providers and industry participants.

In regards to our litigation against West Face and other parties, there are very few firms out there that take the role of fiduciary as seriously as we do. Our commitment to LPs and to the minority shareholders in Callidus Capital is the primary consideration in all decisions we make.

It is exactly because of this culture at Catalyst, as compared to how others behave, that we have chosen to be incredibly tough and demanding when our rights are trampled or counterparties act unethically. Because ultimately, it is our LPs and investors that are impacted.

...

Catalyst has put its faith in the judiciary and expect that our claims and appeals will be heard fairly and the judgment will expose the truth of West Face’s actions, character and values.”<sup>29</sup>

21. The October 2016 Press Release specifically set out a detailed summary of Catalyst’s Notice of Appeal of Justice Newbould’s decision, including the errors of fact and errors of law, including in relation to a spoliation issue involving Mr. Moyses’s destruction of evidence in violation of a Court Order. The October 2016 Press Release also made references to determinations made by Justice Lederer in the Moyses Action which Catalyst considered to be relevant to the costs award made by the Court.<sup>30</sup>

#### **D. THE FIRST INVESTOR LETTER (AUGUST 14, 2017)**

22. The First Investor Letter informed Catalyst’s investors about facts regarding the WIND litigation and also regarding possible interference and market manipulation involving West Face (and others) in Callidus’ shares.<sup>31</sup>

23. The letter was sent days after the article published by the Wall Street Journal on August 9, 2017 accusing Catalyst and Callidus of fraud that (the “**WSJ Fraud Article**”). The WSJ Fraud Article caused Callidus’ share price to “swoon”,<sup>32</sup> and prompted numerous telephone calls and email inquiries from Catalyst Fund Limited Partners.<sup>33</sup>

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<sup>29</sup> Riley Moving Affidavit para 98; Catalyst October 13, 2016 Press Release, Exhibit 42 to the Riley Moving Affidavit

<sup>30</sup> Reasons for decision of Justice Lederer at paras 50-75, Exhibit 51 to the Riley Moving Affidavit

<sup>31</sup> Riley Moving Affidavit para 106; First Investor Letter August 14, 2017, Exhibit 44 to the Riley Moving Affidavit

<sup>32</sup> Riley Moving Affidavit para 106

<sup>33</sup> Riley Moving Affidavit para 44

24. West Face alleges that the following statements in the First Investor Letter were defamatory:

“As a brief update on the West Face and Wind litigation, new facts helpful to the case have been discovered. These relate not only to their stand-alone behavior but also to possible interference and market manipulation involving West Face and others in Callidus.”<sup>34</sup>

25. Prior to the First Investor Letter, Catalyst had been subjected to a campaign of social media harassment, hacks to its computer system, threats of false media coverage about alleged fraud investigations, and other concerted attacks upon its business, which culminated in the publication of the WSJ Fraud Article, and the implementation of a short and distort scheme which caused a significant (and lasting) adverse impact upon the stock price of Callidus and on the investments held by Catalyst’s Funds.<sup>35</sup>

26. Two days after the publication of the online WSJ Fraud Article and one day after the publication of the print edition of the WSJ Fraud Article, Glassman received an unsolicited email from an individual operating under the pseudonym “Vincent Hanna” (the “**Vincent Hanna email**”) which was confirmatory of Catalyst’s existing belief that Callidus was targeted by short-sellers.<sup>36</sup>

27. As stated above, Catalyst was under an obligation to keep investors informed of matters concerning the management, conduct and performance of the investment Funds.<sup>37</sup> The First Investor Letter provided Catalyst’s investors with management’s understanding of the material facts and a detailed response to the false allegations published by The Wall Street Journal.<sup>38</sup> It also reminded Catalyst’s investors of their obligations to keep investor communication confidential.<sup>39</sup>

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<sup>34</sup> Riley Moving Affidavit para 103

<sup>35</sup> First Investor Letter August 14, 2017, Exhibit 44 to the Riley Moving Affidavit; Riley Moving Affidavit para 106; Affidavit of Newton Glassman sworn November 24, 2020 paras 11-12

<sup>36</sup> Riley Moving Affidavit para 108; Email from Vincent Hanna to Newton Glassman August 11, 2017, Exhibit 46 to the Riley Moving Affidavit

<sup>37</sup> Riley Moving Affidavit para 105

<sup>38</sup> Riley Moving Affidavit para 109

<sup>39</sup> First Investor Letter August 14, 2017, Exhibit 44 to the Riley Moving Affidavit

**E. THE MARCH 2018 INVESTOR LETTER (MARCH 19, 2018)**

28. The March 2018 Investor Letter is a reporting letter sent to Catalyst Fund Limited Partners reporting that Catalyst's appeal of Justice Newbould's decision was dismissed by the Court of Appeal<sup>40</sup> and informing Catalyst investors that former employees of West Face had confirmed Catalyst's belief that confidential information significant to the WIND negotiations and VimpelCom's positions and intentions had been improperly obtained by the West Face Consortium during Catalyst's exclusivity period.<sup>41</sup> These were matters that were material and of significant importance and interest to Catalyst investors.<sup>42</sup>

29. The March 2018 Investor Letter specifically informed investors that a former West Face employee, Peter Brimm, had said that West Face had benefitted from the leakage of inside information about Catalyst's confidential bid.<sup>43</sup> Mr. Brimm stated that, in his view the transaction was "polluted" and that "[t]hey had information about Catalyst's bid, and they had information about why Wind wasn't taking it. And so they gave a bid that was lower but a little bit different that the board would accept."<sup>44</sup> He also said that he believed "that West Face had information they weren't supposed to".<sup>45</sup> When cross-examined Mr. Brimm agreed that he made the statements in the March 2018 Investor Letter.<sup>46</sup>

