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' FACTUM
(ANTI-SLAPP MOTIONS OF THE DOW JONES DEFENDANTS AND JEFFREY MCFARLANE)

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I. OVERVIEW

1. *The Wall Street Journal* accused the Plaintiffs of fraud in Website and Print Articles[1] published to an international audience of over 2.4 million readers.

2. *The Wall Street Journal*'s Website Article was published at 3:32 PM on August 9, 2017:[2]

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

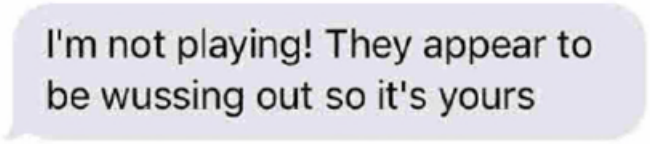
3. During the 28 minutes between the publication of the Website Article and the close of trading on the TSX at 4 PM, *The Wall Street Journal* caused Callidus Capital Corporation's[3] shares to plummet 21.4% and the harm to Callidus was at least C$144 million.

4. The next day, the Front Page of the print edition of *The Wall Street Journal* published a graphic demonstrating Callidus' share price nose-diving by 21.4% headlined: "Stock Swoons". The "Stock Swoons" graphic was not enough promotion of the fraud article for the Dow Jones

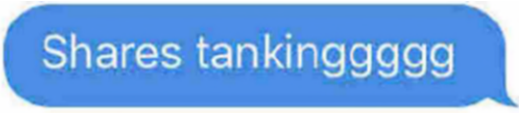
[1] The "**WSJ Fraud Articles**" – the Website Article was published on August 9, 2017 and the Print Article on August 10, 2017.
[2] Rob Copeland and Jacquie McNish, "Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers", *The Wall Street Journal* (August 9, 2017 at 3:32 pm EST), online ("**Website Article**"), at Tab 1 of the Plaintiffs' Brief of *The Wall Street Journal* Articles in Issue ("**WSJ Articles Brief**"), at Tab 1 of the Plaintiffs' Compendium of Evidence (Anti-SLAPP Motion of the Dow Jones Defendants and Jeffrey McFarlane) (the "**Compendium**").
[3] "**Callidus**"

Defendants. The Front Page also reported in the "What's News Column" that the Plaintiffs were accused of fraud and referred readers to the fraud article on the front page of the Business & Finance section.[4]

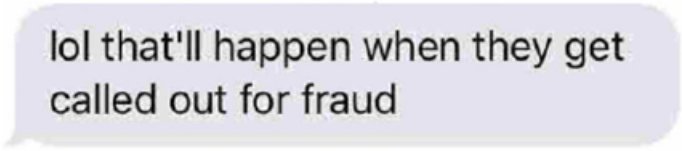
5. A prime source for WSJ Fraud Articles was professional short-seller Nathan Anderson.[5] He takes out short positions in the companies he targets in his whistleblower complaints and then shops the complaints to the media for publication to cause the share price to decrease and make a profit. When Reuters News did not publish Anderson's fraud accusations about the Plaintiffs, he moved on to Rob Copeland, and texted:[6]



6. *The Wall Street Journal* accommodated Anderson which was "good for brand Nate" and "helps keeps the light on"[7] but caused devastating harm to the Plaintiffs, their shareholders, and investors. Copeland gloated over the impact of his "big story" in a text he sent to Anderson shortly after the TSX closed:



Anderson mockingly replied:[8]



[4] Rob Copeland and Jacquie McNish, "Top Buyout Firm Scrutinized on Loans", *The Wall Street Journal* (August 10, 2017) at B1 ("**Print Article**"), at Tab 5 of the WSJ Articles Brief, at Tab 1 of the Compendium.
[5] "**Anderson**"
[6] "**Copeland**"
[7] Copeland-Anderson Text Brief, p. 20, at Tab 2 of the Compendium.
[8] Copeland-Anderson Text Brief, p. 59, at Tab 2 of the Compendium.

7. While the WSJ Fraud Articles may be matters about which the public may be curious, media reports about confidential complaints at the intake/inquiries stage do not relate to a matter of public interest.

8. The Plaintiffs libel action has substantial merit – the words complained of were published; refer to the Plaintiffs; and are defamatory.

9. There are grounds to believe that there are no valid defences. The Defendants have failed to plead truth to any of the meanings pleaded which is fatal to this alleged defence. The elements of the defences of fair comment, qualified privilege and responsible communication are not made out and even if they were, all three of these defences are defeated by the palpable malice of reporters Copeland and Jacquie McNish.[9]

10. Allowing the Plaintiffs to proceed to trial to vindicate their reputations that were seriously harmed by the WSJ Fraud Articles outweighs the public interest in protecting the WSJ Fraud Articles which were a drive by smear.

[9] "**McNish**"

II. FACTS

11. The Website Article was published on *The Wall Street Journal*'s website (www.wsj.com) on August 9, 2017 at 3:32 PM ET. The headline reads: "Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers", followed by a deck: "Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers" (a deck is a sentence or two that summarizes the article).[10] *The Wall Street Journal*'s Website Article was updated at 9:53 PM ET on August 9, 2017.[11]

12. The Front Page of the print edition of *The Wall Street Journal* published on August 10, 2017 contained two items reporting that Callidus and Catalyst were accused of fraud and referred readers to the fraud article on page B1:[12]


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

THE WALL STREET JOURNAL.

[10] Website Article, at Tab 1 of the WSJ Articles Brief, at Tab 1 of the Compendium.
[11] Website Article (9:53 pm version), at Tab 2 of the WSJ Articles Brief, at Tab 1 of the Compendium.
[12] Print Article at A1, at Tabs 3, 4 of the WSJ Articles Brief, at Tab 1 of the Compendium. Red rectangles added for emphasis.

13. The Print Article was published on the Front page of the *Business & Finance* section of the newspaper without the Toronto Police car photo and with a drastically different headline that did not state "Catalyst Accused of Fraud":[13]

BUSINESS & FINANCE

THE WALL STREET JOURNAL. Thursday, August 10, 2017 | B1

S&P 2474.02 ▼ 0.04% S&P FIN ▼ 0.08% S&P IT ▲ 0.03% DJ TRANS ▲ 0.03% WSJ $ IDX ▼ 0.09% LIBOR 3M 1.309 NIKKEI (Midday) 19736.72 ▼ 0.01% See more at WSJMarkets.com

Top Buyout Firm Scrutinized on Loans

Canada looks into complaints Catalyst inflated values and deceived borrowers

By Rob Copeland And Jacquie McNish

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.

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

The inquiries don't necessarily lead to an investigation.

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

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.

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	$186 million
Catalyst II	2008	$635 million
Catalyst III	2011	$1 billion
Catalyst IV	2013	$1 billion
Catalyst V	2015	$1.5 billion

Sources: filings, investor documents THE WALL STREET JOURNAL.

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

"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.

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

14. The Website Article and Print Article were published internationally to over 2.4 million readers.[14]

15. The Plaintiffs' Notice of Libel demanded an apology, retraction and the takedown of the Website Article.[15] To date, the Dow Jones Defendants have not apologized nor retracted their defamatory statements, and the Website Article remains accessible today.

[13] Print Article at B1, at Tab 5 of the WSJ Articles Brief, at Tab 1 of the Compendium.
[14] Chart of undertakings, questions taken under advisement, and refusals given at the cross-examination of Rob Copeland on November 13, 2020 ("**Copeland UT Chart**"), p. 11, no. 37, at Tab 3 of the Compendium.
[15] Letter from Rocco DiPucchio to Joe Weisman dated August 22, 2017 ("**Plaintiffs' Notice of Libel**"), at Tab 1 of the Plaintiff's Pleadings Brief ("**Pleadings Brief**"), p. 7, at Tab 4 of the Compendium.

III. ISSUES

16. The issues in the anti-SLAPP motions brought by the Dow Jones Defendants and Jeffrey McFarlane are:

(1) whether the Dow Jones Defendants and Jeffrey McFarlane have satisfied the Motions Judge that this libel action arises from an expression made by them that relates to a matter of public interest (s. 137.1(3) *Courts of Justice Act*)?

It is submitted that an article about confidential complaints at the intake/inquiries stage that accuse companies of fraud do not relate to a matter of public interest.

(2) whether the Plaintiffs have satisfied the Motions Judge that there are grounds to believe that:

(i) their libel action has substantial merit (s. 137.1(4)(a)(i) *CJA*)?

All three elements of a libel cause of action have been fulfilled – the words complained of were published, refer to the Plaintiffs, and are defamatory;

(ii) the Dow Jones Defendants and Jeffrey McFarlane have no valid defences (s. 137.1(4)(a)(ii) *CJA*)?

There are no valid defences. The Dow Jones Defendants' truth defence fails because they did not plead that any of the meanings (stings) were true. The Defendants have not fulfilled all of the elements of their other defences, and those defences are invalidated by the Defendants' malice;

(iii) the harm likely to be or have been suffered by the Plaintiffs as a result of the Defendants' expression is sufficiently serious that the public interest in permitting the libel action to continue outweighs the public interest in protecting the expression (s. 137.1(4)(b) *CJA*)?

The harm caused by the WSJ Fraud Articles was devastating. The public interest in allowing this libel action to continue outweighs the public interest in protecting a malicious attack on the Plaintiffs' reputations.

IV. LAW AND ARGUMENT

A. ANTI-SLAPP MOTION FRAMEWORK

17. In *Pointes Protection Association* the Supreme Court of Canada held that an anti-SLAPP motion is not a summary trial and the court must bear in mind the stage of proceedings.[16] No examinations for discovery have been conducted in this libel action.

18. 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. Its paradigmatic application is to prevent others from silencing persons who are speaking on matters that have significance beyond themselves.[17]

19. 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.[18]

20. 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. The s. 137.1 analysis is not an adjudication of the merits of the underlying proceeding.[19] This libel action raises many matters that require a deep dive at trial and credibility assessments.

