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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

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

Defendants

RESPONDING MOTION RECORD OF THE PLAINTIFF

(Motion of K. Baumann to Compel Answered to Questions Taken Under Advisement and Refused – Returnable February 26, 2021)

February 22, 2021

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

ONTARIO
SUPERIOR COURT OF JUSTICE
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B E T W E E N:

THE CATALYST CAPITAL GROUP and CALLIDUS CAPITAL CORPORATION

Plaintiffs

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Defendants

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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

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

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND

LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10

Defendants

and

CANACCORD GENUITY CORP.

Third Party

A N D B E T W E E N:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

and

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSEN, B.C. STRATEGY LTD. D/B/A BLACK CUBE, B.C. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP

Defendants to the Counterclaim

A N D B E T W E E N:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

and

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Defendants to the Counterclaim

UNDERTAKINGS, QUESTIONS TAKEN UNDER ADVISEMENT, AND REFUSALS

given at the Cross-Examination of James Riley held on October 27, 2020

Cross-Examination by Kevin Baumann

No.	Pg.	Q.	Category	Specific Question	Answer or Precise Basis for Refusal
1.	379-380	1184	REF	To advise what has transpired relating to the winding down of Callidus.	**This question was objected to during Mr. Riley's cross-examination. Notwithstanding that objection, it is now being answered pursuant to Rule 34.12(2):** **1. Callidus continues to exist as a separate operating company.** **2. Callidus is carrying on business to monetize and maximize the value of its assets and investment positions.** **3. The assets and liabilities of Callidus which existed prior to the privatization were not sold to or assumed by Frontwell and continued to be owned or owed by Callidus, as the case may be.** **4. Some have been monetized and others have not.** **5. Dalton as CEO of Callidus runs the company to get the best monetization and value for its assets.** **6. This is being done with the assistance of senior consultants assigned to individual files/assets.**

No.	Pg.	Q.	Category	Specific Question	Answer or Precise Basis for Refusal
					7. This process and their work are overseen by Dalton.
2.	381-383	1186-1187	REF	To produce the information referenced in the five different topics in Mr. Baumann's email to Mr. Riley's counsel dated October 23, 2020.	**This question is improper and/or irrelevant, for the following reasons:** **(1) the questions all relate to issues which Baumann sought to raise in his proposed counterclaim, which Justice Hainey ordered could not be advanced at this time. See Mr. Baumann's motion record and Justice Hainey's order attached.** **(2) the issues sought to be raised also are the subject of existing actions, claims, filings, affidavits, and productions in Alberta, which Mr. Baumann is very familiar with and has in his possession already.** **(3) Note: If requested by Mr. Baumann, the particulars of documents referenced in sub-paragraph (2) can be provided if Mr. Baumann claims he does not have or know where to find these materials;** **(4) with respect to the Yield Enhancement questions, in addition to the above, Mr. Baumann has already been advised and provided with specific documents and evidence in the Alberta proceedings which show that the Yield Enhancement referred to in his questions does not relate to Alken Basin. Sub-paragraph (3)**

No.	Pg.	Q.	Category	Specific Question	Answer or Precise Basis for Refusal
					above applies to this evidence and these documents. **This answer applies to the answers to Q. 1191, 1206, 1212, 1235, 1237- 1240, 1273, 1294, 1295, 1296.**
3.	388	1191	UA	To agree that there is no confidentiality relating to the credit agreement between Alken Basin Drilling and Callidus.	**See the answer to Q. 1186-1187 above.**
4.	393	1206	UA	To produce any records that show that Alken was ever asked to top up the loan.	**See the answer to Q. 1186-1187 above.**
5.	396	1211	UA	To advise whether Mr. Riley signed the Code of Conduct.	**These questions relate to Callidus' Code of Conduct that was posted on SEDAR on November 17, 2015. A copy is attached. Mr. Riley does not recall whether he signed the Code of Conduct, but he was aware of and abided by its contents.**
6.	396-397	1212	REF	To advise whether Scott Sinclair signed a Code of Conduct on behalf of him and his company Sinclair Range.	**See the answer to Q. 1186-1187 above.**
7.	401-402	1219	UA	To advise why the Code of Conduct and Ethics was not filed at CEDAR [sic] as promised within Callidus' IPO prospectus.	**See the answer to Q. 1211 above.**

No.	Pg.	Q.	Category	Specific Question	Answer or Precise Basis for Refusal
8.	408-409	1235	UA	To provide the National Bank reports relating to the $0.50 to $1.00 value of the yield enhancements.	**See the answer to Q. 1186-1187 above.**
9.	411-413	1237-1240	UA	To provide all 14 independent reports from the third party evaluators relating to the 14 yield enhancements.	**See the answer to Q. 1186-1187 above.**
10.	426	1273	UA	To provide Mr. Baumann with a copy of the file from the RCMP investigator in Edmonton.	**See the answer to Q. 1186-1187 above.**
11.	436	1294	UA	To advise how names for consideration to oversee Alken were provided to Mr. Baumann, i.e. in print or email.	**See the answer to Q. 1186-1187 above.**
12.	436	1295	REF	To advise whether Mr. Riley was aware that Mr. Sinclair had an issue with the OSC prior to him being advanced to Mr. Baumann's company by Mr. Boyer.	**See the answer to Q. 1186-1187 above.**
13.	436-437	1296	UA	To advise whether there are additional documents other than what has been produced in Schedule A to be produced that would explain why there is limited information between yield enhancements when Mr. Glassman states they were a major part of the business.	**See the answer to Q. 1186-1187 above.**

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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Defendants

MOTION RECORD
OF
THE DEFENDANT KEVIN BAUMANN
(Returnable June 30, 2020)

June 25, 2020

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AND TO: John Does #4-10

Defendants

MOTION RECORD
OF
THE DEFENDANT KEVIN BAUMANN

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TAB 1

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.
and
CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

A N D B E T W E E N:

KEVIN BAUMANN

Plaintiffs
by Counterclaim

- and -

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, SINCLAIR RANGE INC., SHELDON TITLE, MNP LLP and
KPMG LLP

Defendants
to the Counterclaim

NOTICE OF MOTION TO AMEND COUNTERCLAIM
OF
KEVIN BAUMANN

1. The Respondent will make a Motion, to Honourable Justice G. Hainey on the Commercial List on Tuesday, June 30, 2020 at 11:00AM via video conference.

2. PROPOSED METHOD OF HEARING:

3. The Motion is to be heard

   [ ] in writing under sub-rule 37.12.1(1);

   [ ] in writing as an opposed motion under sub-rule 37.12.1(4);

   [X] orally.

Part 1: ORDERS SOUGHT

4. That Kevin Baumann (”Baumann”) is granted leave to amend his counterclaim by changing the initial counterclaim filed with the Honourable Justice G. Haney’s office and substituting the counterclaim with the amended counterclaim.

Part 2: FACTUAL BASIS

5. The amended counterclaim is required as the level of the conspiracy between Callidus, Catalyst, Sinclair, Sinclair Range Inc., and MNP LLP ("MNP") with the assistance of KPMG LLP ("KPMG") has only recently become clear from documents that have been uncovered and evaluated by Baumann and his representatives.

6. Baumann first approached Callidus for a loan in 2013. Callidus agreed to loan Baumann and his firm Alken Basin Drilling Ltd ("Alken") a loan to a maximum of 28.5 million that was split between three credit facilities; "A" the revolver, "B" the fixed assets and "C" Baumann's land collateral, which closed on March 31, 2014.

7. From the initial request to receive funds from Facility "A", Callidus and their representative Craig Boyer ("Boyer") started to oppress Baumann and Alken by reducing the quantum of funds available in the facilities by insisting on a $1.2 million hold back, contrary to the negotiated terms of the loan in which a $750 thousand hold back proposed by Callidus had being negotiated and removed. The $1.2 million holdbacks severely affected Alken's ability to run its business.

8. In November 2015, Boyer conspired with Scott Sinclair ("Sinclair") and Sinclair Range Inc. to force Sinclair on Alken.

9. From Sinclair's appointment, the conspiracy increased in its intensity to remove Baumann as Alken president, by withholding funds to Alken and Baumann which were legally available to him in terms of the loan agreement.

10. Callidus, Sinclair and Boyer conspired to oust Baumann from the company. Having achieved this aim, Callidus, Sinclair and Boyer continued to run the company at Baumann's expense, and did not communicate with Baumann as to the business plan for the company, or Callidus' and Boyer's intentions for the company.

11. Callidus, Sinclair and Boyer kept the company running for two reasons;

    The first was that another borrower of Callidus, Horizontal Well Drillers ("HWD") was attempting to obtain a contract for drilling in Venezuela. Callidus, Boyer and Sinclair conspired not to sell the drilling assets of Alken to HWD, while waiting for Venezuela deal to materialize knowing that Alken's equipment would be beneficial to HWD in Venezuela operations.

Secondly, Callidus, Boyer and Sinclair attempted to get business for drilling water wells in a USDA backed drilling operation in Egypt. In December 2015, Alken was approved as a drilling contractor for Egypt and Kuwait.

12. Following the approval for drilling in Egypt, Callidus, Boyer and Sinclair conspired to place Alken into receivership, in order to buy the assets for pennies on the dollar and transfer the assets to a newco (subsequently Altair Water and Drilling). In order to achieve this objective, Callidus enlisted the help of Sheldon Title and MNP to sell the company on a favourable basis to Callidus. At this stage, there were no contracts in place and Callidus with the help of MNP conspired to sell the company without any notification of the opportunities in Egypt.

13. A Memorandum of Agreement ("MOA") was signed for the drilling of the water wells in Egypt in March 2016. This MOA indicated that the contract would be worth hundreds of millions of dollars in drilling fees. This caught Callidus, Boyer and Sinclair by surprise and forced Callidus to engage MNP to proceed with the receivership on an urgent basis to sell the company.

14. MNP in collusion with Callidus arranged for a short sale period and failed to mention the corporate opportunity from the original MOA. During the sales process a more definitive MOA was signed, prompting MNP to extend the deadline for sale by only one week. Callidus then conspired with MNP not to release the details of the MOA to parties that may have been interested in buying the company. In order to conceal the conspiracy, MNP stated that anyone who had signed a confidentiality agreement could receive the MOA. As the company was marketed as a company in receivership, there were no purchases for the company on a going concern basis.

15. Alken assets were sold to Callidus who created a newco Altair Water and Drilling Inc ("Altair") . In the next conference call Q2 2016, Glassman the CEO of Callidus bragged about their "***poster child***" (Altair), which "***without our help, it would not have been able to go into this additional business, which is, in terms of revenue, billions of dollars for them potentially. At least, the first part of it is a couple of billion dollars or more***." Callidus immediately recognized a yield enhancement of $32 million. This is the amount of profit that Callidus believed it would achieve if it immediately sold Altair.

16. Alken's accounts payables went unpaid when Alken's assets were purchased by Callidus. In spite of Callidus representatives contracting suppliers to provide Alken with services. Baumann has established that this was a trend with Callidus, resulting in 15 million dollars of services outstanding to small suppliers within Callidus involved receiverships. This affected the new companies formed by Callidus as they had sabotaged their own client reputation and economic relationship with suppliers. This affected the ability for Callidus owned companies to be sold at a profit, which Callidus required in order to claim their yield enhancement.

17. Callidus with the assistance of Sinclair removed all of Baumann's loans, in order to deceive Baumann and the Canadian Superintendent of Bankruptcy. It is a requirement that all creditor amounts owed be disclosed during a receivership, allowing all creditor's rights to be acknowledged and heard within the process.

18. KPMG assisted Callidus by agreeing to the use of the yield enhancements in the Callidus financial statements, despite these yield enhancements being in contravention of IFRS. The Ontario Securities Commission (OSC) later placed Callidus on a watch list for using these yield enhancements.

19. The conspiracy between the parties illegally harmed Baumann and Alken, leading to the liquidation of Alken.

20. Callidus has not provided full disclosure in any of the cases that it currently has with Baumann. In this claim, Callidus has made no disclosures to Baumann. Callidus, in contravention of the court order by the Honourable Justice G Hainey.

Late filing

21. The Honourable Justice G. Hainey set a date for pleadings to be closed by September 30 2019 and the disclosure of submissions to be made by December 31, 2019. This pleading is late for the following reasons;

22. Callidus, Boyer, Sinclair and MNP have unlawfully hidden information from Baumann in order to perpetuate their fraudulent scheme.

23. A forensic review of all of the documents was required to establish the full extent of the conduct and involvement of the additional parties as well as the level of deception by Catalyst, Callidus, Boyer, Sinclair, Sinclair Range and MNP.

24. Baumann has not yet received any disclosure from Callidus or Catalyst as required in terms of the order of the Honourable Justice G. Hainey. The adding of the parties will provide clarity on the schemes perpetrated by these parties and will disclose pertinent information of the Callidus and Catalyst business model, which will assist the court in understanding and resolving the entire Wolfpack claim.

25. Callidus and Catalyst have reportedly disclosed more than 180,000 documents to other defendants in the Wolfpack claim. It is questionable that any of the parties will have time to address all of the documents prior to June, when the court case is scheduled to start.

26. There will be no prejudice to any other parties, as disclosure to Baumann in the case has not been made by the complainants. The addition of the new parties will clarify the role that Callidus had in its unlawful behaviour.

Part 3: LEGAL BASIS

27. Rule 6-1(1) of the Supreme Court Civil Rules.

28. Rule 14-1 of the Supreme Court Civil Rules.

29. Amendments are allowed unless prejudice can be demonstrated by the opposite party in which case the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined: *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No.550, 48 C.P.C. (3d) 300, 21 B.C.L.R. (3d) 145, 72 B.C.A.C. 252, 40 C.B.R. (3d) 44 (C.A.) at para. 34. The same liberal approach to amendments was taken in *Chouinard v. O'Connor*,[2011] B.C.J. No. 597, 16 B.C.L.R. (5th) 272, 4 C.P.C. (7th) 229, 2011 BCCA 161, at para. 11,where the court approved the trial judge's statement that "amendments should be permitted as necessary to determine the real question and issues between the parties" having regard to the degree of prejudice caused by the delay in seeking the amendment, and that decision in turn was cited in *Sommer v. Coast Capital Savings Credit Union*, [2013] B.C.J. No. 1040, 2013 BCSC 881, at para. 20. See also *Ferguson v. Dippenaar*, [2018] B.C.J. No. 494, 2018 BCSC 434.

30. An amendment will only be refused where the proposed amendment:

(1) discloses a new cause of action beyond the expiry of the limitation period (and not necessarily even then);

(2) is clearly invalid at law; or

(3) will cause actual prejudice to the other parties; see *Carley Estate v.Allied Signal Inc.*, [1997] B.C.J. No. 1097, 35 B.C.L.R. (3d) 54, 91 B.C.A.C. (3d) 54 (C.A.); *Canadian Dewatering L.P. v. Directional Mining & Drilling Ltd.*, [2018] B.C.J. No. 581, 2018 BCSC 517, at paras. 22-23. As to ground (2), it was stated in *Oregon Jack Creek Indian Band v. Canadian National Railway Co. (No. 2)*, [1990] S.C.J. No. 144, [1990] 1 S.C.R. 117, 68 D.L.R.

(4th) 478,103 N.R. 235 (S.C.C.) that amendments should not be refused "unless they are clearly and obviously invalid".

31. In the absence of prejudice (whether resulting from the loss of a limitation defence or otherwise), the following principles are applicable:

(1) all amendments should be permitted as are necessary to permit the applicant to plead any available claim or defence so that the real question in issue between the parties may be determined and the controversy completely and finally determined;

(2) an application to amend should be considered on the assumption that the facts alleged can be established; and

(3) an amendment that discloses no reasonable claim or defence will not be granted, but before an amendment will be refused on that

ground it must be "plain and obvious" or "absolutely beyond doubt" that the amendment discloses no reasonable claim or defence, with any doubt on the facts or the laws resolved in favour of allowing the amendment and permitting the matter to proceed for determination at trial: *Plumrose Inc. v. A & A Foods Ltd.*, [1996] B.C.J. No. 1877, 5 C.P.C. (4th) 336 (S.C.).

32. The respondent will not be prejudiced by the delay in applying for the amendment because proceedings are at an early stage. In addition, Callidus and Catalyst have not yet produced any documents to Baumann as per Justice Hainey's timetable whereas other parties have received documents as per Justice Hainey's timetable from Callidus which Baumann believes the document count exceeds 180,000 documents. The lack of disclosure of these documents to Baumann, will severely impact the ability of Baumann to review the documentation in preparation for trial.

33. Baumann has received no disclosure from Callidus or Catalyst with regards to this claim in spite of various demands by Baumann to Callidus' Counsel Mr. David Moore. Mr. Moore has not responded to Baumann's numerous requests for disclosure.

34. Baumann does not believe that there will be any prejudice suffered by any parties as the proceedings are at such an early stage see: *Casa Roma Pizza, Spaghetti & Steak House Ltd. v. Gerling Global General Insurance Co.*, [1994] B.C.J. No. 254, 111 D.L.R. (4th) 740, 40 B.C.A.C. 241, 24 C.C.L.I. (2d) 105, 23 C.P.C. (3d) 237, 87 B.C.L.R. (2d) 60 (C.A.). The prejudice resulting from any unforeseen delay in bringing this amendment must be balanced against the cost of bringing a separate proceeding to advance the claim to which the amendment relates and the possibility that the claim could be barred by an application of the extended doctrine of res judicata formulated in *Henderson v. Henderson* (1843-60), All E.R. Rep. 378 at 381-382, 67 E.R. 313 (Ch.).

35. The discretion to be exercised by a chambers judge in deciding whether to grant leave to a plaintiff to amend a statement of claim to plead a cause of action that has become statute-barred since the commencement of the original action requires the chambers judge to consider the following factors:

    (a) the relative prejudice to the parties;

    (b) the length of delay in seeking the amendment; and

    (c) the defendant's explanation for the delay: *ASM Capital Corp. v. Mercer International Inc.*, [1999] B.C.J. No. 1276, 69 B.C.L.R. (3d)

177, 36 C.P.C. (4th) 245, 1999 BCCA 353, at para. 20 (C.A.); *Canadian Dewatering L.P. v. Directional Mining & Drilling Ltd.*, [2018] B.C.J. No. 581, 2018 BCSC 517, at paras. 22-23.

A chambers judge must also take into account the extent of the connection, if any, between the existing claims and the proposed new cause of action. The overriding question is what is just and convenient: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.*, [1996] B.C.J. No. 234, 71 B.C.A.C. 161, 34 C.C.L.I. (2d) 211, 46 C.P.C. (3d) 183, 19 B.C.L.R. (3d) 282 at paras. 67 and 84 (C.A.). Having regard to the facts set out in Part 2 of this notice of application and the principles that govern applications to amend pleadings to assert a new cause of action after the expiry of the limitation period, the applicant should be granted leave to amend the *pleading*

36. To the extent that the defendant may have been prejudiced by delay in applying to amend the notice of application to plead a new cause of action, the prejudice that must be considered is restricted to that which occurred since 31 December 2020, which is one year after the expiry of the limitation period, because a notice of civil claim could have been filed within the limitation period and served after the limitation period expired for up to a year, without any prejudice to the defendant: *McIntosh v. Nilsson Brothers Inc.*, [2005] B.C.J. No. 1203, 11 C.P.C. (6th) 257, 48 B.C.L.R. (4th) 124, 2005 BCCA 297 at para. 8

37. To the extent that the defendant may have been prejudiced by delay in applying to amend the notice of application to plead a new cause of action,, that prejudice is not legally relevant as it occurred before [*day/month/year*] when the application to amend the notice of civil claim was served on the defendant [*or* before the hearing of the application to amend the notice of civil claim], which was within one year after the expiry of the limitation period; see *McIntosh v. Nilsson Brothers Inc.*, [2005] B.C.J. No. 1203, 11 C.P.C. (6th) 257, 48 B.C.L.R. (4th) 124, 2005 BCCA 297 at para. 8.

38. Not only is there valid cause of action to add the defendants by counterclaim all parties that I am attempting to add as defendants to the Callidus claim have documentation and information relating to Callidus yield enhancement scheme. Callidus has refused to release valuation reports and information relating to their yield enhancement mechanism within all claims that Baumann is involved in with the plaintiffs. The adding of the defendants by counterclaim will add clarity and confirmation to an extremely complex claim.

Part 4: MATERIAL TO BE RELIED ON

1) Affidavit of Kevin Lyle Baumann dated June 19, 2020
2) OSC Sanctions against Callidus and Callidus' Q2 2018 quarterly release relating to Callidus' loss of its ability to report non-realized yield enhancements
3) Amended Counterclaim
4) Factum and Book of Authorities of Kevin Baumann
5) The applicant estimates that the application will take 15 -30 minutes

6) Any such materials Baumann believes that the Court should consider to make a determination

[*Check the correct box.*]

[x] This matter is within the jurisdiction of a master.

[ ] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

i. you intend to refer to at the hearing of this application, and

ii. (ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

i. a copy of the filed application response;

ii. a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

Date: June 19, 2020

Kevin Baumann
Box 109
Bluffton, Alberta T0C 0M0
Telephone: 403-505-7784
Email: pekiskokb@gmail.com

Defendant

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs _____ of Part 1 of this notice of application

[ ] with the following variations and additional terms:

_____

_____

_____

Date [*day/month/year*]

_____

Signature of [ ] Judge [ ] Master

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Lawyer for the Defendant
Bruce Livesey

AND TO: John Does #4-10

Defendants

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

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

Plaintiffs Defendants

SUPERIOR COURT OF JUSTICE

Commercial List

Proceeding commenced at Toronto

NOTICE OF MOTION TO AMEND

COUNTERCLAIM OF KEVIN BAUMANN

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Telephone: 403-505-7784
Email: pekiskokb@gmail.com
Defendant

TAB 2

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

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

FACTUM AND BOOK OF AUTHORITIES OF THE DEFENDANT KEVIN BAUMANN

1. On May 13, 2020 a case management teleconference was held with the Honourable Justice Hainey. It was Kevin Baumann's **("Baumann")** understanding that his amendment motion could be brought forward at which time, he understood the Plaintiffs could argue their threshold.

2. The Plaintiffs interpreted the teleconference differently, in that their position was they could bring their protocol issue and threshold issue prior to Baumann's amendment being considered.

3. Since the May 13, 2020, teleconference Baumann requested an endorsement to clarify the May 13th direction of the Honourable Justice Hainey and in addition he booked a conference with Justice Hainey on June 16, 2020 to have his amendment considered. All interested parties responded and were prepared to attend, unfortunately the Plaintiffs numerous counsels would not consent to any dates as it was obvious they wanted their threshold item brought forward before the Defendants amendment was considered. In respect of the process of being unable to receive the Plaintiffs' counsel consent to attend, Baumann vacated the June 16 date.

4. The Defendant has filed an Amended Counterclaim which includes the adding of new parties. All parties have been served.

5. Baumann's amendment should be automatic as his amendment is relating to the ANTI SLAPP as well as the main claim see Rule 26.01.

6. Amendments are allowed when ANTI SLAPPS are in play as per Rule 137.1(6) as described;

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.

7. The Defendant respectfully requests that the Amended Counterclaim and adding of parties be accepted by the Court.

8. The Wolfpack Claim and associated ANTI SLAPP is definitely not a garden variety lawsuit. The conduct to date includes limited and selective disclosure, in addition the Defendant has not received disclosure as Ordered for December 31, 2019. The Defendants Counterclaim has substance and has substantial information which will assist in disposing the Claims. In addition, Baumann has a limitation date coming up.

9. The Defendants limitation period has not expired relating to the parties named in the Amended Counterclaim. Callidus Capital Corporation **("Callidus")** was sanctioned by the Ontario Securities Commission **("OSC")** on May 15, 2018 (Exhibit A), in addition Callidus reported on August 14, 2018 within its Q2 2018 Financial Quarter that it would no longer be booking non-realized yield enhancements. (Exhibit B)

10. It is critical that the Defendants Amended Counterclaim go forward, in the Defendants respectful submission, the subject claims by the Plaintiff and conduct leading up to the claims is considered a business scheme by Baumann, which was serious enough to attach sanctions by the OSC.

11. The Plaintiffs are attempting to bury their yield enhancement scheme in procedure and non-disclosure.

    The yield enhancement of 32 million which Baumann believes the Plaintiffs gained from his business Alken Basin Drilling Ltd. was administered by a defacto agent Callidus placed within Baumann's company.

12. The Plaintiffs have even refused a Court Order to produce the yield enhancement reports in Alberta and Baumann expects nothing less from them in Ontario.

13. Baumann's forensic specialists have been unable to locate a single Callidus borrower that consented to a yield enhancement.

14. The following are excerpts from Callidus' own Q2 2016 Earnings Transcript. (Exhibit C)

    Pages 4 and 9 explains the scheme and confirms why the Plaintiffs are so adamant of controlling disclosure and the adding of parties that were part of the scheme.

"Yield enhancements are unequivocally and undeniably a fundamental, ongoing, repeating part of the business for a company such as Callidus. It is therefore a key part of normal operations, albeit they can be lumpy.

We deal in a market segment where our clients often go through structural changes. As a result, it is very common for a client to need or desire changes to the original deal with Callidus. When such changes are requested or needed by the client, Callidus may choose to accommodate the borrower, and in exchange, demand or request a change in the economic relationship, resulting in what's known as "yield enhancement". These yield enhancements can take many forms. The most commonly understood would include revenue royalty streams, periodic fee arrangements, warrants and limited equity participations."

"Please note that the form of yield enhancements determines the impact that is reported on the profit and loss statements or the balance sheet with essentially no discretion to management under the IFRS rules."

Newton G. Z. Glassman A
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

"That being said, again, both under IFRS and under internal policy, we revalue the collateral on an ongoing basis. When we see the collateral changing, we change the value of the collateral. And at times, if we're worried about it, we will change the requirements under the borrowing base. So, if we saw – as an example, if we saw a

loan in oil and gas or anywhere else that didn't have sufficient collateral, we would consider changing the borrowing base and advancing less. If we see any of these loans approaching something that concerns us, we'll either advance less or change the borrowing base, as these are right."

Jaeme Gloyn — Q
Analyst, National Bank Financial, Inc. (Broker)

"Okay. Great. Fair enough. Shifting gears to the yield enhancements and the CAD 32 million gain, can you just sort of elaborate on the size of the [ph] potential can, (24:52) the size of the original loan that those warrants are associated with? What's the value of shareholders' equity or percentage that that CAD 32 million would represent of the company? And then, maybe just some commentary on the industry or sector that those warrants are attached to."

Newton G. Z. Glassman — A
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

"Some of that, I could answer. Some of it, we're not legally allowed to answer for a bunch of reasons. We will not tell you the size of the original loan. It is a loan that originally was troubled. We helped the company review their operations. They entered an additional and extra line of business, [ph] which makes their credit basically found. (25:46) They came to us and asked us if we would amend and help them with our facility to help them go in that business. It is a huge incremental increase in their business. They seemed to be executing well to extremely well."

"We are very supportive of them. They are a poster child of how we can help and why we would want to help a company that first was in trouble and then figures out a way to get out of trouble. Without our help, it would not have been able to go into this additional business, which is, in terms of revenue, billions of dollars for them potentially. At least, the first part of it is a couple of billion dollars or more."

15. Baumann respectfully request the Court to consider his counterclaim which includes the adding of various parties. The involvement of the added parties conduct within the Callidus Baumann relationship is explained in great detail within the amended Statement of defence and counterclaim.

Dated June 25, 2020

Respectfully submitted,

Kevin Baumann

Box 109

Bluffton, Alberta T0C 0M0

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Email: pekiskokb@gmail.com

Self-Represented

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

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

Plaintiffs Defendants

SUPERIOR COURT OF JUSTICE

Commercial List

Proceeding Commenced Via Teleconference

FACTUM OF KEVIN BAUMANN

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Telephone: 403-505-7784
Email: pekiskokb@gmail.com
Defendant

Exhibit "A" Callidus Capital Sanctioned by the Ontario Securities Commission

(//www.osc.gov.on.ca/en/home.htm)

Investors

Refilings and Errors List

Type to filter callidus

All | 0-9 | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | Q | R | S | T | U | V | W | X | Y | Z

Date of Refiling	Issuer Name	Description of Deficiency	Press Release (in PDF)
August 13, 2018	Callidus Capital Corporation	The Company's Q4, 2017 and Q1, 2018 disclosure of forward-looking information in relation to unrecognized yield enhancements did not in the view of staff comply with Part 4A / Part 4B of National Instrument 51-102. The Company has discontinued disclosure of unrecognized yield enhancements in light of comments expressed by the OSC.	News release - August 13, 2018 (/documents/en/Investors-Errors-Refilings/er_nr_20180813_callidus.pdf)
May 15, 2018	Callidus Capital Corporation	Amended Q4, 2017 forward-looking information in relation to unrecognized yield enhancements.	News release - May 15, 2018 (/documents/en/Investors-Errors-Refilings/er_nr_20180515_callidus.pdf)
August 10, 2017	Callidus Capital Corporation	Forward-looking information revised to include additional disclosure with respect to material assumptions, milestones and risk factors in relation to unrecognized yield enhancements.	News release - August 10, 2017 (/documents/en/Investors-Errors-Refilings/er_nr_20170810_callidus.pdf)
May 3, 2017	Callidus Capital Corporation	May 3, 2017 press release - revised disclosure presentation to remove certain non-IFRS financial measures and to give greater prominence to IFRS financial measures.	News release - May 3, 2017 (/documents/en/Investors-Errors-Refilings/er_nr_20170503_callidus.pdf)

EXHIBIT "B" Q2 2018 Financial Quarter

CALLIDUS CAPITAL

Callidus Capital Reports Second Quarter 2018 Results

All amounts in Canadian dollars unless otherwise indicated.

Highlights

- The pipeline of potential borrowers at June 30, 2018 was $1.3 billion, and currently stands at $1.4 billion with three signed back term sheets totaling approximately $260 million.
- Subsequent to June 30, 2018, the Company originated two new loans with commitments totaling $163 million and a gross loans receivable balance as of August 13, 2018 of $139 million before derecognition, or $37 million after derecognition. In addition, the Company received full repayment of one loan, with commitments totaling $26.3 million and a gross loans receivable and net loans receivable balance as of August 13, 2018 of $11.1 million before derecognition, or $2.8 million after derecognition.
- Total revenue of $89.4 million in the second quarter of 2018 increased by $62.6 million from the same period in 2017, primarily due to the consolidation of three additional businesses, partially offset by lower interest and fees in the lending business.
- Provision for loan losses for Q2-2018 was $21.3 million primarily related to a $12.7 million provision on one specific loan concentrated in the energy sector as a result of a delay in expected future cashflows with the remainder related to foreign exchange. Provision for loan losses for the current year-to-date period of $36.3 million, the majority of which was non-cash, with $14.4 million related to foreign exchange, was recorded in the statements of income for the current year to- date period.
- During Q2-2018, there were indications of impairment at one of the Company's businesses (Otto Industries North America Inc.) that reflected declines in forecasted performance, notwithstanding positive Q2-2018 results, due to market conditions and lower than expected economic performance of certain businesses. As a result, $15.5 million was recorded in the statements of comprehensive income as an impairment of goodwill for the period.
- In Q2-2018 Callidus recognized a recovery in the statements of comprehensive income of $7.4 million under the Catalyst guarantee due to the recognition of specific loan loss provisions and other asset impairments in the current quarter. During the current year-to-date period, the Company recognized a recovery in the statements of comprehensive income of $37.3 million under the Catalyst guarantee due to the recognition of specific loan loss provisions and other asset impairments in the current year and confirmation of coverage of the Catalyst guarantee related to a specific loan.
- Net loss of $40.8 million in Q2-2018 compared to a loss of $25.8 million in the prior year period.
- Loss of $0.75 per share (diluted) for the second quarter of 2018 compared to a loss of $0.51 in the same period in 2017.
- Net loss of $47.8 million for the current year-to-date period compared to a loss of $29.3 million for the first six months of 2017.
- Loss of $0.90 per share (diluted) for the current year-to-date period compared to a loss of $0.58 for the first six months of 2017.