30. The March 2018 Investor Letter also reports that a second former West Face employee, Yu-Jia Zhu, said that the West Face Consortium's winning bid was made as a result of collusion during the period Catalyst was contractually entitled to exclusivity.<sup>47</sup>

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<sup>40</sup> Riley Moving Affidavit para 112; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit

<sup>41</sup> Riley Moving Affidavit para 113; March 2018 Investor Letter r, Exhibit 48 to the Riley Moving Affidavit

<sup>42</sup> Riley Moving Affidavit para 120; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit

<sup>43</sup> Riley Moving Affidavit para 114; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit

<sup>44</sup> Riley Moving Affidavit para 114; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit; Transcript from the meeting with Peter Brimm dated November 1, 2017, Exhibit 49 to the Riley Moving Affidavit

<sup>45</sup> Riley Moving Affidavit para 115; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit; Transcript from the meeting with Peter Brimm dated November 1, 2017, Exhibit 49 to the Riley Moving Affidavit

<sup>46</sup> Transcript of the cross-examination of Peter Brimm December 7, 2020 p. 69-71 q. 187-191

<sup>47</sup> Riley Moving Affidavit para 116; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit; Transcript from the meeting with Yu-Jia Zhu dated November 1, 2017, Exhibit 50 to the Riley Moving Affidavit

31. The March 2018 Investor Letter was sent to Catalyst’s investors to keep them apprised of matters material to the Funds.<sup>48</sup> The “Privileged and Confidential Update – WIND Litigation” document was sent to about 100 Catalyst investors, and included the following reminder to LPs to keep matters pertaining to the litigation confidential.<sup>49</sup>

“Currently there are pending Court motions in which VimpelCom (and other defending parties) have asked the Ontario Superior Court of Justice to make orders preventing Catalyst from continuing the lawsuit it has instituted based upon the above claims. The Court's decision is under reserve. You should be aware that inappropriate circulation of this summary could adversely affect the outcome of these motions. Accordingly, it is vital that you respect the confidentiality of this litigation update.”

32. Notwithstanding this reminder, the March 2018 Investor Letter was provided to members of the mainstream media.<sup>50</sup> On April 18, 2018, the *Globe and Mail* published an article titled “In Investor Letter, Catalyst Claims It Can Still Win Wind Mobile Suit”, which repeated publicly the contents of the March 2018 Investor Letter.<sup>51</sup>

33. West Face did not serve a Notice of Libel regarding the April 18, 2018 *Globe and Mail* Article on any of the Catalyst Defendants,<sup>52</sup> and did not commence a libel action against the *Globe and Mail*.<sup>53</sup>

#### **F. WEST FACE AND BOLAND’S DAMAGES ALLEGATIONS**

34. West Face claims, as a result of the expressions in issue in this anti-SLAPP motion, that “West Face has been impaired significantly in managing its existing investments”<sup>54</sup> and that “the efforts of West Face to raise new funds from investors have been undermined”.<sup>55</sup> However, West Face has relied on bald conclusory statements in support of these claims. West Face’s claims ignore the timing of the allegedly defamatory statements which are the subject of the anti-SLAPP motion of the Catalyst

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<sup>48</sup> Riley Moving Affidavit para 120; March 2018 Investor Letter, Confidential Exhibit 48

<sup>49</sup> March 2018 Investor Letter Ex 48 to the Riley Moving Affidavit

<sup>50</sup> Riley Moving Affidavit para 110

<sup>51</sup> Riley Moving Affidavit para 110; *Globe and Mail* article "In Investor letter, Catalyst claims it can still win WIND Mobile suit" dated April 18, 2018, Exhibit 46 to the Riley Moving Affidavit

<sup>52</sup> Riley Moving Affidavit para 111

<sup>53</sup> Riley Moving Affidavit para 111

<sup>54</sup> Affidavit of G. Boland sworn May 29, 2020 (“**Boland Affidavit**”) para 115

<sup>55</sup> Boland Affidavit para 115

Defendants and are also contradicted by its own investor communications and other evidence which point to other causes for West Face's poor performance.

**(a) West Face's Mismatched Hedge Fund Structure**

35. West Face styles itself as a hedge fund. From approximately July 2015, hedge funds generally were falling out of favour with institutional investors who could obtain better returns on their money elsewhere such as through the TSX or US stock exchanges. Boland admits this trend in the performance of hedge funds in general in paragraph 133 of his affidavit.<sup>56</sup>

36. Hedge funds like West Face are appropriate for undertaking short-term trading strategies and provide liquidity through periodic redemption rights (usually quarterly).<sup>57</sup> However, West Face chose (prior to and independently from the expressions in issue), to "focus on less, liquid, more concentrated, and longer-term investments".<sup>58</sup> This led to a "term mismatch" between West Face's short term obligations to investors who could redeem on short notice and West Face's long term investments.<sup>59</sup> Indeed, West Face admitted its investment strategies were ill suited to a hedge fund structure.<sup>60</sup> It stated in its December 8, 2017 Investor Letter that, "the quarterly liquidity required for our core funds general portfolio, and the lack of capital available to allocate to private investments, has restricted our ability to participate fully in many of the higher value opportunities we have identified".<sup>61</sup> West Face acknowledged that, over the last several years, the quarterly liquidity requirements for its hedge funds and the lack of available capital to allocate to private investments, had restricted West Face's ability to successfully participate in higher value opportunities, thereby resulting in losses.<sup>62</sup>

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<sup>56</sup> Affidavit of James Riley August 20, 2020 ("Riley Reply Affidavit") para 12