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[16] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at paras 49-51; *Sokoloff v Tru-Path Occupational Service Inc*, 2020 ONCA 730 at para 47.
[17] *Grist v TruGrp Inc*, 2021 ONCA 309 at para 17.
[18] *Bent v Platnick*, 2020 SCC 23 at para 74.
[19] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 52.

21. 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.[20]

B. THE WSJ FRAUD ARTICLES DO NOT RELATE TO A MATTER OF PUBLIC INTEREST (SECTION 137.1(3) *CJA*)

22. 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.[21] 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".[22] Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about.[23]

23. 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.[24]

24. 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*.[25]

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[20] *Subway Franchise Systems of Canada, Inc v Canadian Broadcasting Corporation*, 2021 ONCA 26 at paras 54-55.
[21] *Courts of Justice Act*, RSO 1990, c C43, s 137.1(3).
[22] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 23 at para 27.
[23] *Bent v Platnick*, 2020 SCC 23 at para 30.
[24] *Grist v TruGrp Inc*, 2021 ONCA 309 at para 23.
[25] *Bent v Platnick*, 2020 SCC 23 at para 29; *Sokoloff v Tru-Path Occupational Service Inc*, 2020 ONCA 730 at para 33.

25. The expression in the WSJ Fraud Articles is really about the whistleblower complaints against the Plaintiffs. The OSC Whistleblower Program is a confidential process - whistleblower complaints are not disclosed to the public and are not accessible by the public.[26] *The Wall Street Journal* republished the fraud and other accusations set out in the confidential whistleblower complaints that were only at the intake/inquiries stage. Likewise, the complaints to the Toronto Police were treated confidentially by the police and were also only at the intake/inquiries stage.

26. The over 2.4 million international readers of the WSJ Fraud Articles are not a segment of the community that have a genuine interest in receiving information about complaints that are at only the intake/inquiries stage. The public may be curious about these matters, but they do not relate to a matter of public interest.

C. SUBSTANTIAL MERIT OF THIS LIBEL ACTION (SECTION 137.1(4)(a)(i) *CJA*)

(a) Introduction

27. There are grounds to believe that the Plaintiffs' libel action has substantial merit. 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 favour of the plaintiff.[27]

28. The three elements of a libel action are:

(i) the words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

(ii) the words complained of refer to the plaintiff; and

[26] McNish agreed that the OSC Whistleblower Program was confidential. Transcript of the cross-examination of Jacquie McNish on November 12, 2020 ("**McNish Transcript**"), p. 144, q. 452, at Tab 5 of the Compendium.
[27] *Bent v Platnick*, 2020 SCC 23 at paras 90-92.

(iii) the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.[28]

(b) The Publication Element

29. Copeland and McNish have admitted they published the WSJ Fraud Articles.[29]

(c) The Reference Element

30. The *WSJ* Fraud Articles expressly refer to the Plaintiffs.

(d) The Words Complained Of Are Defamatory

(i) Introduction

31. The words complained of are defamatory. 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.[30]

32. 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.[31] Proof of actual reputational damage is not necessary given that actual harm to reputation is not required to establish defamation.[32]

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[28] *Grant v Torstar Corp*, 2009 SCC 61 at para 28.
[29] Statement of Defence of the Defendants, Dow Jones & Company, Rob Copeland, and Jacquie McNish ("**Statement of Defence**") at paras 15, 24, at Tab 3 of the Pleadings Brief, pp. 47, 49, at Tab 4 of the Compendium.
[30] *Crookes v Newton*, 2011 SCC 47 at para 39; *Botiuk v Toronto Free Press Publication, Ltd*, [1995] 3 SCR 3, 1995 CarswellOnt 1049 at para 62.
[31] Peter Downard, *The Law of Libel in Canada*, 4th ed (Toronto: LexisNexis, 2021), at §3.2.
[32] *Bent v Platnick*, 2020 SCC 23 at para 95.

33. 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.[33]

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.

(ii) Meanings

34. The words complained of and their meanings regarding the Website Article are set out in paragraphs 31 and 34 of the Amended Statement of Claim.[34] The words complained of and their meanings regarding the Print Article are set out in paragraphs 44-45 of the Amended Statement of Claim.[35]

35. 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

[33] *Baglow v Smith*, 2012 ONCA 407 at para 24. Emphasis added.
[34] Plaintiffs' Amended Statement of Claim, October 15, 2019 ("**Statement of Claim**") at paras 31, 34, at Tab 2 of the Pleadings Brief, pp. 18-20, 22-27, at Tab 4 of the Compendium.
[35] Statement of Claim at paras 44-45, at Tab 2 of the Brief of Pleadings, pages 30-39, at Tab 4 of the Compendium.

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.[36]

36. The Court does not analyze the words as though it was carefully considering a written contract.[37]

37. Allegations of unlawful conduct or criminal conduct are very serious and potentially damaging to anyone's reputation.[38] Expressions alleging criminal conduct are extremely damaging to a person's reputation. [39]

38. Allegations of criminal and unlawful conduct are unequivocally conveyed to the reader through the headline, the deck, the Toronto Police car photo, the lead paragraph and the second paragraph of the WSJ Fraud Articles. There is no escaping the impression that the Plaintiffs have engaged in fraudulent activities, engaged in criminal wrongdoing, conduct their businesses fraudulently, and engaged in illegalities. No charges were ever laid.

39. The headline, the deck, the lead paragraph, and the second paragraph, when read in the context of paragraphs 8 and 31 mean that the Plaintiffs violated Ontario securities laws, engaged in deceptive business practices, and conduct their businesses fraudulently. The Ontario Securities Commission never took any enforcement action.

40. Catalyst is falsely accused of deceiving borrowers in the deck and the second paragraph of

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[36] Ramond Brown, *Brown on Defamation*, 2nd ed (Toronto: Thomson Reuters, 2021) at §5.3(1)(a).
[37] *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CarswellOnt 1417 at para 88 (Sup Ct J), aff'd [2001] OJ No 2228, 54 OR (3d) 626 (CA), leave to appeal denied [2001] SCCA No 433.
[38] *Canadian Standards Association v PS Knight Co Ltd*, 2019 ONSC 1730 at para 44.
[39] *Hobbes v Warner*, 2019 BCSC 2196 at para 150.

the WSJ Fraud Articles. The only borrower specifically identified is former Chief Executive of Xchange Technology Group Jeff McFarlane (para 20). Catalyst never deceived Jeffrey McFarlane or XTG about its loans because they never borrowed money from Catalyst. A statement that a company "deceived borrowers" is on its face defamatory and when read in the context of the fraud accusations, also means that Catalyst engaged in deceptive business practices, acted unethically, and wrongfully conducts its business for its own financial gain at the expense of borrowers.

41. Catalyst is falsely accused of artificially inflating the value of its assets in the deck and the second paragraph of the WSJ Fraud Articles. A statement that a company "artificially inflated the value of its assets" is on its face defamatory and when read in the context of the fraud accusations and paragraphs 24-26 (as explained in False Fact #1 below), mean Catalyst engaged in illegal or improper accounting, engaged in fraudulent and criminal activities, wrongfully conducts its business for its own financial gain, and conducts its business fraudulently.

42. The third paragraph of the Website Article reports that the specialized Financial Crimes Unit of the Toronto Police has begun its own inquiries separate from the OSC's inquiries.[40] This sting is published in the context of a headline, a deck, a Toronto Police car photograph, a lead paragraph and a second paragraph that refer to fraud accusations, the deception of borrowers and the artificial inflation of the value of assets. The clear impression conveyed by the third paragraph is that the Plaintiffs are engaged in financial crimes, engaged in criminal conduct, and act illegally and fraudulently.

43. With respect to Catalyst's acquisition of XTG reported in paragraphs 9, 12 and 19-28 of the Website Article, readers are falsely informed that Catalyst overpaid Callidus $34 million ($101

[40] Website Article at para 3, at Tab 1 of the WSJ Articles Brief, p. 1, at Tab 1 of the Compendium.

million minus $66.9 million) for the XTG assets (as explained in False Fact #1 below). This false fact is followed by McFarlane's false statement that there are serious concerns about the accounting around XTG.[41] These defamatory statements are made in the context of the fraud accusations, artificially inflating the value of assets, the deception of borrowers, and the OSC and Toronto Police inquiries (set out in the headline, deck, Toronto Police car photo, and the first three paragraphs of the Website Article). These paragraphs of the Website Article mean that the Plaintiffs illegally or wrongfully overvalued the XTG assets; engage in illegal or wrongful accounting practices; engage in illegal or wrongful lending practices; engaged in illegal or wrongful conduct in dealings with XTG and McFarlane; dealt with the XTG loans illegally or improperly; and caused Callidus to be overpaid for the XTG investment for the financial gain or benefit of Callidus.

D. NO VALID DEFENCES (SECTION 137.1(4)(a)(ii) *CJA*)

(a) Introduction

44. There are grounds to believe that the Defendants have no valid defences. "Grounds to believe" means something more than mere suspicion, but less than proof on a balance of probabilities.[42]

45. 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.[43]

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[41] Website Article at paras 9, 12, 19-28, at Tab 1 of the WSJ Articles Brief, pp. 2-3, at Tab 1 of the Compendium.
[42] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 40.
[43] *Bent v Platnick*, 2020 SCC 23 at para 103.

46. 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.[44]

(b) The Justification or Truth Defence

(i) The Statement of Defence

47. 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.

(ii) The Elements of The Justification Defence

48. The justification defence is only made out by proving the truth of all of the meanings of the words complained of by the Plaintiffs:

> [107] Once a *prima facie* showing of defamation has been made, the words complained of are presumed to be false… To succeed on the defence of justification, "a defendant must adduce evidence showing that 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" … In other words, "[t]he 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" …[45]

49. 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.[46] By repeating the fraud accusations in the whistleblower complaints, the Dow Jones Defendants have themselves accused the Plaintiffs of fraud.