The Company has discontinued disclosure of unrecognized yield enhancements in light of comments expressed by the Ontario Securities Commission. The Ontario Securities Commission has advised the Company that it will continue to name the Company on its Refilings and Errors List for the next following three years.

TORONTO, August 13, 2018 - Callidus Capital Corporation (TSX:CBL) (the "Company" or "Callidus") today announced its unaudited financial and operating results for the quarter ended June 30, 2018.

	For Three Months Ended			Year to date	
($ 000s unless otherwise indicated)	**Jun 30, 2018**	Mar 31, 2018	Jun 30, 2017	**Jun 30, 2018**	Jun 30, 2017
Net loans receivable (before derecognition), end of period [1]	**244,688**	244,709	472,324	**244,688**	472,324
Gross loans receivable (before derecognition), end of period [1]	**1,131,482**	1,106,140	1,028,423	**1,131,482**	1,028,423
Average loan portfolio outstanding [1]	**1,119,327**	1,080,836	1,029,803	**1,100,081**	1,123,948
Gross yield (%) [1]	**6.6%**	6.3%	11.2%	**6.4%**	16.3%
Total revenues[2]	**89,437**	56,248	26,884	**145,685**	58,463
Net interest margin (%) [1]	**-0.5%**	-0.4%	3.5%	**-0.9%**	5.7%
Net (loss) income	**(40,825)**	(7,023)	(25,801)	**(47,848)**	(29,318)
Earnings per share (diluted)	**($0.75)**	($0.13)	($0.51)	**($0.90)**	($0.58)
Recognized yield enhancements[3]	**-**	-	-	**-**	5,800
Leverage ratio (%)[1]	**40.5%**	38.2%	37.3%	**40.5%**	37.3%

2018 amounts are under IFRS 9 and 2017 amounts are under IAS 39.

(1) Refer to "Forward-Looking and Non-IFRS Measures" in this press release. These financial measures are not recognized measures under IFRS and do not have a standardized meaning prescribed by IFRS. Therefore, they may not be comparable to similar measures used by other issuers.
(2) Certain comparative figures have been reclassified to conform with current period presentation.
(3) Recognized yield enhancements are recorded in the statements of income in total revenues (YTD Q2-2018 – nil; YTD Q2-2017 - $7.0 million) and in loss on derivative assets associated with loans (YTD Q2-2018 – nil; YTD Q2-2017 - loss of $1.2 million).
(4) Income statement data is after derecognition, unless otherwise indicated.

Business Update (As at August 13, 2018)

Loan Portfolio – The Company's pipeline at June 30, 2018 was $1.3 billion, and currently stands at $1.4 billion with three signed back term sheets totaling approximately $260 million.

As noted earlier in this release, subsequent to the end of the second quarter, the Company originated two new loans with commitments totaling $163 million and a gross loans receivable balance as of August 13, 2018 of $139 million before derecognition, or $37 million after derecognition. In addition, the Company received full repayment of one loan, with commitments totaling $26.3 million and a gross loans receivable and net loans receivable balance as of August 13, 2018 of $11.1 million before derecognition, or $2.8 million after derecognition.

As previously disclosed, Callidus undertakes extensive due diligence before closing on a loan transaction and there can be no assurance that the results of the due diligence will be satisfactory to Callidus. The Company continues to maintain a cautious approach in reviewing potential prospects due to increased sectoral liquidity, as it has observed a rising number of deals being signed by competitors at lower yields as credit dollars continue to pour back into the market.

As at June 30, 2018, net loans receivable have remained flat from December 31, 2017 as increased funding was partially offset by higher provisions for loan losses and the consolidation of Midwest Asphalt Corporation in the first quarter of 2018 as this loan was removed from loans receivable and the company was consolidated in the financial statements.

Acquired Subsidiary Companies–A total of six loans have been removed from loans receivable and consolidated in the financial statements in order to protect collateral in each of those loans.

Total non-interest revenues for these acquired subsidiary companies: (i) for the second quarter of 2018 was $90.8 million, an increase of $72.7 million or 402% from the same quarter last year and (ii) for the current year-to-date period was $148.1 million, an increase of $121.5 million or 457% from the same year-to-date period last year, primarily due to the consolidation and recognition, for accounting purposes, of non-interest revenues of the injection molding, forest products, and paving businesses since June 2017, November 2017 and January 2018 respectively.

Total gross margin for these acquired subsidiary companies for the second quarter of 2018 was 15.6%, an increase of 1.5 percentage points from 14.1% in the same quarter last year due primarily to: (i) the consolidation of the forest products business in November 2017, for which gross margins were 24% in the second quarter of 2018 and (ii) 2

percentage point increase in gross margin for the gaming business to 58% in the second quarter of 2018. Gross margin for the current year-to-date period was 12.6%, a decrease of 2.9 percentage points from 15.5% in the same year-to-date period last year due primarily to: (i) the aluminum castings and paving businesses experiencing more negative gross margins in the period and (ii) 2 percentage point decrease in gross margin for the injection molding business to 4% in the current year-to-date period.

Callidus continues to work with these subsidiaries to implement strategic decisions and execute new business plans as part of their respective turnarounds and is pleased with the progress achieved to date at several of them.

Provision for Loan Losses – Provision for loan losses of $21.3 million was recorded in the statements of income for the second quarter of 2018. This primarily related to a $12.7 million provision on one specific loan concentrated in the energy sector as a result of a delay in expected future cashflows with the remainder related to foreign exchange. Provision for loan losses of $36.3 million was recorded in the statements of income for the current year to- date period. Of this total year-to-date provision, approximately $14.4 million is related to foreign exchange with the remainder primarily attributed to a $14.3 million provision on one specific loan concentrated in the energy sector as a result of a delay in future expected cashflows.

During the second quarter of 2018 Callidus recognized a recovery in the statements of comprehensive income of $7.4 million under the Catalyst guarantee due to the recognition of specific loan loss provisions and other asset impairments in the current quarter. During the current year-to-date period, the Company recognized a recovery in the statements of comprehensive income of $37.3 million under the Catalyst guarantee due to the recognition of specific loan loss provisions, other asset impairments and confirmation of coverage of the Catalyst guarantee related to a specific loan.

Normal Course Issuer Bid – In April 2018, the Toronto Stock Exchange accepted Callidus' notice of intention to undertake a normal course issuer bid ("NCIB"). Under the terms of the NCIB, Callidus may acquire up to 2,648,529 of its common shares, representing 5% of the 52,970,597 common shares comprising Callidus' total issued and outstanding common shares as of April 2, 2018, and will be purchased only when and if the Company considers it advisable. The NCIB will terminate on the earlier of April 17, 2019 or on the date on which the maximum number of common shares that can be acquired pursuant to the NCIB have been purchased.

The Company's directors and management believe that from time to time the market price of Callidus' common shares does not reflect the underlying value of the common shares and that the purchase of common shares for cancellation at such times is a prudent corporate measure that will both increase the proportionate interest in the Company of, and be advantageous to, all of the Company's remaining shareholders.

No purchases have been made to date under the current Normal Course Issuer Bid. As the Company continues to pursue a potential privatization transaction, it is maintaining a trading blackout and purchases under the Normal Course Issuer Bid may only be effected when that blackout ceases.

Liquidity and Changes to Credit Facility – The Company's primary sources of short-term liquidity are cash and cash equivalents and undrawn credit facilities. Assuming a participation rate for Catalyst Fund Limited Partnership V of approximately 75%, total liquidity as at June 30, 2018 would be able to support in excess of $345 million of new loans. In addition, as business acquisitions are rehabilitated, we will pursue opportunities to monetize these investments where and when we believe, capital may be deployed in opportunities that generate superior returns. Timing of these divestitures is uncertain and will be assessed on a case by case basis, taking into account performance of the investment and the macro-economic conditions impacting the sector of the investment.

Privatization Process – The Company continues to pursue a privatization and has no material facts or changes to report.

Strategy for restoring and building shareholder value - Callidus reaffirmed its previously announced six strategies for restoring and building shareholder value, the first of which is prudently growing the loan portfolio, which management believes it is moving forward with, as indicated in this press release. The other strategies the Company continues to pursue and remains committed to are: actively managing the loan portfolio to minimize realized losses and with a goal of maximizing recovery of the loan loss provisions recorded to date; maximizing the cash-flow and value of businesses consolidated; prudently increasing leverage, including seeking external sources of financing at the subsidiary level; enhancing the management team as appropriate; and considering other transactions that could support and / or benefit the Corporation.

IFRS and non-IFRS Measures - Management uses both IFRS and non-IFRS measures to monitor and assess the operating performance of the Company's operations. Throughout this press release, Management uses the following terms and ratios which do not have a standardized meaning under IFRS and are unlikely to be comparable to similar measures presented by other organizations:

Average loan portfolio outstanding is calculated before derecognition for the annual periods using daily loan balances outstanding. The average loan portfolio outstanding grosses up the loans receivable for (i) businesses acquired, (ii) the allowance for loan losses, and (iii) discounted facilities. This information is presented to enable readers to see, at a glance, trends in the size of the loan portfolio.

Gross yield is defined as total revenues before derecognition divided by the average net loan portfolio outstanding after adjusting for loans classified as businesses acquired. While gross yield is sensitive to non-recurring fees and yield enhancements earned (for example, as a result of early repayment), the Company has included this information as it believes the information to be instructive given the frequency of receipt of non-recurring fees and enables readers to see, at a glance, trends in the yield of the loan portfolio

Gross loans receivable is defined as the sum of (i) the aggregate amount of loans receivable on the relevant date, (ii) the loan loss allowance on such date, (iii) the book value of businesses acquired as they appear on the balance sheet, and (iv) discounts on loan acquisitions.

($ 000s)	**After Derecognition June 30, 2018**	**Before Derecognition June 30, 2018**	After Derecognition December 31, 2017	Before Derecognition December 31, 2017
Loan facilities	**$ 1,162,720**	**1,214,466**	$ 1,096,888	$ 1,162,483
Gross loans receivable	**1,108,383**	**1,131,482**	1,022,193	1,046,983
Less: Discounted facilities	**(7,575)**	**(7,575)**	(7,575)	(7,575)
Less: Allowance for loan losses	**(339,946)**	**(342,294)**	(358,217)	(359,079)
Less: Cumulative change in fair value of financial instruments[(1)]	**(47,507)**	**(47,507)**	-	-
Less: Impairment on goodwill and businesses acquired[(2)]	**(86,584)**	**(86,584)**	(57,421)	(57,421)
Less: Businesses acquired[(2)]	**(402,835)**	**(402,834)**	(375,602)	(375,602)
Net loans receivable	**$ 223,936**	**244,688**	$ 223,378	$ 247,306

2018 amounts are under IFRS 9 and 2017 amounts are under IAS 39.

(1) Certain loans receivable have been reclassified from loans receivables at amortised cost under IAS 39 to loans receivables measured at FVTPL under IFRS 9.

(2) Businesses acquired are presented in the statements of financial position by their respective assets and liabilities.

Return on equity ("ROE") is defined as net income after derecognition divided by quarterly average shareholders' equity. Return on equity is a profitability measure that presents the annualized net income as a percentage of the capital deployed to earn the income.

Yield enhancement is defined as a component of a lending arrangement that Callidus negotiates in addition to the original loan agreement including additional fees, profit participation arrangements and equity and equity like instruments. Should a value be determined for the enhancement and depending on its contractual nature, the related amount may be recognized in the statements of comprehensive income as a part of interest income, fee income or as a financial instrument at fair value through profit or loss ("recognized yield enhancements") or may be unrecognized, which includes yield enhancements relating to controlling interests, depending on the appropriate accounting treatment under IFRS. The Company has discontinued disclosure of unrecognized yield enhancements in light of comments expressed by the Ontario Securities Commission.

Total gross margin is defined as total non-interest revenues less cost of total cost of sales, divided by total noninterest revenues, expressed as a percentage.

Leverage ratio is defined as total debt (net of unrestricted cash and cash equivalents) divided by gross loans receivable before derecognition. Total debt consists of the senior debt, revolving credit facilities, collateralized loan obligation and subordinated bridge facility.

The non-IFRS measures should not be considered as the sole measure of the Company's performance and should not be considered in isolation from, or as a substitute for, analysis of the Company's financial statements.

About Callidus Capital Corporation

Established in 2003, Callidus Capital Corporation is a Canadian company that specializes in innovative and creative financing solutions for companies that are unable to obtain adequate financing from conventional lending institutions. Unlike conventional lending institutions who demand a long list of covenants and make credit decisions based on cash flow and projections, Callidus credit facilities have few, if any, covenants and are based on the value of the borrower's assets, its enterprise value and borrowing needs. Further information is available on our website, www.calliduscapital.ca.

Conference Call

Callidus will host a conference call to discuss the second quarter 2018 results on Tuesday, August 14, 2018 at 1:00 p.m. Eastern Time. The dial in number for the call is (647) 427-7450 or (888) 231-8191 (Conference ID: 2592555). A taped replay of the call will be available until August 21, 2018 at (416) 849-0833 or (855) 859-2056.

For further information, please contact:
Investor Relations | (416) 945-3240 | investor@calliduscapital.ca

Corrected Transcript

Exhibit "C" Q2 2016 Earnings Transcript

12-Aug-2016

Callidus Capital Corp. (CBL.CA)

Q2 2016 Earnings Call

CORPORATE PARTICIPANTS

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

Dan Nohdomi
Chief Financial Officer & Vice President, Callidus Capital Corp.

David M. Reese
President and Chief Operating Officer, Callidus Capital Corp.

OTHER PARTICIPANTS

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Paul Holden
Analyst, CIBC World Markets, Inc.

Stephen Boland
Analyst, GMP Securities LP

MANAGEMENT DISCUSSION SECTION

Operator: Good morning, my name is Sharon, and I am your conference operator today. Welcome, everyone, to the Callidus Capital Corporation Second Quarter 2016 Results Conference Call. At this time, all lines are in listen-only mode. After the speakers' remarks, there will be a question-and-answer session. [Operator Instructions]

Listeners are reminded that portions of today's call and of today's discussions, including responses to questions posed in today's call, constitute forward-looking statements that are subject to risks and uncertainties related to the company's future financial or business performance and condition. Actual results could differ materially from those anticipated in these forward-looking statements. Risk factors that may affect results are detailed in the company's filings with Canadian Securities Regulatory Authorities, which can be accessed at www.sedar.com.

Please note that the company is under no obligation to update any forward-looking statements discussed today, except as required by applicable law, and investors are cautioned not to place undue reliance on these statements.

On the call today with us today from Callidus are Newton Glassman, Executive Chairman and Chief Executive Officer; David Reese, President and Chief Operating Officer; Dan Nohdomi, Chief Financial Officer; Jim Riley, Secretary; and Paula Myson, Vice President Investor Relations and Special Projects.

At this time, I would like to turn the call over to Mr. Glassman. Please go ahead.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

Thank you, Sharon. Good morning, everyone, and thank you for joining us for our second quarter 2016 results call. During the call, we will be referring to information providing the financial statements and the MD&A and the associated news release for the quarter. All are available on our website as well as SEDAR.

As always, we appreciate your feedback on our materials. So, please feel free to communicate directly with any member of the Callidus team mentioned earlier by Sharon. We will try to keep our comments brief to allow for ample time for Q&A. David and Dan will provide you with some insight into the details of the operating and financial results for the quarter, but to begin, I would like to comment on some significant milestones we have reached in the quarter, as part of the ongoing evolution of Callidus, including positioning the company to restart growth and accelerate the creation of value for all of our shareholders.

It is particularly important to highlight the fact that we have intensely held our loan book constant over the last two quarters, as we undertook a campaign, but first, protect the value of our shares against market opportunists, review the internal processes and staffing to ensure our preparation for the next phase of growth, and solidify our value proposition for all shareholders going forward.

As such, our quarterly result reflects asset management to loan book against the backdrop of initiative to create immediate and long-term value for stakeholders by closing the discounts in our shares from their fundamental value and an enhancement of our capital structure to both reduce future cost of capital and support our projected growth, growth which is clearly not currently reflected in the company's stock price.

The cornerstone in this quarter of our capital markets' activities is a new senior secured investment grade facility created to fund our loan portfolio growth going forward. It is the securitization facility that will have four investment grade debt tranches ranging from AAA to BBB, and represents about 64% of incremental funding in and of itself going forward.

The ratings are important because they indicate that our cost of debt will decline as we move more loans into the securitization program and simultaneously improve the company's liquidity. At the margin, it means that Callidus itself will fund CAD 9 million in cash for every CAD 100 million incremental increase in loan growth, able ultimately to recover 100% of the growth due to the participation agreement with Fund V. We expect the securitization program to represent an ever growing proportion of our capital structure, as it becomes the ultimate source of funding for the incremental growth in our portfolio and further reduces our cost of capital.

I'd like to give you some perspective on how the facilities will be used going forward. The securitization program will augment what we already have in place. Our existing facilities will basically function as a warehousing facilities. We will finance new loans initially in the facilities that already exist, our syndicated senior facility and currently the Catalysts [indiscernible] (04:47) facility.

As loans aggregate to a size that can be effectively securitized, they will be moved into the securitization program. The securitization program will commence with an initial amount of CAD 165 million, of which approximately 64% will receive an investment grade rating. As new loans are added to the total amount in the facility, and therefore the proportionate represents of total debt funding will obviously rise.

Second is the inflection point between the NCIB and SIB programs against the value of deploying capital in the loan portfolio. The return for a participating shareholders has been good, but the trend has shown that there is significant potential for continued future value creation. During this interim period, we have generated cash and have a scalable facilities now to expand liquidity. [ph] And we're going now (05:41) at a point where we must deploy some of that liquidity in order to maintain our increase return to shareholders.

Simply stated, building cash, not used in the SIB or NCIB to this time – at this time, since only about a third has been funded into the SIB, has [ph] hurt (05:58) and cash flow's leverage too low and negatively impacted both net

income and return on equity. As a result, we will restart loan growth in the portfolio while we complete the current SIB and consider a follow-on NCIB thereafter.

The Callidus platform is a lot more dynamic use of scale we can achieve and – furthermore, we have always stated that we have and we'll continue to add people ahead of projected growth and strengthen the team in the process. [ph] As first step for such (06:39) is the announcement of the addition of a Chief – the creation of a Chief Credit Officer. Jay Rogers will be Callidus' first Chief Credit Officer. Jay brings with him extensive credit and workout experience most recently as the senior member of Cerberus Capital Management team, and particularly their finance company called Ableco or used to be called Ableco, now called Cerberus Finance – Business Finance.

As Chief Credit Officer, Jay will be responsible for managing the aggregate risk in the loan portfolio, coordinate and manage the work-out of certain credits, and recommend appropriate strategies to the Credit Committee to enhance the operations and overall quality of the loan portfolio. In addition, we will be adding other senior underwriters and senior members of management over the next two quarters to manage, ahead of time, the proposed and projected increase in the loan book.

Last but certainly not least, we are able to update you on the yield enhancements we have spoken off in previous quarters and especially last quarter, which also positively influenced our results in this particular quarter. For the benefit of those who are unfamiliar with yield enhancements, they are required under IFRS accounting rules and are generally no-risk or low-risk financial [ph] instruments (07:57) we receive when we make an accommodation to a borrower.

Yield enhancements are unequivocally and undeniably a fundamental, ongoing, repeating part of the business for a company such as Callidus. It is therefore a key part of normal operations, albeit they can be lumpy.

We deal in a market segment where our clients often go through structural changes. As a result, it is very common for a client to need or desire changes to the original deal with Callidus. When such changes are requested or needed by the client, Callidus may choose to accommodate the borrower, and in exchange, demand or request a change in the economic relationship, resulting in what's known as "yield enhancement". These yield enhancements can take many forms. The most commonly understood would include revenue royalty streams, periodic fee arrangements, warrants and limited equity participations.

Please note that the form of yield enhancements determines the impact that is reported on the profit and loss statements or the balance sheet with essentially no discretion to management under the IFRS rules.

On our last call, we estimated that we would have yield enhancements on seven loans to report in Q2 with three following in Q3. In terms of value, we reported that National Bank had valued the yield enhancements between $0.50 and $1 per share in their valuation prepared in April, in conjunction with the substantial issuer bid. We also stated at that time that we thought that it was unduly conservative and incorrect. As you will see in our MD&A, we have exceeded all of those estimates. We have indicated that there are yield enhancements in place on 13 loans, which is almost 40% of our total portfolio.

These have been internally valued, according to IFRS and with third parties, at CAD 57 million pre-tax with CAD 34.8 million or CAD 0.68 per share on a diluted basis recognized in this quarter alone. Since yield enhancement is an ongoing and critical part of our business, this proves our previous assertions that this has not been properly valued by either the market, including being substantially undervalued by National Bank Financial in their SIB valuation.

The value of the yield enhancements will be reviewed every quarter, and some of those changes as required by IFRS will be put through the income statements and others via the balance sheet. We would expect the yield enhancement not only to add to value, but unfortunately, will also add some volatility of the results going forward.

I will now ask David to walk us through the operating results for the first quarter.

David M. Reese

President and Chief Operating Officer, Callidus Capital Corp.

Thanks, Newton. Once again, we're pleased that the quarter continued our overall long-term trend of consistent improvement with significant gains in the key metrics of gross yield, net income and return on equity. As of yesterday, gross loans receivable before derecognition stood at CAD 1.218 billion, which is what we would expect, given we had held the loan book constant for the past two quarters.

Looking forward and giving you some guidance on growth in the portfolio, the loan pipeline remains very strong at approximately CAD 940 million, and which includes signed back term sheets and the balance of funding for Project Resolve of approximately CAD 150 million. On the repayment side, we received full repayment on two loans during the quarter, totaling just under CAD 60 million. That brings our 2016 year-to-date repayments to six loans, totaling about CAD 165 million.

Looking forward to Q3, we are expecting approximately CAD 75 million in repayments, based on the loan balance as of August. Over the next quarter, we expect the resolution of another CAD 10 million of gross loans receivable, representing four loans in our watch-list accounts.

I want to note that we consider loan repayments to be a critical part of our growth. Successful loan repayments demonstrate how, working with Callidus, our clients benefit from properly sized and designed facilities to support the successful rehabilitation of their companies. This helps future clients gain confidence in our capabilities and the repayments provide us with capital to redeploy.

Now, I'll ask Dan to discuss the financial highlights for the quarter. Dan?

Dan Nohdomi

Chief Financial Officer & Vice President, Callidus Capital Corp.

Thanks, David. Callidus recorded a strong financial performance in the second quarter. I'd like to highlight a few of these key metrics and what were the main drivers in their change from prior periods.

Our earnings for this quarter, for the first time, include the impact of the yield enhancements that Newton has discussed, these are options, and therefore, there will be some variability or volatility in their valuations from quarter-to-quarter. To make it easier for investors to compare our results historically, our reporting, beginning in this quarter and going forward, will present the key financial performance metrics with and without the impact of yield enhancements.

EPS were up CAD 0.39 per share or 115% from last quarter, and CAD 0.37 or 104% from the second quarter of 2015, primarily because of the addition of yield enhancements during the quarter. Revenue after derecognition was down 7% or CAD 3.6 million from the first quarter, and increased CAD 6.6 million or 17% from the prior-year period.

Our consolidated gross yield for the quarter was up at 20%, compared to 19.4% in the first quarter of 2016, and 18.8% in Q2 of 2015. The main driver here is the recognition of additional fees during the period. If we break down the gross yield by our two products, traditional Callidus loans and Callidus Lite, we earned 20.5% on our core Callidus product and 14.4% on our Callidus Lite loans. Both are up from Q2 of 2015, when we earned 19.9% on the Callidus loans and 14.2% on Callidus Lite.

Moving on to one of our most important metrics, ROE, we delivered a record ROE of 29.2% during the second quarter, which compares to 13.9% and 15.2% in the second quarter last year. Net income of CAD 37.5 million increased 119% from CAD 17.1 million last quarter and 103% from the second quarter of 2015.

We have two offsetting unique events that have a substantial impact on net income and ROE, yield enhancements and the Gray Aqua provision. Newton has already discussed the yield enhancements. The Gray Aqua provision was CAD 12 million during the quarter or over 80% of our total loan loss provision for the period. David will be providing some background and commentary on this event in his comments.

Our leverage ratio, which is measured as net debt to gross loans, was 38.5% at quarter-end, consistent with the ratio last quarter, as there was not a material change in the size of our portfolio during the period. Going forward, however, we do expect this increase as we access funding for new loans from our new securitization program.

During the quarter, we've recognized the recovery of CAD 8.5 million under the Catalysts guarantee due to the recognition of specific loan loss provisions. Our liquidity and therefore our capacity to fund new loans has three components. Cash on hand, the undrawn capacity in our debt facilities and further funding we can obtain for loans from Callidus Fund V.

At the end of the quarter, total liquidity would be able to support approximately CAD 480 million of new loans. This leaves us in a very good position and meet the funding requirements that come from our robust pipeline.

Looking forward, our liquidity will increase again in the third quarter with the finalization and close of our new securitization facility, which should allow us to lever our loan portfolio by an incremental CAD 25 million. So, based on these key metrics, our second quarter financial results extended our overall record of strong and improving performance. David?

David M. Reese

President and Chief Operating Officer, Callidus Capital Corp.

Thanks, Dan. I'd like to expand on one of the items Dan touched on in his comments. Dan mentioned the impact of our provision for loan losses on net income. I want to go into more detail on the provision and what drove that.

The provision for the quarter was CAD 14.4 million, which is a provision rate of 4.9% on an annualized basis. This is running above where we're guiding you last quarter to a range of 2.5% to 3.5% on an annualized basis. While risk is a part of our growing business, the current rate is above where we want it to be.

The largest item including the provision for the second quarter related to the Gray Aqua Group. You'll recall that we have already taken CAD 25.4 million in provisions against this loan to-date. This quarter, we had another CAD 12 million, bringing the total to CAD 37.4 million. This is a loan that was made to a New Brunswick-based salmon farming operation that also has operations in Newfoundland. The collateral on this loan was a combination of fixed assets and working capital.

[ph] In the working capital is inventory. (17:27) The largest inventory of a salmon farming operation is salmon. Like all other inventory, we have third-party appraisals prepared on a periodic basis. We have just received a new appraisal, which indicates the significant downward change in the quantity and quality of the salmon inventory. There are likely several factors contributing to the decline in the value of the fish, most notably, a detrimental change in water temperature and an infestation of marine parasites, sea lice to be exact. As a result, we expect the harvest of this inventory to be much smaller and of less value than originally estimated.

With the final harvest not occurring until March 2017, we will continue to monitor this issue and take any steps to maximize the value of the inventory. We will also begin the process of selling the fixed assets comprised mainly of machinery and equipment. We constantly adjust our underwriting criteria based on what we see in the market and what we experience and learn on individual loans. We have made changes to our practice based on the Grey Aqua experience. Going forward, we will not underwrite loans to businesses where their collateral and cash flow are dependent on biological assets that can unexpectedly and unpredictably deteriorate.

With that, I'll turn it over to Newton for a final comment before we move to questions.

Newton G. Z. Glassman

Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

Thanks, David. We have spent the time to enhance our capital structure and are on track to achieve a lower sustainable cost of capital while funding our future growth for our next phase. It places us in a very strong position to benefit from the favorable conditions in the marketplace, as we restart our loan portfolio growth.

As we enter this new phase, our strong liquidity position allows us to continue to return significant capital to our shareholders through a monthly dividend as well as to those that wish to participate in our existing SIB and future capital markets program. And as our ROE strengthens even further with the growth, since this is a highly scalable business, the ability to increase leverage and our lower cost of capital, long-term shareholders will share in the strong positive future results for Callidus.

As always, I would like to thank our investors for their continued support. And now, operator, we'll be pleased to take questions.

QUESTION AND ANSWER SECTION

Operator: [Operator Instructions] Your first question comes from Jaeme Gloyn from National Bank Financial. Your line is open.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

Yeah. Good morning, guys.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

Good morning, Jaeme.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

The first question is related to the Gray Aqua provision. Can you just elaborate on the size of that loan? How – what percentage of provisions have you taken to-date as percentage of the loan? And then, a follow-up, the final inventory in March 2017, does that coincide with the maturity of the loan as well?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

So, I'll take the first cutout. And then, David, you can expand on it. I don't believe the size of the loan is public, but the vast majority of the loan has already been written off. Under IFRS rules, we have to value the collateral on an ongoing basis. We're very careful with Gray Aqua. When the value [ph] came in, that there (21:00) is a problem with the inventory. And remember, most of our loans are valued or are [ph] lend against (21:07) inventory receivables and the balance of the [ph] gains fixed (21:11) equipment or machinery and equipment.

We took the provision. The reality is that Gray Aqua was a mistake. We tried something, as I said last quarter and we tried to enter into a new area. We are going to, on occasion, try new areas and new approaches as a growing business. And at times, we'll get it right. And at times, we'll get it wrong. Gray Aqua is a one-off situation in the sense that we [ph] lend against (21:36) inventories that's biologic in nature, and we thought that the operators as well as the third-parties that we had engaged would be able to help us understand the business.

Clearly, the business was more – is more complicated than we thought. We tried it. It didn't work. We'll clean it up to the extent that there is any more left to be written-off. If and when the value of the remaining collateral fall below that value, we'll take a provision on it. But you need to understand that the collateral includes machinery equipment in a number of locations. And at some point, we're obviously going to get very, very close, it's not already there, to the underlying value of the collateral that is not fish related.

So, right now, we're very comfortable with where the provision is. It could go in both directions. It could go up, but it also could go down in the future, meaning the provision will be adjusted relative to the value of the underlying collateral. In terms of the inventory [audio gap] (22:38) all of our loans are technically 364-day loans and have to be renewed. I don't remember the exact date, maybe David does, when that loan is up for renewal. So, we are in the process of dealing with the loan, and we will deal with this in due course and in a timely manner regardless of when the actual technical due date is.

David?

David M. Reese
President and Chief Operating Officer, Callidus Capital Corp.