<sup>57</sup> Riley Reply Affidavit para 14

<sup>58</sup> Boland Affidavit para 118

<sup>59</sup> Riley Reply Affidavit para 15

<sup>60</sup> Riley Moving Affidavit para 176

<sup>61</sup> West Face LTOF Investor Letter dated December 8, 2017, Exhibit 73 to the Moving Riley Affidavit

<sup>62</sup> Riley Moving Affidavit para 176

**(b) West Face's Poor Performance**

37. Since 2011 – well before any of the expressions in issue – the West Face Funds have consistently suffered from poor financial performance.<sup>63</sup> In early 2016, West Face had experienced redemptions and lagging performance.<sup>64</sup> As of July 1, 2016, West Face was reported as experiencing an estimated 6 month change of -7.32% and a 12 month change of -13.14%.<sup>65</sup>

38. As a result of West Face's poor investment performance, many investors lost confidence in the firm and elected to redeploy their investment capital elsewhere.<sup>66</sup> As reflected in the Form 13F of West Face's primary Long Term Opportunities Fund ("LTOF"), West Face's assets under management ("AUM") declined from a high of approximately \$2.8 billion to approximately \$1.7 billion by March 2016. By September 2017, West Face's AUM had further declined to only approximately \$1 billion as its investors redeemed their investments.<sup>67</sup>

39. West Face's LTOF has consistently underperformed for reasons unrelated to the expressions in issue. In its Q1 2017 investor letter, West Face reported that, apart from the two recovery years following the 2008 global recession, the LTOF was posting poor returns for the period from 2007 to 2017. From the perspective of a five-year cumulative return, the Long Term Opportunity Fund's performance lagged even further behind the comparative indices:<sup>68</sup>

	<b>West Face Long Term Opportunity Fund</b>	<b>S&amp;P/TSX Composite Total Return Index</b>	<b>S&amp;P 500</b>
1-Year Cumulative	2.8%	11.0%	17.9%
3-Year Cumulative	-2.5%	9.5%	31.7%
5-Year Cumulative	16.9%	52.1%	97.9%

<sup>63</sup> Riley Moving Affidavit para 166

<sup>64</sup> Riley Moving Affidavit para 167

<sup>65</sup> Riley Moving Affidavit para 167; Miles Kruppa, "Billion Dollar Club: Redemptions mount in first 12-month drop since crisis" *Absolute Return* (September 29, 2016), Exhibit 67 to the Riley Moving Affidavit

<sup>66</sup> Riley Moving Affidavit para 172

<sup>67</sup> Riley Moving Affidavit para 173

<sup>68</sup> Riley Moving Affidavit para 166

40. These returns highlight the extent of West Face’s poor performance as an investment manager when assessed against the backdrop of one of the longest bull markets in recorded history.<sup>69</sup>

41. Moreover, any reputational damage to West Face caused by its exceedingly poor performance was further compounded when West Face announced, in September 2017, the decision to suspend withdrawals and redemptions in LTOF (known in the business as “gating”). As a result of this extreme decision, investors in the LTOF were prohibited from withdrawing any of their investment. This decision, made out of necessity given the accelerated pace of redemption requests, created strong negative sentiment amongst West Face’s investors and the marketplace, and damaged West Face’s business prospects.

42. West Face’s own investor communication (before the West Face Counterclaim) divulged the actual reasons for these losses:<sup>70</sup>

- (a) negative investment returns from high investment exposure in oil and gas companies like PHI Inc. and Gran Tierra Energy Inc., following the collapse of the oil and gas market in 2014-2015;
- (b) “unexpected outcomes” in West Face’s investments in Entravision Communications Corporation and Air Methods Corporation;
- (c) investments that failed to meet West Face’s forecast;
- (d) failed short positions; and
- (e) over-attribution of illiquid investments.

**(c) The West Face Distressed Fund**

43. In late 2017 or early 2018, West Face abandoned its flawed investment strategy that had failed its investors. West Face attempted to create a new private equity fund, the “West Face Distressed

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<sup>69</sup> Riley Reply Affidavit para 21; James Chen “Market Milestones as the Bull Market Turns 10” (October 16, 2019) *Investopedia*, Exhibit 4 to the Riley Reply Affidavit

<sup>70</sup> Riley Moving Affidavit para 170; The LTOF Q1 2017 investor letter dated May 31, 2017, Exhibit 71 to the Riley Moving Affidavit

Fund”.<sup>71</sup> Unlike West Face’s other funds, the primary focus of the “West Face Distressed Fund” was intended to be on investments in distressed and undervalued situations.<sup>72</sup>

44. West Face sought to raise \$1 billion for its new fund. It attempted to do so notwithstanding that:

- (a) it had an abysmal investment track record as a hedge fund;<sup>73</sup>
- (b) it had no prior performance record of managing and creating value from a private equity fund focussed on distressed and undervalued investments.<sup>74</sup>
- (c) the \$1 billion West Face sought was excessive for a first time private equity fund by a manager with no private equity track record.<sup>75</sup>

45. In an attempt to raise the new Fund, West Face held “road show” sales presentations to potential investors.<sup>76</sup> These sales pitches presented a “cherry-picked” list of specific investments that showed only positive returns, while ignoring many of West Face’s investments that yielded negative or poor returns.<sup>77</sup>

On cross-examination Boland attempted to explain this decision by asserting that “we were required by the SEC to market your track record in a fashion that is coherent with the product you are marketing, and the product that we were marketing were our highest returning strategies pursuant to certain sub-strategies we had done historically” [emphasis added].<sup>78</sup> West Face later admitted that there was no such SEC policy.<sup>79</sup>