[44] *Subway Franchise Systems of Canada, Inc v Canadian Broadcasting Corporation*, 2021 ONCA 26 at para 56.
[45] *Bent v Platnick*, 2020 SCC 23 at para 107. Emphasis added.
[46] *Montour v Beacon Publishing Inc*, 2019 ONCA 246 at para 14.

50. In *Thompson v Cohodes*, the Plaintiff was the CEO of a publicly traded corporation, Concordia International Inc. The Defendant Mark Cohodes (a short-seller) alleged fraud against Thompson. Justice Kristjanson held:

> [18] To establish the defence of truth, or justification, the defendant must prove the substantial truth of the "sting", or main thrust of the libel complained of: *Cusson v Quan*, 2007 ONCA 771 at para 35, rev'd on other grounds 2009 SCC 62. In this case the words complained of are reasonably interpreted as conveying the defamatory sting that Thompson committed fraud, or participated in fraud, when he was employed at Biovail early in his career …
>
> [27] The sting that one has committed or participated in fraud is an allegation of fact…[47]

Justice Brown followed *Thompson v Cohodes* in *Levant v Day*.[48]

(iii) No Valid Truth Defence

51. 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.[49] On this basis alone, there are grounds to believe that there is no valid basis for the truth defence.

52. In addition, none of the stings of libel are true. The WSJ Fraud Articles are rife with false facts, examples of which are set out in the "False Facts" section below.

53. 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.

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[47] *Thompson v Cohodes*, 2017 ONSC 2590 at paras 18, 27.
[48] *Levant v Day*, 2017 ONSC 5956 at para 36.
[49] Statement of Defence at para 34, at Tab 3 of the Pleadings Brief, pp. 51-54, at Tab 4 of the Compendium.

(c) The False Facts

(i) False Fact #1 – Catalyst Funds Overpaid Callidus for XTG

54. 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.[50]

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.[51]

The amount of the "gross loan receivable" as of March 2016 was C$101.3 million. Jeffrey McFarlane[52] 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.[53]

55. The "carrying value" of an asset for sale is different and separate from a "gross loan receivable".[54] 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.

56. During cross-examination, McNish agreed that in September 2015, Callidus accurately

[50] Website Article at para 24, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium. Emphasis added.
[51] Website Article at para 25, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium. Emphasis added.
[52] "**McFarlane**"
[53] Website Article at para 27, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium. Emphasis added.
[54] Affidavit of James Riley, sworn May 29, 2020 ("**Riley Libel Affidavit**") at paras 160, 174-183, at Tab 6 of the Compendium.

recorded the Xchange investment as an asset for sale at C$66.9 million.[55] 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".[56] This is an egregious false fact – the C$101 million was not the carrying value of XTG as of March 2016.

57. *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 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).

(ii) False Fact #2 – Catalyst Inflated the Value of some of its Assets

58. The WSJ Fraud Articles falsely reported that Catalyst Capital artificially inflated the value of its assets in the deck ("Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers") and in the second paragraph ("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").[57] Readers are falsely informed that Catalyst overpaid Callidus by $34 million to acquire XTG in March 2016 (paras 24 and 25). Paragraph 26 then reports: "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".[58] The statement that Catalyst artificially inflated the value of its assets is false. Jim Riley's evidence regarding Catalyst's accounting treatment of XTG

[55] McNish Transcript, pp. 71-72, qq. 261-265, at Tab 7 of the Compendium.
[56] McNish Transcript, p. 72, q. 268, at Tab 7 of the Compendium.
[57] Website Article at deck and at para 2, at Tab 1 of the WSJ Articles Brief, p. 1, at Tab 1 of the Compendium. Emphasis added.
[58] Website Article at para 26, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium.

and the write down of XTG's value as at December 31, 2016 is uncontroverted.[59]

(iii) False Fact #3 – Catalyst Deceived Borrowers

59. The WSJ Fraud Articles falsely reported that Catalyst deceived borrowers in the deck ("Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers") and in the second paragraph ("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").[60]

60. Catalyst never deceived XTG about the terms of its loans because XTG never borrowed money from Catalyst. McNish agreed that Catalyst never loaned money to XTG (Callidus did), a fact that McNish and Copeland had wrong just hours prior to publication. Copeland sent McNish an email less than 4 hours prior to publication saying:

> 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.[61]

At no time did XTG borrow money from Catalyst. It is unfathomable that just hours before accusing Catalyst and Callidus of fraud to an international readership in excess of 2 million that these two reporters did not know that XTG borrowed from Callidus, rather than Catalyst.

(iv) False Fact #4 – Catalyst Delayed And Underreported Losses

61. Catalyst did not delay or underreport potential losses in XTG as falsely stated by McFarlane in paragraph 27 of the Website Article. Jim Riley's evidence is uncontroverted that the

[59] Riley Libel Affidavit at para 186, at Tab 8 of the Compendium.
[60] Website Article at deck and at para 2, at Tab 1 of the WSJ Articles Brief, p. 1, at Tab 1 of the Compendium. Emphasis added.
[61] Exhibit 10 to Riley Libel Affidavit, at Tab 9 of the Compendium.

restructuring of XTG's business during the Callidus Receivership took longer to achieve than originally anticipated to avoid adverse U.S. tax consequences for Callidus, namely, the possibility of a "tax inversion".[62]

62. Catalyst closed the purchase of XTG from Callidus the end of March 2016. Jim Riley's evidence is uncontroverted that the Catalyst Funds initially carried XTG at Callidus' carrying value in the Consolidated Financial Statements for the Year Ended December 31, 2015 and 2014.[63] 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. KPMG LLP reviewed Catalyst's year-end financial statements and KPMG's audit opinion was unqualified. There is no truth to McFarlane's statement that there were serious concerns about the integrity of Callidus' accounting around XTG, nor that there was a delay or underreporting of potential losses in XTG. McFarlane testified 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.[64]

(v) False Fact #5 – Catalyst Seized XTG

63. The WSJ Fraud Articles falsely report that Catalyst seized XTG. Paragraphs 9, 19-21 report: (1) "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, … Some of the complaints involve a series of loans to a small technology distributor [XTG]", and

[62] Riley Libel Affidavit at paras 140-141, at Tab 10 of the Compendium.
[63] Riley Libel Affidavit at para 186, at Tab 8 of the Compendium.
[64] Transcript of the cross-examination of Jeffrey McFarlane on November 24, 2020 ("**McFarlane Transcript**"), pp. 99-100, qq. 354-360, at Tab 11 of the Compendium.

(2) that "One of those borrowers is Jeff McFarlane... the former chief executive of computer distributor Xchange Technology group, known as XTG."[65]

64. 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: (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."[66] Justice Morawetz's Vesting Order approved the sale of XTG to a subsidiary of Callidus on the basis of its Stalking Horse Offer.[67] Credit bids and stalking horse offers are regularly approved by the Courts and are not seizures.

(vi) False Fact #6 – The PNC Bank Loan

65. 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."[68] 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).[69]

[65] Website Article at paras 9, 19-21, at Tab 1 of the WSJ Articles Brief, p. 2, at Tab 1 of the Compendium. Emphasis added.
[66] Exhibit 67 to Riley Libel Affidavit, at Tab 12 of the Compendium; Exhibit 68 to Riley Libel Affidavit, paras 10, 17, at Tab 6 of the Compendium.
[67] Riley Libel Affidavit at para 139, at Tab 10 of the Compendium; Exhibit 73 to Riley Libel Affidavit, at Tab 13 of the Compendium.
[68] Website Article at para 21, at Tab 1 of the WSJ Articles Brief, p. 2, at Tab 1 of the Compendium.
[69] McNish Transcript, pp. 99-101, qq. 336-341, at Tab 14 of the Compendium; Riley Libel Affidavit at paras 110-111, at Tab 14 of the Compendium.

(vii) False Fact #7 – Company Officials Wouldn't Comment For The Article

66. The Website Article falsely reports that "Company officials wouldn't comment for this article".[70] Readers were not informed that the day before publication, the Plaintiffs met with Copeland and McNish to educate them about XTG and the accounting. A true statement would have been "company officials declined to provide comment for publication".

67. On the morning of the day of publication, Dennis Berman (the head of the Money and Markets section of *The Wall Street Journal*) asked:

> 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.[71]

This "helpful" information never made its way into the WSJ Fraud Articles. Instead, the Plaintiffs were intentionally depicted as evasive, having something to hide, and uncooperative.

(d) Fair Comment Defence

(i) The Statement of Defence

68. The Dow Jones defendants plead the fair comment defence at paragraph 35 of the Statement of Defence:

> [35] 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.[72]

[70] Website Article at para 7, at Tab 1 of the WSJ Articles Brief, p. 1, at Tab 1 of the Compendium.
[71] Email from Dennis Berman to Geoff Rogow and others, August 9, 2017 at 9:51 am (DOW000048-0001), at Tab 15 of the Compendium. Emphasis added.
[72] Statement of Defence at para 35, at Tab 3 of the Pleadings Brief, p. 55, at Tab 15 of the Compendium.

(ii) The Elements of the Fair Comment Defence

69. The elements of the fair comment defence were set down by the Supreme Court of Canada in *WIC Radio Ltd v Simpson* as follows:

(a) the comment must be on a matter of public interest;

(b) the comment must be based on fact;

(c) the comment, though it can include inference of fact, must be recognizable as comment;

(d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?

(e) 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.[73]

70. 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.[74]

71. "Comment" includes "deduction, inference, conclusion, criticism, judgement, remark or observation which is generally incapable of proof".[75] 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.[76]

(iii) Omissions

72. 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

[73] *WIC Radio Ltd v Simpson*, 2008 SCC 40 at paras 1, 52.
[74] *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 31; *Canadian Standards Association v PS Knight Co Ltd*, 2019 ONSC 1730 at para 51.
[75] *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 26.
[76] *Thompson v Cohodes*, 2017 ONSC 2590 at paras 27-28.

commentary.[77] As set out below in the "Omissions" section, the WSJ Fraud Articles maliciously omit numerous facts such as the fact that KPMG LLP audited the Plaintiffs' financial statements (i.e. there was no issue with the integrity of the accounting around XTG).