A

Thanks, Newton. I don't recall the date of the loan offhand. Even if I did, I don't think we would probably disclose it. I don't really have anything to add to your comments, unless Jaeme has a follow-on question on Gray.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

No. But I will follow on just some other loan disclosures, specifically related to oil and gas loans. I noticed that the collateral coverage ratio declined from [ph] 172% to 118% (23:27) from Q1 to Q2. Can you just describe what happened or what drove that decline?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

The decline in – first of all, I don't know about you, but having collateral of 118% makes me pretty happy in something that's been beat up [ph] in a sector, (23:47) I suspect that most lenders, especially the Canadian banks [ph] that blends with the sector, (23:51) would be beyond ecstatic to have 118% coverage on their loan.

That being said, again, both under IFRS and under internal policy, we revalue the collateral on an ongoing basis. When we see the collateral changing, we change the value of the collateral. And at times, if we're worried about it, we will change the requirements under the borrowing base. So, if we saw – as an example, if we saw a loan in oil and gas or anywhere else that didn't have sufficient collateral, we would consider changing the borrowing base and advancing less. If we see any of these loans approaching something that concerns us, we'll either advance less or change the borrowing base, as these are right.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

Okay. Great. Fair enough. Shifting gears to the yield enhancements and the CAD 32 million gain, can you just sort of elaborate on the size of the [ph] potential can, (24:52) the size of the original loan that those warrants are associated with? What's the value of shareholders' equity or percentage that that CAD 32 million would represent of the company? And then, maybe just some commentary on the industry or sector that those warrants are attached to.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

Some of that, I could answer. Some of it, we're not legally allowed to answer for a bunch of reasons. We will not tell you the size of the original loan. It is a loan that originally was troubled. We helped the company review their operations. They entered an additional and extra line of business, [ph] which makes their credit basically found. (25:46) They came to us and asked us if we would amend and help them with our facility to help them go in that business. It is a huge incremental increase in their business. They seemed to be executing well to extremely well.

We are very supportive of them. They are a poster child of how we can help and why we would want to help a company that first was in trouble and then figures out a way to get out of trouble. Without our help, it would not have been able to go into this additional business, which is, in terms of revenue, billions of dollars for them potentially. At least, the first part of it is a couple of billion dollars or more.

The value is not determined by us. The value is actually determined in conjunction with third-parties outside of the firm and then reviewed with the auditors. The IFRS rules are incredibly specific and esoteric. The form of the yield enhancement itself will determine when it hits your financial statement and where. So, for example, under the IFRS rules, there is zero discretion in dealing with this issue. So, if you are receiving work or options as we did in this particular case, one is required to value those options or warrant and put them through the P&L.

Similarly, when we receive a cash fee, that also must be run through the P&L. If we have [ph] Gray's equity (27:36) being granted to us or other forms of yield enhancements, it actually goes on to the balance sheet and is only recognized on the P&L at the time of the sale. I understand that that's complicated and I understand it's hard to follow. There's no discretion. There is nothing we can do nor is there anything we would do other than abide explicitly and directly with the IFRS rules.

In addition, under the IFRS rules, we are required to recognize whether it's on the P&L or the balance sheet, the yield enhancements in the period in which it becomes obvious that that is available to us or that is the agreement with the party has been entered into. So, this quarter's yield enhancements disclosure actually incorporates in effect some things that have in the past been in our P&L, such as fees or revenue and other things that have not, such as the option in this one situation and some other things that are on the balance sheet which have not in the past been included.

This is a recurring and ongoing part of our business. It is a fundamental part of the business. It's critical to how we run the business. It will contribute. Albeit in a very lumpy way, in every period going forward, they will be revalued as required under IFRS on a quarterly basis. But as the book grows, as you can see, with almost 40% of our loans having some form of yield enhancements, one can easily understand that, as the book grows, so will yield enhancements and it requires valuation by TheStreet.

So, right now, we don't think TheStreet is valuing either the restart of growth or the ongoing contributions of yield enchantments to the earnings stream and the earnings power of the business. One approach, which was suggested to me, which I actually think is, at least, intellectually acceptable, albeit I don't believe it's the right way to do it, is that similar to the way public-private equity firms are valued, where they value the management fee at a higher ongoing multiple that they carry, it would be arguable that the income stream of normal income would be valued in our business at Callidus at a higher multiple than the ongoing value of yield enhancement. But it's very clear to me that a 1 multiple on that value is simply intellectually indefensible.

We've already exceeded essentially the valuation on a 1 multiple basis that National Bank included in their valuation in the SIB and even the most conservative approach, where there would be a lower multiple on yield enhancement to normal earning, would result in a multiple greater than 1. So, clearly, this is something that we're going to have to help TheStreet understand and TheStreet will decide how to value.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

Okay. So, just one point to clarify. The unrecognized value of CAD 22.2 million, where is that on the balance sheet right now?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

That's not on the balance sheet.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

Okay. Sorry. But I thought I heard you said it was on the balance sheet. Okay.

Dan Nohdomi
Chief Financial Officer & Vice President, Callidus Capital Corp.

A

No...

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

No, what I said is that IFRS requires specific and explicit treatment sometimes on the P&L, sometimes on the balance sheet and sometimes you don't recognize it until it's earned.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

Right. Okay. The last question just before I turn it over. With respect to the expenses, you'd mentioned that there's been some recent hires within the quarter and you expect to make some hires subsequent to the quarter. How do you see expenses evolving over the coming quarters? I guess, how much of these new hires are reflected in the current quarter and how much would you expect to be reflected going forward?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

I think that's actually a really good question. I think all of these questions have been really good, actually. We've always said that we hire ahead of growth. We've always said that when we are growing. We argued that our expenses were ahead of what we thought the normalized amount would be. I would argue that our expenses currently are a little bit but not a lot, meaning in Q2 and Q1 where they would be. But since we're restarting growth, we would expect that, even with the hires to come more into line and go down over time, it might be lumpy at the frontend and then come down as a percentage.

We think that's the right way to build the business. We think that you actually have to have the people in the business and understanding it ahead of your need for them so that they can actually learn it. Historically, we have said publicly that, roughly, for every CAD 100 million of growth, the operating leverage is such that [ph] by CAD 500,000 (32:52) of expense is lumpy because, this time, you're hiring a more expensive person like a chief credit officer or an underwriter or whatever. And then, next time, you're hiring a field examiner or a collateral clerk.

Typically, we would backfill the office after we've built in the higher and more senior people. We would expect, as a result of the increased leverage and the new securitization facility, that overall and over the next two quarters to four quarters our expense ratio is actually coming down and our cost of capital is coming down, but it will take us a few quarters.

Jaeme Gloyn
Analyst, National Bank Financial, Inc. (Broker)

Q

Okay. I'll turn it over to somebody else for now.

Operator: Your next question comes from Stephen Boland from GMP Securities. Your line is open.

Stephen Boland
Analyst, GMP Securities LP

Q

Good morning. Just two questions. I guess, you've already touched on the provision. Can you talk on the recovery that occurred in the quarter? Is that from one loan or is it just the ongoing adjustment with your collateral values that you're getting that money back from – through the guarantee?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

David, Dan, maybe you guys could answer that.

Dan Nohdomi
Chief Financial Officer & Vice President, Callidus Capital Corp.

A

Sure, Newton. The recovery of CAD 8.5 million is just a normal course for us. It covers some loans that are guaranteed from Callidus and that's really all it is, Stephen.

Stephen Boland
Analyst, GMP Securities LP

Q

Okay. And Gray Aqua is not part of that recovery, right?

Dan Nohdomi
Chief Financial Officer & Vice President, Callidus Capital Corp.

A

We haven't disclosed that. But I think if you look at and see that we took a CAD 12 million provision and that our total recovery was CAD 8.5 million.

Stephen Boland
Analyst, GMP Securities LP

Q

Right. Just confirming. Okay. Maybe the second question is just for you Newton and looking forward over the next four months to your past comments about going private, restarting growth as you said, you're throwing some big EPS up, your SIB [indiscernible] (35:04) essentially nearly done and you're considering then an NCIB.

If the stock is near or at the range of the National Bank, is your rent really the trigger or is it – if January comes or February and the stock is still – if it hits that range but doesn't stay there, what should we look forward to? Is it ongoing battle for you to keep the shareholders in surplus value in all these mechanisms that you're doing? Hopefully, that was clear.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

I think I understand parts of the question. So, let me try to address as much as it is I can. And if I missed something, you can re-ask or you can clarify the questions, Stephen. First off, I think one of your underlying assumptions about the SIB is not correct. The SIB, unfortunately, for us, has only had about 1/3 of it tendered.

As of the last extension that I think was July 30, [ph] so either 29th or 30th. (36:10) Only about 1.2 million shares out of an offering for CAD 3.7-ish million had been tendered, which is somewhat disappointing to us because, frankly, it's better for the company more shares that are tendered into the SIB. As a result of the SIB, we're sitting on a lot of cash because we have to actually have the cash to settle at a fairly quick basis, sometimes within the

days or a couple of days of the shares being tendered. So, we have to actually sit on cash, which in turn has reduced our leverage as you can see from the numbers to about 38.5% – 40-ish percent.

And that in turn has hurt what otherwise would have been net income and ROE. The SIB is a critical part of what we're trying to do for long-term shareholders. We work for the long-term shareholders. It's our job to figure out the best ways for them to get a return. At CAD 16.10, it is our view that, even to the midpoint of the National Bank valuation, that's a 25% return roughly, CAD 4.16, but 25% essentially no change in risk and risk that's a no execution risk. Returns, in our view, is actually a very good use of capital to the investors. What we've noticed is that as a result of holding the book steady, that cash is actually going up. And that will further hurt both ROE and net income if we don't start deploying the cash, which is why we have said that we will restart growth.

Notwithstanding that, we clearly on an operating basis exceeded all of TheStreet's target. And if you include yield enhancements, which we believe and can prove is an ongoing part of the business, we massively exceeded all of TheStreet's targets. So, it's a little surprising for me this morning to read – I read three positive notes about the company exceeding expectations and one with a very short headline that said that we missed the operating expectations, which is just factually not correct.

So, the problem that we're going to deal with going forward is what's the value if there is to be a growing private transaction. And the answer is that we will engage in a process if the stock has not – oh, let me go back. So, you mentioned something about the National Bank valuation. Clearly, the National Bank valuation is too low. They included CAD 0.50 to CAD 1 for yield enhancement, and we've actually basically disclosed CAD 0.50 really more than the pre-tax at about CAD 0.60-odd after tax per share. I think it was about CAD 0.60 odd, CAD 0.62 of share after-tax if my math is correct. And that would assume it was only a 1 multiple, which is just mathematically not correct.

So, clearly, it's our view that the National Bank valuation itself is too low on the low side. And to be fair to National Bank, they didn't have the same amount of data that we have now because we're further along in a whole bunch of the yield enhancement. And frankly, we have more of them now. We have told people in Q1 that it was 7, and we are working on three more, and now we have 13.

When you combine that with growth, and we know that some proportion of the new loans will end up having yield enhancement, even at a 1 multiple, it's clearly too low in the National Bank valuation. Our job will be to be to run a process if the stocks remain undervalued, whereby the minority shareholders get full value for their stock. It's one of the reasons why we have said in the past, and I'm repeating now, that Catalyst will not be a bidder in the going-private transaction.

Our view is that the market may misinterpret it and see us, at Catalyst, trying to buy the business on the chip. So, we've removed ourselves from any future prospective process to make sure that people understand that our interests are aligned. Since we're not the buyer and we have to mark-to-market, in the funds, we want that sale to be as high as anybody else does. And we will ensure that the process takes care of and maximizes the value for the minority of shareholders.

Legally, as part of any going-private transaction, if the stocks does not recover to where we think it's a fair value, there will be another third-party valuation and opinion provided to the board, and then the board will decide whether it's fair value. Since we're clearly restarting growth and intending to restart growth, if that growth materializes along with the increased value of yield enhancements, it's pretty clear that our view is that the stock is worth a lot more than what the historic National Bank [ph] valuations as it was (41:35) and we'll leave it to the board to evaluate it and to run the process.

Stephen Boland
Analyst, GMP Securities LP

Q

And your time line is still [ph] near end then, right, through that – through that, (41:46) to get to that valuation for that time?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

What I've always said is that – if the value has not been unlocked, we will start the process before yearend. We obviously would never be able to complete a transaction before yearend and the process would take as long as it takes. The first thing you do, generally, is you hire a third-party to run a sale process. You'd to hire another third-party as part of that process, separate, independent from the one running the process to provide evaluation. We will follow the letter of the law and the process that we will do everything we can back to my value. And as I've said in the past, if that means we started in – that means if the stock has got recovered sometime in Q4, we will start the process in Q4.

Stephen Boland
Analyst, GMP Securities LP

Q

Okay. That's great. That's all I have. Thanks.

Operator: Your next question comes from Paul Holden from CIBC. Your line is open.

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

So, I want to ask a couple of questions on the yield enhancements. So, one, to get -I just want to make sure I understand the accounting appropriately and I think, Newton, you kind of referred to this already, but I want to make sure I understand it. In terms of mark-to-market gains, those will be broken out separately on the income statement as it was this quarter. And then, in terms of the royalty income and other type of income enhancements, those will be included in revenue, i.e., like the CAD 2.8 million this quarter, is that correct?

A

Yeah. To be clear, we've always included anything that's on the revenue line, where it's been received in cash. We're required under the accounting rules to do so. The accounting rules are incredibly asset [indiscernible] and frankly annoying. Under the IFRS, the deal was discussed. I've argued that there is a lot more form than substance under the rules, and that it could cause people to misunderstand it. We have to follow those rules, we have no choice. We will follow those rules. The rules generally say two things, and David or Dan, you can expand on this.

When I look at it, I think there is two ways. The first is that the form of the agreement determines the accounting treatment and the findings of it is also determined by the form. So, basically when you look at the form of how the yield enhancement is taken, whether if a revenue or fee issue, it leads you down one path or options, it leads you down a similar path, but with potentially different timings and valuation issues, or it's straight out equity or other issues, you don't recognize it until the very end. It's kind of silly because you're recognizing something immediately and you're deferring others, this is proportionally long unit it's actually realized on.

So, I agree that leaders of the statements will not see some of it because under the accounting rules, it's actually not recognized until it's actually crystallized and realized upon. There is nothing we can do about that. All we can do is, do what we did we think fairly well this quarter and we're open to suggestions of people actually have better ideas of breaking it out and showing how much of it was revenue, how much of it is options etcetera, and then fair valuing it so as quarters go by if there is a change in a fair value, you'll see it and you'll see where it is.

Paul Holden
Analyst, CIBC World Markets, Inc.
Q

And then what would be dealing with the stress lending portfolio, there may not be a very typical situation, but just on average I mean what is the type of situation that would get you into these yield enhancement instruments.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.
A

You're right. There is no typically – first of all I want to go back and ask David and Dan. Do you guys have anything to add on these crazy after the IFRS rules related to yield enhancements.

Dan Nohdomi
Chief Financial Officer & Vice President, Callidus Capital Corp.
A

Yeah, just pointing out one thing, Newton, that on page 13, of our MD&A and I'm sure Paul you've looked at this. We would get our chart and this chart will get updated every quarter. To Newton's point there is five different methods of accounting depending on what the instruments are and so we've broken out our portfolio that has yield enhancements into each of those buckets and we show what those through the P&L in the quarter and as Newton said also what is not yet recognized and why it's not recognized. So, you know what is likely to come at some point in the future assuming things pulled up. So, that will be the chart you're going to want to look at every quarter.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.
A

Okay, that's helpful. And if people have suggestions we're certainly willing to entertain discussion about whether there is a better way to disclose it or whatever else. My worry is that the MD&A now has become an extremely long and in places complicated read. It's a result of the accounting rules. We are required obviously to follow the accounting rules and we're doing so. But I'm getting worried that it's getting too hard to follow. We will continue to provide as much transparency as we can and that means that we have to figure out a way to summarize better at the front end of the MD&A or in the press releases, we'll try to do that. As the team can attest, we spent an enormous amount of time and lots of effort trying to simplify the language and the disclosure, both in the MD&A and the press release. I don't think we're very good at it, and I think we can improve at it.

In terms of the nature and types of the yield enhancements, they range. So, you're right, there is no typical one. What I would say to you is that from a pure specific perspective, we have a sample size and we have a long enough period now, where we have more than a normal distribution, normal distribution being [indiscernible] (48:11). We obviously have had multiple years of running the business. We have CAD 1.2 billion in the portfolio, and we currently have plus or minus 40-ish loan. And over time, [indiscernible] (48:27) specifically valid that some large proportion of our portfolio will eventually have some yield enhancements to us, and that makes intellectual sense if you think about it. These are companies that are going through a restructuring process.

They're going to see opportunities that they didn't think they would see that will result in an opportunity for us where we can help them, like the biggest contributor to yield enhancements on the P&L this quarter. And there

will be others that don't execute as well as they think, and they need help from us; and as a result, we have to decide if we're going to help them. And if so, on what terms? That would be something like a company that's been in the public domain in the past, which it's now been the report process called Blueberry. We will get value where we help people, or else we just won't help them and we'll liquidate our collateral.

So, it's really up to us to decide if we're willing to help people and accommodate them; and if so, what the price of that will be. If you look at it, you'll see there is a range. The range is from a small fee for an extension because somebody couldn't finance us out after the term of the loan, to very large where, but for our contribution, the rest of the stakeholders [ph] at (49:51) the borrower would not have any of the upside, and we want and believe that, as a result, we're entitled to a piece of it, and we negotiate it.

One of the problems with yield enhancements is that it's a negotiation. So, we don't get to determine the form in isolation of what that yield enhancement will look like. It requires a conversation and a negotiation with the borrower. We don't control the ultimate outcome, or else we'd have a more formalized approach that we could show to you guys. We have to negotiate it with the borrower.

There are times when the borrower may say, we don't agree to that, we're not going to do it, it's not worth it to us, and we'll get nothing. There'll be other times where they say, we don't agree with that, but we would offer you X, Y or Z. I do think that the right way to handle it is to statistically look at it over time and say, well, when you have a portfolio of X dollars, over time, yield enhancement will contribute Y number of income because it'll be Z number of loan. And I think it will take a number of quarters of our doing it for people to see. I would point out that historically some of it has already been included in revenue and therefore the implied multiple in the market, which is on the revenue side or the fee side because by law, we're required to recognize revenue and we receive it or when it's agreed to.

So, I think, what you were really worried about is trying to disaggregate enhanced yield enhancements, and I think that people are already starting to think about finally, how do you value yield enhancements separate from the ongoing stream of a portfolio of X hundred or billions of dollars, and I don't think it's an easy issue. I think it's hard.

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

So, a follow-up question to that. So, to give out the portion of yield enhancements that's currently not included in revenue and hasn't been historically, how do we think about that value being crystallized? Is it when a company saw that, i.e., there is a change in equity ownership? Is it when the lending relationship ends? So, yeah, how do we think about it?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

So, I would say two things. First of all, our average term is somewhere between two and two and a quarter years right now. So, whatever is on that table, I would [indiscernible] (52:34), and I would say that it would be received essentially sometime on average over the duration of that average term, that's number one.

Number two, I wouldn't – this is just me. I don't focus on the specific of this unrecognized or that recognized yield enhancement agreement. I focus on it as a percentage of the total book because that would help me model out how that will grow over time, but that's how I would do it. And then, I would add average term to it. It's clearly not been included in earnings, and it has not been included in valuation. We're happy to help people to think about it, it's not our place to tell them or tell you how to do it, other than to say that a [ph] value that's zero (53:25), which is what the market has been doing, is clearly indefensible intellectually.

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

Right. I guess what I'm specifically trying to get at here, say, it's warrants or direct equity ownership, how do you actually crystallize that value of equity?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

Well, it depends on the agreement. So, there may be a [ph] shotgun with (53:49) the company where they have to buy it back from us over a period of time. There may be a [indiscernible] (53:33) call arrangement. If it's an – if its options or warrants or a straight-up equity. If we own 100% of the business, it would be because we're selling the business and it's entirely within our control. This is no different than – I'm not trying to be arrogant when I say this, it's no different than what Catalysts already does incredibly well, which is unlock value from companies that need our help. In these circumstances, this goes very well with the competitive advantages already at Catalysts. And frankly, CBL gets to exploit because of its relationship with Catalysts. So, when it comes to monetizing on this, that's not frankly something I worry about. I care about the value in creating the value. We'll end up getting the value as we have historically and always we'll try to do as best we can. But that's why I said to look at the term, the average term.

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

Okay. So, different topic now to review of employees and some of the decisions you're making going forward. So, first off, in terms of the decision to hire new underwriters, how many do you currently have today? And have you seen some turnover over the last year?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

Including junior people, David, we have how many right now?

David M. Reese
President and Chief Operating Officer, Callidus Capital Corp.

A

We would have, with junior people – four, five – nine.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

So, if you think about it, nine underwriters for our portfolio of 30-odd, 40-ish loans, it's a little bit heavy. Some of that is as a result of junior people being groomed to take on more responsibility, which we're in the process of. Some of that is because we always knew that we would end up restarting growth sooner or later, and it's actually frankly a little bit sooner than I have thought it would be. I think that – and we've said this publicly, I think that we'll probably add two senior or mid-senior underwriters in the next couple of quarters, it's in the – I think it's in the press release and I think I'm pretty sure it's in either the MD&A or my earlier comments.

We'd clearly decided to increase the structure and discipline of the business with the hiring of Jay and the creation of a Chief Credit Officer back on purpose. Obviously, we think that managing at CAD 2.5 billion book is fundamentally different than managing a CAD 1.2 billion book, so we're getting ready for that.

We've been fairly privileged and blessed for the last two quarters to able to turn inward. And frankly, in a twisted way, Gray Aqua has been a great [ph] lesson (56:58). So, there are some collaterals and there are some forms of inventory that we'll just never touch ever again. And the experience has taught us that there are just some areas, no matter what we think internally, we will never be able to actually understand some businesses as well as we would like. And I frankly would rather have the experience – a one-off experience in the biologics area, have something like Gray Aqua now in the business when we have a ton of liquidity and no issues while we were taking a pause in growth than when the business is being [ph] fresh (57:38), growing businesses learn while they're growing. There's nothing unusual about that. What is unusual about Gray Aqua is that, A, some of the process that was involved in Gray Aqua was not as robust as we would like. And in the last quarter, we highlighted nine changes, I think it's nine, nine changes internally. Those changes are obviously continuing, as you can see, by the retirement of Craig Boyer and – the pending retirement at the end of the year of Craig Boyer and the hiring of Jay Rogers. We're clearly very focused on tightening and continuing to tighten the business. We think that's normal.

David M. Reese
President and Chief Operating Officer, Callidus Capital Corp.

A

And Paul, to answer your question very specifically about turnover. We've had zero turnover. And as Newton mentioned, other than Craig who will be retiring by year end, we've had no turnover in the underwriting and credit section of our business.

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

Got it. Thanks for that.

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

Well, we had one person who, unfortunately and unfortunately for his family, died but technically wasn't in the underwriting group.

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

One final question from me...

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

And we were not [indiscernible] (58:58).

Paul Holden
Analyst, CIBC World Markets, Inc.

Q

With respect to the SIB, Newton, as you pointed out, only a third or so has been tendered relative to the amount you are willing to buy back. So, if that number does not increase, do you take a [ph] similar to move (59:18) as to what you've done in the past in terms of extending the offer and perhaps increasing the offer price?

Newton G. Z. Glassman
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

A

I'm not going to speculate on what my board may have approved or not approved or decided to do going forward. If you remember, Paul, you were one of the proponents who told me that SIB was going to be oversubscribed and

that you thought it would be significantly oversubscribed going into that CAD 14, which I think contributed to your target of CAD 14, CAD 15. My view at the time was I think that that wouldn't be incredibly stupid by the markets, but if they're going to be stupid, we will take advantage of it on behalf of our long-term shareholders, so long as we do it in a legally appropriate and a highly transparent manner, which was the point of the SIB.

Clearly, the market is not stupid. It certainly didn't tender very much from CAD 14 to CAD 15.50, and now CAD 15.10. Very confident in my board, and that the board will evaluate it on an ongoing basis. I'm pretty sure that the entire board is disappointed that only roughly a third has been tendered into the SIB. Under the rules, the SIB can basically be renewed, we're currently doing it on a monthly basis. I will talk with my board in the next few days and we'll decide what's going to happen at the expiry of this extension, which I think is August 30 or something. David, do you remember the exact day?

David M. Reese A
President and Chief Operating Officer, Callidus Capital Corp.

Yes. That's right, Newton. At the end of August.

Paul Holden Q
Analyst, CIBC World Markets, Inc.

And so...

Newton G. Z. Glassman A
Executive Chairman & Chief Executive Officer, Callidus Capital Corp.

I think – my personal view is that banking on the market being stupid overall is a losing strategy in the long run, and I believe that the market will eventually understand both the value of this business restarting growth, the quality of our earnings which clearly has held in very, very well even with Gray Aqua as a fairly atypical issue because we're never going to be in the biologics business, and we will never frankly value inventory that way ever again, even if it's not a biologics business. And we're not going to have inventory technically that is a very quick – not only a quick wasting asset but requires investment to maintain its value.

So, there's a whole bunch of process and procedure issues that we are unique, the Gray Aqua, and in a twisted way, I think it's helped our team. But I also don't think the market is stupid enough to put a zero value on yield enhancement. It's going to put a multiple on it, I don't know if the market will put the same multiple as our normal revenue stream and maybe it'll be that it puts it on the same multiple for the stuff that we recognize as fee or income because that's fairly stable, and a different multiple on the stuff that's either often directly, but I don't think the market is going to put a zero value on it which it currently is.

So, we'll see what the market does. And if the market does disagree with my board's view of the value, then we'll evaluate what we think that value is and we will decide to use capital in the most efficient manner for our long-term shareholders, and if we're making that 20%, 25%, 30% return by buying into the SIB, then we're extending it or increasing the price up, that's what we'll do. And remember, the stock price goes up as you actually materialize on that growth. So, our view of value and the world's view of value will change once growth starts hitting the loan book, it will go up. And if people want liquidity, we're more than happy, we're not quite ecstatic, and encourage them to tender to the SIB.

Paul Holden Q
Analyst, CIBC World Markets, Inc.

Great. That's all the questions from me.

Operator: [Operator Instructions] We are showing no further questions at this time. I will turn the call over to Mr. Reese.

David M. Reese

President and Chief Operating Officer, Callidus Capital Corp.

Thank you, Sharon. Thank you, all, for your questions. We look forward to seeing many of you over the coming weeks. Enjoy your day, and thanks again for your support of Callidus.

Operator: Ladies and gentlemen, this concludes today's conference call. You may now disconnect your lines.

TAB 3

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

A N D B E T W E E N:

KEVIN BAUMANN

Plaintiffs
by Counterclaim

- and -

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, SINCLAIR RANGE INC., SHELDON TITLE, MNP LLP and KPMG LLP

Defendants
to the Counterclaim

AFFIDAVIT OF KEVIN BAUMANN

Sworn on June 19, 2020

I, Kevin Baumann, of Bluffton, Alberta, SWEAR AND SAY THAT:

1. I am the Defendant and Plaintiff by Counterclaim in this action and as such I have personal knowledge of the matters hereinafter deposed to except where stated to be based upon information and belief, in which case I verily believe the same to be true.

2. The within action arises from a credit agreement between Callidus Capital Corporation (Callidus) and Alken Basin Drilling Ltd. (Alken) and a personal guarantee which I executed in connection with that credit agreement. At all material times, I was the majority shareholder of Alken.

Background

3. I am an individual businessman residing near Bluffton, Alberta. Until my resignation on 21 April, 2015, at the insistence of Callidus, I was Shareholder, President, Officer, and Director of Alken Basin Drilling Ltd. ("Alken" or the "Company"), which was founded in 1982 and purchased by myself and my brother Michael Baumann (“M Baumann”) on or about February 2013. I was a guarantor of a loan to Alken from Callidus.

4. Alken is a private company that provided water well drilling and associated services to oil and gas producers across Western Canada until its undertaking, property and assets were sold as described herein. Alken was a borrower of Callidus.

5. I held sixty common shares and 1,602,688 Series 1 Preferred Shares in Alken collectively amounting to seventy-five percent of the Company's shares issued.

6. Callidus is an Ontario corporation that purports to be in the business of high-risk distressed debt lending. Callidus extended a loan to Alken pursuant to an agreement dated and effective as of 31 March, 2014 (the "Credit Agreement"), under which Callidus granted individual credit facilities to Alken bearing an aggregate credit limit of $28,500,000.00 at an interest rate of 18% (with a default rate of 21%) (the "Credit Facilities"). [1] (See Exhibit 1)

7. Matthew Scott Sinclair AKA Scott Sinclair ("Sinclair")[2] (See Exhibit 2) is an individual who resides in Toronto, Ontario. Until 29 September, 2016, Sinclair was the Managing Director of an Ontario corporation named Range Corporate Advisors Inc. ("Range"). On 21 April, 2015, Sinclair was appointed the President of Alken. Sinclair remained the President of Alken until 4 May, 2016.

8. Sinclair Range Inc ("Sinclair Range") is a company that was formed on or about 29 September, 2016[3], (See Exhibit 3) as a result of the merger of a number of other companies, including Range. Accordingly, Sinclair Range is the legal successor to Range. At all material times hereto, Sinclair was the President of Sinclair Range. Altair Water and Drilling Services Ltd. ("Altair") is a wholly-owned subsidiary of Callidus, and acquired the undertaking, property and assets of Alken as described herein. At all material times hereto, Sinclair was the President of Altair.

[1] Exhibit 1 -Termsheet dated 31 March 2014
[2] Exhibit 2 – Linkedin profile of Scott Sinclair printed 19 Feb 2020
[3] Exhibit 3 - Range Corporate Advisors to Merge, Creating Sinclair Range Inc.pdf

9. MNP LLP ("MNP")[4] (See Exhibit 4) is one of the largest full-service chartered accountancy and business advisory firms in Canada. MNP conducted the Alken receivership.

10. By virtue of Callidus' placement of Sinclair within Alken, Sinclair and Callidus together, or Callidus through Sinclair acting as its agent, either directly or through Range, were the legal and de facto controlling mind(s) or principal(s) of Alken from 21 April, 2015, through 4 May, 2016.

11. KPMG Canada LLP ("KPMG") is one of the "big four" accounting firms and was the auditor of Callidus.

Conspiracy

12. Catalyst , Callidus, Sheldon Title ("Title"), MNP, Sinclair, Sinclair Range ("the Conspirators") have conspired unlawfully and wrongfully to deprive me of my assets and cause harm to me, alternatively that the Conspirators breached the terms of the Credit Agreement and abused the bankruptcy process with the predominant purpose of harming me, and which did harm to me.