## **PART II - ISSUES**

46. Should the West Face Counterclaim be dismissed as against the Catalyst Defendants pursuant to

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<sup>71</sup> Riley Moving Affidavit para 168; Scott Daveau "West Face Said to Seek \$1.5 Billion for New Private Equity Fund", (September 27, 2016) *Bloomer*, Exhibit 68 to the Riley Moving Affidavit; Reuters "Canada's West Face looking to raise \$1.5 billion" (September 27, 2016) *Reuters*, Exhibit 69 to the Riley Moving Affidavit

<sup>72</sup> Riley Moving Affidavit para 178

<sup>73</sup> Riley Reply Affidavit para 27(a)

<sup>74</sup> Riley Moving Affidavit para 179

<sup>75</sup> Riley Moving Affidavit para 179

<sup>76</sup> Riley Moving Affidavit para 179; West Face Distressed Fund Deck dated November 2017, Exhibit 74 to the Riley Moving Affidavit

<sup>77</sup> Riley Moving Affidavit para 179; West Face Distressed Fund Deck dated November 2017, Exhibit 74 to the Riley Moving Affidavit; Riley Reply Affidavit para 32

<sup>78</sup> Transcripts from the cross-examination of G. Boland on December 9, 2020 p. 14-15 q. 33

<sup>79</sup> West Face Answers to Undertakings dated January 3, 2021, Item 32



section 137.1 of the *Courts of Justice Act* insofar as it is based on Catalyst's expressions? The Catalyst Defendants respectfully submit that it should.

47. West Face has not satisfied its onus and evidentiary burden on all three of the elements of section 137.1(4) of the *Courts of Justice Act*:

- (a) **West Face has not shown the Counterclaim has substantial merit:** In each case, the expressions in issue are either not reasonably capable of bearing defamatory meanings, or West Face has failed to show that it has suffered any damages.
- (b) **West Face has not shown that that Catalyst Defendants have no valid defences:** The expressions in issue were all made in circumstances of qualified privilege, fair comment, or as examples of responsible communication in the public interest. In respect of two expressions in issue, West Face's claims are barred by the limitation periods imposed by the *Libel and Slander Act* for failure to issue Notices of Libel.
- (c) **West Face has not shown the harm it has suffered is sufficiently serious that the public interest in protecting the expression is outweighed by the public interest in allowing the proceeding to continue:** West Face has relied exclusively on bald conclusory allegations it has suffered harm as a result of the expressions in issue. Not only are these allegations not supported by a shred of independent financial documentation, but they are entirely untethered to any evidence showing that, to the extent West Face has suffered harm, that harm was *a result of the expressions in issue* (and not some other cause). A damages claim unsupported by evidence cannot outweigh the significant public interest in the expressions in issue, and therefore the proceeding based on those expressions should be dismissed.

### PART III - LAW AND ARGUMENT

#### A. THE PRINCIPLES RELATING TO ANTI-SLAPP MOTIONS AND THE LAW OF DEFAMATION

48. The elements of the test under s. 137.1 of the *Courts of Justice Act*<sup>80</sup> pertaining to SLAPP motions and the law of defamation are set in the Factum of the Plaintiffs in the Dow Jones Libel Action.

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<sup>80</sup> Section 137.1 of the *Courts of Justice Act*, RSO 1990 c C43, Schedule "B" below

**B. THE PROCEEDING BASED ON CATALYST'S EXPRESSIONS DOES NOT HAVE SUBSTANTIAL MERIT AND THE CATALYST HAS VALID DEFENCES**

**(a) The August 2016 Written Statement**

49. The subject matter of the August 2016 Written Statement concerned Catalyst's claims based upon its allegations regarding the purchase of WIND and breaches of its exclusivity rights by a group of competing bidders independent of the Moyse claims. The dispute over the acquisition of WIND's shares involving the ownership of a fourth Canadian wireless provider and the users of publically regulated spectrum was a matter of public interest.<sup>81</sup>

50. The August 2016 Written Statement provided Catalyst's commentary on the findings following the trial of the Moyse Action.<sup>82</sup>

51. In assessing whether the words complained of in the August 2016 Written Statement defamed West Face, those words must be read in the context of the article as a whole. The paragraphs prior to the words complained of as reported in the *National Post* article report that:<sup>83</sup>

- (a) "Catalyst Capital Group" will appeal Justice Newbould's decision that "dismissed in its entirety Catalyst's lawsuit that alleged rival Bay Street firm West Face Capital Inc. used confidential information from a former Catalyst employee to buy a stake in Wind Mobile, a deal both firms were chasing in 2014."
- (b) "Catalyst argued West Face couldn't have landed the deal without confidential information from analyst Brandon Moyse, who was working on Catalyst's telecom file before he quit in May 2014 and joined West Face in June. It asked the court to order West Face to hold its ownership of Wind in a trust for Catalyst. But Justice Newbould ruled this week that Moyse did not provide any information to West Face that enabled it to offer a better deal than Catalyst".
- (c) "The judge went on to chastise Catalyst owner Newton Glassman, stating he had "considerable difficulty accepting his evidence as reliable...." On the other hand, he praised West Face witnesses as "straight forward" and "impressive". He stated they "did not engage in overstatement". After Catalyst filed its initial lawsuit against West Face... Catalyst sued

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<sup>81</sup> Riley Moving Affidavit para 26

<sup>82</sup> Riley Moving Affidavit para 26

<sup>83</sup> Emily Jackson, "Catalyst Capital Group Inc to appeal after Judge dismisses Wind Mobile lawsuit" *Financial Post* (August 19, 2016), Exhibit 29 to the Riley Moving Affidavit

West Face and the consortium of buyers including Globalive for \$750M, "...of the sale".