(iv) No Valid Fair Comment Defence

73. 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.

74. In addition, there are grounds to believe there is no valid defence of fair comment because: (1) the words complained of are fact not comment, (2) there is no true factual foundation underlying any alleged comment that is stated in the WSJ Fraud Articles, and (3) the defence is defeated by malice (which is set out in detail in the "Malice" section below).

(e) Responsible Communication Defence

(i) The Statement of Defence

75. The Dow Jones Defendants plead the responsible communication defence at paragraph 38 of the Statement of Defence:

> [38] 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,

[77] *Creative Salmon Company Ltd v Staniford*, 2009 BCCA 61 at para 61.

components of which were promptly incorporated into both the Online Article and the Print Article.[78]

(ii) The Elements Of The Responsible Communications Defence

76. The elements of the public interest responsible communication defence were set down by the Supreme Court of Canada in *Grant v Torstar Corp*, 2009 SCC 61 as follows:

> [98] This brings us to the substance of the test for responsible communication. In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.[79]

77. 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.[80]

78. "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".[81] The Dow Jones Defendants did not conduct a diligent investigation.

(iii) The Publication of The WSJ Fraud Articles Was Irresponsible

79. A review of the factors to be considered in determining whether a publication was

[78] Statement of Defence at para 38, at Tab 3 of Pleadings Brief, p. 56 at Tab 4 of the Compendium.
[79] *Grant v Torstar Corp*, 2009 SCC 61 at para 98.
[80] *Grant v Torstar Corp*, 2009 SCC 61 at paras 111-122.
[81] *Subway Franchise Systems of Canada, Inc v Canadian Broadcasting Corporation*, 2021 ONCA 26 at para 57.

responsible lead to one conclusion – the Dow Jones Defendants were irresponsible.

1. The Seriousness of the Allegation

80. 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.[82]

81. Fraud is one of the most egregious securities regulatory violations.[83] In *Thompson v Cohodes,* Justice Kristjanson held that an allegation that a plaintiff has committed fraud is a very serious charge.[84]

2. The Public Importance Of The Matter

82. Inherent in the logic of proportionality is the degree of the public importance of the communication's subject matter.[85] There was no public importance in a story about unproven allegations in confidential whistleblower complaints by a professional whistleblower and by disgruntled 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.

[82] *Grant v Torstar Corp*, 2009 SCC 61 at para 111.
[83] *Re Lehman Cohort Global Group Inc*, 2010 ONSEC 15 at para 86.
[84] *Thompson v Cohodes*, 2017 ONSC 2590 at para 33.
[85] *Grant v Torstar Corp*, 2009 SCC 61 at para 112.

3. The Urgency Of The Matter

83. The question is whether the public's need to know required the Defendants to publish when they did.[86] The only urgency that the Dow Jones Defendants faced was competitive pressure from Reuters News (which is detailed in the "Malice" section below). A journalist's desire to "scoop" the competition and rush to print is irresponsible and malicious.

4. Status and Reliability of the Source

84. 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."[87]

85. McNish was told by a confidential source that Kevin Baumann is "crazier than a soup sandwich".[88] McNish passed this information onto Copeland by describing Kevin Baumann as "a complete nutter".[89] But that did not deter them from reporting in the lead paragraph that there were at least four individuals who filed whistleblower complaints, one of whom was Kevin Baumann.[90]

86. Two primary sources for the WSJ Fraud Articles were biased and agenda driven - McFarlane (the disgruntled former CEO of XTG who was "at war" with the Plaintiffs) and Anderson (who profited from his short positions in Callidus stock).

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

> Btw no way we could have printed this story if you hadn't filed your claim too
> Our side was so concerned about being used by aggrieved borrowers
> I described you as pure as snow

[86] *Grant v Torstar Corp*, 2009 SCC 61 at para 113.
[87] *Grant v Torstar Corp*, 2009 SCC 61 at para 114.
[88] Transcript of telephone call between McNish and a confidential source, July 20, 2017 (DOW000861-0001), p. 65 of Appendix A to the Catalyst Amended Order of McEwen J (April 7, 2021) ("**Catalyst Amended Order**"), at Tab 16 of the Compendium; McNish Transcript, pp. 221-224, qq. 670-681, at Tab 16 of the Compendium.
[89] Transcript of telephone call between McNish and Copeland, July 20, 2017 (DOW000861-0001), p. 95 of Appendix A to the Catalyst Amended Order, at Tab 17 of the Compendium.
[90] Website Article at para 1, at Tab 1 of WSJ Articles Brief, p. 1, at Tab 1 of the Compendium; Print Article at para 1, at Tab 5 of WSJ Articles Brief, p. 12, at Tab 1 of the Compendium.

> Canadian rocky snow
> (Described you to our editors).[91]

Although "Copeland's side" was concerned about being used by aggrieved borrowers, they nevertheless published unproven fraud accusations by three aggrieved borrowers / whistleblowers (McFarlane, Darryl Levitt, and Kevin Baumann).

88. Anderson was the fourth whistleblower and definitely not pure as Canadian Rocky Mountain snow. Anderson's interest was a quick hit on his short positions in Callidus stock. Publishing the fraud accusations based on Anderson's unproven whistleblower complaint was reckless in light of the fact that 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"; or "allegedly").

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

89. The Plaintiffs side of the story was not accurately reported.

(i) The Plaintiffs' "Compelling Explanation"

90. 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 [*sic*] is actually so pissed".[92] 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

[91] Copeland-Anderson Text Brief, p. 61, at Tab 2 of the Compendium. Emphasis added.
[92] Copeland-Anderson Text Brief, p. 54, at Tab 2 of the Compendium.

> want us to … they didn't want to go on the record … It would help explain all the questions around XTG[93]

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.[94]

91. Although the Plaintiffs "very compelling explanation" about XTG's accounting made a lot of sense to McNish, the Dow Jones Defendants nevertheless maliciously published McFarlane saying that he had "serious concerns about the integrity of Callidus's accounting around XTG".[95]

(ii) Callidus' Statement Regarding The Allegations In The WSJ

92. Callidus released a full page statement regarding the allegations in *The Wall Street Journal*.[96] 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.[97] Copeland considered this Callidus Statement to be "unbelievably lame"[98] and omitted to report:

> (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."[99]

> (2) "…The Company knows of no legitimate basis for any whistleblower complaint. 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".[100]

[93] McNish Transcript, pp. 78-79, 81, qq. 285, 289, at Tab 18 of the Compendium. Emphasis added.
[94] McNish Transcript, p. 82, q. 293, at Tab 18 of the Compendium. Emphasis added.
[95] Website Article at para 27, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium.
[96] Exhibit 40 to Riley Libel Affidavit, p. 1, at Tab 19 of the Compendium.
[97] Website Article (9:53 pm version) at paras 8-9, at Tab 2 of the WSJ Articles Brief, p. 5, at Tab 1 of the Compendium; Print Article at paras 8-9, at Tab 5 of the WSJ Articles Brief, p. 12, at Tab 1 of the Compendium.
[98] Copeland-Anderson Text Brief, p. 36, at Tab 2 of the Compendium
[99] Exhibit 40 to Riley Libel Affidavit, p. 1, at Tab 19 of the Compendium. Emphasis added.
[100] Exhibit 40 to Riley Libel Affidavit, p. 1, at Tab 19 of the Compendium. Emphasis added.

(3) "… [The guarantors] are filing deliberately misleading whistleblower reports with the OSC 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."[101]

6. Whether Inclusion Of The Defamatory Statement Was Justifiable

93. The need to include a particular statement may be taken into account in deciding whether the communicator acted responsibly.[102] There was no scope for the inclusion of unproven fraud and other accusations made in OSC whistleblower complaints at the intake/inquiries stage.

94. Nor was there any scope to be given to the inclusion of a sentence that says that the Financial Crimes Unit of the Toronto Police Service has begun its own inquiries, accompanied by a photograph of a Toronto Police car. 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...."[103] 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.[104]

[101] Exhibit 40 to Riley Libel Affidavit, p. 1, at Tab 19 of the Compendium. Emphasis added.
[102] *Grant v Torstar Corp*, 2009 SCC 61 at para 118.
[103] Transcript of telephone call between McNish and a confidential source, July 20, 2017 (DOW000861-0001), p. 58 of Appendix A to the Catalyst Amended Order, at Tab 20 of the Compendium.
[104] Transcript of the cross-examination of Rob Copeland on November 13, 2020 ("**Copeland Transcript**"), pp. 113-114, 222-225, Questions 250, 252, 253, 531-539 at Tabs 21, 27 of the Compendium.

7. Reportage

95. 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.

96. Reportage is an exception to the repetition rule:

> [120] However, 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. 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...
>
> [121] …As always, the ultimate question is whether the publication was responsible in the circumstances. [105]

Reportage is not a stand alone defence – the presence of reportage is merely one of the responsibility factors.[106]

97. The Defendants fail to meet any of the four elements to establish 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[107]); (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.

[105] *Grant v Torstar Corp*, 2009 SCC 61 at para 120.
[106] *Wilson v Canwest Publishing Inc*, 2018 BCCA 441 at paras 11, 21.
[107] Email from McNish to Copeland, July 31, 2017 at 1:55 pm (DOW000209-0001), at Tab 22 of the Compendium.

8. Other Relevant Considerations[108]

(i) Numerous False Facts

The number of false facts published in the WSJ Fraud Articles that are discussed above demonstrates not only insufficient diligence, but gross negligence.

(ii) Failure To Obtain Copies Of The "At Least" Four Whistleblower Complaints

98. The headline of the Website Fraud Article states that Catalyst was accused of fraud by whistleblowers. The lead paragraph reports that there are "at least" four whistleblower complaints. The Website Article referred to whistleblower complaints over ten times. Shockingly, Copeland and McNish admitted they did not have copies of all of those whistleblower complaints prior to publication.