[4] Exhibit 4 - https://en.wikipedia.org/wiki/MNP_LLP

13. The Conspirators have produced few if any communications amongst them to me. It is recognized in conspiracy cases that evidence of the full particulars of a conspiracy lies with the conspirators. Only through a process of discovery will the full extent of the conspiracy become known. The Conspirators have unlawfully and wrongfully conspired to obtain the assets and business of Alken under false pretenses with the express purpose of making a "Yield Enhancement." in order to hide loan losses in Callidus and to achieve unrealistic forecasts that Callidus had stated to market participants that it could achieve.

Involvement of Callidus

14. Callidus is a lender to businesses that cannot obtain funding from traditional sources.

15. Callidus and I entered into a loan agreement on or about 31 March 2014[5](See Exhibit 1).In the loan agreement, Callidus agreed to advance three facilities to me totalling $28.5 million.

16. Callidus' original business model was to lend money to businesses for a short period of time at a relatively high-interest rate (18% per annum). The loans would all be backed by security, either of fixed or current assets, which were designed to make the loans relatively low risk. Callidus' website upon myself conducting due diligence on Callidus stated Callidus loaned funds against a borrowers assets only. In addition, Callidus representatives stated to me that the company and its Principals would be subject to extreme ethics.

[5] Exhibit 1 -Termsheet dated 31 March 2014

17. Within Callidus IPO they committed to regulators and the market to file a Code of Conduct and Ethics on SEDAR, when I reviewed the SEDAR system and determined there was no Code of Conduct and Ethics filed relating to Callidus I contacted the OSC. The OSC forced Callidus to file a Code of Conduct and Ethics, upon reviewing Callidus Code of Conduct and Ethics the conduct I received from Callidus and its representatives was in total contravention of their Code of Conduct and Ethics.

18. The lending of money to companies caps the amount of profit that Callidus could make for its shareholders. Glassman stated in earnings calls that Callidus would be able to make 40% returns on investor funds ("***If we have a situation like currently where the SIB (Substantial Issuer Bid) accretes more than 40% return on equity for the existing shareholders with no risk and no change in the book,*** ").[6] (See Exhibit 5) This high return was unlikely to happen by Callidus purely loaning money.

19. Callidus then changed its business model to acquiring companies, preferably for pennies on the dollar, running the companies for a short period of time and then offloading the companies to a buyer for a substantial profit. Callidus named this strategy their "Yield Enhancement."

20. In order to achieve this yield enhancement strategy, it was necessary and advantageous to place the target company into receivership and buy the assets of the target company out of the receivership process. This was done by implementing arbitrary holdbacks and denials of funding, and then by conspiring with the Chief Recovery Officer ("CRO") and Receiver of the target company.

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[6] Exhibit 5 Callidus Capital Earnings Call Q1 2016

21. In my case, the deception started before the loan was signed. The original term sheet offered to me did not include any holdbacks.[7] (See Exhibit 6A and 6B) The next iteration of the term sheet contained a $750,000 holdback[8].(See Exhibit 7) I questioned the holdback[9] (See Exhibit 8)and Callidus subsequently removed the holdback in the third iteration, which was signed by all parties. (See Exhibit 1)[10]

22. From the first cash drawdown against facility A, Callidus invoked a holdback of $1.25 million.[11] (See Exhibit 9) This was clearly against the negotiations that resulted in the holdback being removed from the term sheet. Callidus initiated the holdback on a clause in the term sheet, which stated: "***are net of any reserves as determined by the lender in its sole discretion.***" Communication between my lawyer and Callidus stated that the holdback would not be large and that Callidus would act reasonably. Callidus instead acted unreasonably and instituted their priority conspiracy strategy to hold back economically unfeasible amounts.

[7] Exhibit – 6 (A and B) – Term Sheet – Jan. 7, 2013
[8] Exhibit 7 – Credit Redline
[9] Exhibit 8 – Email questioning holdback
[10] Exhibit 1 – Termsheet signed 31 March 2014
[11] Exhibit 9 – Holdback of 1.25 million borrowing base calculation

23. Callidus required, in terms of the Loan Agreement, that funds from any and all sources were to be placed into a blocked account. The blocked account has been referred to by Callidus as a proprietary mechanism to control the cash flow of the borrower. Alken would then request funds from Callidus in terms of a formula in the loan agreement and had to state to whom any funds were to be paid. Callidus would then review the amounts to be paid and would only release funds to the creditors they agreed should be paid. Payment to critical suppliers was sometimes rejected, further straining the ability of Alken to continue as a going concern and damaging the reputation of the company. Creditors, in particular, would be reluctant to do further work for the company on payment terms.

24. The effect of the initial holdbacks was to immediately place Alken under financial pressure, limiting Alken's ability to run a commercially viable operation. The continuing holdbacks over the period of the loan continued to place Alken under financial pressure.

25. Alken continued to survive and had a good 2014-2015 winter drilling season. Boyer, realizing that the company was still able to make a profit had to change his approach and introduced Sinclair to me on the auspice that he would help me. In reality, Sinclair was placed in Alken to assist the conspirators in taking over the company.

26. From the moment Sinclair was appointed to the company, Boyer and Sinclair plotted to remove me. This plan was effected by insisting that Sinclair sign off on all funding requests, with Sinclair not asking for sufficient funds to keep the company running. It was Sinclair's duty of loyalty to act in the best interest of Alken and me, which was evidently not the case.

27. When I realized what Sinclair was doing, I fired Sinclair on or about 31 January 2015. (See Exhibit 10)[12] Sinclair reported to Boyer that he had been fired. Boyer subsequently stated to me that no funds would be available until signed off by Sinclair fully in the knowledge that Sinclair no longer worked for Alken. This action by Callidus ensured that I had no commercially available options, but to reappoint Sinclair.

28. Sinclair and Boyer continued to conspire to oust me. Sinclair and Boyer held back funds from Alken, forcing me to look at the option of CCAA protection, (See Exhibit 11)[13] to enable Alken to escape from Callidus' grip.

29. I was unable to get funds from Callidus due to the blocked account, I followed the only commercially available action and circumvented the Callidus controlled blocked account and proceeded to appoint lawyers, pay creditors and applied to the court to have Alken placed into CCAA protection.

30. Callidus immediately instructed their lawyers to contact me, and to undo the filing of the company into CCAA protection. They stated that if I did not acquiesce to their demands they would place the company into a forced liquidation procedure, which would significantly reduce the asset value of Alken, further harming me.

31. As a CCAA proceeding did not fit with the conspirator's plans, Callidus called the loan. As Alken had not breached the terms of the agreement, Callidus called the loan because, in their opinion, "the oil patch industry is in a state of distress." (See Exhibit 12)[14]

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[12] Exhibit – 10 Sinclair Termination letter
[13] Exhibit – 11 filing for CCAA protection
[14] Exhibit - 12 Letter from Chaiton's calling the loan

32. Callidus' lawyer stated that Alken ***"had been under increasing pressure from suppliers and other creditors to pay amounts owing,"*** and that I "***had succumbed to that pressure."*** (See Exhibit 13)[15] It is noted that at this point in time, Facility A was in an undrawn credit position, and I had in excess of three million dollars in accounts receivable, more than enough in terms of the formula in the loan agreement to settle all of the accounts payable and fund the .CCAA proceeding.

33. Callidus insisted that "***Baumann immediately resigns, and Scott Sinclair or another person acceptable to Callidus is appointed president the authority to run the day to day affairs of the company."*** (See Exhibit 13)[16]

34. I made the commercial decision to resign as a director and afterwards appointed Sinclair. (See Exhibit 14)[17]

35. Sinclair now operated the company despite his lack of knowledge of the drilling industry. This lack of knowledge, experience and expertise substantially harmed me and Alken.

36. Callidus and their fellow co-conspirators now had Alken firmly in their grasp. Instead of placing the company into an orderly liquidation proceeding, On numerous occasions, I requested and demanded that the company be placed into liquidation and that the abuse of Alken stop. Despite my protestations, Callidus continued to operate the company from April 2015 to March 2016.

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[15] Exhibit 13 - Letter from Chaiton's demanding Baumann resigns
[16] Exhibit 13 - Letter from Chaiton's demanding Baumann resigns
[17] Exhibit 14 – Appointment of Scott Sinclair as president

37. Callidus recklessly continued to run the company on their own admission that the company would suffer further losses due to the " ***oil patch is in a state of distress***," (See Exhibit 12)[18] causing harm to me and Alken.

38. Callidus continued to run the company at a loss while looking for new business. Callidus effectively forced me to pay for their marketing efforts knowing that the conspirators could rely on my guarantee.

39. During this period, Callidus instructed Sinclair not to deal with me, shutting me out from the workings of the company. In one email Sinclair wrote "You are not a Director of Alken. As a shareholder, you will receive all information and disclosure properly due to shareholders." (See Exhibit15)[19] Sinclair failed to provide me with any further information whatsoever.

40. I was concerned with the way that Sinclair was attempting to manage the business, called a shareholders meeting to vote Sinclair out and reinstate myself as president of the company. (See Exhibit 16)[20] This went against the plans of the conspirators, forcing Callidus to invoke a share pledge agreement ("SPA") that Callidus possessed over the shares of Alken (See Exhibit 17)[21]. Having invoked the SPA, Callidus and their fellow co-conspirators cancelled the shareholders meeting and continued to run the company to the detriment of myself and Alken and all stakeholders.

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[18] Exhibit 12 - Letter from Chaiton's calling the loan
[19] Exhibit 15 – Email from Scott Sinclair to Baumann dated 13 May 2015
[20] Exhibit 16 – Email from Baumann calling of shareholders meeting
[21] Exhibit 17 – Lawson Lundel - Callidus invoking Share Pledge agreement

41. In December 2015, it appeared that the efforts of Callidus to market the company to overseas customers had succeeded as Alken was approved as a drilling contractor in both Egypt and Kuwait. As a result of this approval, the potential that Alken would be worth a significant amount of money prompted Callidus to start the receivership process.

42. Callidus and Boyer in collusion with Sinclair phoned me in December 2015 with an offer to buy out the company. The offer was to sign over the land held under the guarantee and shares of the company, and that Callidus would cease all actions against me. At this point, Callidus, Boyer and Sinclair knew that a MOA for drilling in Egypt was imminent. Callidus, Boyer and Sinclair realized that there was a significant risk that if the company was placed into receivership, the MOA might come to light, resulting in the net worth of the company being substantially higher then the current forced liquidation value. This attempt was a fraudulent way to not inform me of the corporate opportunity in Egypt, and to place the company into receivership and fraudulently take over the company.

43. Callidus now started working in earnest with MNP to place Alken into liquidation. At this time, Sinclair and Boyer had planned to establish a Newco, which would benefit from the contract in Egypt. As the negotiations were at a preliminary stage, Catalyst and /or Callidus, along with Boyer, Sinclair, Title and MNP, believed that the company could be sold to Callidus, without declaring the corporate opportunity that existed in Egypt, for pennies on the dollar whilst at the same time diminishing my ability to enforce my rights against Callidus and Sinclair.

44. Catalyst, Callidus and its co-conspirators were thwarted in this attempt when the first Memorandum of Agreement ("MOA") was signed sooner than expected. This led to a scramble to sell Alken. The first MOA was received on a Friday, and MNP was instructed by Sinclair and Callidus to initiate a short sales process for Alken starting on the following Monday morning. Sinclair was placed in charge of marketing the sale of Alken, which was a direct conflict of interest considering that over the previous months, Sinclair had been communicating with Callidus of purchasing the company's assets and Sinclair running the Newco company as president.

45. Callidus succeeded in their illegal plan to purchase Alken out of a staged receivership. In the quarter following the purchase of the company Callidus recorded a "Yield Enhancement" of $32 million (See Exhibit 18)[22]. This was well over a 100% profit on the loan, a figure that was agreed to by its auditors KPMG.

46. Callidus and Sinclair firmly believed that they had been awarded the contract in Egypt, prompting Sinclair to post on his website in December 2016 "***Sinclair Range is pleased to announce its new role as Project Lead on a proposed multi billion dollar drilling and reclamation project in Egypt***." (See Exhibit 19)[23] This is eight months after the purchase of Alken assets by Callidus.

[22] Exhibit 18 Q2 2016 Financial Statements Callidus

[23] Exhibit 19 - Sinclair Range Selected as Project Lead...vate Partnership – Sinclair Range Inc

47. Callidus ultimately failed to secure the contract in Egypt, with the contract being awarded to a Chinese company in 2017 (See Exhibit 20)[24]. If the company been sold to a reputable drilling contractor with management that was skilled in drilling and water well contract negotiations prior to the receivership, the company may well have secured the drilling rights.

48. The "Yield Enhancement" business model has harmed significant businesses. Callidus stated that it only financed companies based on their fixed and current assets. There are a number of instances in which companies were sold on behalf of Callidus, in a liquidation sale for less than the amount owed, resulting in Callidus claiming on personal guarantees. This business model destroyed wealth within companies and individuals. Ironically, most of the companies that Callidus destroyed have not realized the forecasted "Yield Enhancements," resulting in significant (almost one Billion dollars of loans provided for) losses to Callidus. (See Schedule 1)[25]

49. The "Yield Enhancement" scheme and business model harmed me and many other parties, including Callidus shareholders. In addition, it created opportunities and potential reasons to short Callidus stock, issue articles, studies and reports. I note that rather than Callidus and its representatives taking responsibility for their actions, Callidus has been an extremely hyper-aggressive litigant against any individual or corporation that has ever questioned Callidus or Catalyst, and thus, has abused the court process.

[24] Exhibit 20 Feature_ China's drilling company bring...gar factory - Xinhua _ English.news.pdf
[25] Schedule 1– Callidus Capital Financial performance 2104 - 2019

50. The Supreme Court of Canada has found that a Creditor is required to act in Good faith. In Bluberi vs Callidus 500-11-049737-154 (See Exhibit 21)[26] it was found by the Supreme Court of Canada that "***Callidus' behaviour is contrary to the "requirements of appropriateness, good faith, and due diligence [that] are baseline considerations that a court should always bear in mind when exercising CCAA authority." In short, the court finds that Callidus intends to use its vote for an improper purpose and should not be allowed to do so***." The court went on to say ***"(41) Moreover, the Court finds that Callidus' conduct, in the course of the CCAA proceedings, lacked transparency. In particular, Callidus allowed the Monitor and the Debtors to work on a valuation of the business and then the appointment of a chief restructuring officer, only to eventually adopt a different position before the court. It seems that Callidus' strategy was to exhaust Mr. Duhamel financially***".

51. This is the same behaviour that Callidus has used against me. Callidus has oppressed me and Alken from the start of the loan agreement. Callidus at no point has acted in Good Faith, and has commenced numerous cases against me and other debtors in order to exhaust me and other borrowers financially.

52. By insisting that I appoint Sinclair as president, and then denying me the rights to access the records of the company, and enforcing the share pledge agreement, Callidus triggered control of the borrower by the lender.

[26] Exhibit 21 - 2018 QCCS 1040 (CanLII) _ Arrangement r...nc.) -and- Ernst & Young Inc

53. Callidus effected de facto control over Alken, passing the tests in the law review document by Nicole Sigouin and Karen Galpern. (See Exhibit 22)[27]

In particular, Callidus influenced the board of directors of Alken, controlled all of the management decisions of Alken from April 2015 to March 2016, actively made day to day management decisions, controlled the availability of funds, directed and scheduled the payment of accounts payable, and actively marketed the companies services to potential clients. All of this was done without any consultation or discussion with me.

Involvement of Catalyst

54. Catalyst Capital Group Limited ("Catalyst"), is a Canadian private equity investment firm founded in June 2002. Catalyst specializes in controlling and/or influencing investments in distressed and undervalued Canadian situations (See Exhibit 23)[28]. Catalyst's stated business model is to purchase companies in a distressed condition, turn the companies around, and subsequently sell the companies at a significant profit.

55. Catalyst is controlled by Glassman and Riley, the same controlling minds as Callidus.

56. Catalyst encouraged Callidus to start using the Catalyst model to increase the returns to the shareholders. The majority of Callidus' shares were owned by Catalyst. Callidus was urged to take companies over from the receivership process, change the management and then sell the companies for a high profit – the "Yield Enhancement".

[27] Exhibit 22 – Lender's control over borrower
[28] Exhibit 23 – overview of Catalyst Capital

57. Catalyst's actions directly harmed me, Alken and numerous other companies, significantly changing the risk profile that the borrowers had undertaken.

Involvement of Sinclair

58. Sinclair is the president and majority owner of Sinclair Range (previously Range Advisors). (See Exhibit 24)[29]

59. Sinclair had previously worked with Callidus on multiple occasions: as an advisor to Leader Energy (a Callidus borrower in liquidation), Chief Restructuring Officer ("CRO") to Roofers World (Callidus Borrower), and Beresford Box (Callidus Borrower) (See Exhibit 25)[30]. Sinclair was also proposed as CRO for Bluberi Gaming, (See Exhibit 26)[31] also a Callidus Borrower, to which he was not appointed.

60. Sinclair is a puppet of Callidus who dances to Callidus's tune, in order to appease Callidus and in the hope of receiving more work from them.

61. Sinclair was introduced to me in late November 2014 by Boyer (See Exhibit 27)[32]. Boyer was a vice president of underwriting at Callidus. Boyer was responsible for the Alken account. Sinclair was not known to me prior to this introduction.

[29] Exhibit 24 - Sinclair Range leadership
[30] Exhibit 25 - Sinclair's Linkedin profile
[31] Exhibit 26 2015-11-12-Bluberi-Initial-Order-.pdf
[32] Exhibit 27 – Email from Boyer to Baumann and Sinclair

62. Sinclair was introduced to me as "Scott Sinclair" and not "Matthew Scott Sinclair." this was done deliberately and strategically as Sinclair was previously sanctioned by both the OSC under the name "Matthew Scott Sinclair" (See Exhibit 28)[33] and the Institute of Chartered Accountants of Ontario under M Scott Sinclair (See Exhibit 29)[34]. A background search of "Scott Sinclair" would not have brought up the censure.

63. Boyer is currently in litigation with Callidus (Court File No. CV-17-569065) (See Exhibit 30)[35]. Callidus is alleging, amongst other things, that Boyer committed fraud and falsified documents. Callidus is presently claiming $150 million in damages from Boyer (See Exhibit 31)[36]. This has been denied by Boyer (See Exhibit 32)[37], but the allegations on either side have not been tested in court.

64. Sinclair was appointed by me on 1 December, 2014(See Exhibit 33)[38], at the insistence of Boyer on behalf of Callidus to assist Alken with producing a business plan, Cash flow forecasts and helping Alken with its relationship with Callidus.

Sinclair's Engagement Letter

65. Range Advisors was appointed to assist Alken in the following areas

    a) Helping the Company to manage its short-term liquidity shortfall by assisting in the development and execution of an agreeable liquidity plan;

[33] Exhibit 28 – OSC censure of Matthew Scott Sinclair
[34] Exhibit 29 – CPA Ontario censure of Sinclair
[35] Exhibit 30 – Boyer v Callidus Statement of claim
[36] Exhibit 31 – Boyer v Callidus - Statement of Defence and Counter Claim
[37] Exhibit 32 – Boyer Counterclaim
[38] Exhibit 33 – Alken Basin Drilling Engagement of Range Corporate Advisors Inc

b) Assisting the company to turnaround its operations and financial performance by assisting in the development and implementation of an agreeable turnaround plan, appropriately documented to support the refinancing efforts of the company;

c) Helping the company prepare materials and a plan to attract a new senior lender or lenders to payout the existing senior lender of the company and managing the sale and closing process with respect to the new senior facilities;

d) Helping the Company with its business and strategy communications to various stakeholders, including its senior lender Callidus, intended to effectively communicate and gain support for the liquidity, turnaround and refinancing plans, and; and

e) All other matters, as agreed between Range Advisors and the Company.

66. Sinclair did not complete a turnaround plan until December 2015, and at no stage, discussed a turnaround plan with me.

67. Sinclair, at no stage, was appointed by Alken or me to eliminate related party transactions such as shareholder loans or intercompany loans or to revalue the assets of the company.

Sinclair as an advisor to Alken

68. Sinclair, soon after his appointment to Alken, began to report all of Alken's activities to Callidus and started to reduce the amount of cash requested required to effectively run Alken's business, despite the fact that funds were available. The point of obtaining the loan from Callidus was to obtain funding in order to continue operations, and the failure to provide more cash as envisaged by the term sheet contradicted the purpose of the loan, further depicting an ulterior intent on behalf of Callidus. This conduct harmed Alken's ability to pay suppliers, harming my name and Alken's name in the market place as a reputable individual and company.

69. I realized that Sinclair was not acting in the best interests of me, Alken or its shareholders but rather was working solely for the best interests of Callidus and Sinclair. I dismissed Sinclair on or about 31 January, 2015(See Exhibit 34)[39]. Sinclair stated to Janice Jansen, the office manager at Alken, "***I will be back***" and communicated to Boyer that he had been dismissed from the company.

[39] Exhibit 34 - Sinclair Termination Letter

70. Callidus required, in terms of the Loan Agreement, that funds from any and all sources were to be placed into a blocked account (See Exhibit 1)[40]. The blocked account has been referred to by Callidus as a proprietary mechanism to control the cash flow of the borrower. Alken would then request funds from Callidus in terms of a formula in the loan agreement and had to state to whom any funds were to be paid. Callidus would then review the amounts to be paid and would only release funds to creditors they agreed should be paid. Critical suppliers were sometimes rejected further straining the ability of Alken to continue as a going concern.

71. Boyer then proceeded to halt any further release of available and requested funds until such time that the requests had been approved by Sinclair, fully knowing that Sinclair had been dismissed by me. This action by Boyer forced me to reappoint Sinclair on behalf of Alken, ensuring that the unlawful conspiracy could be carried out. Boyer, on behalf of Callidus, knew that Sinclair was acting in the best interests of Callidus and that such coercion of myself would harm me and Alken. It was Sinclair's duty of loyalty to be acting in the best interest of Alken. This was clearly not the case with Sinclair choosing to act in the best interests of Callidus.

72. Sinclair and Boyer continued conspiring to oust me from Alken so that the unlawful conspiracy could be implemented. Following the reappointment of Sinclair at Boyer's insistence and with no other alternative, I realized that the company needed an "out" from Callidus' control, to prevent the abuse of the relationship by Callidus and Sinclair. I mentioned the CCAA application to Sinclair, who then relayed this information to Boyer.

[40] Exhibit 1 – Signed Termsheet

73. Boyer then instructed Callidus to call the loan despite the loan not being in default. Notwithstanding that Alken was up to date on all payments, Callidus called the loan based on "**the oil patch is in a state of distress**." (See Exhibit 15)[41]

74. I, realizing that Callidus and Sinclair were not acting honestly and in good faith during the term of the loan, decided to proceed with placing the company into CCAA protection to mitigate losses caused by Callidus and Sinclair.

75. I requested funds that were available in accordance with the loan agreement to pay creditors to which Sinclair answered "really?" No funds were transferred to Alken. I, now realized that I had to move quickly and to try and avoid further harm by Sinclair and Callidus, used the only available commercial solution and diverted funds from the blocked account, to allow me to start the CCAA process, and to pay the Accounts Payable that had been outstanding for some time.

76. Given the conduct of Sinclair and the Defendants by Counterclaim, there was no other commercially reasonable alternative available to me to stop the actions that were being perpetrated by the Defendants to Counterclaim including Sinclair against me.

77. Callidus then instructed Sinclair to close the bank account, cancel all cheques that had been made out, and have the money returned from the lawyers who had been appointed to assist in the CCAA proceedings.

78. The vast majority of funds were returned to Callidus.

[41] Exhibit 15 – Letter from Chaiton's calling the loan

79. I was then told by Callidus' counsel that I had to resign and appoint "Sinclair or someone like him" (See Exhibit 13)[42] to be president of the Company.

80. Having no choice, and to avoid further harm to himself and Alken, I acquiesced to Callidus' demand and resigned as Director (See Exhibit 14)[43] appointing Sinclair as president of Alken. I was informed by Boyer that Callidus would act responsibly and would place Alken into orderly liquidation proceedings in order to maximize the value of the assets and apply such proceeds to settle the Callidus facilities and other stakeholder claims. The Conspirators did not act in a commercially reasonable manner and instead took steps to wrongfully seize my assets for pennies on the dollar, whilst at the same time attempting to remove my rights and ability to enforce his claims against the Conspirators.

Sinclair as president of Alken

81. Callidus, Sinclair and Sinclair Range failed to act honestly and in good faith with me and Alken and did not place Alken into orderly liquidation proceedings, to maximize the value of the assets for the benefit of all stakeholders of Alken. Sinclair immediately sought to appoint legal counsel for Alken that was "sympathetic to Callidus" despite not being in the best interests of Alken for whom he was purportedly employed, stating that he felt he could "***push Alken into a proper selection***."

82. Immediately after his appointment as president, Sinclair ceased communicating with me about the plans and actions for Alken, materially altering my risk as a guarantor.

[42] Exhibit 13 - Letter from Chaiton's demanding Baumann resigns
[43] Exhibit 14 - appointment of Sinclair as president

83. Callidus, through Boyer and with the help of Sinclair, continued to run the company for the next year. During this time, Sinclair forwarded numerous proposals to Boyer for the takeover of Alken by a Newco wholly owned and operated by Callidus. This company was Altair Water and Drilling Services Inc.

84. The plan was for Callidus to purchase the assets out of a "friendly liquidation" run by MNP on behalf of Callidus, and to transfer the assets and some critical suppliers to a Newco, leaving all other suppliers to remain unpaid after the sale. This was despite the fact that the majority of the accounts payable were incurred after Sinclair took over the company. (See Schedule 2)[44]

85. Sinclair refused to talk to me and refused to give him any information that I was entitled to receive. In one email correspondence with me, he stated, "***You are not a Director of Alken***. ***As a shareholder, you will receive all information and disclosure properly due to shareholders***" (See Exhibit 15)[45]. Sinclair failed to provide me with any further information.

86. Sinclair also prevented me from entering the premises, and on one occasion Sinclair called the police to have me removed from the premises.

[44] Schedule 2 – Analysis of Accounts payable
[45] Exhibit 15 – Email from Sinclair to Baumann

Shareholders Loan

87. Sinclair, with the full knowledge and assistance of Boyer and Callidus, upon becoming president of Alken immediately started to materially alter the books and records of Alken to the detriment of myself; the altering was based on fictitious entries that consequently harmed me.

88. Sinclair, with the knowledge and support of Callidus, wrongfully and fraudulently, wrote off a debt to Pekisko Ranch for the use of the property by Alken as collateral. This was done without consultation with either me or Pekisko Ranch.

89. Sinclair wrongfully and fraudulently wrote off the shareholders loan owed to me for both the contribution into Alken of two drilling rigs and for expenses that he had incurred on behalf of Alken. Sinclair did not consult with me prior to writing off the loans.

90. Sinclair, with intent and malice, wrote off the above two amounts owing to me with the consent and knowledge of Boyer and Callidus, in order to prevent me or Pekisko Ranch from having any standing as Creditors in the receivership process.

91. Callidus and Sinclair passed the journal entries to assist them with their unlawful business plan to wrongfully seize the assets of Alken for pennies on the dollar. This was done so that Callidus could cover losses made by Callidus in other loans. This profit enabled Callidus to meet its unreasonable forecasts to market participants that Callidus knew were not achievable otherwise.

92. During the loan period ending 31 March, 2015, Alken's internal financial statements show that the company was quite profitable even after paying Callidus' high-interest rates. (See Exhibit 35)[46]

Sinclair adjusts the books and records of Alken.

93. Sinclair passed a number of journal entries in the books of Alken at the request of Callidus without advising me. This was wrongful and unlawful and caused harm to me and Pekisko.

94. The fraudulent altering of books included the unlawful writing down of fixed assets to the asset appraisal ordered by Callidus, and the elimination of intercompany accounts and related party loans.

95. Sinclair did not complete the financial year-end for March 2015 (See Exhibit 36)[47] and did not have the Financial Statements audited by an independent auditing firm. Alken was placed into liquidation subsequent to the March 2016 year-end. Sinclair again did not complete a financial year-end or have the financials audited. The lack of auditing of the financial statements was condoned by the conspirators as a means for purchasing the company at less than market value.

[46] Exhibit 35 - Trial Balance as at 27 March 2015
[47] Exhibit 36 – Alken Basin struck off the record

Sinclair on the behest of Callidus increases the debt

96. Sinclair ran the company from April 2015 to March 2016. During this period, there was a slump in sales, without any corresponding reduction in operating costs. This led to a ballooning of the debt from $22 million ($19 million net of receivables) to $27 million dollars (and no accounts receivable). In addition, Sinclair collected the majority of accounts receivable that were outstanding at the time that Callidus and Sinclair took over the running of the company. The accounts receivable were approximately three million dollars at the time of the takeover. The total debt owed to Callidus escalated by approximately ten million dollars during this period.

Sinclair fails to sell assets of Alken

97. Sinclair did not sell any of the assets from Alken from the time that he was appointed as president to the liquidation of Alken, despite offers being presented to Sinclair and Callidus. To my knowledge, no negotiations were actively conducted by Sinclair or Callidus to maximize the value of the assets.

98. Sinclair, Boyer and Callidus continued to frustrate efforts to liquidate the assets of Alken in a commercially reasonable and orderly manner. Two potential purchasers, Bredy and Mike Baumann were both rejected out of hand by Sinclair and Callidus. In addition, evidence exists that another Callidus borrower asked Sinclair and Callidus that offers to buy the equipment of Alken be put on hold while the other Callidus borrower negotiated a drilling

deal. When the deal did not materialize, the offer to purchase evaporated. I am unaware of the number of purchasers that were turned away during this period, but there were other buyers looking to purchase the assets of Alken.

99. Sinclair received various offers to sell the assets of the company on a piecemeal basis but he chose not to sell the assets on the bequest of Callidus, who wanted to keep the assets for their own uses. This was an attempt by Callidus to appropriate the corporate opportunities meant for Alken and its stakeholders.

100. By not selling the assets in an orderly way, Sinclair and Callidus adversely affected the value of the assets and, at the subsequent liquidation sale, the assets received a far lower amount then they would have received in an orderly liquidation. This decision resulted in financial harm to myself, and was not made in good faith, which materially altered my risk as a guarantor.

Callidus thwarts me from taking back control of the company

101. Distressed at the actions of Sinclair, Boyer and Callidus, attempted to call a shareholders meeting to vote Sinclair out of office (See Exhibit 16)[48]. As part of the loan term sheet between Callidus and myself, I had signed a share pledge agreement over my shares to Callidus. Callidus invoked the share pledge agreement and prevented me from calling or voting in a shareholders meeting. As a result, Sinclair was able to continue running the company with impunity for the benefit of Callidus for approximately one year.

[48] Exhibit 16 - Email from Baumann calling a shareholders meeting

Sale of Alken and the Egypt MOA

102. Catalyst is a Canadian private equity investment firm founded in June 2002. Catalyst specializes in control and/or influence investments in distressed and undervalued Canadian situations. Catalyst's stated business model is to purchase companies in a distressed situation, turn the companies around, and sell the companies at a significant profit.