52. In this context, the words complained of simply report Catalyst's allegations that supported its conspiracy and breach of contract action. The reasonable reader knows these allegations have not yet been proven in court. The article provides the reader with West Face's position, which is one of "vindication" and that Catalyst's lawsuits against West Face are "without merit".<sup>84</sup> No reasonable reader would take the words complained of to mean what West Face pleads in its Counterclaim;<sup>85</sup> namely that West Face had been shown to have engaged in an unlawful conspiracy and breach of contract action in relation to WIND mobile.

53. The August 2016 Written Statement stated that "after the Moyse litigation commenced, additional evidence came out that is supportive of our case against Globalive West Face, VimpelCom and other parties". The "additional evidence" was comprised of documents showing that VimpelCom and UBS had shared information relating to Catalyst's bid for WIND in breach of the confidentiality and exclusivity obligations owed to Catalyst. None of these emails, communications and steps were known to Catalyst until after the Moyse litigation commenced, when West Face began (starting in January 2016) to produce the above documents.

(i) Fair Comment

54. When put in proper context, the words complained of in the August 2016 Written Statement and *National Post* Article are fair comment under the test in *WIC Radio Ltd v Simpson*. The comments:

- (a) clearly related to a matter of public interest, which was described by the Supreme Court of Canada in *WIC Radio* as a "broad concept";<sup>86</sup>
- (b) were based on fact, being the additional evidence supporting Catalyst's allegations of a breach of exclusivity and confidentiality that had come to light since the Moyse Action;<sup>87</sup>
- (c) were recognizable as comments as opposed to statements of fact (indeed the West Face

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<sup>84</sup> Riley Moving Affidavit para 72; National Post article published August 19, 2016, Exhibit 29 to the Riley Moving Affidavit

<sup>85</sup> West Face Counterclaim, paragraph 130, Exhibit 1 to the Riley Moving Affidavit

<sup>86</sup> *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 30

<sup>87</sup> Exhibits 31 to 36 of the Riley Moving Affidavit

Counterclaim defines the August 2016 Written Statement as the “Post-Judgment Comments”).<sup>88</sup>

- (d) were opinions that a person could honestly express based on the “additional evidence” strongly supporting Catalyst’s suspicions that West Face was fed information in breach of Catalyst’s exclusivity and confidentiality rights.
- (e) were made without malice, but rather based on Catalyst’s *bona fide* views that Justice Newbould’s decision demonstrated a possible bias as evidenced by the fact, among others, that Catalyst eventually acted on that belief by appealing Justice Newbould’s decision on grounds including that different standards were applied in assessing the evidence submitted by Catalyst and in assessing the evidence of Moyse and West Face.

(ii) Responsible Communication

55. In addition, West Face cannot establish grounds to believe that the Catalyst Defendants’ responsible communication defence is not “valid”. The two elements of the defence of responsible communication set out by the *Grant v Torstar Corporation*,<sup>89</sup> are that (i) the matter is one of public interest and (ii) the publication was responsible, in that the defendant was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.<sup>90</sup>

56. Applying the factors from *Grant*, the Catalyst Defendants acted responsibly in publishing the August 2016 Written Statement:

- (a) the matter of how bids are made in regard to Canada’s public wireless spectrum is serious and a matter of public importance;
- (b) the Catalyst defendants relied on reliable sources – the documents generated by and exchanged between the members of the West Face Consortium themselves;
- (c) West Face’s side of the story was reported either before or alongside Catalyst’s;
- (d) the inclusion of the statements was justifiable because this engaged the public interest and was corroborated by reliable evidence;

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<sup>88</sup> West Face Counterclaim para 129. In *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 30, the Supreme Court noted that the notion of “comment” is to be “generously interpreted” and, like the public interest requirement, a “relatively easy” onus to discharge

<sup>89</sup> *Grant v Torstar Corporation*, 2009 SCC 61

<sup>90</sup> *Grant v Torstar Corporation*, 2009 SCC 61 at para 98

(e) the statement did not amount to distortion or sensationalism.<sup>91</sup>

(iii) Failure to Provide Notice under the Libel and Slander Act

57. Even if the August 2016 Written Statement published by the *National Post* was defamatory (which it was not), West Face's failure to serve a Notice of Libel on the Catalyst Defendants bars the Counterclaim action regarding that publication based on that expression. Section 5 of *Libel and Slander Act* mandates that no action for libel in a newspaper or in a broadcast lies unless the plaintiff gives written notice of the complaint within six weeks after the alleged libel has come to the plaintiff's knowledge.<sup>92</sup> In addition, West Face has also failed to comply with the limitation period prescribed by section 6 of the *Libel and Slander Act* which requires an action to be commenced within 3 months.<sup>93</sup> The protection of these limitation periods is available to third parties such as Catalyst whose statements are quoted by the *National Post*.<sup>94</sup>

**(b) The October 2016 Press Release**

58. The October 2016 Press Release was issued in reply to a West Face Press Release issued earlier that day regarding the ongoing litigation related to WIND and the grounds for the appeal of Justice Newbould's decision in the Moyse Action.<sup>95</sup>

59. The comments in the West Face Press Release that Catalyst was responding to were that "the Catalyst and Callidus claims in each of these proceedings are without merit". The West Face Press Release also announced that West Face launched a new website at [www.catalystlitigation.com](http://www.catalystlitigation.com).