99. 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.[109]

100. 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.[110]

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

[108] *Grant v Torstar Corp*, 2009 SCC 61 at paras 122-125.
[109] McNish Transcript, p. 134, q. 420, at Tab 23 of the Compendium. Emphasis added.
[110] Copeland Transcript, pp. 113-114, qq. 248, 250, 251, at Tab 3 of the Compendium. Emphasis added.

(iv) No Valid Responsible Communication Defence

101. 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.

(f) Qualified Privilege Defence

(i) The Statement of Defence

102. The Dow Jones Defendants have pleaded the qualified privilege defence at paragraph 37 of the Statement of Defence:

> 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.[111]

(ii) The Elements Of The Qualified Privilege Defence

103. 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.[112]

104. The qualified privilege defence was rejected in *Bent v Platnick:*

> [124] A question arises as to whether privilege even attaches to the occasion upon which Ms. Bent's communication on the Listserv was made. Indeed, "the threshold for privilege remains high" ... Privilege is "grounded" not in "free expression values but in the social utility of protecting particular communicative occasions from civil liability" …

[111] Statement of Defence at para 37, at Tab 3 of the Pleadings Brief, pp. 55-56, at Tab 4 of the Compendium.
[112] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CarswellOnt 396 at para 143.

> [138] … my colleague chooses to accept Ms. Bent's evidence over Dr. Platnick's at this early stage. With respect, this is not what is called for on a s. 137.1 motion …[113]

105. Qualified privilege protects only communications that are reasonably appropriate to the discharge of the duty said to have created the occasion of privilege.[114] 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*: "It remains uncertain when, if ever, a media outlet can avail itself of the defence of qualified privilege".[115] The defence is "rarely available for widely circulated publications".[116]

(iii) No Valid Defence of Qualified Privilege

106. 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.[117] On this basis alone, there are grounds to believe there is no valid qualified privilege defence.

107. A precise characterization of the occasion is essential.[118] 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.

108. The Dow Jones Defendants did not have a duty – legal, social or moral – to publish the WSJ Fraud Articles. In addition, the over 2.4 million readers to whom the WSJ Fraud Articles

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[113] *Bent v Platnick*, 2020 SCC 23 at paras 136, 138. Emphasis added.
[114] *Botiuk v Toronto Free Press Publication, Ltd*, [1995] 3 SCR 3, 1995 CarswellOnt 1049 at paras 78-80; *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CarswellOnt 396 at para 144-147.
[115] *Grant v Torstar Corp*, 2009 SCC 61 at para 37. Emphasis added.
[116] *Lascaris v B'Nai Brith Canada*, 2019 ONCA 163 at para 36.
[117] *Canadian Standards Association v PS Knight Co Ltd*, 2019 ONSC 1730 at para 58.
[118] *Bent v Platnick*, 2020 SCC 23 at para 122.

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.

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

109. 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*.[119]

110. 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 …[120]

111. The TPS and the OSC investigations are not "proceedings". Nor are TPS and OSC investigations open to the public. This statutory defence is also defeated by malice which is palpable in this case. There are grounds to believe that there is no valid defence.

E. MALICE

(a) Introduction

112. The malicious conduct of the Defendants toward the Plaintiffs is palpable in this case. Malice defeats the fair comment and qualified privilege defences, and invalidates the responsible communication defence because by definition, a journalist who acts maliciously, is irresponsible.

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[119] Statement of Defence at para 40, at Tab 3 of the Pleadings Brief, p. 56, at Tab 4 of the Compendium.
[120] *Libel and Slander Act*, RSO 1990, c L12, s 3(1). Emphasis added.

113. In *Leenen v Canadian Broadcasting Corp*,[121] 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);
>
> (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).

114. Set out below are only some of the examples of the Defendants' malicious conduct known at this stage of the proceeding.

(b) Sensationalism – The Toronto Police Car Photograph

115. Sensationalism superseded truth and accuracy in the WSJ Fraud Articles. The Website Article (which is still accessible today) prominently featured a photograph of a Toronto Police Service car parked in front of the Metropolitan Toronto Police Headquarters building immediately

[121] *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CarswellOnt 1417 at paras 138-141 (Sup Ct J).

below the headline "Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers".

116. Copeland agreed that the Dow Jones Defendants could have taken a photograph of the signs outside the Callidus or Catalyst offices (which is the photograph Reuters News published.)[122] Instead, they gave prominence to a Toronto Police car photograph:

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

117. Jim Riley's uncontroverted evidence is that "at no time did a Toronto police officer contact anybody at Catalyst or Callidus about the fraud accusations made by the whistleblowers or anybody else."[123] No charges were laid.

118. Of the 32 paragraphs of the Website Article, only one sentence refers to the Toronto Police.[124] 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? The answer is obvious – to heighten the meaning the WSJ Fraud Articles intended to convey which

[122] Copeland Transcript, p. 148, q. 353, at Tab 24 of the Compendium; Lawrence Delevingne, John Tilak, "Special Report: Private equity star's picks shine, until cash-out time," *Reuters* (March 23, 2018), pp. 1, 6, at Tab 24 of the Compendium.
[123] Riley Libel Affidavit at para 269, at Tab 25 of the Compendium; McNish agreed that no charges were ever laid against the Plaintiffs.
[124] Website Article at para 3, at Tab 1 of the WSJ Articles Brief, p. 1, at Tab 1 of the Compendium.

was that the Plaintiffs were engaged in fraudulent and criminal activities, illegalities, and wrongdoing. The inclusion of the Toronto Police car photograph was a "kill shot" aimed at the Plaintiffs' reputations – it worked.

(c) Failure to Interview The Financial Crimes Unit's Police Officers

119. McNish told a confidential source:

> And we have accumulated a lot of information, 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.[125]

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[126]). Copeland and McNish knew this fact and never interviewed them. The failure to make these inquiries is unconscionable.

120. 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).[127] The failure to make inquiries of these prior sources was reckless.

(d) Sensationalism - The "Exclusive" deserves "Good Play"

121. 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."[128] The "exclusive" fraud

[125] Transcript of telephone call between McNish and a confidential source, July 20, 2017 (DOW000861-0001), p. 58 of Appendix A to the Catalyst Amended Order, at Tab 20 of the Compendium.
[126] Affidavit of Rob Copeland, affirmed August 17, 2020 at para 18, at Tab 26 of the Compendium.
[127] Copeland Transcript, pp. 222-225, qq. 531-540, at Tab 27 of the Compendium.
[128] Email from Russell Adams to Copeland and others, August 9, 2017 at 3:33 pm (DOW000015-0001), at Tab 28 of the Compendium.

article was definitely given "good play" – it was disseminated to over 2.4 million readers internationally through multiple *Wall Street Journal* platforms.

(e) Bias and Spite – The "Great WSJ Scoop"

122. Shortly after the Website Article was published, reporters and their editors sent out Tweets that promoted and linked their "Great WSJ Scoop". All of their Tweets included the photograph of the Toronto Police car.[129]

123. *The Wall Street Journal*'s Canadian Bureau Chief Sara Muñoz emailed McNish:

> Congrats! Heard anything from them?[130]

McNish replied:

> [T]hey are complaining that we also wrote about Catalyst when it was there [*sic*] impression we were only writing about Callidus. Stock is down 23%. Story is currently most read on website according to Parsley nerd rob copeland.[131]

Shortly thereafter, Muñoz sent out a Tweet:

> Great WSJ Scoop: Canadian Private-Equity Giant Catalyst Accused of Fraud @realrobcopeland @jacquiemcnish[132]

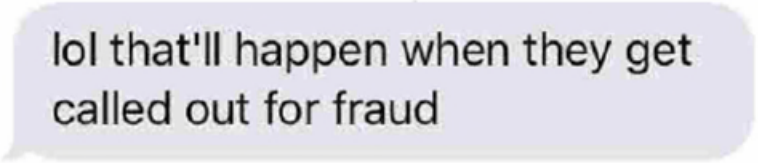
124. Copeland could not contain himself – he sent out three Tweets about his "Exclusive".[133] Less than 10 minutes after the Website Article was published, Copeland Tweeted: "'Goldman Sachs of Canada' is accused of fraud. Exclusive w/ @jacquiemcnish".[134] At 4:37 PM Copeland Tweeted "Shares fall 21% for Callidus Capital, majority owned by PE giant Catalyst Capital, after @WSJ reports alleged fraud".[135]

[129] Exhibits 136, 138-142 to Riley Libel Affidavit, at Tab 29 of the Compendium.
[130] Exhibit 137 to Riley Libel Affidavit, at Tab 29 of the Compendium.
[131] Exhibit 137 to Riley Libel Affidavit, at Tab 29 of the Compendium. Emphasis added.
[132] Exhibit 138 to Riley Libel Affidavit, at Tab 29 of the Compendium.
[133] Exhibits 140-142 to Riley Libel Affidavit, at Tab 29 of the Compendium.
[134] Exhibit 140 to Riley Libel Affidavit, at Tab 29 of the Compendium.
[135] Exhibit 141 to Riley Libel Affidavit, at Tab 29 of the Compendium.

(f) Bias and Spite – Callidus' Shares Tankinggggg

125. Minutes after the Toronto Stock Exchange closed trading on the day of publication, Copeland texted professional short-seller Nathan Anderson: [136]

Anderson replied: [137]



126. Copeland was so elated that he caused Callidus' shares to tank that he emailed his editors proposing to update the story and moving the line "the stock dropped 19% after the story was pubbed" more prominently in the story.[138]

(g) Bias and Spite Towards Newton Glassman

127. Copeland's spite against Newton Glassman was unbridled. Copeland depicted Newton Glassman to be a "skeeve" (an immoral or repulsive person).[139]

128. Copeland considered charitable donations made by Newton Glassman "sleazy".[140]

129. Copeland texted Anderson the image below saying: "Love a good burning trash can":[141]

[136] Copeland-Anderson Text Brief, p. 59, at Tab 2 of the Compendium.
[137] Copeland-Anderson Text Brief, p. 59, at Tab 2 of the Compendium.
[138] Exhibit 24 to Riley Libel Affidavit, at Tab 30 of the Compendium.
[139] Exhibit 191 to Riley Libel Affidavit, at Tab 31 of the Compendium; Exhibit 130 to Riley Libel Affidavit, at Tab 31 of the Compendium.
[140] Transcript of a telephone call between Copeland and McNish (DOW000864-0001) at p. 117 of Appendix A to the Catalyst Amended Order, at Tab 32 of the Compendium.
[141] Copeland-Anderson Text Brief, p. 21, at Tab 2 of the Compendium.