103. Callidus started using the Catalyst model during this period. Catalyst and Callidus did not look to increase sales by Alken in the local market but instead looked at the overseas market.

104. At this point, Egypt, assisted by the United States Department of Agriculture (See Exhibit 37)[49], formulated a plan to drill wells in Egypt to allow for the irrigation of some of the desert. Sinclair and Boyer, on behalf of Callidus, were approached by a company in the Middle East to assist with drilling in the area. on or about January 2016, Alken was approved as a driller in Egypt and Kuwait, opening the path to obtaining the contract in Egypt. I, as the majority shareholder, had no knowledge of these negotiations.

105. Callidus now started working in earnest with MNP to place the company into liquidation. this was done so that the Newco that Sinclair and Boyer had communicated about would benefit from the contract in Egypt. As the negotiations were at a preliminary stage, Catalyst and /or Callidus, along with Boyer, Sinclair, Title and MNP, believed that the company could be sold to Callidus, without declaring the corporate opportunity that

[49] Exhibit 37 - USDA press statement

existed in Egypt, for pennies on the dollar whilst at the same time diminishing my ability to enforce my rights against Callidus and Sinclair.

106. Catalyst, Callidus and its staff were thwarted in this attempt when the first MOA was signed sooner than expected. This led to a scramble to sell Alken. the first MOA was received on a Friday, and MNP was instructed by Sinclair and Callidus to initiate a short sales process for Alken starting on the following Monday. Sinclair was placed in charge of the marketing the sale of Alken, which was a conflict of interest considering that Sinclair over the previous months had been talking about Callidus purchasing the company's assets and Sinclair running the Newco company as president.

107. Section 247 of the Bankruptcy and Insolvency Act the receiver shall

a) Act honestly and in good faith; and

b) Deal with the property of the insolvency person or the bankrupt in a commercially reasonable manner

108. Title's actions failed to comply with the above, thereby harming me and causing damages, and as a result, MNP is vicariously liable for the acts and omissions of Title.

109. Title neither acted honestly or in good faith or behaved in a commercially reasonable manner in attempting to get the highest value for the assets of Alken. The Conspirators attempted to keep the MOA hidden from other prospective buyers, so as not to garner additional bids from parties wishing to buy the company as a going concern. This was done to preserve Callidus's attempt to reap a significant "Yield Enhancement."

110. All of these marketing efforts would only have resulted in auction companies bidding for the assets, and not companies looking to buy the company as a going concern based on a potentially lucrative drilling deal in Egypt. The balance of marketing was led by Sinclair. Sinclair, on behalf of Callidus, has stated that he had little or no involvement in the marketing of the company; however, the First Report of the Receiver issued by MNP directly contradicts this.

111. I have been unable to find, and Callidus has not disclosed, which companies were contacted, and what assets were mentioned in the sales materials. The MOA was not included in the sales pack.

112. Sinclair failed to inform MNP of the first MOA. He signed the second MOA and sent it back to the corresponding party in Egypt. MNP was only informed of the second MOA a week before closing after Sinclair received the signed copy back from the corresponding party. MNP in collusion with Sinclair and Callidus, fraudulently withheld the contents of the MOA from parties who may have been interested in purchasing the company as a going concern to take advantage of the corporate opportunities.

113. From the timesheets submitted by MNP, MNP intentionally or recklessly had scant regard for the MOA, only extending the closing for a week, and conspired with Callidus and Sinclair to hide the MOA under a confidentiality agreement (only those who had signed the confidentiality agreement were asked if they wanted a copy of the MOA). As the majority of these were distressed purchasers of assets or auction companies, the MOA would have had little effect on their bidding process. This fraudulent conduct resulted in no companies bidding on Alken as a going concern basis.

114. Title, hoping for more work from Callidus by agreeing to facilitate Callidus' underhanded, unlawful, and unethical business practices, did not follow industry norms and follow a more prudent course of action, by stopping the sale and reissuing the documents for the sale of the company, clearly spelling out the details of the MOA. The corporate opportunity was hidden and used to keep other potential buyers of Alken in the dark at the behest of Callidus and Sinclair so that Callidus and Sinclair could reap the benefits of the contract. This was not done so as to avoid scuppering Callidus' "Yield Enhancement."

115. Callidus and Catalyst have repeated the highly improbable statement that the MOA had no value. Sinclair, in December 2016 (See Exhibit 19)[50], stated on his website that he had been appointed to run a billion-dollar drilling project in Egypt. Callidus and Catalyst lost the Egypt drilling opportunity in the MOA to Chinas ZPEC (See Exhibit 20)[51] drilling company, which has so far drilled at least 30 of 300 proposed wells in the area. This is a highly lucrative deal for the Chinese company.

116. It is irrelevant that the contract never reached fruition, as deception and concealment of the MOA were engaged upon. This adversely affected the bidders for Alken as a going concern.

[50] Exhibit 19– Sinclair corporate statement on Egypt
[51] Exhibit 20- Feature_ China's drilling company bring...gar factory - Xinhua _ English. News

117. It is highly unlikely that a company on the verge of bankruptcy would have been able to obtain a billion-dollar contract in Egypt without paying substantial bribes in contravention of the Corrupt Foreign Practices Officials Act ("CFPOA") The full extent of such illicit and illegal conduct will be uncovered in discovery.

Involvement of Sinclair Range Inc

118. Sinclair Range Inc (See Exhibit 24)[52] is a turnaround company headed by Sinclair with vice president Olga Jilani.

119. The company was formed on 29 September, 2016, from the amalgamation of Range Advisors and seven other parties. (See Exhibit 38)[53]

120. At all times, from the hiring of Sinclair by Alken to Sinclair being appointed as president of Altair Water and Drilling, Sinclair was the controlling mind of Sinclair Range.

121. Sinclair and Boyer were known to each other prior to the appointment of Sinclair to Alken. Sinclair communicated with Boyer using his Range Advisor's email address in order to conceal communications between Sinclair and Callidus from me.

122. Sinclair used Sinclair Range to participate in the unlawful conspiracy to further the conspiracy with the other counterclaim Defendants.

[52] Exhibit 24– Leadership – Sinclair Range Inc
[53] Exhibit 38 – Range Corporate advisors to merge

Involvement of Sheldon Title

123. Title (See Exhibit 39)[54] was employed as a senior vice president by MNP and controlled the receivership of Alken as the Receiver.

124. Title was first approached by Sinclair, Boyer and Callidus on or about 8 December 2015 to serve as Receiver (See Exhibit 40)[55]. This was subsequent to Boyer and Sinclair conspiring to purchase the company out of the receivership process.

125. MNP performs substantial work for Callidus and has acted as receiver for Callidus in numerous cases. MNP is vicariously liable for the actions and omissions of Title.

126. Title advised Boyer and Sinclair to pay only some of the creditors so that the liquidation of Alken did not appear to be a scam.

127. On 29 March, 2016, Sinclair advised Alan Shiner ("Shiner") of MNP of the existence of a significant potential contract in Egypt. (See Exhibit 40)[56]

128. Shiner and Title intentionally failed to stop or alter the sale process on this news and did not re-market the company in order to reflect this significant development to the detriment of Alken, myself and other stakeholders. Shiner and Title did not attempt to sell the assets for the maximum value that could have been achieved to appease Callidus to the detriment of myself.

[54] Exhibit 39- Sheldon Title _ LinkedIn profile
[55] Exhibit 40 MNP third report
[56] Exhibit 40 - MNP third report

129. On 11 April, 2016, Shiner stated that he had not received the signed agreement for the Egypt deal. (See Exhibit 40)[57] There are no further timesheet entries from any parties at MNP or Gowlings relating to the Egypt deal. In terms of the Bankruptcy and Insolvency Act RSC 1985 as amended, 4(2) (1) any interested person in any proceedings under this Act shall act in good faith and with respect to those proceedings. Section 13.5 states A trustee shall comply with the prescribed Code of Ethics.

130. Title has previously been sanctioned for similar conduct in an earlier case. I note that Title worked on the Ambercore Software Inc. and Terrapoint Canada (2008) Inc file (See Exhibit 41)[58] in which similar fact evidence was led. The honourable Justice J Newbould stated that "*the principles to be considered by court in deciding to approve a sale recommended by a receiver are well known...Regrettably, I have come to the conclusion that the tests set out in Soundair have not been met in all the circumstances, the motion to approve APA is dismissed*."

131. Title did not stop the sale of Alken or re-advertise the assets for sale in Alken as this would have gone against the wishes of Callidus.

[57] Exhibit 40 - MNP third report
[58] Exhibit 41- 2011 ONSC 2308 (CanLII) _ Canrock Ventures v

132. Title did not act in a commercially reasonable manner in advertising the company subsequent to the receipt of the Memorandum of Agreement. Title sent the listing to MNP branches, and to auctioneers and buyers of distressed assets, but did not send the documents to any drilling companies. Title intentionally or recklessly relied on Sinclair to market the assets despite knowing that Callidus was attempting to buy Alken and that Sinclair would be president of the new company. Title was fully aware of the conflict of interest but decided to do nothing.

133. Title allowed Sinclair to market the company, knowing that information vital to the sale of the company had not been made available to potential purchasers of the company.

134. I asked Title by email where the amounts were that related to my shareholder loans and the charge for the use of land by Pekisko Ranch. Title instead decided to rely upon the financial information provided by Sinclair, knowing that Sinclair was not independent and Title did not independently review any of the Alken Financial statements.

135. Title did not audit the amounts owing to Callidus in terms of either Facility A, Facility B or Facility C. despite having a duty as receiver to do so.

Involvement of MNP

136. MNP had the following team members working on the Alken receivership

a) Alan Shiner
b) Eric Sirrs
c) Evan Mackinnon
d) Grant Bazian

e) Jessica Hue

f) Sheldon Title

137. During the receivership, there are only two mentions of the Egyptian MOA, both attributed to Alan Shiner. Despite the significant potential ramifications of a corporate opportunity potentially worth well in excess of $100 million, Shiner, according to his timesheets, spent less than 0.7 hours in reviewing the MOA and wilfully, in the alternative, recklessly or negligently and under the direction of Title failed to discuss the MOA with other team members from MNP, the legal team or myself.

138. MNP failed to adequately market Alken for sale, only circulating the sale notice to their internal branches and to buyers of distressed goods. For the majority of advertising, they relied on Sinclair. MNP was aware that Sinclair was not independent.

139. At Callidus's behest, MNP did not remarket the company when they were made aware of the MOA, significantly reducing any possibility of attracting any buyers who may have wished to purchase the company as a going concern. Such conduct and omissions caused significant harm to me and my fellow shareholder.

Involvement of KPMG

140. KPMG are the auditors of Callidus Capital Corporation.

141. During the 2016 Q2 conference call, Glassman stated that the "Yield Enhancements" were calculated by a third party and reviewed by the auditors. "***The value is not determined by us. The value is actually determined in conjunction with third parties outside of the firm and then reviewed with the auditors***." (See Exhibit 42)[59]

142. During the Q2 Financial Results Conference call, David Reese, (former Chief Operating Officer and President of Callidus) and Glassman stated that Yield Enhancements were a fundamental part of the Callidus business model.

143. KPMG knew or ought to have known that the Yield Enhancements that they were auditing and advising Callidus on were not reasonable or in conformance with IFRS as subsequently stated by the OSC. In the alternative, KPMG, recklessly or negligently advised Callidus that the Yield Enhancements claimed by Callidus were reasonable, and would enable and facilitate the conspirators to carry out their unlawful and unethical business plan.

144. The Conspirators, armed with the advice and audit from KPMG, used KPMG's advice and audit results to prey on me and others to effect an unlawful and unethical business plan.

145. KPMG foresaw or ought reasonably to have seen that its advice and conduct could or would have been unlawfully perpetrated by Callidus and its agents against me and others in causing damages to me. As a result, KPMG is liable for damages to me.

[59] Exhibit 42 - Callidus Capital Q2 2016 MD&A

146. KPMG should not have signed off on the "Yield Enhancements," which the OSC has deemed not to be reasonable. Callidus issued the following statement on its Q2 2018 press release, "The Company has discontinued disclosure of unrecognized yield enhancements in light of comments expressed by the Ontario Securities Commission. The Ontario Securities Commission has advised the Company that it will continue to name the Company on its Refilings and Errors List for the next following three years." (See Exhibit 43)[60]

147. The OSC placed Callidus on the reporting watch list and instructed Callidus to cease using these non-IFRS measures.

148. By signing off on the "yield enhancements," KPMG knew or ought to have known that they were not in compliance with GAAP and IFRS. The use of these "Yield Enhancements" caused harm to me and to Callidus shareholders who relied on this data.

149. KPMG had an obligation to ensure that the financial statements were prepared in accordance with Generally Accepted Accounting Principles (GAAP) and IFRS. KPMG has failed in its obligation, thereby resulting in contributing to harm caused by the Conspirators.

150. Callidus did not reverse the "Yield Enhancement" for Alken (Altair) until forced to remove the non-IFRS measure from the financial accounts in 2018. This is despite the fact that Altair lost the bid to drill wells in Egypt to a Chinese company in 2017.

[60] Exhibit 43 - 2018 Q2 Press Release

151. KPMG failed to exercise professional skepticism as an auditor of Callidus on the "Yield Enhancements" put forth by Callidus. KPMG knew or ought reasonably to have known that such yield enhancements were not reasonable in terms of GAAP. Such omission by KPMG enabled, facilitated and motivated Callidus to perpetuate its unlawful, wrongful, and corrupt business practices, which harmed me. KMPG foresaw or ought reasonably to have foreseen that such omission would and, in fact, did cause harm to me.

Conclusion

152. Callidus has been the architect of their own demise. Callidus' model to earn yield enhancements has been shown to be destructive to the businesses involved, as the companies could not recover from being forced into liquidation due to Callidus not abiding by the term sheets, and withholding funds from the borrowers. Callidus has lost a substantial amount of money in terms of loan losses provided for. This one billion dollar loss has severely affected the share price of Callidus. This imprudent policy in trying to make super profits has resulted in the company's share price collapsing.

153. This action has resulted in numerous parties questioning Catalyst and Callidus as to their business activities Catalyst and Callidus have retaliated with vexatious lawsuits.

154. I make this Affidavit in support of providing my Notice of Motion herein.

SWORN BEFORE ME at the
City of Red Deer in the
Province of Alberta this
19 day of June, 2020

Christina Yan
~~Commissioner for Taking Affidavits~~
(or as may be) Commissioner for
for C Oaths in and for Alberta

Kevin Baumann

CHRISTINA YAN
My Commission Expires
September 2, 2021.

TAB 4

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

A N D B E T W E E N:

KEVIN BAUMANN

Plaintiffs
by Counterclaim

- and -

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, SINCLAIR RANGE INC., SHELDON TITLE, MNP LLP
and KPMG LLP

Defendants
to the Counterclaim

<u>AMENDED</u> STATEMENT OF DEFENCE
<u>AND COUNTERCLAIM</u> OF KEVIN BAUMANN

39. This Statement of Defence is delivered by the defendant, Kevin Baumann, in response to the Fresh As Amended Statement of Claim dated 19 July, 2019 (the "SOC").

40. This Statement of Defence adopts the same naming conventions used in the SOC, except as may be varied herein.

41. In response to paragraph 29 of the SOC, Mr. Baumann lives in Bluffton, Alberta.

42. Mr. Baumann denies all of the allegations contained in the SOC.

43. This action is an improper and misguided effort to intimidate Mr. Baumann and other Defendants into silence with respect to the Plaintiffs' wrongful, heavy-handed and illegal business practices designed to profit at the expense of their own borrowers.

There was no Conspiracy

44. Mr. Baumann denies there was a Conspiracy to cause economic harm to the Plaintiffs, as defined at paragraph 87 of the SOC and later said, at paragraph 182(a), to have been "particularized" at paragraph 90 of the SOC, and as otherwise referred to at paragraph 39 of the SOC as a "conspiracy" with a lower case 'c.'

45. In the alternative, if there was a Conspiracy, Mr. Baumann was not a participant.

46. Mr. Baumann never entered into any agreement with anyone to injure the Plaintiffs. Nor did he ever take any steps together with others, the predominant purpose of which was to harm the Plaintiffs. He held no common design with any other Defendants, as alleged in the SOC, and he took no acts in combination, in concert, or by agreement with others.

47. Any similarities in the Defendants' legal positions arise from the same or similar misconduct employed by the Plaintiffs in their dealings with the respective Defendants.

48. Mr. Baumann specifically denies that he ever used unlawful means to harm the Plaintiffs, whether alone or in conjunction with others and that he ever offered to fund any of the other Defendants in their litigation with the Plaintiffs.

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

No Defamation or Injurious Falsehood

50. Mr. Baumann denies doing or saying anything which constitutes defamation and further denies the Plaintiffs' claim for damages on that basis, as claimed at paragraph 1(a) of the SOC.

51. In particular, Mr. Baumann denies that he defamed Callidus by re-tweeting any tweets (as alleged at paragraph 59 of the SOC), by spreading rumours through the Bay Street Rumour Mill (as alleged at paragraph 90 of the SOC), by filing false Whistleblower complaints to the OSC and SEC (as alleged in paragraphs 77 and 90 of the SOC), by leaking such complaints to the media or police (as alleged in paragraph 90 of the SOC), or otherwise.

13A. Baumann admits to filing thirteen truthful submissions with Canadian Securities regulators. Baumann believes the Ontario Securities Commission agreed that Callidus' "Yield Enhancement" scheme was unlawful or, at least, improper. Within Callidus' Q2 2018 quarterly release Callidus stated that at the recommendation of the OSC, it would no longer be booking non realized 'Yield enhancements". This decision removed Callidus' ability to oppress future borrowers and unlawfully seize assets.

13B. The previous booking of non realized "Yield Enhancements" in the first place demonstrates the questionable intent of Callidus to include such enhancements while not proper.

13C. Baumann admits to filing a complaint with the Toronto Police.

13D. Baumann sought to obtain a Preservation Order against Callidus and Catalyst to obtain emails that would confirm the illegal actions of Callidus and Catalyst that Baumann and other Callidus borrowers from Texas to Alberta allege. On 21 May, 2019, Baumann retained additional Calgary Counsel and an additional Forensic Specialist to evaluate and investigate all conduct relating to his various Callidus and Catalyst claims. Unfortunately, the cost of obtaining such an order proved prohibitive.

13E. From evaluation and investigation, it was recommended that an extensive submission be made to the RCMP Commercial Crimes division. A complaint against Callidus relating to fraud, theft over and Bankruptcy Act offences were submitted and confirmed received by the RCMP K Division Federal Policing on 3 October, 2019. The individual who conducted the investigation and submission on behalf of Baumann has proper credentials and is known in Alberta as a leading investigator.

52. No statements made by Mr. Baumann about the Plaintiffs were defamatory either in their ordinary meaning or by innuendo, or capable of bearing any defamatory meaning with respect to the Plaintiffs, whether alleged or at all.

53. All statements made by Mr. Baumann about the Plaintiffs were made in good faith and without malice and reflected his honest assessment of the facts. To the extent any such statements were defamatory, which is denied, they were published on occasions of absolute or qualified privilege.

54. Mr. Baumann exercised reasonable diligence and judgement in publishing statements about the Plaintiffs and all such statements were justified and true or substantially true, or were fair comments or responsible communications on matters of public interest.

55. Mr. Baumann denies that he is liable for any injurious falsehood with respect to the Plaintiffs.

56. Mr. Baumann denies that he ever (i) entered into any agreement with others to injure the Plaintiffs by communicating injurious falsehoods, (ii) took any steps together with others the predominant purpose of which was to harm the Plaintiffs through the communication of injurious falsehoods, and (iii) held any common design with any other Defendants to act in combination, in concert, or by agreement with them to maliciously communicate injurious falsehoods about the Plaintiffs as part of a Conspiracy or otherwise.

No Breach of Securities Act and No Unjust Enrichment

57. Mr. Baumann was never enriched at all, whether justly or unjustly, and never participated in or obtained any gain from any Conspiracy or the alleged short positions taken by the Wolfpack Conspirators in Callidus Shares.

58. Further, Mr. Baumann had no knowledge of any short attack and held no common design with others to carry out the alleged short attack as part of a larger Conspiracy.

59. Mr. Baumann played no role in the publication of the Article alleged to have precipitated the alleged short attack.

60. Mr. Baumann denies that he did anything that violates s. 126.1 and 126.2 of the *Securities Act*. Mr. Baumann further denies that he had any knowledge that others might do such things or that he held any common design with others to do such things through any Conspiracy.

No Intentional Interference with Economic Relations

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

62. Mr. Baumann committed no unlawful acts against any third parties and held no intention to cause economic harm to the Plaintiffs, whether alone or in common with others.

63. Mr. Baumann denies any liability for the tort of intentional interference with economic relations.

No Confidential Documents, Information, or Communications

64. Mr. Baumann denies being in possession of or sharing any confidential documents or information of the Plaintiffs (as alleged in paragraph 84 of the SOC). Any non-confidential documents distributed by Baumann were provided by the Plaintiffs or were public documents filed with regulators.

65. Mr. Baumann denies that he shared or circulated any non-public material information with anyone (as alleged at paragraph 124 of the SOC).

66. Mr. Baumann denies that any communications he had with any of the other Defendants were ever directed towards the furtherance of any Conspiracy. To the extent that he spoke with any of the other Defendants about matters concerning the Plaintiffs, such communications were merely concerned with learning from others about their similar experiences in dealing with the Plaintiffs. Mr. Baumann denies that he was in close, frequent or unlawful contact with any of the Defendants.

Callidus was the architect of its own demise

28A. Callidus' business model originally was to loan money to companies who were unable to obtain funding from traditional lenders. The interest rate charged by Callidus ranged from 18% to 21% per annum.

28B. Callidus changed its business model to a loan to own scheme. Callidus would loan money to a company and suppress the companies ability to repay the loan. When the company was placed in receivership, Callidus would provide a Stalking Horse bid to buy the companies assets out of liquidation at pennies on the dollar, often leaving unsecured creditors unpaid.

28C. It was advantageous to Callidus to purchase the company in this manner as the assets were purchased for less than the going concern value of the assets

28D. Callidus' plan was to replace the management of the companies, turn the fortunes of the companies around, and then sell the companies to a new buyer for a significant profit. This profit was known within Callidus as the "Yield Enhancement."

28E. This model mirrored the business plan of Catalyst, the parent company of Callidus, with one major exception. In Catalyst, Catalyst purchased the company and then proceeded to turn the company around. In Callidus, Callidus loaned money to the company with the intention of acquiring the company for less than the asset value and later re-selling the same company for a profit.

28F. The "Yield Enhancement" was, in essence, the value that Callidus would gain from buying the companies for pennies on the dollar during liquidation of the companies and then selling the same companies as going concerns soon after for a high profit.

28G. In contravention of International Financial Reporting Standards ("IFRS") Callidus booked the anticipated profit from the "Yield Enhancement" prior to selling the company, or even having the company in a state ready to be sold to a third party.

28H. Newton Glassman, CEO of Catalyst and Callidus, ("Glassman") stated that the National Banks' financial valuation included in the share price was $0.50 to $1 per share on these "Yield Enhancement" options.

28I. Callidus failed to sell any of the companies that it bought to any third party for a profit. In two deals (Xchange Technology Group and Bluberi Gaming Technologies Inc) Callidus transferred the losses to the parent company Catalyst in a vain attempt to prop up the failing share price.

28J. By engineering the liquidation of companies, Callidus destroyed the business models of the companies, rendering the assets purchased out of the liquidation worthless.

28K. Craig Boyer ("Boyer"), was a senior vice president of underwriting for Callidus, Callidus is vicariously liable for the acts and or omissions of Boyer.

28L. Callidus' financial statements indicate that close to a billion dollars of losses have been provided against loans. This demonstrates the extent to which the business model applied by Callidus has failed.

28M. Callidus has stated in court papers that Horizontal Well Drillers ("HWD"), a Callidus lender falsified paperwork on Callidus letterhead, and supported by Boyer, stated that Callidus would provide a letter of guarantee to HWD to provide funding for drilling in Venezuela.

28N. Despite the falsified paperwork, Callidus continued to fund HWD in excess of $250 million. Despite the fact that no assets were deployed in Venezuela, Callidus provided for the full value of the loan.

28O. As Callidus is an asset-based lender, it is inconceivable that the full amount of the loan was written off. It is this type of loss that eroded any confidence in the Callidus share price.

28P. The working papers of KPMG will indicate how they arrived at the value of the "Yield Enhancements", including the companies on which Callidus intended to make a "Yield Enhancement" and the date by which the yield enhancement should have been realized. The working papers will also show when these "Yield Enhancements" were subsequently reversed.

28Q. KPMG assisted in the perpetuation of the accounting for "Yield Enhancements", and failed to show independence in the performance of their duties by not enforcing Callidus to report in terms of international standards, adversely affecting many investors by assisting Callidus to show profits, not in line with IFRS. It was only when Baumann reported Callidus for their accounting of "Yield Enhancements" that the Ontario Securities Commission sanctioned Callidus, stopping them from reporting non-IFRS "Yield Enhancement" gains and placing Callidus on a three-year reporting watchlist.

28R. Had it not been for the non-IFRS reporting sanctioned by KPMG, the Callidus share price would have dropped much earlier, which would have saved a number of unsuspecting investors from losing money when purchasing the Callidus stock.

Other

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

68. Mr. Baumann denies the Plaintiffs have identified any legal basis to recover the accounting and disgorgement claimed at paragraph 1(b) of the SOC and the investigation costs claimed at paragraph 1(g) of the SOC.

69. Mr. Baumann denies the Plaintiffs are entitled to any punitive or aggravated damages, as claimed at paragraph 1(h) of the SOC.

70. Some or all of the allegations in the SOC duplicate allegations made against Mr. Baumann in an action filed against him by Callidus in the Court of Queen's Bench of Alberta as Court File No. 1701-14167. Accordingly, the within action as against Mr. Baumann ought to be stayed or struck out as an abuse of process.

Disposition Sought

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

COUNTERCLAIM

72. The Defendant, Kevin Baumann, claims as against the Defendants by Counterclaim, The Catalyst Capital Group Inc, Callidus Capital Corporation, Scott Sinclair, Sinclair Range Inc., Sheldon Title, MNP and KPMG.

a) General and aggravated damages of $235.6 million for injurious falsehood, the tort of causing loss by unlawful means (intentional interference with economic relations), civil conspiracy, and unjust enrichment;

i. $200 Million for the loss of corporate opportunities,

ii. Disgorgement of $32 million for Callidus' 2016 "Yield Enhancement"; and

iii. $1.6 million loss of shareholders loans

iv. $2 Million for legal fees

b) In the alternative, an accounting of any and all gains from the unlawful and wrongful conduct described in (a) above; and to the extent that such amounts are greater than any amounts of general damages awarded, disgorgement or another such equitable remedy in relation to such gains.

c) A declaration that the Defendants by Counterclaim (defined infra) are personally liable for the unlawful actions carried out by or through the corporations and/or other entities that are named as Defendants.

d) A declaration that KPMG was reckless and/or negligent in harming Baumann;

e) A declaration that the Defendants by Counterclaim deceived the plaintiff;

f) Special damages for costs associated with the investigation of the willful misconduct of the Defendants by Counterclaim, or some of the Defendants by Counterclaim;

g) Punitive and or aggravated damages as against all of the Defendants by Counterclaim;

h) Pre and post judgement interest in accordance with sections 128 and 129 of the Courts of Justice Act, RSO 1990,c.C.43, as amended;

i) The costs of this action plus the applicable taxes, and

j) Such further and other relief as this Honourable Court sees just.

Background

73. Baumann is an individual businessman residing near Bluffton, Alberta. Until his resignation on 21 April, 2015, at the insistence of Callidus, he was Shareholder, President, Officer, and Director of Alken Basin Drilling Ltd. ("Alken" or the "Company"), which was founded in 1982 and purchased by Baumann and Baumann's brother Michael Baumann ("M Baumann") in or about February 2013. Baumann was a guarantor of a loan to Alken from Callidus.

74. Alken is a private company that provided water well drilling and associated services to oil and gas producers across Western Canada until its undertaking, property and assets were sold as described herein. Alken was a borrower of Callidus.

75. At all material times hereto, Baumann held sixty common shares and 1,602,688 Series 1 Preferred Shares in Alken collectively amounting to seventy-five percent of the Company's shares issued.

76. Callidus is an Ontario corporation that purports to be in the business of high-risk distressed debt lending. Callidus extended a loan to Alken pursuant to an agreement dated and effective as of 31 March, 2014 (the "Credit Agreement"), under which Callidus granted individual credit facilities to Alken bearing an aggregate credit limit of $28,500,000.00 at an interest rate of 18% (with a default rate of 21%) (the "Credit Facilities").

77. Matthew Scott Sinclair AKA Scott Sinclair (“Sinclair”) is an individual who resides in Toronto, Ontario. Until 29 September, 2016, Sinclair was the Managing Director of an Ontario corporation named Range Corporate Advisors Inc. ("Range"). On 21 April, 2015, Sinclair was appointed the President of Alken. Sinclair remained the President of Alken until 4 May, 2016.

78. Sinclair Range Inc (“Sinclair Range”) is a company that was formed on or about 29 September, 2016, as a result of the merger of a number of other companies, including Range. Accordingly, Sinclair Range is the legal successor to Range. At all material times hereto, Sinclair was the President of Sinclair Range. Altair Water and Drilling Services Ltd. ("Altair") is a wholly-owned subsidiary of Callidus, and acquired the undertaking, property and assets of Alken as described herein. At all material times hereto, Sinclair was the President of Altair.

79. MNP LLP (“MNP”) is one of the largest full-service chartered accountancy and business advisory firms in Canada.

80. By virtue of Callidus' placement of Sinclair within Alken, Sinclair and Callidus together, or Callidus through Sinclair acting as its agent, either directly or through Range, were the legal and de facto controlling mind(s) or principal(s) of Alken from 21 April, 2015, through 4 May, 2016.

81. KPMG Canada LLP (“KPMG”) is one of the “big four” accounting firms and was the auditor of Callidus.

Conspiracy

82. It is specifically pleaded that the Defendants to the Counterclaim together with Sheldon Title ("Title"), MNP, Sinclair, Sinclair Range ("the Conspirators") have conspired unlawfully and wrongfully to deprive Baumann of his assets and cause harm to Baumann resulting in damages to him, alternatively that the Conspirators breached the terms of the Credit Agreement and abused the bankruptcy process with the predominant purpose of harming Baumann, and which did harm to Baumann.

83. The Conspirators have produced few if any communications amongst them. It is recognized in conspiracy cases that evidence of the full particulars of a conspiracy lies with the conspirators. Only through a process of discovery will the full extent of the conspiracy become known. The Conspirators have unlawfully and wrongfully conspired to obtain the assets and business of Alken under false pretenses with the express purpose of making a "Yield Enhancement." in order to hide loan losses in Callidus and to achieve unrealistic forecasts that Callidus had stated to market participants that it could achieve.