(i) Fair Comment

60. The statements in the October 2016 Press Release are protected by the fair comment defence. The October 2016 Press Release was commentary issued in response to the West Face Press Release and

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<sup>91</sup> *Grant v Torstar Corporation*, 2009 SCC 61 at para 110-126

<sup>92</sup> Section 5 of the *Libel and Slander Act*, Sched "B" below

<sup>93</sup> Section 6 of the *Libel and Slander Act*, Sched "B" below

<sup>94</sup> *Watson v Southam Incorporated*, 2000 CanLII 5758 (ON CA) at paras 51-54

<sup>95</sup> Riley Moving Affidavit para 99

was in fact titled “Catalyst Capital Group Comments on West Face Statements”.<sup>96</sup> There was moreover a significant public interest in the subject matter of the commentary, being the litigation pertaining to WIND.

61. The the October 2016 Press Release provided a detailed summary of Catalyst’s Notice of Appeal of Justice Newbould’s decision. It set out the factual and honestly held bases for Catalyst’s comments, including the alleged errors of fact and procedural fairness and the error of law in determining the spoliation issue involving Mr. Moyses’s destruction of evidence. The October 2016 Press Release also stated that the substantial indemnity costs award by Justice Newbould ignored the prior findings in the Moyses Action that Catalyst had a “strong *prima facie* case” against West Face and Mr. Moyses.<sup>97</sup>

**(c) The First Investor Letter**

62. The First Investor Letter informed Catalyst’s investors about the discovery of facts helpful to its litigation regarding the WIND acquisition and reported on possible interference and market manipulation involving West Face (and others) in Callidus’ shares as first revealed in the Vincent Hanna email. West Face alleges the following statements were defamatory:

“As a brief update on the West Face and Wind litigation, new facts helpful to the case have been discovered. These relate not only to their stand-alone behavior but also to possible interference and market manipulation involving West Face and others in Callidus.”

63. West Face submits that these words are defamatory in their natural and ordinary meaning and were understood to mean that West Face:<sup>98</sup>

- (a) engaged in improper conduct intended to manipulate the market price for the shares of Callidus;
- (b) engaged in conspiracies with other people or entities intended to manipulate the market price for the shares of Callidus;

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<sup>96</sup> Riley Moving Affidavit para 97

<sup>97</sup> Reasons for decision of Justice Lederer at paras 50-75, Exhibit 51 to the Riley Moving Affidavit

<sup>98</sup> West Face Counterclaim para 141

- (c) made misrepresentations to the public concerning Callidus; and
- (d) manipulated improperly other market participants.

64. The words complained of, when read in the context of the confidential letter as a whole, do not convey the defamatory meanings pleaded by West Face. No Court has decided on the merits whether West Face participated with others in a possible inference and market manipulation of Callidus. There is evidence that West Face and others participated in such activities.<sup>99</sup>

(i) Fair Comment Defence

65. The statements made in the First Investor Letter are protected by the fair comment defence set out in *WIC Radio*.<sup>100</sup> The comments were based on evidence of West Face's involvement in possible interference and market manipulation, as set out in the Vincent Hanna Email. The comments expressed by Catalyst and Callidus were reasonably held opinions based on the Vincent Hanna Email that any person could honestly express.<sup>101</sup> West Face's involvement in such activities has been borne out by the evidence thus far.<sup>102</sup>

66. As discussed in the following section dealing with the public interest in the expressions, market manipulation schemes and their effect on the Canadian capital markets are, moreover, matters of public interest.<sup>103</sup>

(ii) Qualified Privilege

67. Partnerships like the Catalyst Funds can rely on qualified privilege as a defence to defamation claims relating to internal business communication, where the need for frank communication is required.<sup>104</sup> Catalyst had a duty to publish the First Investor Letter and the Fund LPs had a corresponding

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<sup>99</sup> Factum of the Plaintiffs in the Main Action herein

<sup>100</sup> *WIC Radio Limited v Simpson*, [2008 SCC 40](#)

<sup>101</sup> *WIC Radio Limited v Simpson*, [2008 SCC 40](#) at para 90

<sup>102</sup> Reasons for decision of Justice Lederer at paras 50-75, Exhibit 51 to the Riley Moving Affidavit

<sup>103</sup> Riley Moving Affidavit para 105-109

<sup>104</sup> *Best v Spasic*, [2004 CarswellOnt 6107 \(SCJ\)](#)

interest in receiving that information.<sup>105</sup>

68. Limited partners have a statutory right to all information concerning the limited partnership, pursuant to sections 10(a) and (b) of the *Limited Partnerships Act*.<sup>106</sup> Catalyst is in turn under an obligation to keep investors informed of matters concerning the management, conduct and performance of the investment Funds both as a fiduciary at common law<sup>107</sup> and under the terms of its contracts with the Funds.<sup>108</sup>

69. The matters dealt with by the First Investor Letter were of significant interest and importance to Catalyst's investors, as exemplified by the numerous inquiries and requests for information received from Funds LPs in the immediate aftermath of the WSJ Fraud Article.<sup>109</sup>

70. The First Investor Letter was moreover accompanied by a specific directive to the small number of LPs to which it was sent to keep the letter confidential. The Limited Partnership Agreements for the Funds contained a confidentiality provision and Catalyst reasonably expected that this legal obligation would be abided by.<sup>110</sup>

(iii) *Responsible Communication*

71. The Catalyst Defendants have met the test for responsible communication: the First Investor Letter concerned a 'matter of public interest.' The Catalyst Defendants had bona fide beliefs regarding the existence of a coordinated group attack upon Catalyst and Callidus, both before and following the First Investor Letter, and investigated the facts relating to such misconduct by a variety of ways and means.<sup>111</sup> By the time of the First Investor Letter, Catalyst was "finding more information that made

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<sup>105</sup> *Cusson v Quan*, [2007 ONCA 771](#) at para 38; Riley Moving Affidavit para 108-109