130. In a phone conversation with McNish, Copeland made the following spiteful and biased comments about Newton Glassman:

> (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."[142]
>
> (2) "And the first story is how do we communicate really succinctly just how hated he [Glassman] is?"[143]

131. McNish's notebook includes personal information entries about Newton Glassman which were irrelevant to the whistleblower complaints such as: new wife;[144] divorce case;[145] custody;[146] never passed bar exam;[147] cottage property.[148]

132. McNish has met Newton Glassman once.[149] 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 that it was going to make her "barf"; "This is so bad"; and "Oh my God" (5 times).[150]

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[142] Transcript of telephone call between McNish and Copeland, July 20, 2017 (DOW000861-0001), p. 104 of Appendix A to the Catalyst Amended Order, at Tab 32 of the Compendium.
[143] Transcript of telephone call between McNish and Copeland, July 20, 2017 (DOW000861-0001), p. 106 of Appendix A to the Catalyst Amended Order, at Tab 32 of the Compendium.
[144] DOW001020-0001 at page 53, at Tab 33 of the Compendium.
[145] DOW001020-0001 at page 53, at Tab 33 of the Compendium.
[146] DOW001020-0001 at page 59, at Tab 33 of the Compendium.
[147] DOW001020-0001 at page 49, at Tab 33 of the Compendium.
[148] DOW001020-0001 at page 48, at Tab 33 of the Compendium.
[149] McNish Transcript, p. 227, q. 688, at Tab 34 of the Compendium.
[150] Transcript of telephone call between McNish and Copeland, July 20, 2017 (DOW000861-0001), p. 107 of Appendix A to the Catalyst Amended Order, at Tab 32 of the Compendium.

(h) Reliance on a Biased Source – Professional Short-Seller Nathan Anderson

133. When Anderson gave up shopping his whistleblower complaint to Reuters News, he texted Copeland:

> "This one is our OSC and SEC actual submissions… I'm not playing! They appear to be wussing out so it's yours".[151]

Text messages exchanged between Copeland and Anderson thereafter drip of malice. Some examples are set out below.

(1) Copeland Tells His Editors that Anderson Is "Pure as Canadian Rocky Snow"

134. Anderson:

> You da man. Honestly we've both progressed pretty remarkably in step since we first met… I actually know the next one we crack and it will be epic.[152]

> Copeland: Btw no way we could have printed this story if you hadn't filed your claim too…Our side was so concerned about being used by aggrieved borrowers… I described you as pure as snow… Canadian rocky snow.[153]

Anderson was definitely not pure as "Canadian rocky snow" – he held short positions in Callidus stock that he closed out just before the TSX closed on the day of publication.

(2) Another Big Story

135. Anderson: Ah that would be nice but I think Catalyst is the largest end of this road

> Copeland: I'll get another big story out of[154]

(3) Copeland Tipped Anderson About the Publication Date – "Don't Tell the Conspiracy of Short-Sellers"

136. Copeland:

> Story should be out Tuesday... Don't tell the conspiracy of short sellers!
> Anderson: Lol knock on wood… Cohodes will be pleased > :)

[151] Copeland-Anderson Text Brief, p. 2, at Tab 2 of the Compendium.
[152] Copeland-Anderson Text Brief, p. 60, at Tab 2 of the Compendium. Emphasis added.
[153] Copeland-Anderson Text Brief, p. 61, at Tab 2 of the Compendium.
[154] Copeland-Anderson Text Brief, p. 62, at Tab 2 of the Compendium. The remainder of this text was not produced.

> Copeland: When this is read aloud in court please your honor know that was sarcasm
> Anderson: yes, it was thankfully... Also I'm clearing this whole chat log[155]

Copeland's text was not sarcasm, it was pure malice - he was mocking the Plaintiffs. Although the fraud article was not published on the "Tuesday", Copeland thought it was going to be published on "Tuesday", and provided a professional short-seller a tip about when a *Wall Street Journal* fraud article was going to be published about a public company in which he knew Anderson held short positions. Although Anderson anticipated he would be sued, he did clear his chat log and did not produce any of his text messages with Copeland.

137. Another text message in which Copeland tipped Anderson about publication was sent to Anderson 12 minutes before the fraud article was published on *The Wall Street Journal*'s website: "I never had to lift harder to get a story out… Honestly"[156]

138. Copeland also tipped Anderson about the Print Article:

> Anderson: You know where it will run in the print edition?
> Copeland: Graphic of stock price is on page one… Story is on[157]

139. Prior to publication, Copeland knew that Anderson held short positions in Callidus' shares. Copeland's tipping violated New Corp's *Insider Trader and Confidentiality Policy*:

> 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 …[158]

Copeland's tipping also violated the *Dow Jones Code of Conduct* which prohibits the use of forthcoming news to assist a third party (i.e. Anderson) in buying or selling securities.[159]

[155] Copeland-Anderson Text Brief, p. 32, at Tab 2 of the Compendium. Emphasis added.
[156] Copeland-Anderson Text Brief, p. 58, at Tab 2 of the Compendium.
[157] Copeland-Anderson Text Brief, p. 60, at Tab 2 of the Compendium. The remainder of this text was not produced.
[158] Exhibit 3 to Riley Libel Affidavit, p. 3, s. 2.A, at Tab 35 of the Compendium.
[159] Ex 4 to Riley Libel Affidavit, p. 14, at Tab 36 of the Compendium.

(4) Herr Shithead

140. Copeland texted Anderson saying he would trade the whistleblower reports "for 5M Canadian… Apiece... We can split it."

> Anderson: Net of however much it takes to defend against herr shithead's [Newton Glassman] inevitable frivolous lawsuit."
>
> Copeland: My lawyer got his degree approx last week as an Eagle Scout it appears won't cost me much".[160]

(i) Plaintiffs Were Denied an Opportunity to Review The Whistleblower Complaints To Defend Themselves

141. 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.[161] 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".[162]

(j) Plaintiffs Were Denied an Opportunity to Defend Themselves From McFarlane's Fraud Accusations

142. 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 nor the specific fraud accusations McFarlane made in his whistleblower complaint.[163] It was malicious to not provide the Plaintiffs an

[160] Copeland-Anderson Text Brief, p.30, at Tab 2 of the Compendium.
[161] Exhibit 176 of Riley Libel Affidavit, p. 3, at Tab 37 of the Compendium; Exhibit 178 of Riley Libel Affidavit, p. 2, at Tab 37 of the Compendium; Exhibit 180 of Riley Libel Affidavit, p. 4, at Tab 37 of the Compendium.
[162] Website Article at paras 1, 2, 8, 9, 12, 15, 26, at Tab 1 of the WSJ Articles Brief, pp. 1-3, at Tab 1 of the Compendium; Print Article at paras 1, 2, 10, 11, 14, at Tab 5 of the WSJ Articles Brief, pp. 12-13, at Tab 1 of the Compendium.
[163] McNish Transcript, pp. 90, 92, qq. 317, 321, at Tab 38 of the Compendium.

opportunity to defend McFarlane's statement that attacked the integrity of the accounting around XTG.

143. 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."[164]

(k) Competitive Pressure By Reuters News

144. 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.[165]

145. In email sent on July 25, 2017, Copeland tells his editors:

> 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[166]

146. On the morning of the publication of the Website Article, Copeland sent an email to an editor informing him that Reuters "were close":

> Subject: *Reuters* called a v good source on Catalyst for first time in a few weeks
>
> Asked v specific clarifying questions, <u>said they were close</u>[167]

It was no coincidence that the fraud article was published on *The Wall Street Journal*'s website later that afternoon to scoop the competition (Reuters News).

[164] McNish Transcript, pp. 87-88, qq. 309-310, at Tab 39 of the Compendium.
[165] Transcript of telephone call between McNish and Copeland, July 19, 2017 (DOW000864-0001), p. 114 of Appendix A to the Catalyst Amended Order, at Tab 40 of the Compendium.
[166] Email from Rob Copeland to Sara Muñoz and others, July 25, 2017 at 11:44 am (DOW000078-0001), at Tab 41 of the Compendium.
[167] Exhibit 210 to Riley Libel Affidavit, at Tab 42 of the Compendium. Emphasis added.

(l) No Apology or Retraction

147. 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.

(m) Republication Of The August 9, 2017 Article

148. The conduct of the defendants before and after the time of publication may be taken into account in assessing general damages.[168] On August 11, 2017 Copeland repeated the fraud accusations in an article headlined "Canadian Lender Callidus, Accused of Fraud By Whistleblowers, Posts Loss".[169]

149. 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 Jacquie McNish and published on *The Wall Street Journal*'s website on March 31, 2021.[170]

F. OMISSIONS

150. The omission of significant facts contrary to the story's thesis is evidence of malice[171] and can impact the availability of the fair comment defence. Examples are set out below.

(a) Omission – KPMG's Unqualified Audit Opinions

151. 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

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[168] *Thompson v Cohodes*, 2017 ONSC 2590 at para 36.
[169] Exhibit 230 to Riley Libel Affidavit, at Tab 43 of the Compendium.
[170] Jacquie McNish, "Black Cube Was Paid "Large Amount of Money" to Improperly Discredit Judge, Court Rules," The Wall Street Journal (March 31, 2021), online: https://www.wsj.com/articles/black-cube-was-paid-large-amount-of-money-to-improperly-discredit-judge-court-rules-11617210208, at Tab 44 of the Compendium.
[171] *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CarswellOnt 1417 at paras 113, 150-162.