Involvement of Callidus

84. Callidus is a lender to businesses that cannot obtain funding from traditional sources.

85. Callidus and Baumann entered into a loan agreement on or about 31 March 2014. In the loan agreement, Callidus agreed to advance three facilities to Baumann totalling $28.5 million.

86. Callidus' original business model was to lend money to businesses for a short period of time at a relatively high-interest rate. The loans would all be backed by security, either of fixed or current assets, which were designed to make the loans relatively low risk.

87. The lending of money to companies caps the amount of profit that Callidus could make for its shareholders. Glassman stated in earnings calls that Callidus would be able to make 40% returns on investor funds. This high return was unlikely to happen by Callidus purely loaning money.

88. Callidus then changed its business model to acquiring companies, preferably for pennies on the dollar, running the companies for a short period of time and then offloading the companies to a buyer for a substantial profit. Callidus named this strategy their "Yield Enhancement."

89. In order to achieve this yield enhancement strategy, it was necessary and advantageous to place the target company into receivership and buy the assets of the target company out of the receivership process. This would be done by conspiring with the Chief Recovery Officer ("CRO") and Receiver of the target company.

90. In Baumann's case, the deception started before the loan was signed. The original term sheet offered to Baumann did not include any holdbacks. The next iteration of the term sheet contained a $750,000 holdback. Baumann questioned the holdback and Callidus subsequently removed the holdback in the third iteration, which was signed by all parties.

91. From the first cash drawdown against facility A, Callidus invoked a holdback of $1.2 million. This was clearly against the negotiations that resulted in the holdback being removed from the term sheet. Callidus initiated the holdback on a clause in the term sheet, which stated: "***are net of any reserves as determined by the lender in its sole discretion.***" Communication between Baumann's lawyer and Callidus stated that the holdback would not be large and that Callidus would act reasonably. Callidus instead acted unreasonably and instituted their priority conspiracy strategy to hold back economically unfeasible amounts

92. Callidus required, in terms of the Loan Agreement, that funds from any and all sources were to be placed into a blocked account. The blocked account has been referred to by Callidus as a proprietary mechanism to control the cash flow of the borrower. Alken would then request funds from Callidus in terms of a formula in the loan agreement and had to state to whom any funds were to be paid. Callidus would then review the amounts to be paid and would only release funds to the creditors they agreed should be paid. Payment to critical suppliers was sometimes rejected, further straining the ability of Alken to continue as a going concern and damaging the reputation of the company. Creditors, in particular, would be reluctant to do further work for the company on payment terms.

93. The effect of the holdback was to immediately place Alken under financial pressure, limiting Alken's ability to run a commercially viable operation.

94. Alken continued to survive and had a good winter drilling season. Boyer, realizing that the company was still able to make a profit introduced Sinclair to Baumann on the auspice that he would help Baumann. In reality, Sinclair was placed in Alken to assist the conspirators in taking over the company.

95. From the moment Sinclair was appointed to the company, Boyer and Sinclair plotted to remove Baumann. This plan was effected by insisting that Sinclair sign off on all funding requests, with Sinclair not asking for sufficient funds to keep the company running. It was Sinclair's duty of loyalty to act in the best interest of Alken and Baumann, which was evidently not the case.

96. When Baumann realized what Sinclair was doing, he fired Sinclair on or about 31 January 2015. Sinclair reported to Boyer that he had been fired. Boyer subsequently stated that no funds would be available until signed off by Sinclair. This action by Callidus ensured that Baumann had no commercially available options, but to reappoint Sinclair.

97. Sinclair and Boyer continued to conspire to oust Baumann. Sinclair and Boyer held back funds from Alken, forcing Baumann to look at the option of CCAA protection, to enable Alken to escape from Callidus' grip.

98. Baumann, unable to get funds from Callidus due to the blocked account, followed the only commercially available action and circumvented the Callidus controlled blocked account and proceeded to appoint lawyers, pay creditors and applied to the court to have Alken placed into CCAA protection.

99. Callidus immediately instructed their lawyers to contact Baumann, to undo the filing of the company into CCAA protection. They stated that if Baumann did not acquiesce to their demands they would place the company into a forced liquidation procedure, which would significantly reduce the asset value of Alken, further harming Baumann.

100. As a CCAA proceeding did not fit with the conspirator's plans, Callidus called the loan. As Alken had not breached the terms of the agreement, Callidus called the loan "**based on the Alberta economy**".

101. Callidus' lawyer stated that Alken ***"had been under increasing pressure from suppliers and other creditors to pay amounts owing,"*** and that Baumann "***had succumbed to that pressure."*** It is noted that at this point in time, Facility A was in an undrawn credit position, and Baumann had in excess of three million dollars in accounts receivable, more than enough in terms of the formula in the loan agreement to settle all of the accounts payable and fund the .CCAA proceeding.

102. Callidus insisted that ***"Baumann immediately resigns, and Scott Sinclair or another person acceptable to Callidus is appointed president the authority to run the day to day affairs of the company."***

103. Baumann made the commercial decision to resign as a director and afterwards appointed Sinclair.

104. Sinclair now operated the company despite his lack of knowledge of the drilling industry. This lack of knowledge, experience and expertise substantially harmed Baumann and Alken.

105. Callidus and their fellow co-conspirators now had Alken firmly in their grasp. Instead of placing the company into an orderly liquidation proceeding, Callidus continued to operate the company from April 2015 to March 2016.

106. Callidus recklessly continued to run the company on their own admission that the company would suffer further losses due to the "***state of the Alberta economy***," causing harm to Baumann and Alken.

107. Callidus continued to run the company at a loss while looking for new business. Callidus effectively forced Baumann to pay for their marketing efforts knowing that the conspirators could rely on Baumann's guarantee.

108. During this period, Callidus instructed Sinclair not to deal with Baumann, shutting Baumann out from the workings of the company.

109. Baumann, concerned with the way that Sinclair was attempting to manage the business, called a shareholders meeting to vote Sinclair out and reinstate Baumann. This went against the plans of the conspirators, forcing Callidus to invoke a power of attorney ("POA") that Callidus possessed over the shares of Alken. Having invoked the POA, Callidus and their fellow co-conspirators cancelled the shareholders meeting and continued to run the company to the detriment of Baumann and Alken

110. In December 2015, it appeared that the marketing efforts of Callidus to the overseas market had succeeded as Alken was approved as a drilling contractor in both Egypt and Kuwait. As a result of this approval, the potential that Alken would be worth a significant amount of money prompted Callidus to start the receivership process.

111. Callidus and Boyer in collusion with Sinclair phoned Baumann in December 2015 with an offer to buy out the company. The offer was for Baumann to sign over his personal land used as collateral in the guarantee and shares of the company, and that Callidus would cease all actions against Baumann. At this point Callidus, Boyer and Sinclair knew that a MOA for drilling in Egypt was imminent. Callidus, Boyer and Sinclair realized that there was a significant risk that if the company was placed into receivership, the MOA might come to light, resulting in the net worth of the company being substantially higher then the current forced liquidation value.. This attempt was a fraudulent way to not inform Baumann of the corporate opportunity in Egypt, prevent the company from being placed into receivership and to fraudulently take over the company.

112. Callidus now started working in earnest with MNP to place Alken into liquidation. At this time, Sinclair and Boyer had planned to establish a Newco, which would benefit from the contract in Egypt. As the negotiations were at a preliminary stage, Catalyst and /or Callidus, along with Boyer, Sinclair, Title and MNP, believed that the company could be sold to Callidus, without declaring the corporate opportunity that existed in Egypt, for pennies on the dollar whilst at the same time diminishing Baumann's ability to enforce his rights against Callidus and Sinclair.

113. Catalyst, Callidus and its co-conspirators were thwarted in this attempt when the first Memorandum of Agreement ("MOA") was signed sooner than expected. This led to a scramble to sell Alken. The first MOA was received on a Friday, and MNP was instructed by Sinclair and Callidus to initiate a short sales process for Alken starting on the following Monday. Sinclair was placed in charge of marketing the sale of Alken, which was a conflict of interest considering that over the previous months, Sinclair had been talking of Callidus purchasing the company's assets and Sinclair running the Newco company as president.

114. Callidus succeeded in their illegal plan to purchase Alken out of a staged receivership. In the quarter following the purchase of the company Callidus recorded a "Yield Enhancement" of $32 million. This was well over a 100% profit on the loan, a figure that was agreed to by its auditors KPMG.

115. Callidus ultimately failed to secure the contract in Egypt, with the contract being awarded to a Chinese company in 2017. Had the company been sold to a reputable drilling contractor prior to the receivership, the company may well have secured the drilling rights.

116. The "Yield Enhancement" business model has harmed significant businesses. Callidus stated that it only financed companies based on their fixed and current assets. There are a number of instances in which companies were sold on behalf of Callidus, in a liquidation sale for less than the amount owed, resulting in Callidus claiming on personal guarantees. This business model destroyed wealth within companies and individuals. Ironically, most of the companies that Callidus destroyed have not realized the forecasted "Yield Enhancements," resulting in significant (almost one Billion dollars of loans provided for) losses to Callidus.

117. The "Yield Enhancement" scheme and business model harmed Baumann and many other parties, including Callidus shareholders. In addition, it created opportunities and potential reasons to short Callidus stock, issue articles, studies and reports. Rather than Callidus and its representatives taking responsibility for their actions, Callidus has been an extremely hyper-aggressive litigant against any individual or corporation that has ever questioned Callidus or Catalyst, and thus, abusing the court process.

Involvement of Catalyst

118. Catalyst Capital Group Limited ("Catalyst"), is a Canadian private equity investment firm founded in June 2002. Catalyst specializes in controlling and/or influencing investments in distressed and undervalued Canadian situations. Catalyst's stated business model is to purchase companies in a distressed condition, turn the companies around, and subsequently sell the companies at a significant profit.

119. Catalyst is controlled by Glassman and Riley, the same controlling minds as Callidus.

120. Catalyst encouraged Callidus to start using the Catalyst model to increase the returns to the shareholders, predominantly Catalyst. Callidus was urged to take companies over from the receivership process, change the management and then sell the companies for a high profit – the "Yield Enhancement".

121. Catalyst's actions directly harmed Bauman, Alken and numerous other companies, significantly changing the risk profile that the borrowers had undertaken.

Involvement of Sinclair

122. Sinclair is the president and majority owner of Sinclair Range (previously Range Advisors).

123. Sinclair had previously worked with Callidus on multiple occasions: as an advisor to Leader Energy (a Callidus borrower in liquidation), Chief Restructuring Officer ("CRO") to Roofers World (Callidus Borrower), and Beresford Box (Callidus Borrower). Sinclair was also proposed as CRO for Bluberi Gaming, also a Callidus Borrower, to which he was not appointed.

124. Sinclair is a puppet of Callidus who dances to Callidus's tune, in order to appease Callidus and get more work from them.

125. Sinclair was introduced to Baumann in late November 2014 by Boyer. Boyer was a vice president of underwriting at Callidus. Boyer was responsible for the Alken account. Sinclair was not known to Baumann prior to this introduction.

126. Sinclair was introduced to Baumann as "Scott Sinclair" and not "Matthew Scott Sinclair." This was done deliberately and strategically as Sinclair was previously sanctioned by the OSC under the name "Matthew Scott Sinclair." A background search of "Scott Sinclair" would not have brought up the censure.

127. Boyer is currently in litigation with Callidus (Court File No. CV-17-569065). Callidus is alleging, amongst other things, that Boyer committed fraud and falsified documents. Callidus is presently claiming $150 million in damages from Boyer.

128. Sinclair was appointed by Baumann on 1 December, 2014, at the insistence of Boyer on behalf of Callidus to assist Alken with producing a business plan, Cash flow forecasts and helping Alken with its relationship with Callidus.

Sinclair's Engagement Letter

129. Range Advisors was appointed to assist Alken in the following areas

a) Helping the Company to manage its short-term liquidity shortfall by assisting in the development and execution of an agreeable liquidity plan;

b) Assisting the company to turnaround its operations and financial performance by assisting in the development and implementation of an agreeable turnaround plan, appropriately documented to support the refinancing efforts of the company;

c) Helping the company prepare materials and a plan to attract a new senior lender or lenders to payout the existing senior lender of the company and managing the sale and closing process with respect to the new senior facilities;

d) Helping the Company with its business and strategy communications to various stakeholders, including its senior lender Callidus, intended to effectively communicate and gain support for the liquidity, turnaround and refinancing plans, and; and

e) All other matters, as agreed between Range Advisors and the Company.

130. Sinclair did not complete a turnaround plan until December 2015, and at no stage, discussed a turnaround plan with Baumann.

131. Sinclair, at no stage, was appointed by Alken or Baumann to eliminate related party transactions such as shareholder loans or intercompany loans or to revalue the assets of the company.

Sinclair as an advisor to Alken

132. Sinclair, soon after his appointment to Alken, began to report all of Alken's activities to Callidus and started to reduce the amount of cash requested required to effectively run Alken’s business, despite the fact that funds were available. The point of obtaining the loan from Callidus was to obtain funding in order to continue operations, and the failure to provide more cash contradicted the purpose of the loan, further depicting an ulterior intent on behalf of Callidus. This conduct harmed Alken's ability to pay suppliers, harming Baumann’s and Alken’s name in the market place as a reputable individual and company.

133. Baumann, realizing that Sinclair was not acting in the best interests of Baumann, Alken or its shareholders but rather was working solely for the best interests of Callidus and Sinclair. Baumann dismissed Sinclair on or about 31 January, 2015. Sinclair stated to Janice Jansen, the office manager at Alken, "***I will be back***" and communicated to Boyer that he had been dismissed from the company.

134. Callidus required, in terms of the Loan Agreement, that funds from any and all sources were to be placed into a blocked account. The blocked account has been referred to by Callidus as a proprietary mechanism to control the cash flow of the borrower. Alken would then request funds from Callidus in terms of a formula in the loan agreement and had to state to whom any funds were to be paid. Callidus would then review the amounts to be paid and would only release funds to creditors they agreed should be paid. Critical suppliers were sometimes rejected further straining the ability of Alken to continue as a going concern.

135. Boyer then proceeded to halt any further release of available and requested funds until such time that the requests had been approved by Sinclair, fully knowing that Sinclair had been dismissed by Baumann. This action by Boyer forced Baumann to reappoint Sinclair on behalf of Alken, ensuring that the unlawful conspiracy could be carried out. Boyer, on behalf of Callidus, knew that Sinclair was acting in the best interests of Callidus and that such coercion of Baumann would harm Baumann and Alken. It was Sinclair's duty of loyalty to be acting in the best interest of Alken. This was clearly not the case with Sinclair choosing to act in the best interests of Callidus

136. Sinclair and Boyer continued conspiring to oust Baumann from Alken so that the unlawful conspiracy could be implemented. Following the reappointment of Sinclair at Boyer's insistence and with no other alternative, Baumann realized that the company needed an “out” from Callidus' control, to prevent the abuse of the relationship by Callidus and Sinclair. Baumann mentioned the CCAA application to Sinclair, who then relayed this information to Boyer.

137. Boyer then instructed Callidus to call the loan despite the loan not being in default. Notwithstanding that Alken was up to date on all payments, Callidus called the loan based on "**the state of the Alberta economy**.”

138. Baumann, realizing that Callidus and Sinclair were not acting honestly and in good faith during the term of the loan, decided to proceed with placing the company into CCAA protection to mitigate losses caused by Callidus and Sinclair.

139. Baumann requested funds that were available in accordance with the loan agreement to pay creditors to which Sinclair answered "really?" No funds were transferred to Alken. Baumann, now realizing that he had to move quickly and to try and avoid further harm by Sinclair and Callidus, used the only available commercial solution and diverted funds from the blocked account, to allow him to start the CCAA process, and to pay the Accounts Payable that had been outstanding for some time.

140. Given the conduct of Sinclair and the Defendants by Counterclaim, there was no other commercially reasonable alternative available by Baumann to stop the actions that were being perpetrated by the Defendants to Counterclaim including Sinclair against Baumann.

141. Callidus then instructed Sinclair to close the bank account, cancel all cheques that had been made out, and have the money returned from the lawyers who had been appointed to assist in the CCAA proceedings

142. Sinclair relished this opportunity, emailing Boyer with what he termed were "frauds of the day" for actions undertaken by Baumann. The vast majority of funds were returned to Callidus.

143. Baumann was then told by Callidus' counsel that he had to resign and appoint "Sinclair or someone like him" to be president of the Company.

144. Baumann, having no choice, to avoid further harm to himself and Alken, acquiesced to Callidus' demand and resigned as Director appointing Sinclair as president of Alken. Baumann was informed by Boyer that Callidus would act responsibly and would place Alken into orderly liquidation proceedings in order to maximize the value of the assets and apply such proceeds to settle the Callidus facilities and other stakeholder claims. The Conspirators did not act in a commercially reasonable manner and instead took steps to wrongfully seize Baumann's assets for pennies on the dollar, whilst at the same time attempting to remove Baumann's right and ability to enforce his claims against the Conspirators.

Sinclair as president of Alken

145. Callidus, Sinclair and Sinclair Range failed to act honestly and in good faith with Baumann and Alken and did not place Alken into orderly liquidation proceedings, to maximize the value of the assets for the benefit of all stakeholders of Alken. Sinclair immediately sought to appoint legal counsel for Alken that was “sympathetic to Callidus” despite not being in the best interests of Alken for whom he was purportedly employed, stating that he felt he could "***push Alken into a proper selection***."

146. Immediately after his appointment as president, Sinclair ceased communicating with Baumann about the plans and actions for Alken, materially altering Baumann's risk as a guarantor.

147. Callidus, through Boyer and with the help of Sinclair, continued to run the company for the next year. During this time, Sinclair forwarded numerous proposals to Boyer for the takeover of Alken by a Newco wholly owned and operated by Callidus. This company was Altair Water and Drilling Services Inc.

148. The plan was for Callidus to purchase the assets out of a "friendly liquidation" run by MNP on behalf of Callidus, and to transfer the assets and some critical suppliers to a Newco, leaving all other suppliers to remain unpaid after the sale. This was despite the fact that the majority of the accounts payable were incurred after Sinclair took over the company

149. Sinclair refused to talk to Baumann and refused to give him any information that Baumann was entitled to receive. In one email correspondence with Baumann, he stated, "***You are not a Director of Alken. As a shareholder, you will receive all information and disclosure properly due to shareholders***". Sinclair failed to provide Baumann with any further information

150. Sinclair also prevented Baumann from entering the premises, and on one occasion Sinclair called the police to have Baumann removed from the premises

Shareholders Loan

151. Sinclair, with the full knowledge and assistance of Boyer and Callidus, upon becoming president of Alken immediately started to materially alter the books and records of Alken to the detriment of Baumann; the altering was based on fictitious entries that consequently harmed Baumann

152. Sinclair, with the knowledge and support of Callidus, wrongfully and fraudulently, wrote off a debt to Pekisko Ranch for the use of the property by Alken as collateral. This was done without consultation with either Baumann or Pekisko Ranch.

153. Sinclair wrongfully and fraudulently wrote off the shareholders loan owed to Baumann for both the contribution into Alken of two drilling rigs and for expenses that he had incurred on behalf of Alken. Sinclair did not consult with Baumann prior to writing off of the loans.

154. Sinclair, with intent and malice, wrote off the above two amounts owing to Baumann with the consent and knowledge of Boyer and Callidus, in order to prevent Baumann or Pekisko Ranch from having any standing as Creditors in the receivership process.

155. Callidus and Sinclair passed the journal entries to assist them with their unlawful business plan to wrongfully seize the assets of Alken for pennies on the dollar. This was done so that Callidus could cover losses made by Callidus in other loans. This profit enabled Callidus to meet its unreasonable forecasts to market participants that Callidus knew were not achievable otherwise.

156. During the loan period ending 31 March, 2015, Alken's internal financial statements show that the company was quite profitable even after paying Callidus' high-interest rates.

Sinclair adjusts the books and records of Alken.

157. Sinclair passed a number of journal entries in the books of Alken at the request of Callidus without advising Baumann. This was wrongful and unlawful and caused harm to Bauman and Pekisko

158. The fraudulent altering of books included the unlawful writing down of fixed assets to the asset appraisal ordered by Callidus, and the elimination of intercompany accounts and related party loans.

159. Sinclair did not complete the financial year-end for March 2015 and did not have the Financial Statements audited by an independent auditing firm. Alken was placed into liquidation subsequent to the March 2016 year-end. Sinclair again did not complete a financial year-end or have the financials audited. The lack of auditing of the financial statements was condoned by the conspirators as a means for purchasing the company at less than market value.

Sinclair on the behest of Callidus increases the debt

160. Sinclair ran the company from April 2015 to March 2016. During this period, there was a slump in sales, without any corresponding reduction in operating costs. This led to a ballooning of the debt from $22 million ($19 million net of receivables) to $27 million dollars (and no accounts receivable). In addition, Sinclair collected the majority of accounts receivable that were outstanding at the time that Callidus and Sinclair took over the running of the company. The accounts receivable were approximately three million dollars at the time of the takeover. The total debt owed to Callidus escalated by approximately ten million dollars during this period.

Sinclair fails to sell assets of Alken

161. Sinclair did not sell any of the assets from Alken from the time that he was appointed as president to the liquidation of Alken, despite offers being presented to Sinclair and Callidus. To Baumann's knowledge, no negotiations were actively conducted by Sinclair or Callidus to maximize the value of the assets.

162. Sinclair, Boyer and Callidus continued to frustrate efforts to liquidate the assets of Alken in a commercially reasonable and orderly manner. Two potential purchasers, Bredy and Mike Baumann were both rejected out of hand by Sinclair and Callidus. In addition, evidence exists that another Callidus borrower asked Sinclair and Callidus that offers to buy the equipment of Alken be put on hold while the other Callidus borrower negotiated a drilling deal. When the deal did not materialize, the offer to purchase evaporated. Baumann is unaware of the number of purchasers that were turned away during this period, but Baumann believes there were other buyers looking to purchase the assets of Alken

163. Sinclair received various offers to sell the assets of the company on a piecemeal basis but chose not to sell the assets on the bequest of Callidus, who wanted to keep the assets for their own uses. This was an attempt by Callidus to appropriate the corporate opportunities meant for Alken and its stakeholders.

164. By not selling the assets in an orderly way, Sinclair and Callidus adversely affected the value of the assets and, at the subsequent liquidation sale, the assets received a far lower amount then they would have received in an orderly liquidation. This decision resulted in financial harm to Baumann, and was not done in good faith, which materially altered Baumann's risk as a guarantor.

Callidus thwarts Baumann from taking back control of the company

165. Baumann, distressed at the actions of Sinclair, Boyer and Callidus, attempted to call a shareholders meeting to vote Sinclair out of office. As part of the loan term sheet between Callidus and Baumann, Baumann had signed a power of attorney over his shares to Callidus. Callidus invoked the power of attorney and prevented Baumann from calling or voting in a shareholders meeting. As a result, Sinclair was able to continue running the company for the benefit of Callidus for approximately one year.

Sale of Alken and the Egypt MOA

166. Catalyst is a Canadian private equity investment firm founded in June 2002. Catalyst specializes in control and/or influence investments in distressed and undervalued Canadian situations. Catalyst's stated business model is to purchase companies in a distressed situation, turn the companies around, and sell the companies at a significant profit.

167. Callidus started using the Catalyst model during this period. Catalyst and Callidus did not look to increase sales by Alken in the local market but instead looked at the overseas market.

168. At this point, Egypt, assisted by the United States Department of Agriculture, formulated a plan to drill wells in Egypt to allow for the irrigation of some of the desert. Sinclair and Boyer, on behalf of Callidus, were approached by a company in the Middle East to assist with drilling in the area. In or about January 2016, Alken was approved as a driller in Egypt and Kuwait, opening the path to obtaining the contract in Egypt. Baumann, as the majority shareholder, had no knowledge of these negotiations.

169. Callidus now started working in earnest with MNP to place the company into liquidation. This was done so that the Newco that Sinclair and Boyer had communicated about would benefit from the contract in Egypt. As the negotiations were at a preliminary stage, Catalyst and /or Callidus, along with Boyer, Sinclair, Title and MNP, believed that the company could be sold to Callidus, without declaring the corporate opportunity that existed in Egypt, for pennies on the dollar whilst at the same time diminishing Baumann's ability to enforce his rights against Callidus and Sinclair.

170. Catalyst, Callidus and its staff were thwarted in this attempt when the first MOA was signed sooner than expected. This led to a scramble to sell Alken. The first MOA was received on a Friday, and MNP was instructed by Sinclair and Callidus to initiate a short sales process for Alken starting on the following Monday. Sinclair was placed in charge of the marketing the sale of Alken, which was a conflict of interest considering that Sinclair over the previous months had been talking about Callidus purchasing the company's assets and Sinclair running the Newco company as president.

171. Section 247 of the Bankruptcy and Insolvency Act the receiver shall

a) Act honestly and in good faith; and

b) Deal with the property of the insolvency person or the bankrupt in a commercially reasonable manner

172. Title's actions failed to comply with the above, thereby harming Baumann and causing damages, and as a result, MNP is vicariously liable for the acts and omissions of Title.

173. Title neither acted honestly or in good faith or behaved in a commercially reasonable manner in attempting to get the highest value for the assets of Alken. The Conspirators attempted to keep the MOA hidden from other prospective buyers, so as not to garner additional bids from parties wishing to buy the company as a going concern. This was done to preserve Callidus's attempt to reap a significant "Yield Enhancement."

174. All of these marketing efforts would only have resulted in auction companies bidding for the assets, and not companies looking to buy the company as a going concern based on a potentially lucrative drilling deal in Egypt. The balance of marketing was led by Sinclair. Sinclair, on behalf of Callidus, has stated that he had little or no involvement in the marketing of the company; however, the First Report of the Receiver issued by MNP directly contradicts this.

175. Baumann has been unable to find, and Callidus has not disclosed, which companies were contacted, and what assets were mentioned in the sales materials. The MOA was not included in the sales pack

176. Sinclair failed to inform MNP of the first MOA. He signed the second MOA and sent it back to the corresponding party in Egypt. MNP was only informed of the second MOA a week before closing after Sinclair received the signed copy back from the corresponding

party. MNP in collusion with Sinclair and Callidus, fraudulently withheld the contents of the MOA from parties who may have been interested in the loan.

177. From the timesheets submitted by MNP, MNP intentionally or recklessly had scant regard for the MOA, only extending the closing for a week, and conspired with Callidus and Sinclair to hide the MOA under a confidentiality agreement (only those who had signed the confidentiality agreement were asked if they wanted a copy of the MOA). As the majority of these were distressed purchasers of assets or auction companies, the MOA would have had little effect on their bidding process. This fraudulent conduct resulted in no companies bidding on Alken as a going concern basis.

178. Title, hoping for more work from Callidus by agreeing to facilitate Callidus' underhanded, unlawful, and unethical business practices, did not follow industry norms and follow a more prudent course of action, by stopping the sale and reissuing the documents for the sale of the company, clearly spelling out the details of the MOA. The corporate opportunity was hidden and used to keep other potential buyers of Alken in the dark at the behest of Callidus and Sinclair so that Callidus and Sinclair could reap the benefits of the contract. This was not done so as to avoid scuppering Callidus' "Yield Enhancement."

179. Callidus and Catalyst have repeated the highly improbable statement that the MOA had no value. Sinclair, in December 2016, stated on his website that he had been appointed to run a billion-dollar drilling project in Egypt. Callidus and Catalyst lost the Egypt drilling opportunity in the MOA to Chinas ZPEC drilling company, which has so far drilled at least 30 of 300 proposed wells in the area. This is a highly lucrative deal for the Chinese company.

180. It is irrelevant that the contract never reached fruition, as deception and concealment of the MOA were engaged upon. This adversely affected the bidders for Alken as a going concern

181. It is highly unlikely that a company on the verge of bankruptcy would have been able to obtain a billion-dollar contract in Egypt without paying substantial bribes in contravention of the Corrupt Foreign Practices Officials Act ("CFPOA") The full extent of such illicit and illegal conduct will be uncovered in discovery. Further, the MOA states that two fees will be paid, one a consulting fee of 4.5% and 6.5% undocumented fees to other parties in Egypt.

182. Baumann is aware that Sinclair, on behalf of Alken, attempted to open an offshore Deutsche Bank account on 11 January 2016. This was the same time period as when the bribes likely would have been paid.

Involvement of Sinclair Range Inc

183. Sinclair Range Inc is a turnaround company headed by Sinclair with vice president Olga Jilani.

184. The company was formed on 29 September, 2016, from the amalgamation of Range Advisors and seven other parties.

185. At all times, from the hiring of Sinclair by Alken to Sinclair being appointed as president of Altair Water and Drilling, Sinclair was the controlling mind of Sinclair Range.

186. Sinclair and Boyer were known to each other prior to the appointment of Sinclair to Alken. Sinclair communicated with Boyer using his Range Advisor's email address in order to conceal communications between Sinclair and Callidus from Baumann.

187. Sinclair used Sinclair Range to participate in the unlawful conspiracy to further the conspiracy with the other counterclaim Defendants.

Involvement of Sheldon Title

188. Title was employed by MNP as a senior vice president and controlled the receivership of Alken to act as the Receiver

189. Title was first approached by Sinclair, Boyer and Callidus on or about 8 December 2015 to serve as Receiver. This was subsequent to Boyer and Sinclair conspiring to purchase the company out of the receivership process.

190. MNP performs substantial work for Callidus and has acted as receiver for Callidus in numerous cases. MNP is vicariously liable for the actions and omissions of Title

191. Title advised Boyer and Sinclair to pay only some of the creditors so that the liquidation of Alken did not appear to be a scam.

192. On 29 March, 2016, Sinclair advised Alan Shiner ("Shiner") of MNP of the existence of a significant potential contract in Egypt.

193. Shiner and Title intentionally failed to stop or alter the sale process on this news and did not re-market the company in order to reflect this significant development to the detriment of Alken, Baumann and other stakeholders. Shiner and Title did not attempt to sell the assets for the maximum value that could have been achieved to appease Callidus to the detriment of Baumann.

194. On 11 April, 2016, Shiner stated that he had not received the signed agreement for the Egypt deal. There are no further timesheet entries from any parties at MNP or Gowlings relating to the Egypt deal. In terms of the Bankruptcy and Insolvency Act RSC 1985 as amended, 4(2) (1) any interested person in any proceedings under this Act shall act in good faith and with respect to those proceedings. Section 13.5 states A trustee shall comply with the prescribed Code of Ethics.

195. Title has previously been sanctioned for similar conduct in an earlier case. Baumann notes that Title worked on the Ambercore Software Inc. and Treeapoint Canada (2008) Inc file in which similar fact evidence was led. The honourable Justice J Newbould stated that "*the principles to be considered by court in deciding to approve a sale recommended by a receiver are well known...Regrettably, I have come to the conclusion that the tests set out in Soundair have not been met in all the circumstances, the motion to approve APA is dismissed*."

196. Title did not stop the sale of Alken or re-advertise the assets for sale in Alken as this would have gone against the wishes of Callidus.