<sup>106</sup> Section 10, *Limited Partnerships Act*, RSO 1990, c L16 Schedule B below

<sup>107</sup> *Tzembelicos v Tzembelicos*, [2004 CanLII 28312 \(ON SC\)](#); *Merklinger v. Jantree No. 3 Limited Partnership & Snapdragon Limited*, [2004 CanLII 54553 \(ON SC\)](#) at para 176

<sup>108</sup> Management Advisory Agreement dated April 21, 2006, Exhibit 45 to the Riley Moving Affidavit

<sup>109</sup> *Cusson v Quan*, [2007 ONCA 771](#) at para 38

<sup>110</sup> First Investor Letter August 14, 2017, Exhibit 44 to the Riley Moving Affidavit

<sup>111</sup> Transcripts from the Cross-examination of James Riley April 22, 2021 p. 1013-1014 Q. 2865; Transcripts from the Cross-examination of Newton Glassman on May 3, 2021



what had been said by Vincent Hanna less relevant because [they] were finding other evidence of behaviour.”<sup>112</sup>

**(d) The March 2018 Investor Letter**

72. The March 2018 Investor Letter informs investors that Mr. Brimm (without identifying him) said that Catalyst was correct in believing that West Face had indeed received confidential information about the WIND transaction that it was not supposed to have, but the leakage did not come from Mr. Moyse.<sup>113</sup>

73. The *Globe and Mail* published an article repeating the contents of the March 2018 Investor Letter.<sup>114</sup> West Face alleges that the Catalyst Defendants “anticipated and intended” that this would happen,<sup>115</sup> but there is no evidence to support this allegation. To the contrary, the March 2018 Investor Letter was titled “Privileged and Confidential Update – Wind Litigation” and the record shows that it was a confidential and privileged update on the Moyse Action,<sup>116</sup> and that the recipients were urged to respect these restrictions. Catalyst is not aware of how this communication came to be disseminated outside its intended audience.<sup>117</sup>

**(i) Fair Comment Defence**

74. The comments made by Catalyst in the March 2018 Investor Letter were based on honestly held beliefs based on true facts. The facts supporting Catalyst’s statements regarding West Face’s improper conduct in the WIND transaction were obtained from former West Face employees at the time of the negotiations pertaining to WIND. As discussed above in the context of the August 2016 Press Release and the October 2016 Press Release, matters pertaining to the WIND transaction were of also of pressing public importance.

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<sup>112</sup> Transcripts from the Cross-examination of James Riley April 22, 2021 p. 1014-1014 Q. 2867

<sup>113</sup> Riley Moving Affidavit para 115; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit

<sup>114</sup> Riley Moving Affidavit para 110; *Globe and Mail* article "In Investor letter, Catalyst claims it can still win WIND Mobile suit" dated April 18, 2018, Exhibit 46 to the Riley Moving Affidavit

<sup>115</sup> Riley Moving Affidavit para 110

<sup>116</sup> Riley Moving Affidavit para 112

<sup>117</sup> Riley Affidavit para 112; March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit

75. In addition, the substance of the March 2018 Investor Letter reflects both the public interest it deals with the WIND transaction and that the comments were made fairly and responsibly given the magnitude of the issues at play.<sup>118</sup> The closeness of the sources of the information to West Face (Brimm and Zhu) made the information upon which Catalyst based the March 2018 Investor Letter highly reliable.

(ii) Qualified Privilege

76. The March 2018 Investor Letter was published to Catalyst Fund LPs on an occasion of qualified privilege. Catalyst had a duty to provide Fund LPs with the communication and the LPs had a corresponding interest in receiving the information. As with the First Investor Letter, Catalyst took steps to ensure that the circulation of the March 2018 Investor Letter was limited through a specific directive to the recipients of the letter to keep the matters discussed therein confidential.<sup>119</sup>

(iii) Responsible Communication

77. The March 2018 Investor Letter also satisfies the test for responsible communication in that the communication was in the public interest and in the circumstances the expression was made responsibly.<sup>120</sup> The status of West Face's employees as contemporaneous witnesses to West Face's conduct during the WIND negotiations made the information they provided reliable.<sup>121</sup>

(iv) Failure to Provide Notice under the Libel and Slander Act

78. Neither Catalyst nor Callidus were served with a Notice of Libel regarding the *Globe and Mail* article as required in the case of publications in a newspaper or broadcast by section 5 of the *Libel and Slander Act*.<sup>122</sup> West Face also failed to comply with the limitation period prescribed by section 6 of the *Libel and Slander Act*. As stated above, the Catalyst Defendants are entitled to the benefit of these notice provisions.<sup>123</sup>

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<sup>118</sup> *Grant v Torstar Corporation*, [2009 SCC 61](#) at 100

<sup>119</sup> March 2018 Investor Letter, Exhibit 48 to the Riley Moving Affidavit

<sup>120</sup> *Grant v Torstar Corporation*, [2009 SCC 61](#) at para 98

<sup>121</sup> *Grant v Torstar Corporation*, [2009 SCC 61](#) at para 114

<sup>122</sup> Section 5 of the *Libel and Slander Act*, Sched "B" below

<sup>123</sup> *Watson v Southam Incorporated*, [2000 CanLII 5758 \(ON CA\)](#) at paras 51-54

C. **PUBLIC INTEREST BALANCING**

(a) **The Public Interest Regarding the Expressions in Issue**

79. The expressions in issue clearly constitute expression related to two matters of public interest.
- (a) **WIND litigation:** All the expressions in issue related to the legal dispute between Catalyst and West Face over the acquisition of WIND's shares. These expressions constituted commentary about a judicial decision and the status of the ongoing litigation with West Face regarding the WIND acquisition. WIND was the fourth largest Canadian wireless provider, in a highly regulated industry. The expressions were of interest to both the public at large and to Catalyst LPs, who would have a genuine interest in receiving information on the subject and the users of publically regulated spectrum.
- (b) **Market Manipulation of Callidus:** The First Investor Letter related to the manipulation in the market in the shares of Callidus, a public company. The expressions were of interest to both the shareholders in Callidus, including the Catalyst Funds, all of whom would have a genuine interest in receiving information on the subject and the users of publically regulated wireless spectrum.