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.[172]

152. When asked why that fact was omitted from the Article, McNish answered incredibly: "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."[173]

(b) Omission – Jeff McFarlane And XTG

153. Copeland's notes record that McFarlane "went to war" with the Plaintiffs but this fact was omitted.[174] The Article also omitted to inform readers that McFarlane was shopping his whistleblower complaint to the media such as Reuters News and *The Wall Street Journal*.

154. 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, and issued the Vesting Order regarding XTG.

155. Although readers are told "McFarlane was the former chief executive" of XTG, they are not informed that Justice Perell found that "the XTG Group, then under management of a court appointed Receiver, dismissed McFarlane as an employee".[175]

156. 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.[176]

Yet, the Article omitted to inform readers that McFarlane was obtaining assistance with his

[172] McNish Transcript, p. 72, q. 266, at Tab 45 of the Compendium.
[173] McNish Transcript, p. 93, qq. 324-325, at Tab 46 of the Compendium
[174] Exhibit 125 to Riley Libel Affidavit, p. 4, at Tab 47 of the Compendium.
[175] Website Article at para 21, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium; *2393134 Ontario Inc v McFarlane*, 2015 ONSC 7307 at para 6.
[176] Transcript of telephone call between McNish and Copeland, July 19, 2017 (DOW000864-0001), p. 117 of Appendix A to the Catalyst Amended Order, at Tab 32 of the Compendium.

whistleblower complaint from Mr. Boland, a competitor of Catalyst. Nor are readers informed that McFarlane sought finances from West Face Capital to end "the BS with Callidus".[177]

157. In short, although the WSJ Fraud Articles depicted McFarlane as the victim, the Dow Jones Defendants omitted to inform readers that he was a disgruntled former employee and guarantor who was looking for retribution against the Plaintiffs.

(c) Omission – Whistleblowers With Axes To Grind

158. 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 disgruntled former officers of companies that borrowed from Callidus and were sued on their personal guarantees (Kevin Baumann, Darryl Levitt, McFarlane).[178]

159. Readers are not informed that the fourth whistleblower was Nathan Anderson, a professional short-seller who shorts shares in companies he targets in his whistleblower complaints. Prior to publication, Anderson sent Copeland a copy of a report he prepared in July 2017[179] that disclosed that Anderson held short positions in Callidus' shares and that he would benefit financially if the Callidus share price decreased. Copeland agreed during cross-examination that Anderson sent him this Callidus report.[180] The WSJ Fraud Articles omitted this fact.

[177] Exhibit 95 to Riley Libel Affidavit, at Tab 48 of the Compendium.
[178] *Callidus Capital Corporation v McFarlane*, 2016 ONSC 3154; *Callidus Capital Corporation v McFarlane*, 2017 ONCA 626.
[179] Exhibit 165 to Riley Libel Affidavit, at Tab 49 of the Compendium.
[180] Copeland Transcript, pp. 67-73, qq. 140-144, at Tab 50 of the Compendium.

(d) The Catalyst Guarantee

160. 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.[181] 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:

> [Email subject line:] we've got to mention the guarantee somehow.
>
> We can't just… not, as in this current version. Much as I'd like to![182]

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

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

(a) Introduction

161. 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."[183]

162. 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... Accordingly, 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

[181] Website Article at para 23, at Tab 1 of the WSJ Articles Brief, p. 3, at Tab 1 of the Compendium.
[182] Email from Copeland to McNish, August 8, 2017 at 9:26 pm (DOW000171-0001), at Tab 51 of the Compendium. Emphasis added.
[183] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 81.

provision does not depend on a particular *kind* of harm, but expressly refers only to *harm* in general."[184]

163. 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.[185]

(b) The Serious Harm Caused By The WSJ Fraud Articles

(i) Introduction

164. 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.[186]

165. 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.[187] A fully developed damages brief is not required.[188]

166. *The Wall Street Journal* is an internationally renowned financial newspaper and claims that it is the largest paid subscription new site on the Internet.[189] According to Copeland, *The Wall Street Journal* is "the world's pre-eminent financial news publication."[190] When *The Wall Street Journal* attacks a target, that is an attack by one of the largest media platforms in the world.

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[184] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 69.
[185] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 82.
[186] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 71.
[187] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 71.
[188] *Bent v Platnick*, 2020 SCC 23 at para 145.
[189] Riley Libel Affidavit at para 3, at Tab 52 of the Compendium.
[190] Copeland Transcript, pp. 78-79, q. 160, at Tab 53 of the Compendium.

167. Print and digital sales of *The Wall Street Journal* for the Americas on an average day in August 2017 totaled 2,470,000 copies.[191]

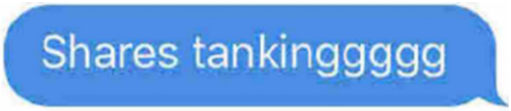
168. Implications of criminal conduct are likely to have a significant effect on one's reputation.[192]

169. According to Anderson "most due-diligence pros in the industry stop caring when they get even a whiff of fraud because they know its [*sic*] uninvestigable and just move on."[193]

170. The #1 search result from a Google search on the words "Catalyst fraud" today remains the Website Article published on August 9, 2017.[194] It is difficult to imagine stings of libel about a company more serious than being falsely accused by *The Wall Street Journal* of fraud, deceiving borrowers, inflating the value of assets, and lacking accounting integrity. In a confidence business such as lending, being accused of fraud and other improprieties was a devastating blow.[195] Callidus' and Catalyst's reputations and businesses were seriously harmed by *The Wall Street Journal*'s malicious and false accusations of fraud, unlawful conduct and illegalities.

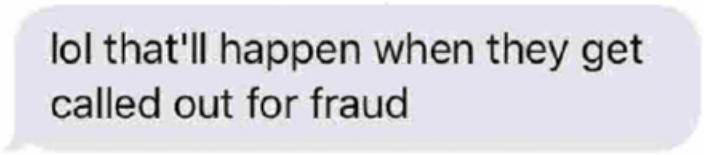
(ii) The WSJ Fraud Articles Caused Callidus' Share Price To Tank

171. Copeland sent the following text message to professional short-seller Anderson minutes after trading closed on the TSX on August 9, 2017:[196]



[191] Exhibit 232 to Riley Libel Affidavit, p. 1, at Tab 54 of the Compendium.
[192] *Kam v CBC*, 2021 ONSC 1304 at para 107(a).
[193] Exhibit 102 to Riley Libel Affidavit, at Tab 55 of the Compendium.
[194] Exhibit 250 to Riley Libel Affidavit, at Tab 56 of the Compendium.
[195] Riley Libel Affidavit at para 438, at Tab 57 of the Compendium.
[196] Copeland-Anderson Text Brief, p. 59, at Tab 2 of the Compendium.

Anderson replied:[197]



When Copeland was asked why he added four "g's" to the word tanking, he incredibly answered that he was a "colloquial texter" and a "casual texter".[198] In fact, "shares tankinggggg" was Copeland's unadulterated gloating about his fraud story causing Callidus' shares to nose-dive.

172. Copeland gloated again in a Tweet sent at 4:37 PM ET on August 9, 2017 that "shares fall 21% for Callidus Capital, majority owned by PE giant Catalyst Capital, after @WSJ reports alleged fraud."[199]

173. 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.[200]

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".[201]

174. The Front Page of the Print Article carried a graphic "Stock Swoons" that stated: "shares of Canadian lender Callidus fell Wednesday after *The Wall Street Journal* reported whistleblowers have accused it and private equity firm Catalyst of fraud".[202]

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[197] Copeland-Anderson Text Brief, p. 59, at Tab 2 of the Compendium.
[198] Copeland Transcript, pp. 80-81, qq. 165, 168, at Tab 58 of the Compendium.
[199] Exhibit 141 to Riley Libel Affidavit, at Tab 59 of the Compendium. Emphasis added.
[200] Copeland Transcript, p. 79, q. 162, at Tab 60 of the Compendium.
[201] Copeland Transcript, p. 85, q. 179, at Tab 61 of the Compendium.
[202] Print Article, at Tab 1 of the WSJ Articles Brief, p. 10, at Tab 1 of the Compendium. Emphasis added.

175. 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.[203]

(iii) Expert Report of Vinita Juneja (NERA Economic Consulting)

176. 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;[204]
>
> (2) the harm to Callidus was at least approximately C$144 million to C$161 million.[205]

(iv) Report of Mark Sunshine

177. 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.[206]

[203] Copeland Transcript, p. 87, q. 183, at Tab 62 of the Compendium.
[204] Exhibit 1 to the Affidavit of Vinita Juneja, affirmed May 29, 2020 ("**Juneja Affidavit**"), paras 50-52, at Tab 3 of the Plaintiffs' Motion Record, vol. III, p. 7138, at Tab 63 of the Compendium.
[205] Exhibit 1 to Juneja Affidavit, paras 47-52, at Tab 3 of the Plaintiffs' Motion Record, vol. III, pp. 7137-7138, at Tab 63 of the Compendium.
[206] Exhibit 1 to the Affidavit of Mark Sunshine, affirmed May 29, 2020 ("**Sunshine Affidavit**"), paras 6.9.8-9, at Tab 4 of the Plaintiffs' Motion Record, vol. III, p. 7255, at Tab 64 of the Compendium.

(v) The August 11, 2017 Earnings Call

178. 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 call) subsequently declined to renew credit facilities extended to the Funds.[207]

(vi) Reactions Of Investors about the WSJ Fraud Articles

179. The Plaintiffs received numerous telephone calls and emails about the *WSJ's* fraud articles from persons residing throughout North America (e.g. Ontario, Ohio, New York, Illinois and California).[208] 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.[209]

(vii) The World Wide Dissemination of the WSJ Fraud Articles

180. 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.