197. Title did not act in a commercially reasonable manner in advertising the company subsequent to the receipt of the Memorandum of Understanding. Title sent the listing to MNP branches, and to auctioneers and buyers of distressed assets, but did not send the documents to any drilling companies. Title intentionally or recklessly relied on Sinclair to market the assets despite knowing that Callidus was attempting to buy Alken and that Sinclair would be president of the new company. Title was fully aware of the conflict of interest but decided to do nothing.

198. Title allowed Sinclair to market the company, knowing that information vital to the sale of the company had not been made available to potential purchasers of the company.

199. Baumann asked Title by email where the amounts were that related to the shareholder loans of Baumann and the charge for the use of land by Pekisko Ranch. Title instead decided to rely upon the financial information provided by Sinclair, knowing that Sinclair was not independent and Title did not independently review any of the Alken Financial statements.

200. Title did not audit the amounts owing to Callidus in terms of either Facility A, Facility B or Facility C. despite having a duty as receiver to do so.

Involvement of MNP

201. MNP had the following team members working on the Alken receivership

a) Alan Shiner

b) Eric Sirrs

c) Evan Mackinnon

d) Grant Bazian

e) Jessica Hue

f) Sheldon Title

202. During the receivership, there are only two mentions of the Egyptian MOA, both attributed to Alan Shiner. Despite the significant potential ramifications of a corporate opportunity potentially worth well in excess of $100 million, Shiner, according to his timesheets, spent less than 0.7 hours in reviewing the MOA and wilfully, in the alternative, recklessly or negligently and under the direction of Title failed to discuss the MOA with other team members from MNP, the legal team or Baumann.

203. MNP failed to adequately market Alken for sale, only circulating the sale notice to their internal branches and to buyers of distressed goods. For the majority of advertising, they relied on Sinclair. MNP was aware that Sinclair was not independent

204. At Callidus's behest, MNP did not remarket the company when they were made aware of the MOA, significantly reducing any possibility of attracting any buyers who may have wished to purchase the company as a going concern. Such conduct and omissions caused significant harm to Baumann

Involvement of KPMG

205. KPMG are the auditors of Callidus Capital Corporation

206. During the 2016 Q2 conference call, Glassman stated that the "Yield Enhancements" were calculated by a third party and reviewed by the auditors. "***The value is not determined by us. The value is actually determined in conjunction with third parties outside of the firm and then reviewed with the auditors***."

207. During the Q2 Financial Results Conference call, David Reese, (former Chief Operating Officer and President of Callidus) and Glassman stated that Yield Enhancements were a fundamental part of the Callidus business model.

208. KPMG knew or ought to have known that the Yield Enhancements that they were auditing and advising Callidus on were not reasonable or in conformance with IFRS as subsequently stated by the OSC. In the alternative, KPMG, recklessly or negligently advised Callidus that the Yield Enhancements claimed by Callidus were reasonable, and would enable and facilitate the conspirators to carry out their unlawful and unethical business plan.

209. The Conspirators, armed with the advice and audit from KPMG, used KPMG's advice and audit results to prey on Baumann and others to effect an unlawful and unethical business plan.

210. KPMG foresaw or ought reasonably to have seen that its advice and conduct could or would have been unlawfully perpetrated by Callidus and its agents against Baumann and others in causing damages to Baumann. As a result, KPMG is liable for damages to Baumann.

211. KPMG should not have signed off on the acceptability of the "Yield Enhancements," which the OSC has deemed not to be reasonable. The OSC placed Callidus on the reporting watch list and instructed Callidus to cease using these non-IFRS measures.

212. By signing off on the "yield enhancements," KPMG knew or ought to have known that they were not in compliance with GAAP and IFRS. The use of these "Yield Enhancements" caused harm to Baumann.

213. KPMG had an obligation to ensure that the financial statements were prepared in accordance with Generally Accepted Accounting Principles (GAAP) and IFRS. KPMG has failed in its obligation, thereby resulting in contributing to harm caused by the Conspirators.

214. Callidus did not reverse the "Yield Enhancement" for Alken (Altair) until forced to remove the non-IFRS measure from the financial accounts in 2018. This is despite the fact that Altair lost the bid to drill wells in Egypt to a Chinese company in 2017.

215. KPMG failed to exercise professional skepticism as an auditor of Callidus on the "Yield Enhancements" put forth by Callidus. KPMG knew or ought reasonably to have known that such yield enhancements were not reasonable in terms of GAAP. Such omission by KPMG enabled, facilitated and motivated Callidus to perpetuate its unlawful, wrongful, and corrupt business practices, which harmed Baumann. KMPG foresaw or ought reasonably to have foreseen that such omission would and, in fact, did cause harm to Baumann.

Conclusion

216. Baumann pleads that such actions are worthy of censure by this Honourable Court and Baumann claims punitive and aggravated damages in the sum of $1 million

217. Baumann pleads and relies upon Section 29.01 of the Rules of Civil Procedure, R.S.O. 1990, Reg 194.

218. Baumann proposes that the defendants by counterclaim be tried concurrently or consecutively with the main action.

Date: 30 September, 2019

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

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

SUPERIOR COURT OF JUSTICE
Commercial List

Proceeding commenced at Toronto

AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM OF KEVIN BAUMANN

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TAB 5

Schedule A

Mazzuca v. Silvercreek Pharmacy Ltd., 2001 CanLII 8620 (ON CA)

Date: 2001-11-27

File number: c34882

Other citations: 56 OR (3d) 768 — 207 DLR (4th) 492 — 152 OAC 201 — 15 CPC (5th) 235 — [2001] CarswellOnt 4133 — [2001] OJ No 4567 (QL) — 109 ACWS (3d) 880

Citation: Mazzuca v. Silvercreek Pharmacy Ltd., 2001 CanLII 8620 (ON CA), <http://canlii.ca/t/1f3kf>, retrieved on 2020-06-25

Mazzuca v. Silvercreek Pharmacy Ltd.
[Indexed as: Mazzuca v. Silvercreek Pharmacy Ltd.]

56 O.R. (3d) 768
[2001] O.J. No. 4567
Docket No. C34882

Court of Appeal for Ontario
Laskin, Rosenberg and Cronk JJ.A.
November 27, 2001

Civil procedure -- Parties -- Adding or substituting parties -- Court has discretion to dismiss motion under rule 5.04(2) to add or substitute party after expiry of limitation period even in absence of non-compensable prejudice -- Plaintiff must also show existence of special circumstances to justify amendment -- Court has power under rule 5.04(2) to amend pleading in appropriate cases to substitute another party for one named by mistake -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 5.04(2).

A fire at the defendant's premises in February 1993 damaged the inventory of a neighbouring business. A negligence action was commenced in June 1998, in the name of the plaintiff, for damages to inventory and loss of income. During examinations for discovery in 1999, it emerged that the proper principal claimant for the damages sustained in the fire was not the plaintiff in her personal capacity but L Ltd., her corporation. The plaintiff brought a motion in February 2000 for an order permitting her to amend the statement of claim to substitute L Ltd. as the named plaintiff. The motions judge found that the error in naming the plaintiff as the original plaintiff was a misnomer, that the defendant had not been misled as to the nature of the claim being advanced against it, and that it would not be prejudiced by an amendment to correct a simple error by counsel. The motion was granted. The defendant appealed.

Held, the appeal should be dismissed.

Per Cronk J.A. (Rosenberg J.A. concurring): Under both rule 26.01 and rule 5.04(2) of the Rules of Civil Procedure, a pleadings amendment is not to be made if non-compensable prejudice would result. In contrast to rule 26.01, however, the language of rule 5.04(2) imports a discretionary power rather than a mandatory direction. In motions under rule 5.04(2), the courts retain a discretion to deny an amendment in a proper case, even in the absence of non-compensable prejudice, when it is sought to change the parties to a proceeding. Rule 5.04(2) contemplates that the existence or absence of special circumstances warranting the amendment should be considered as one of the factors to be taken into account in determining whether a discretionary amendment is to be permitted or denied after the expiry of a limitation period. In cases where leave is sought to add, delete or substitute a new party, the examination of special circumstances involves consideration of the knowledge of both the moving party and her agents at the time of the commencement of the proceedings regarding the proper parties to be named and of the opposing party in relation to the nature of the true claim intended to be advanced.

This was not a case of misnomer in the narrow sense of a misdescription of the person suing, but rather, was a case of mistake as to the identity of the person who should have brought the suit. However, the power conferred under

rule 5.04(2) to amend a pleading to change parties is not confined to misnomers of the misdescription type. It extends to the power to substitute parties and to correct, in proper cases, the naming of a party by mistake.

The motions judge properly took into consideration the fact that the action was mistakenly brought in the name of the plaintiff, and that this was not a situation where a deliberate decision was made to sue in her name rather than in the name of her company. Counsel always intended, and was instructed, to bring the action to recover damages sustained by the business. The defendant always understood that it was the owner of the business who was suing for damages, and defended on that basis. No new cause of action was being asserted and no new facts were alleged. The defendant was not prejudiced by the proposed amendment, and was not misled or taken by surprise. There was no reason to interfere with the view of the motions judge that the error in this case was a simple and unintentional mistake.

The action was commenced within the relevant limitation period in respect of exactly the same claim. There was no evidence of lack of good faith on the part of the plaintiff's solicitor in commencing the proceedings, and there was no material delay in seeking the amendment once the need to do so became apparent. Moreover, as some of the damaged inventory was allegedly purchased by the plaintiff in her personal capacity, it was not clear that the originally named plaintiff did not also enjoy a cause of action against the defendant. A sufficient explanation was advanced for the failure to name L Ltd. in the first instance. Viewed cumulatively, these factors constituted sufficient special circumstances to justify the proposed amendment in the interests of justice.

Per Laskin J.A. (concurring): Unlike rule 26.01 which governs motions to amend proceedings, rule 5.04(2) gives the court discretion to refuse to add or substitute a party even absent non-compensable prejudice. However, there is no reason to burden that discretion with a "special circumstances" component. Requiring "special circumstances" is unnecessary, contrary to the underlying philosophy of the rules, and in some cases may impose a heavier burden on the moving party than called for by rule 5.04(2). Absent non-compensable prejudice, motions under rule 5.04(2) should ordinarily be granted.

Typically, motions to add or substitute a party after the expiry of a limitation period arise because a lawyer has mistakenly named the wrong plaintiff. In deciding these motions, the case law has distinguished between different kinds of mistakes: between mistaking the correct name of the plaintiff and mistaking who had the right to sue, and between deliberate and unintentional mistakes. These distinctions are problematic, even confusing, and have not been consistently applied. We should be concerned not with the kind of mistake the lawyer has made, but with the effect of the mistake, with whether the mistake has prejudiced the defendant. Holding that motions under rule 5.04(2) may turn on whether the lawyer's mistake is deliberate or unintentional is bound to produce some unjust results, results that would be inconsistent with the philosophy of the current rules.

APPEAL by a defendant from an order amending a statement of claim to substitute plaintiffs.

Dill v. Alves, 1967 CanLII 297 (ON CA), [1968] 1 O.R. 58, 65 D.L.R. (2d) 416 (C.A.); Ladouceur v. Howarth, 1973 CanLII 30 (SCC), [1974] S.C.R. 1111, 41 D.L.R. (3d) 416; Swain Estate v. Lake of the Woods District Hospital (1992), 1992 CanLII 7601 (ON CA), 9 O.R. (3d) 74, 93 D.L.R. (4th) 440, 9 C.P.C. (3d) 169 (C.A.) [Leave to appeal to S.C.C. refused (1993), 19 C.P.C. (3d) 25n, 164 N.R. 158n], revg (1990), 1990 CanLII 6816 (ON SC), 75 O.R. (2d) 388, 37 O.A.C. 310, 71 D.L.R. (4th) 551 (Div. Ct.), revg (1988), 1988 CanLII 4785 (ON SC), 64 O.R. (2d) 206, 49 D.L.R. (4th) 447, 26 C.P.C. (2d) 152 (H.C.J.); W.J. Realty Management Ltd. v. Price (1973), 1973 CanLII 584 (ON CA), 1 O.R. (2d) 501 (C.A.), consd Other cases referred to Bank of Montreal v. Ricketts (1990), 1990 CanLII 1996 (BC CA), 44 B.C.L.R. (2d) 95, 68 D.L.R. (4th) 716, 39 C.P.C. (2d) 224 (C.A.); Barker v. Furlotte (1985), 12 O.A.C. 76 (Div. Ct.); Basarsky v. Quinlan, 1971 CanLII 5 (SCC), [1972] S.C.R. 380, [1972] 1 W.W.R. 303, 24 D.L.R. (3d) 720; Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs), 1971 CanLII 176 (SCC), [1972] S.C.R. 471, 4 N.B.R. (2d) 96, 22 D.L.R. (3d) 115; Carachi v. World Cheque Control Inc. (1986), 12 C.P.C. (2d) 43 (Ont. Dist. Ct.); Colville v. Small (1910), 22 O.L.R. 426 (Div. Ct.); Croll v. Greenhow (1930), 39 O.W.N. 105 (C.A.), affg (1930), 38 O.W.N. 101 (H.C.J.); Deaville v. Boegeman (1984), 1984 CanLII 1925 (ON CA), 48 O.R. (2d) 725, 6 O.A.C. 297, 14 D.L.R. (4th) 81, 47 C.P.C. 285, 30 M.V.R. 227 (C.A.); Dyck v. Sweeprite Manufacturing Inc. (1989), 1989 CanLII 7290 (MB CA), 62 Man. R. (2d) 250, [1990] 1 W.W.R. 637, 41 C.P.C. (2d) 63 (C.A.), affg (1989), 1989 CanLII 7255 (MB QB), 58 Man. R. (2d) 156, [1989] 3 W.W.R. 507, 33 C.P.C. (2d) 230 (Q.B.); G. & R. Trucking Ltd. v. Walbaum (1983), 1983 CanLII 2562 (SK CA), 22 Sask. R. 22, 144 D.L.R. (3d) 636, [1983] 2 W.W.R. 622, 36 C.P.C. 160 (C.A.); Hanlan v. Sernesky (1996), 1996 CanLII 1762 (ON CA), 3 C.P.C. (4th) 201, 39 C.C.L.I. (2d) 107, 95 O.A.C. 297 (C.A.), revg (1996), 1 C.P.C. (4th) 1, 37 C.C.L.I. (2d) 262, 7 O.T.C. 269 (Gen. Div.); King's Gate Developments Inc. v. Drake (1994), 1994 CanLII 416 (ON CA), 17 O.R. (3d) 841, 23 C.P.C. (3d) 137 (C.A.), revg (1993), 23 C.P.C. (3d) 121 (Ont. Gen. Div.) (sub nom. Kings Gate Developments Inc. v. Colangelo); London (City) Commissioners of Police v. Western Freight Lines Ltd., 1962 CanLII 169 (ON CA), [1962] O.R. 948, 34 D.L.R. (2d) 689 (C.A.); Prassad v. Canada (Minister of Employment and Immigration), 1989 CanLII 131 (SCC), [1989] 1 S.C.R. 560, 57 D.L.R. (4th) 663, 93 N.R. 81, [1989] 3 W.W.R. 289 (sub nom. Prassad v. Minister of Employment and Immigration); Swiderski v. Broy Engineering Ltd. (1992), 1992 CanLII 7559 (ON

SC), 11 O.R. (3d) 594, 16 C.P.C. (3d) 46, 40 M.V.R. (2d) 228 (Div. Ct.); T.K. Group & Associates v. Wolfe (1998), 21 C.P.C. (4th) 366 (Ont. Gen. Div.); Turgeon v. Border Supply (EMO) Ltd. (1977), 1977 CanLII 1291 (ON SC), 16 O.R. (2d) 43, 3 C.P.C. 233 (Div. Ct.); Weldon v. Neal (1887), 19 Q.B.D. 394, 56 L.J.Q.B. 621, 35 W.R. 820 (C.A.); Williamson v. Headley, [1950] O.W.N. 185 (H.C.J.); Witco Chemical Co. Canada Ltd. v. Oakville (Town), 1974 CanLII 7 (SCC), [1975] 1 S.C.R. 273, 43 D.L.R. (3d) 413, 1 N.R. 453 Statutes referred to Courts of Justice Act, R.S.O. 1990, c. C.43, s. 66 Family Law Act, R.S.O. 1990, c. F.3 Limitations Act, R.S.O. 1990, c. L.15, s. 47 Small Claims Court Act, R.S.O. 1970, c. 439 Trustee Act, R.S.O. 1980, c. 512 [now R.S.O. 1990, c. T.23] Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.04(1), 5.04(2), 26.01 Rules of Practice, R.R.O. 1980, Reg. 540, rules 132, 136(1) Authorities referred to Driedger, E.A., Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) Watson, G.D., and C. Perkins, Holmested and Watson: Ontario Civil Procedure, Vol. 2 (Toronto: Carswell, 1993) Report on the Civil Procedure Revision Committee, Ministry of the Attorney General (Ontario), 1980 Watson, G.D., "Amendment of Proceedings After Limitation Periods" (1975), 53 Can. Bar Rev. 237

John D. Strung, for appellant.
Ryan M. Naimark, for respondent.

[1] CRONK J.A. (ROSENBERG J.A. concurring): -- This appeal concerns the jurisdiction of a court under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to permit the amendment of a pleading, after expiry of a limitation period, to substitute a corporate plaintiff for an individual plaintiff in an action framed in negligence and involving claims for damages arising from a business premises fire. Molloy J. granted the motion to amend the pleading. Silvercreek Pharmacy Limited ("Silvercreek") appeals. For the reasons that follow, I would dismiss the appeal.

Background

[2] Silvercreek's principal submission is that this is not a case of "misnomer" and, since the original plaintiff allegedly had no cause of action, it was not open to the motions judge to substitute the corporate plaintiff once the limitation period intervened. To address the misnomer aspect of the appellant's argument, it is necessary to examine the facts in some detail.

[3] On February 8, 1993, a fire occurred at premises leased by Silvercreek. The inventory of an adjacent clothing and lingerie business was damaged by the fire. On June 5, 1998, shortly before expiry of the applicable six-year limitation period under the Limitations Act, R.S.O. 1990, c. L.15, Elsa Mazzuca commenced proceedings against Silvercreek for damages to inventory and for loss of income during a period of business interruption, in the amount of $150,000.

[4] The statement of claim was served on Silvercreek in mid- June 1998. In mid-December 1998, the plaintiff provided the defendant with a copy of a proof of loss form supported by an adjusters' inventory showing a total claim in the amount of $275,588.

[5] In early January 1999, prior to expiry of the limitation period, Silvercreek's solicitor requested receipt of copies of the plaintiff's tax returns and financial statements for the six years prior to the fire. Examinations for discovery were scheduled for August 27 and September 1, 1999. On the day prior to the commencement of the discoveries, and more than six months after expiration of the limitation period, financial statements for a company known as "La Gondola Ladies Boutique and Lingerie Ltd." ("La Gondola Ltd.") were produced to Silvercreek's solicitor. Financial statements for the named plaintiff, Elsa Mazzuca, were not provided.

[6] During the discoveries, it emerged that the proper principal claimant for the damages sustained in the fire was La Gondola Ltd. and not Elsa Mazzuca in her personal capacity. It was also confirmed that La Gondola Ltd. owned the store that operated the clothing and lingerie business. Elsa Mazzuca was the sole shareholder, director and officer of La Gondola Ltd.

[7] Silvercreek was involved in several actions arising out of the fire and was aware of heat and smoke damage caused to other businesses or tenants in the area. The fire loss was investigated by Silvercreek's insurer.

[8] The operative policy of insurance relating to the clothing and lingerie business, issued by State Farm Fire and Casualty Company ("State Farm"), referred to "Mazzuca, Elsa [doing business as] La Gondola Ladies Boutique and Lingerie" as the named insured. No reference was made in the insurance policy to an incorporated entity.

[9] Three proof of loss forms were prepared. Two of the forms referred to the business as "Elsa Mazzuca [doing business as] La Gondola Ladies Boutique and Lingerie". The third form identified the named insured only as "Elsa Mazzuca". All three forms were signed by Elsa Mazzuca.

[10] Business records existing prior to or generated in consequence of the fire, and documents created for the purpose of establishing the losses occasioned by the fire, referred variously to "Elsa Mazzuca", "Elsa Mazzuca, [doing business as] La Gondola Ladies Boutique and Lingerie" or La Gondola Ltd. An accounting report in relation to the fire damage, obtained on behalf of State Farm, referenced the claimant as "Elsa Mazzuca, [doing business as] La Gondola Ladies Boutique and Lingerie Ltd." A second report, by adjusters commissioned by Ms. Mazzuca, made no reference to an incorporated entity. Various cheques issued by the business identified either La Gondola Ltd. or "La Gondola Ladies Boutique" as the account holder. Cheques issued by State Farm in respect of the claim were payable to "Elsa Mazzuca". Invoices from various suppliers to the business were issued under one of several names, including "La Gondola Boutique" and "La Gondola".

[11] As part of an office move in 1995, two years after the fire and three years before the statement of claim was issued, the accountants for the clothing and lingerie business shredded various tax returns, financial statements and supporting documents relating to the business. Subsequently, financial statements and tax returns relating to La Gondola Ltd. were located and provided to Silvercreek; however, the source documents used to prepare the financial statements were no longer available due to their earlier destruction. There was no evidence on the record suggesting that this destruction of records occurred other than in the normal course of business.

[12] According to the evidence of Ms. Mazzuca's solicitor, he had no knowledge that Ms. Mazzuca had incorporated the clothing and lingerie business, and was no longer operating it as a sole proprietorship, until after Ms. Mazzuca's examination for discovery in the fall of 1999. While he acknowledged receipt of the relevant policy of insurance, the various proof of loss forms and the adjusters' report commissioned by Ms. Mazzuca, these documents did not indicate that the business was conducted through an incorporated entity. Upon his receipt of the file in 1994, he also received a copy of the accounting report prepared on behalf of the insurer which did make reference to Elsa Mazzuca doing business as "La Gondola Ltd". The file also contained some cheques which showed the incorporated entity as the account holder. He did not receive any of the financial statements for La Gondola Ltd. prior to the discoveries.

The Decision Under Appeal

[13] On February 1, 2000, following her examination for discovery the previous fall, the plaintiff brought a motion seeking an order permitting her to amend the statement of claim to substitute La Gondola Ltd. as the named plaintiff in her stead. Silvercreek brought a cross-motion in late March 2000 seeking an order dismissing the plaintiff's claim, in the event that she was unsuccessful in obtaining an order permitting the requested amendment, on the basis that Ms. Mazzuca had no cause of action against Silvercreek in her personal capacity. The motions judge granted the plaintiff's motion. In consequence, the premise of Silvercreek's cross-motion disappeared.

[14] The motions judge concluded that the error in naming Ms. Mazzuca as the original plaintiff was a misnomer, Silvercreek had not been misled as to the nature of the claim being advanced against it, and it would not be prejudiced by an amendment to correct a simple error by counsel.

[15] Silvercreek argued before the motions judge that it would be significantly prejudiced by the requested amendment because of the destruction in 1995 of various records of the clothing and lingerie business. In particular, Silvercreek argued that the destroyed records would be useful to it because the value ascribed to the business inventory in the financial statements of La Gondola Ltd. was significantly lower than the value placed on the inventory by independent adjusters shortly after the fire. In disposing of this argument, the motions judge stated:

> . . . I accept that the destruction of those documents might give rise to prejudice. However, it is prejudice which arose in 1995, prior to the expiration of the limitation period. Therefore, if the action had been commenced in 1998 by La Gondola (rather than by Ms. Mazzuca), the defendant would be in precisely the same position with respect to those documents as it is now. The prejudice contemplated by the Rules is one arising from the amendment sought: Hanlan v. Sernesky (1996), 1996 CanLII 1762 (ON CA), 39 C.C.L.I. (2d) 107 (Ont. C.A.); Lambkin v. Chapeskie (1983), 37 C.P.C. 158 (Ont. Co. Ct.).

[16] On this appeal, Silvercreek advanced various arguments in opposition to the requested amendment. It asserted that:

> (i) Rules 26.01 and 5.04(2) are procedural in nature, and cannot be interpreted to deprive a litigant of a statutorily conferred right in the nature of a limitation defence;
>
> (ii) the proper characterization of the error in this case was not "misnomer", in the sense of a misnaming of the right party, but rather, was a mistake of naming the wrong party;
>
> (iii) the decision of this court in W.J. Realty Management Ltd. v. Price (1973), 1973 CanLII 584 (ON CA), 1 O.R. (2d) 501 (C.A.) was binding on the motions judge and required denial of the amendment. In reliance on this case,

Silvercreek argued that no substitution of a plaintiff may be made where the originally named plaintiff had no cause of action against the defendant, and must be denied where non-compensable prejudice is made out; and

> (iv) in any event, no such amendment may be made after expiry of a limitation period unless the moving party establishes the existence of "special circumstances" warranting the amendment, which were not made out in this case.

[17] I turn now to consideration of these assertions.

Analysis

[18] As noted, the action in this case is framed in negligence. It is common ground between the parties that a six-year limitation period applies. Accordingly, as the fire occurred in early February 1993, the limitation period expired in February 1999. The statement of claim, naming the wrong plaintiff, was issued in June 1998, more than seven months prior to expiry of the limitation period. The motion to amend the statement of claim was brought five months after discovery of the error, and more than one year after expiry of the limitation period. The issue thus arises whether the amendment should be permitted, notwithstanding the expiration of the limitation period, in the circumstances of this case.

(1) The framework of the rules

[19] This issue requires consideration of rules 26.01, 5.04(2) and 1.04(1) of the Rules of Civil Procedure, as amended, and related jurisprudence. Rule 26.01, in its current form, was introduced in 1984. It provides as follows:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[20] The mandatory character of rule 26.01 has been recognized on numerous occasions (see, for example, Barker v. Furlotte (1985), 12 O.A.C. 76 (Div. Ct.)), as has the reality that a rule 26.01 motion necessarily requires a balancing to give effect to the purposes of statutory limitation periods and, at the same time, to the purposes underlying the power of amendment. A useful articulation of this balancing exercise was provided by Bayda C.J.S. of the Saskatchewan Court of Appeal in G. & R. Trucking Ltd. v. Walbaum, 1983 CanLII 2562 (SK CA), [1983] 2 W.W.R. 622, 144 D.L.R. (3d) 636 in connection with a similar, although not identical, rule in that province. He stated at pp. 635-36 W.W.R.:

> The purpose behind the power of the amendment is to correct an injustice that would otherwise ensue as a result of a mistake, often of an informational or procedural nature, and usually made unwittingly and not by the person most likely to suffer, that is, the litigant. The English courts have adopted a conservative, strict, constructionist approach, placing emphasis on the limitation periods. The Canadian courts, on the other hand -- particularly as demonstrated in the more recent cases -- have sought to balance the two principles of law involved here and have perhaps adopted a more evenhanded approach. In so doing, they have been more lenient in allowing amendments where no real prejudice resulted to the opposite party (apart from the right to rely on the statute of limitations), but at the same time, have been careful not to unfairly attenuate the exacting force of the limitation periods. That approach, in my respectful view, is the right one.

(See also, Dyck v. Sweeprite Manufacturing Inc. (1989), 1989 CanLII 7290 (MB CA), [1990] 1 W.W.R. 637, 62 Man. R. (2d) 250 (C.A.), per Monnin C.J.M. at p. 677 W.W.R.)

[21] Although reference to rule 26.01 was made by counsel for both parties on this appeal, emphasis was placed on subrule 5.04(2) which specifically provides for the addition, deletion or substitution of parties in defined circumstances:

> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[22] Finally, subrule 1.04(1) provides:

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[23] The rule of interpretation established by subrule 1.04(1) provides the basis for a proper construction of all the other rules. In my view, the combined effect of rules 26.01, 5.04(2) and 1.04(1), generally, is to focus the analysis on

the issue of non-compensable prejudice, in the wider context of the requirement that a liberal construction be placed on the rules to advance the interests of timely and cost effective justice in civil disputes.

(2) The inter-relationship of rules 26.01, 5.04(2) and 1.04(1)

[24] The issue raised on this appeal requires consideration of the inter-relationship of rules 26.01 and 5.04(2).

[25] Under both rules, a pleadings amendment is not to be made if non-compensable prejudice would result. In contrast to rule 26.01, however, the language of subrule 5.04(2) imports a discretionary power rather than a mandatory direction. The inter-relationship of the two rules is described in Holmested and Watson: Ontario Civil Procedure, Vol. 2 (Toronto: Carswell, 1993), at 5-34 to 5-35:

> [Subrule 5.04(2)] is part and parcel of the court's broad power of amendment. The general power is found in rule 26.01. The relationship between rule 26.01 and rule 5.04(2) and the breadth of the amendment power was dealt with in Seaway Trust Co. v. Markle (1988), 25 C.P.C. (2d) 64 (Ont. Master), affirmed (1990), 40 C.P.C. (2d) 4 (Ont. H.C.) (The same threshold test applies to a motion to amend under either rule 26.01 or rule 5.04(2) and the moving party must demonstrate that no prejudice would result from the amendment that could not be compensated for by costs or an adjournment; once this threshold test is met, under rule 26.01 the granting of leave is mandatory; however, where it is sought to add parties under rule 5.04(2) the court has a discretion whether to allow the amendment, notwithstanding that the threshold test is satisfied; the discretion is to ensure procedural fairness and consideration has to be given to such matters as the state of the action, whether the trial is imminent, whether examinations for discovery of all parties have already been held, whether it would be a proper joinder of a new cause of action, whether the purpose in adding a party defendant was improper (such as simply to obtain discovery of the party added), whether the proposed added party was a necessary or proper party, and whether a variety of special rules were observed such as those respecting class actions, representation orders, trade unions, assignees, insurance, trustees, infants, persons under disability, amicus curiae, accrual of the cause of action and limitations).
>
> Rule 5.04(2) is subject to common law restrictions regarding adding parties after the expiry of a limitation period. However, it is frequently possible to add parties after expiry if there are "special circumstances" as discussed in Basarsky v. Quinlan, 1971 CanLII 5 (SCC), [1972] S.C.R. 380 (S.C.C.), or if the requirements of s. 2(8) of the Family Law Act are met in cases governed by that statute (e.g. Gatterbauer v. Ballast Holdings Ltd. (1986), 1986 CanLII 2852 (ON SC), 9 C.P.C. (2d) 273 (Ont. Div. Ct.)). . . .

(Emphasis added)

[26] As suggested in this passage, the amendment authority under both rules is restricted in application to those cases where the prejudice to be occasioned by the amendment is compensable. The difference in language between the two rules, however, suggests that the drafters of the rules intended to preserve for the courts under subrule 5.04(2) a discretion to permit or deny amendments relating to a change of parties, while the authority under rule 26.01 was to be further constrained by the language of mandatory direction. It must be assumed, in my view, that this distinction was purposive. [See Note 1 at end of document] That this is so, is confirmed by examination of the development of the two rules.