80. All the expressions in issue related to material matters of significant importance and interest to Catalyst's investors and to shareholders in Callidus, a public company.

(b) **No Established Harm Suffered by West Face**

81. Despite the burden on West Face on this issue, the only evidence put forward by it in respect of the alleged harm caused by the expressions in issue are conclusory statements by Mr. Boland about the harm allegedly caused by the Catalyst Defendants. These statements fly in the face of West Face's representations to its investors in its own investor letters, which report the actual causes for the poor performance of the West Face funds (such as too much oil and gas exposure at a time when oil and gas prices plummeted; failed short positions; unexpected outcomes in portfolios that pulled the general portfolio down; missteps).<sup>124</sup> West Face's historical performance difficulties have nothing to do with the allegations levelled against Catalyst. Rather, it is submitted that West Face's alleged losses and lack of "business success" were not caused by the Catalyst Defendants but by West Face's own

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<sup>124</sup> Riley Reply Affidavit para 10

mismanagement, which led its hedge funds to perform very poorly prior to the expressions in issue.<sup>125</sup>

82. Given the poor financial performance of the West Face Funds, the lack of any prior record of private equity fund performance of distressed and undervalued investments, West Face's history of gating and prohibiting its investors from withdrawing their investments, and the selective and improper investment illustrations used to attempt to raise \$1 billion from potential investors, West Face failed to raise the West Face Distressed Fund as expected.<sup>126</sup> West Face's failure to raise new funds had nothing to do with the Catalyst Defendants.<sup>127</sup>

83. Consequently, any loss that West Face and Boland have allegedly suffered or any alleged lack of success on the part of West Face and Boland to attract investors for the new proposed private equity fund were entirely attributable to their own decisions and actions in marketing the proposed fund, and West Face's growing reputation as a poor fund manager.<sup>128</sup> The Catalyst Defendants' expressions did not cause the harm that West Face alleges.

#### **PART IV - RELIEF SOUGHT**

84. The Catalyst Defendants request that the Counterclaim be dismissed regarding the following publications: the August 2016 Written Statement, the October 2016 Press Release, the First Investor Letter, and the March 2018 Investor Letter.

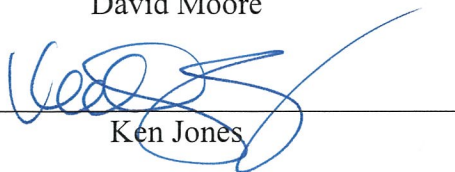
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2021.



David Moore



Matthew Karabus



Ken Jones

<sup>125</sup> Riley Moving Affidavit para 177

<sup>126</sup> Riley Moving Affidavit para 180

<sup>127</sup> Riley Moving Affidavit para 180

<sup>128</sup> Riley Moving Affidavit para 181

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**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Best v. Spasic*, [2004 CarswellOnt 6107 \(SCJ\)](#)
2. *Cusson v Quan*, [2007 ONCA 771](#)
3. *Grant v Torstar Corporation*, [2009 SCC 61](#)
4. *Merklinger v Jantree No. 3 Limited Partnership & Snapdragon Limited.*, [2004 CanLII 54553 \(ON SC\)](#)
5. *Tzembelicos v Tzembelicos*, [2004 CanLII 28312 \(ON SC\)](#)
6. *Watson v Southam Incorporated*, [2000 CanLII 5758 \(ON CA\)](#)
7. *WIC Radio Limited v Simpson*, [2008 SCC 40](#)

**SCHEDULE “B”  
STATUTES AND REGULATIONS**

*Courts of Justice Act, RSO 1990 c C43*

**Dismissal of proceeding that limits debate**

**Purposes**

**137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,

- (a) to encourage individuals to express themselves on matters of public interest;
- (b) to promote broad participation in debates on matters of public interest;
- (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
- (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

**Definition, “expression”**

(2) In this section,

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

**Order to dismiss**

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

**No dismissal**

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

- (a) there are grounds to believe that,
  - (i) the proceeding has substantial merit, and
  - (ii) the moving party has no valid defence in the proceeding; and
- (b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

*Libel and Slander Act, RSO 1990 c L12*

**Notice of action**

**5 (1)** No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

...

**Limitation of action**

**6** An action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action. .

**Application of ss. 5 (1), 6**

**7** Subsection 5 (1) and section 6 apply only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.



*Limited Partnerships Act, RSO 1990, c L16*

**Rights of limited partner**

10 A limited partner has the same right as a general partner,

- (a) to inspect and make copies of or take extracts from the limited partnership books at all times;
- (b) to be given, on demand, true and full information concerning all matters affecting the limited partnership, and to be given a complete and formal account of the partnership affairs; and
- (c) to obtain dissolution of the limited partnership by court order.

THE CATALYST CAPITAL GROUP et al.  
Plaintiffs

- and - Court File No. CV-17-587463-00CL  
WEST FACE CAPITAL INC et al. Defendants

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF CATALYST DEFENDANTS**  
(Anti-SLAPP Motion Pursuant to section 137.1 *Courts of Justice Act*)

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