(c) The Weighing Of The Public Interests

181. The *quality* of the expression and the *motivation* behind it are relevant to the section 137.1(4)(b) *CJA* public interest analysis.[210]

182. The WSJ Fraud Articles were a repetition of unproven fraud and other accusations by whistleblowers that were only at the intake/inquiries stage. OSC Staff Notice 15-703 (Guidelines

[207] Riley Libel Affidavit at para 391, at Tab 65 of the Compendium.
[208] Riley Libel Affidavit at paras 395-408, at Tab 65 of the Compendium.
[209] Exhibit 222 to Riley Libel Affidavit, at Tab 66 of the Compendium.
[210] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 74.

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."[211] The OSC never took enforcement action. Of course, Anderson and Copeland were disinterested in the harm the publication of the WSJ Fraud Articles would cause – Anderson profited from his short positions in Callidus' shares and Copeland got his "Great Scoop" and "big story".

183. Copeland's testimony during cross-examination proves why the WSJ Fraud Articles were not in the public interest and should never have been published. 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."[212] 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."[213]

184. It is unconscionable that, although Copeland viewed the Plaintiffs' allegations about a conspiracy of short-sellers and whistleblowers as "unproven at best", the unproven fraud and other allegations in the whistleblower complaints were published on the front pages of *The Wall Street Journal*. To use Copeland's words, there was "certainly no reason to include such allegations in the WSJ Publications." Doing so was tantamount to a drive by smear of the Plaintiffs and not in the public interest. This expression falls at the lowest end of the protection deserving spectrum.

[211] *Guidelines for Staff Disclosure of Investigations*, OSC Staff Notice 15-703, (2004) 27 OSCB 8520 at para 2, at Tab 67 of the Compendium.
[212] Affidavit of Rob Copeland, affirmed August 17, 2020 at para 15, at Tab 68 of the Compendium. Emphasis added.
[213] Copeland Transcript, pp. 49-50, q. 101, at Tab 69 of the Compendium.

185. This is not a case in which the Plaintiffs are vindictively or strategically attempting to silence the Defendants. The purpose of this action is to restore the Plaintiffs' reputations.

186. This libel action in no way discourages individuals from filing whistleblowers complaints with securities regulators which are protected by absolute privilege.[214] 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.

187. Nor does this libel action discourage individuals from speaking with journalists as alleged. Post-publication, Anderson has been quoted in *Wall Street Journal* articles defending his whistleblower complaints about Callidus ("We stand by our research on the subjects 100%").[215]

188. 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".[216] There is no power imbalance.

189. Nor are the Dow Jones Defendants chilled off. They gratuitously added into articles about short-seller Anderson targeting public companies such as Nikola[217] and Lordstown Motors[218] that they are confident in the fairness and accuracy of their reporting in the August 2017 articles in issue in this libel action. And, if that was not enough bravado, on March 31, 2021, they republished the August 9, 2017 fraud article by hyperlinking it in an article written by McNish about Justice Boswell's privilege ruling in the conspiracy action.

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[214] *The Catalyst Capital Group Inc v West Face Capital Inc*, 2019 ONSC 128 at para 49.
[215] Tab A-49 to the Brief of Exhibits to the Cross-examination of Jacquie McNish (November 12, 2020) and to the Cross-examination of Rob Copeland (November 13, 2020) ("**Brief of Exhibits to the Dow Jones Defendants' Cross-examinations**"), p. 3, at Tab 70 of the Compendium.
[216] Copeland UT Chart, no. 57, pp. 14-15, at Tab 3 of the Compendium.
[217] Tab A-49 to the Brief of Exhibits to the Dow Jones Defendants' Cross-examinations, at Tab 70 of the Compendium.
[218] Exhibit 10 to the Continued Cross-Examination of Anderson on April 28, 2021, at Tab 72 of the Compendium.

190. 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."[219] Justice Kristjanson also held that the value of a statement that the plaintiff committed or participated in fraudulent conduct was low.[220]

191. The Plaintiffs deserve their day in court to vindicate their reputations and to rectify the damages caused by the WSJ Fraud Articles. The public interest in permitting this libel action to proceed to trial outweighs the public interest in the WSJ Fraud Articles.

H. JEFFREY MCFARLANE'S ANTI-SLAPP MOTION

(a) The Expression

192. Jeffrey McFarlane alleges in his Notice of Motion that his "expression" is his opinion included in *The Wall Street Journal* article and his OSC Whistleblower complaint.[221]

193. In February 2020, counsel for the Plaintiffs requested a copy of McFarlane's whistleblower complaint referred to in his affidavit.[222] McFarlane has refused to produce his OSC Whistleblower complaint claiming absolute privilege.[223] 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.[224]

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[219] *Thompson v Cohodes*, 2017 ONSC 2590 at para 3.
[220] *Thompson v Cohodes*, 2017 ONSC 2590 at para 40.
[221] Affidavit of Jeffrey McFarlane, sworn December 2019 at para 12, at Tab 73 of the Compendium.
[222] Exhibit 133 to Riley Libel Affidavit, p. 1, at Tab 74 of the Compendium.
[223] Exhibit 134 to Riley Libel Affidavit, at Tab 75 of the Compendium.
[224] McFarlane Transcript, pp. 8-9, qq. 8-9, at Tab 11 of the Compendium.

194. 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 provided to Reuters News, *The Wall Street Journal* and others. Because the Court has no evidence of this "expression", McFarlane's motion must be dismissed.

(b) The Defences

195. 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 "conspiracy" 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).

196. As regards McFarlane's expression in the WSJ Fraud Articles, the above submissions equally apply to McFarlane's anti-SLAPP motion. In short, he has not pleaded truth to any of the meanings and his defences of fair comment and qualified privilege are defeated by his malice.

197. 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".[225]

198. 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 <u>in seeing this individual face justice</u>".[226] The "individual" he is

[225] Exhibit 95 to Riley Libel Affidavit, at Tab 77 of the Compendium.
[226] Exhibit 103 to Riley Libel Affidavit, at Tab 78 of the Compendium. Emphasis added.

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.[227]

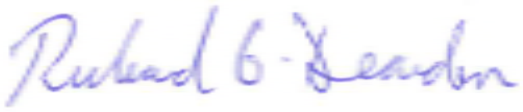
199. McFarlane worked the media to get this fraud accusations published as retribution against the Plaintiffs for "seizing" his company. McFarlane had an axe to grind and grind it he did.

I. ORDER SOUGHT

200. The Plaintiffs request that the anti-SLAPP motions of the Dow Jones Defendants and Jeffrey McFarlane be dismissed.

201. 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.

Date: May 12, 2021



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Lawyers for the Responding Parties/Plaintiffs

[227] VWK Partners Fund LP Portfolio, August 3, 2017 (VOOR0000054_0001), at Tab 79 of the Compendium.

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22
2. *Sokoloff v Tru-Path Occupational Service Inc*, 2020 ONCA 730
3. *Bent v Platnick*, 2020 SCC 23
4. *Subway Franchise Systems of Canada, Inc v Canadian Broadcasting Corporation*, 2021 ONCA 26
5. *Grant v Torstar Corp*, 2009 SCC 61
6. *Crookes v Newton*, 2011 SCC 47
7. *Botiuk v Toronto Free Press Publication, Ltd*, [1995] 3 SCR 3, 1995 CarswellOnt 1049
8. *Baglow v Smith*, 2012 ONCA 407
9. *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CarswellOnt 1417
10. *Canadian Standards Association v PS Knight Co Ltd*, 2019 ONSC 1730
11. *Hobbes v Warner*, 2019 BCSC 2196
12. *Montour v Beacon Publishing Inc*, 2019 ONCA 246
13. *Thompson v Cohodes*, 2017 ONSC 2590
14. *Levant v Day*, 2017 ONSC 5956
15. *WIC Radio Ltd v Simpson*, 2008 SCC 40
16. *Creative Salmon Company Ltd v Staniford*, 2009 BCCA 61
17. *Re Lehman Cohort Global Group Inc*, 2010 ONSEC 15
18. *Creative Salmon Company Ltd v Staniford*, 2009 BCCA 61
19. *Wilson v Canwest Publishing Inc*, 2018 BCCA 441
20. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CarswellOnt 396
21. *Lascaris v B'Nai Brith Canada*, 2019 ONCA 163
22. *2393134 Ontario Inc v McFarlane*, 2015 ONSC 7307

23. *Callidus Capital Corporation v McFarlane*, 2016 ONSC 3154

24. *Callidus Capital Corporation v McFarlane*, 2017 ONCA 626

25. *Kam v CBC*, 2021 ONSC 1304

26. *The Catalyst Capital Group Inc v West Face Capital Inc*, 2019 ONSC 128

27. *Grist v TruGrp Inc*, 2021 ONCA 309

Secondary Sources

1. Peter Downard, *The Law of Libel in Canada*, 4th ed (Toronto: LexisNexis, 2021)

2. Ramond Brown, *Brown on Defamation*, 2nd ed (Toronto: Thomson Reuters, 2021)

SCHEDULE "B"
TEXT OF STATUTES

1. *Courts of Justice Act*, RSO 1990, c C43, s 137.1

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. 2015, c. 23, s. 3.

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. 2015, c. 23, s. 3.

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. 2015, c. 23, s. 3.

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. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

2. ***Libel and Slander Act,*** **RSO 1990, c L12, s 3(1)**

Privileged reports

3 (1) 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:

1. The proceedings of any legislative body or any part or committee thereof in the British Commonwealth that may exercise any sovereign power acquired by delegation or otherwise.

2. The proceedings of any administrative body that is constituted by any public authority in Canada.

3. The proceedings of any commission of inquiry that is constituted by any public authority in the Commonwealth.

4. The proceedings of any organization whose members, in whole or in part, represent any public authority in Canada. R.S.O. 1990, c. L.12, s. 3 (1).

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

THE CATALYST CAPITAL GROUP INC. et al	-and-	WEST FACE CAPITAL INC. et al.
Plaintiffs		Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

PLAINTIFFS' FACTUM (ANTI-SLAPP MOTION OF THE DOW JONES DEFENDANTS AND JEFFREY McFARLANE)

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