[27] Former Rule 132, Rules of Practice, R.R.O. 1980, Reg. 540, the predecessor rule to current rule 26.01, was discretionary in nature. It provided that an amendment "may be made by leave of the court, or of the judge at the trial, . . .". In contrast, upon introduction in 1984, rule 26.01 provided that leave shall be granted to amend a pleading unless non- compensable prejudice would result. The mandatory language of rule 26.01 thus signalled a change in the general approach to pleading amendments and narrowed the broad discretion previously afforded the courts regarding amendment requests.

[28] The predecessor rule to subrule 5.04(2) similarly was discretionary in nature. Former subrule 136(1) provided:

> 136(1) The court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined be struck out, and that any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added or, where an action has through a bona fide mistake been commenced in the name of the wrong person as plaintiff or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may order any person to be substituted or added as plaintiff.

[29] In 1980, the Civil Procedure Revision Committee, chaired by the late Walter B. Williston, Q.C., reported on proposed comprehensive changes to the rules and recommended that a new rule concerning misjoinder and non-joinder specifically require that leave be given, on such terms as might [seem] just, when leave to add, delete or substitute a party was sought, unless non-compensable prejudice would result. [See Note 2 at end of document] The

proposed rule ultimately became subrule 5.04(2). When the new rules were introduced in 1984, including rule 26.01, this recommendation was not acted upon and, in contrast to rule 26.01, new subrule 5.04(2) was not expressed in mandatory terms.

[30] In these circumstances, having regard to the legislative history of rules 26.01 and 5.04(2), I conclude that in motions under subrule 5.04(2) the courts do retain a discretion to deny an amendment in a proper case, even in the absence of non- compensable prejudice, when it is sought to change the parties to a proceeding.

(3) The relevance of special circumstances

[31] As observed by Holmested and Watson, supra, the caselaw reveals numerous instances in which the rules have been utilized in "special circumstances" to permit a change of parties to a proceeding after the expiry of a limitation period. At common law, it has long been settled that in special circumstances pleading amendments may be permitted by the courts notwithstanding the intervention of a limitation period. This possibility was recognized in the early case of Weldon v. Neal (1887), 19 Q.B.D. 394, 56 L.J.Q.B. 621 (C.A.) and subsequent jurisprudence. In an oft-quoted passage from that case, Lord Esher M.R. stated at p. 395 Q.B.D.:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

(Emphasis added)

[32] Thus, as a general rule, amendments to pleadings which had the effect of relieving against a limitation period, were not allowed. This did not mean, however, that in every case such amendments were to be denied.

[33] The exception to the general rule, which contemplated the allowing of an amendment in a proper case notwithstanding the intervention of a limitation period, was expressly recognized by the Supreme Court of Canada in Basarsky v. Quinlan, 1971 CanLII 5 (SCC), [1972] S.C.R. 380, 24 D.L.R. (3d) 720, in which Hall J. observed at p. 385 S.C.R.: "The adjective 'peculiar' in the context of Lord Esher, M.R.'s judgment and at the date thereof may be equated with 'special' in current usage." This decision, and the undertaking of a special circumstances analysis, have been followed in numerous subsequent cases. In some instances, this has occurred in the context of the operation of particular limitation periods where special considerations may apply, or legislative regimes which expressly provide for the extension of time periods established by statute. In other cases, the analysis of special circumstances has been undertaken when a change of parties is sought, as a discretionary matter, under the rules.

[34] In Swain Estate v. Lake of the Woods Hospital (1992), 1992 CanLII 7601 (ON CA), 9 O.R. (3d) 74, 93 D.L.R. (4th) 440 (C.A.), leave to appeal to the Supreme Court of Canada refused (1993), 19 C.P.C. (3d) 25n, 164 N.R. 158n, this court considered an amendment request to add two defendants after expiry of the relevant limitation period in a negligence action in which damages were claimed for the death of a 14-year-old patient in a hospital. The case turned on consideration of s. 47 of the Limitations Act, supra, and ss. 38 and 17, respectively, of the Trustee Act, R.S.O. 1980, c. 512 (now R.S.O. 1990, c. T. 23) and the Health Disciplines Act, R.S.O. 1980, c. 196, and did not involve the interpretation or application of rules 26.01 and 5.04(2). In that case, the estate of the deceased patient sued the hospital for damages through her administrators, and various family members sought to advance derivative claims under the Family Law Act, 1986, S.O. 1986, c. 4 (now R.S.O. 1990, c. F.3). The requested amendment, which sought to add two physicians as defendants, was held to be statute-barred, but was permitted in any event because of the existence of special circumstances and the absence of prejudice. Arbour J.A., for the court, concluded that in special circumstances the court has a discretion to permit an amendment to add defendants notwithstanding the expiry of a limitation period.

[35] In the earlier case of Deaville v. Boegeman (1984), 1984 CanLII 1925 (ON CA), 48 O.R. (2d) 725, 14 D.L.R. (4th) 81 (C.A.), in which this court considered the particular regime set out under the Family Law Reform Act, R.S.O. 1980, c. 152 for extension of limitation periods to permit dependants' relief claims, MacKinnon A.C.J.O. stated with reference to "special circumstances" at pp. 729-30 O.R.:

> A number of courts have made rather heavy weather out of the meaning of "special circumstances" and have sought to establish conditions or detailed guide-lines for the granting of relief after the expiry of the limitation period. This is a discretionary matter where the facts of the individual case are the most important consideration in the exercise of that discretion. While it is true that the discretion is not one that is to be exercised at the will or

> caprice of the court, it is possible to outline only general guide-lines to cover the myriad of factual situations that may arise.

[36] In Swain Estate v. Lake of the Woods Hospital, supra, various special circumstances were held to apply which, viewed cumulatively, supported the plaintiff's entitlement to the pleadings amendment. Arbour J.A. distinguished between cases in which the circumstances fully explained the failure by the plaintiff's solicitors to sue earlier the parties sought to be added by the amendment, from cases in which the evidence suggested that a deliberate decision had been made by the plaintiff's solicitors not to sue the parties subsequently sought to be added. In the first category of case, the establishment of such circumstances would justify a late amendment of the pleadings in contrast to cases in the latter category, where an amendment would be denied. This approach is consistent with earlier judicial decisions. (See, for example, London (City) Commissioners of Police v. Western Freight Lines Ltd., 1962 CanLII 169 (ON CA), [1962] O.R. 948, 34 D.L.R. (2d) 689 (C.A.), which held that the suggestion of a simple error or misnomer, as explanation for the failure to name the proper party in the first instance, was defeated in the face of evidence of a deliberate selection by the plaintiff's solicitors among potential defendants at the time of the commencement of the proceedings.)

[37] The decision in Swain Estate v. Lake of the Woods Hospital, supra, confirms that where a change of parties to a proceeding is sought, amendment requests are to be assessed with regard both to evidence of actual prejudice to the party opposing the amendment and in light of any special circumstances which may justify the amendment. The absence of the former will not establish the latter. Further, while neither factor alone will be determinative, taken together these features will dictate a principled outcome. Arbour J.A. stated at p. 85 O.R.:

> In the present case, the existence of the third party claim against the doctors has provided them with enough notice and exposure to remove any significant prejudice. The doctors have filed a statement of defence to the third party claim, as well as a statement of defence to the statement of claim of the plaintiffs. In the special circumstances of this case, it would be a vindication of form over substance to allow the doctors to defend without being defendants. I wish to stress that no single factor, neither the lack of real prejudice nor any one of the special circumstances of this case, would have in itself sufficed to displace the defendants' entitlement to rely on the limitation period. However, considering all the circumstances, I think that this is a case where the interests of justice are better served by allowing the amendment.

[38] In the subsequent case of Swiderski v. Broy Engineering Ltd. (1992), 1992 CanLII 7559 (ON SC), 11 O.R. (3d) 594, 40 M.V.R. (2d) 228 (Div. Ct.), Adams J. expressed the relationship between the absence of proof of prejudice and the establishment of special circumstances, in the following terms at p. 601 O.R.:

> In the facts at hand, Justice O'Brien has noted the candid admission of the defendant's counsel that he cannot claim to be prejudiced despite the statement of MacKinnon A.C.J.O. in Deaville v. Boegeman . . . that prejudice may be presumed. Nevertheless, in Swain the Court of Appeal did not equate the absence of prejudice with the presence of special circumstances. Rather, both features are generally required although they may overlap in certain respects. There is no automatic right to an amendment simply because the respondent cannot establish prejudice. Were it otherwise, the expiration of a limitation period would never have any reliable consequence.

[39] In the present case, the motions judge stated as follows with respect to the requirement of "special circumstances":

> The courts have refused to add parties to an action after the expiry of a limitation period unless "special circumstances" are shown: Swain Estates v. Lake of the Woods, supra; Swiderski v. Broy, supra; Knudsen v. Holmes (1995), 1995 CanLII 7148 (ON SC), 22 O.R. (3d) 160 (Ont. Ct. Gen. Div.). However, the same considerations do not apply to a person who was formally put on notice of a claim and made a party to an action within the limitation period. In my opinion, it is not necessary to show special circumstances in order to substitute a plaintiff for an existing plaintiff when no prejudice is caused by the amendment. However, if special circumstances are required, they exist in this case.

(Emphasis added)

[40] To the extent that this conclusion suggests, in the absence of proof of actual prejudice to a defendant, that generally it will be less difficult to substitute or add a new plaintiff for an originally named plaintiff than might be the case with respect to the addition of a new or different defendant, I agree. However, I respectfully do not agree that proof of special circumstances will never be required absent proof of prejudice when it is sought under subrule 5.04(2) to add or substitute a new plaintiff. In my view, subrule 5.04(2) contemplates that the existence or absence of special circumstances warranting the amendment should be considered as one of the factors to be taken into account in determining whether a discretionary amendment is to be permitted or denied after expiry of a relevant limitation period. There may well be circumstances where, by virtue of the original plaintiff's conduct or the

demonstrated knowledge of counsel at the time of the commencement of the proceedings, an amendment under subrule 5.04(2) should be denied.

(4) Overview

[41] The established principles concerning rules 26.01 and 5.04(2) confirm the continuing importance, as a base consideration, of the issue of actual prejudice in determining applications to amend pleadings, including those designed to add, delete or substitute parties, after the expiry of a limitation period. The centrality of this issue is also confirmed by the express language of rules 26.01 and 5.04(2) in their current form. Both the related jurisprudence and the rules themselves thus underscore a simple, common sense proposition: that a party to litigation is not to be taken by surprise or prejudiced in non-compensable ways by late, material amendments after the expiry of a limitation period. If such surprise or actual prejudice is demonstrated on the record, an amendment generally will be denied.

[42] At the same time, proof of the absence of prejudice will not guarantee an amendment. Rather, when a change of parties is sought after the expiry of a limitation period, the circumstances of all affected parties should be examined to determine, on the facts of the individual case, whether sufficient special circumstances are present to support the requested amendment. In those cases where leave is sought to add, delete or substitute a new party, the examination of special circumstances involves consideration of the knowledge of both the moving party and her agents at the time of the commencement of the proceedings regarding the proper parties to be named and of the opposing party in relation to the nature of the true claim intended to be advanced.

(5) Silvercreek's arguments

(i) The procedural nature of the rules

[43] One of the arguments made by Silvercreek raises a threshold issue. This concerns the suggestion that the Rules of Civil Procedure are procedural in nature and cannot be interpreted to displace a limitation period defence conferred by statute. If this is so, it would dispose of this appeal. However, this argument may be dealt with summarily because, in my opinion, the proposition conflicts with the approach followed by the Supreme Court of Canada in Basarsky v. Quinlan, supra, and with that court's decision in Ladouceur v. Howarth, 1973 CanLII 30 (SCC), [1974] S.C.R. 1111, 41 D.L.R. (3d) 416, discussed in the reasons which follow. Accordingly, it is not well founded, and I reject it.

[44] I note also that in Ontario, in addition to the common law, the Civil Rules Committee is authorized by s. 66 of the Courts of Justice Act, R.S.O. 1990, c. C.43, to make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings even though such rules may alter the substantive law. Further, under s. 66(3), while such rules cannot conflict with a statute, they may supplement the provisions of a statute in respect of practice and procedure. The joinder of claims and parties, and pleadings, are among the specifically enumerated subjects in relation to which the Committee may make such rules. These provisions provide authority for rules 26.01, 5.04(2) and 1.04. The entirety of the rules are embodied in regulation form.

[45] Accordingly, it is permissible at law for the rules to provide for the addition, deletion or substitution of parties to a proceeding and the circumstances under which such a change of parties is to be permitted.

(ii) The concept of misnomer

[46] Silvercreek also asserted that the error in this case was not "misnomer", in the sense of a misnaming of the right party. For this reason, it argued that the requested amendment could not be permitted.

[47] As noted, subrule 5.04(2) provides, in part:

> At any stage of a proceeding the court may by order . . . correct the name of a party incorrectly named, . . .

[48] This language addresses misnomer situations and, in the absence of non-compensable prejudice, permits an amendment where it was intended to commence proceedings in one name but, in error, the proceedings were commenced in another name. Similarly, this aspect of the subrule may apply in situations where the plaintiff intended to sue one person but, in error, sued the wrong person. Such cases reflect an irregularity in the nature of a misnomer, which may be relieved against in proper circumstances.

[49] This is not a case of misnomer in the narrow sense of a misdescription of the person suing, but rather, is a case of mistake as to the identity of the person who should have brought suit. However, that does not end the matter. Properly characterized, the motion in this case sought to delete one party to the action and to substitute another. An

amendment request for this purpose engages a different aspect of subrule 5.04(2) which need not depend for success on proof of a misnomer in the nature of a misdescription of a party. Stated differently, the power conferred under subrule 5.04(2) to amend a pleading to change parties is not confined to misnomers of the misdescription type. It extends to the power to substitute parties and, as well, to correct in proper cases the naming of a party by mistake. Silvercreek's argument on this ground, therefore, must fail.

(iii) The decision in W.J. Realty Management Ltd.

[50] Silvercreek relied upon many cases decided prior to the introduction in 1984 of the mandatory language of rule 26.01. Such cases must be regarded with caution, as they were decided in a different context, when an exclusively discretionary approach to pre-trial amendments governed the balancing exercise made necessary when a pleadings amendment was sought after the expiry of a limitation period.

[51] As noted, Silvercreek argued that the decision of this court in W.J. Realty Management Ltd., supra, was dispositive of the plaintiff's motion, so as to deny amendment of the statement of claim. That case involved a small claims court action for damages for breach of a lease commenced in the name of the corporate manager of the affected property, rather than in the name of the corporate landlord. The relevant section of the Small Claims Court Act, R.S.O. 1970, c. 439, provided for the addition or substitution of a plaintiff, on a discretionary basis, where the wrong person had mistakenly been named as a plaintiff. Relying on the earlier cases of Colville v. Small (1910), 22 O.L.R. 426 (Div. Ct.) and Croll v. Greenhow (1930), 38 O.W.N. 101 (H.C.J.), affd (1930), 39 O.W.N. 105 (C.A.), among others, the court held that where the original plaintiff had no cause of action, a new plaintiff who was alleged to have a cause of action could not be substituted for the original plaintiff after expiry of a limitation period. Similar results obtained in Turgeon v. Border Supply (EMO) Ltd. (1977), 1977 CanLII 1291 (ON SC), 16 O.R. (2d) 43, 3 C.P.C. 233 (Div. Ct.) and in the more recent case of T.K. Group & Associates v. Wolfe (1998), 21 C.P.C. (4th) 366 (Ont. Gen. Div.), which followed the decision in W.J. Realty Management Ltd., supra.

[52] In a second line of cases, also developed prior to 1984, the courts emphasized the facts known to the plaintiff, or counsel, at the time of the commencement of the proceedings to determine whether the naming of the incorrect plaintiff was the product of deliberate choice or simple, innocent error. In the latter event, the mistake was characterized as a "misnomer" and an amendment was generally allowed. (See London (City) Commissioners of Police v. Western Freight Lines, supra, and Bank of Montreal v. Ricketts (1990), 1990 CanLII 1996 (BC CA), 44 B.C.L.R. (2d) 95, 68 D.L.R. (4th) 716 (C.A.)).

[53] Thus, in Dill v. Alves, 1967 CanLII 297 (ON CA), [1968] 1 O.R. 58, 65 D.L.R. (2d) 416 (C.A.), proceedings were commenced in the name of the operator of a motor vehicle who had not suffered any injuries as a result of an accident, rather than in the name of the operator's father who was actually the injured party. In permitting the requested amendment to allow substitution of the name of the operator's father as plaintiff, this court set out the relevant test at p. 59 O.R.:

> The test is whether or not the naming of the plaintiff in the writ and proceedings which are sought to be amended was a misnomer. Clearly on the facts here we think it was a misnomer. That it was such and that it was treated as such is clearly indicated we think, by the conduct of the defendant who knew that no claim was being advanced by the son whose name appears in the writ, who negotiated with respect to the injuries of the father, the injured party, and who, knowing that the named plaintiff had no claim, paid into Court moneys with the defence to answer in reality the claims for injury of the father.

[54] No issue concerning the father's status to sue, or the existence of a cause of action personal to him, was considered. Instead, the lack of prejudice to the defendant to be occasioned by the amendment and the evidence establishing that the defendant had not been misled by the error, governed the outcome.

[55] This approach was followed by the Supreme Court of Canada in Ladouceur v. Howarth, supra, a negligence action similar on the facts to those in Dill v. Alves, supra, in which proceedings were commenced in the name of the father, the owner and operator of a motor vehicle who had not sustained injuries in the relevant accident, rather than in the name of the injured son who had been a passenger in the vehicle at the time of the accident. Once again, the analysis centred on the knowledge of both the named plaintiff's solicitor and the defendant concerning the identity of the proper claimant. The record established that the plaintiff's solicitor knew that he did not act for the father and that the son alone had sustained personal injuries. The defendant's insurer, with whom the plaintiff's solicitor had been dealing, also knew this and continued to negotiate for a compromise of the claim notwithstanding the failure to name the son as the original plaintiff. In relianc e on the test propounded in Dill v. Alves, supra, the court concluded that the case was a typical example of a misnomer and the defendant had not been misled by the error. In the result, the amendment was allowed under then subrule 136(1) (now subrule 5.04(2)), after expiry of the applicable limitation period although the originally named plaintiff had no cause of action against the defendant.

[56] In the case on appeal, the motions judge considered this caselaw and concluded:

> In the case before me, the action was mistakenly brought in the name of Ms. Mazzuca. This is not a situation in which a conscious decision was made to sue in her name rather than in the name of her company, La Gondola [Ltd.]. It was simply an error. Counsel always intended, and indeed was instructed, to bring the action to recover damages sustained to the business. The defendant always understood that it was the owner of the business who was suing for damages and defended on that basis. Correcting the misnomer has no impact on the defendant. There is no new cause of action being asserted and no new facts are alleged.

(Emphasis added)

[57] I agree with these conclusions by the motions judge. In my opinion, she considered and properly applied the governing principles in her assessment of these issues.

[58] The motions judge also correctly pointed out that the court in T.K. Group & Associates v. Wolfe, supra, does not appear to have been directed to the binding decisions in Dill v. Alves, supra, and Ladouceur v. Howarth, supra. To this I would add that Ladouceur v. Howarth, supra, although decided some months prior to W.J. Realty Management Ltd., supra, was not reported until the following year. Perhaps for this reason, it was not considered in the latter case.

[59] To the extent that W.J. Realty Management Ltd., supra, established the principle that a new plaintiff, with a proper cause of action, can never be substituted following expiry of a limitation period for an originally named plaintiff who had no cause of action against the defendant, I conclude that the case and those which subsequently followed it were implicitly overruled by the Supreme Court of Canada in Ladouceur v. Howarth, supra. It follows that Silvercreek's assertion that the former case was dispositive of the plaintiff's motion to amend, is not sustainable.

[60] Of continuing interest, however, is the focus in many of these cases on the issue of proof of actual prejudice to the party opposing the amendment. The issue of prejudice to be occasioned by the amendment sought, and the question whether the defendant was misled by an error in the naming of the original plaintiff, drove the decisions in both Dill v. Alves, supra, and Ladouceur v. Howarth, supra. The same theme dominated the analysis in T.K. Group & Associates v. Wolfe, supra. In this important sense, there is no inconsistency in the judicial reasoning in these cases. As indicated by Spence J. in Ladouceur v. Howarth, supra, at p. 1116 S.C.R., referring to the 1950 decision in Williamson v. Headley, [1950] O.W.N. 185 (H.C.J.) and quoting Middleton J. in a still earlier case, it has long been recognized that the prime principle in dealing with irregularities in a style of cause (or, in the current terminology, a sty le of proceedings) concerns evidence, or lack thereof, of prejudice:

> The general principle underlying all the cases is that the court should amend, where the opposite party has not been misled, or substantially injured by the error.

[61] This principle is expressly confirmed by current rule 26.01 and recognized by subrule 5.04(2).

[62] Cases decided since 1984 have continued to affirm the base requirement of proof of prejudice to support the denial of amendments. Where the evidence establishes that the party to be affected by the amendment has not been misled, and will not suffer non-compensable prejudice other than that occasioned by the inability to rely on the limitation defence, amendments to pleadings have been permitted following the expiry of limitation periods, including amendments designed to add, delete or substitute plaintiffs or defendants. (See Carachi v. World Cheque Control Inc. (1986), 12 C.P.C. (2d) 43 (Ont. Dist. Ct.); Swain Estate v. Lake of the Woods Hospital, supra; King's Gate Developments Inc. v. Colangelo (1994), 1994 CanLII 416 (ON CA), 17 O.R. (3d) 841, 23 C.P.C. (3d) 137 (C.A.); and Hanlan v. Sernesky (1996), 1996 CanLII 1762 (ON CA), 3 C.P.C. (4th) 201, 39 C.C.L.I. (2d) 107 (C.A.)).

[63] Many of the cases also emphasize, even absent proof of prejudice to the party to be affected by the amendment, the requirement that the applicant establish special circumstances to support the amendment sought and to displace the opposing party's entitlement to rely upon a limitation period established by statute.

[64] Having found that the decision in W.J. Realty Management Ltd., supra, does not determine the plaintiff's entitlement in this case to the amendment sought, it remains necessary to address the issues of prejudice and special circumstances in this case.

(iv) Prejudice and special circumstances

[65] The prejudice alleged by Silvercreek concerns the destruction in 1995 of various records of the clothing and lingerie business. Copies of most, although not all, of the destroyed records were subsequently located or obtained from other sources and provided to Silvercreek. The only outstanding documentation appears to be the source

documents relating to La Gondola Ltd.'s financial statements, which were among the documents destroyed in 1995 and which were not subsequently replicated. I agree with the motions judge's conclusion that, although the destruction of the source documents relied upon for preparation of the financial statements conceivably might give rise to some element of prejudice, this prejudice would have existed, in any event, if the action had named La Gondola Ltd. as plaintiff from the outset. I also agree with her observation that had the proper parties been named at the time of the commencement of the action, Silvercreek's position in respect of the missing records would be precisely the same as it is today. This cannot be viewed as prejudice arising from the requested amendment.

[66] The amendment sought is confined to the substitution of La Gondola Ltd. for the named plaintifff, Elsa Mazzuca, and the addition to the statement of claim of a description of the corporate status of La Gondola Ltd. No alteration of the nature of the claim is proposed, no new facts are alleged, no new causes of action are sought to be added, and no new relief is requested. From initiation of the litigation, the claim concerned damages allegedly occasioned to the business adjacent to Silvercreek's premises. This would not change under the proposed amendment. Further, Silvercreek's insurer investigated the fire loss and Silvercreek was involved in other actions arising out of the same fire concerning heat and smoke damage to other businesses or tenants in the area. In all of these circumstances, except for the loss of the ability to rely on the limitation period, it cannot be said that Silvercreek would be prejudiced by the proposed amendment, nor can it be said that Silvercreek has been misled or taken by surprise.

[67] The evidence indicated that the plaintiff's solicitor was retained to recover damages for the losses to the clothing and lingerie business sustained as a result of the fire. This was the claim in fact advanced from the beginning. Most of the documents provided to the plaintiff's solicitor upon receipt of the file, including those related to the fire loss claim, made no reference to operation of the business through an incorporated entity. Although some documents made reference to La Gondola Ltd., most did not, and the plaintiff's solicitor was unaware that the business was actually operated through an incorporated entity until he received, for the purpose of the discoveries, the income tax returns of La Gondola Ltd. There is no evidence that the plaintiff's solicitor appreciated, prior to the fall of 1999, the possibility that Ms. Mazzuca's sole proprietorship had been replaced by a corporation, or that he lent his mind to the issue at all before receipt of the tax returns for La Gondola Ltd. On these facts, it cannot be concluded that the plaintiff's solicitor made a deliberate and informed choice among several known alternatives when initiating the proceedings to sue in the name of Ms. Mazzuca in preference to La Gondola Ltd. I see no reason to interfere, therefore, with the view of the motions judge that the error in the present case was a simple and unintentional mistake.

[68] This action was commenced within the relevant limitation period involving Silvercreek in the same capacity as is now proposed and, as observed by the motions judge, "in respect of exactly the same claim". Further, there is no evidence of lack of good faith on the part of the plaintiff's solicitor in commencing the proceedings or of delaying in any material sense to seek the required amendment once the need to do so became apparent at the discovery stage. No deliberate and informed decision to refrain from naming La Gondola Ltd. was made, and the company has a cause of action against Silvercreek. Moreover, as some of the damaged inventory was allegedly purchased by Ms. Mazzuca in her personal capacity, it is not clear that the originally named plaintiff did not also enjoy a cause of action against Silvercreek. She is free, of course, not to seek relief in respect of that cause of action, if such exists. In these circumstances, a sufficient explanation has been advanced for the failure to name La Gondola Ltd. in the first instance. Moreover, viewed cumulatively, these factors constitute sufficient special circumstances to justify the proposed amendment in the interests of justice.

[69] In the result, I would dismiss the appeal with costs.

[70] LASKIN J.A. (concurring): -- I have read the thorough reasons of my colleague Cronk J.A. I agree with her that this appeal should be dismissed and I agree with most of her analysis. I disagree, however, with two aspects of her reasons:
first, her view that "special circumstances" are relevant on a motion under rule 5.04(2) of the Rules of Civil Procedure; and second, her conclusion that it matters whether the plaintiff's mistake was "deliberate" or "unintentional".

1. Special Circumstances

[71] Cronk J.A. concludes that when a plaintiff wants to add a party or substitute one party for another after the expiry of a limitation period, showing an absence of non-compensable prejudice is not enough. The plaintiff must also show that special circumstances are present to justify the amendment. I take a different view. I accept that unlike rule 26.01, which governs motions to amend proceedings, rule 5.04(2) gives the court discretion to refuse to add or substitute a party even absent non-compensable prejudice. But I see no reason to burden that discretion with a "special circumstances" component. Requiring "special circumstances" is unnecessary, contrary to the underlying philosophy of the rules and in some cases may impose a heavier burden on the moving party than called for by rule

5.04(2). In my view, courts ought to be guided by the principle that ordinarily an amendment should be granted "where the opposite party has not been misled or substantially injured by the error", or in other words, has not suffered prejudice that cannot be compensated for by costs or an adjournment. See Ladouceur v. Howarth, supra, at p. 1116 S.C.R. Although the court still has discretion to refuse the amendment, that discretion should not often be exercised.

[72] The so-called special circumstances test first arose, in the Canadian context, in the Supreme Court of Canada's decision in Basarsky v. Quinlan, supra, The prevailing philosophy of the day was that the running of a limitation period was an absolute bar to the granting of an amendment to add a new cause of action. That philosophy was reflected in the lower court decisions in Basarsky. The Supreme Court of Canada broke new ground by developing a test -- special circumstances -- to allow an amendment despite the expiry of a limitation period. [See Note 3 at end of document]

[73] Basarsky v. Quinlan was an action for damages brought by the estate of a man killed in a car accident. The administrator of the estate sought an amendment to his pleading to add a new cause of action, a claim under The Fatal Accidents Act of Alberta, though the two-year limitation period under that statute had expired. The Supreme Court of Canada held that special circumstances justified the amendment. In practice, these special circumstances amounted to a showing that the defendant would not be prejudiced by the amendment. The plaintiff had pleaded all of the facts relevant to the new cause of action, the defendants had admitted liability for the death, and the defendant's counsel had examined the deceased person's widow on matters relevant to a claim under The Fatal Accidents Act.

[74] Under our current rules, the Basarsky v. Quinlan special circumstances test for adding a new cause of action after the expiry of a limitation period has been displaced by the mandatory provisions of rule 26.01. Absent non-compensable prejudice, an amendment must be granted. The special circumstances test has no role to play. Indeed, the current rules reflect quite a different philosophy from their predecessors, a philosophy captured by the general interpretative principle in rule 1.04(1):

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[75] Thus, when it comes to amendments under rule 26.01, the focus is on whether non-compensable prejudice would result. And, importantly, the mere expiry of a limitation period by itself is not the kind of prejudice that would defeat an amendment. Instead, the court must evaluate prejudice in light of the two main purposes of a limitation period: first, defendants should have a fair opportunity to prepare an adequate defence and at some point should no longer have to preserve or seek out evidence for that defence; and second, at some point defendants should be free of claims that might affect their economic, social or personal interests. See Garry D. Watson, "Amendment of Proceedings After Limitation Periods" (1975), 53 Can. Bar Rev. 237 at pp. 272-73.

[76] Take a case where a plaintiff moves to add a new cause of action after the limitation period has expired. If evidence relevant to the new claim was lost before the motion was brought but after the limitation period expired, that loss of evidence might give rise to non-compensable prejudice sufficient to defeat the proposed amendment. Absent this kind of prejudice, however, the motion under rule 26.01 must be granted. If "special circumstances" refers to something more than the absence of non-compensable prejudice, then a plaintiff need not show them. The rule has done away with this requirement.

[77] But several cases, including some decisions of this court, have invoked the need for special circumstances on motions to add or substitute a party. And they have done so not only on motions under provincial legislation like the Family Law Act, R.S.O. 1990, c. F.3 but also on motions under rule 5.04(2), no doubt because the legislation and the rule are discretionary, not mandatory.

[78] Unquestionably, the judge or master hearing a motion to add or substitute a party under rule 5.04(2) has a discretion to refuse the amendment even where no non-compensable prejudice would result from allowing it. But, imposing a special circumstances requirement needlessly and improperly fetters that discretion, is inconsistent with the philosophy of the current rules and may, as I said earlier, suggest a more onerous burden on the party seeking the amendment than the rule calls for. If precedent matters, it seems to me, respectfully, that what the cases invoking the special circumstances requirement have overlooked is the controlling authority of Ladouceur v. Howarth, supra, and Witco Chemical Co. Canada Ltd. v. Oakville (Town), 1974 CanLII 7 (SCC), [1975] 1 S.C.R. 273, 43 D.L.R. (3d) 413, both Ontario cases decided by the Supreme Court of Canada.

[79] Ladouceur is discussed by Cronk J.A. in her reasons. In brief, a father and son were in a car accident. The son was injured but the father was not. The son's lawyer mistakenly started the action in the father's name. After the limitation period had expired, the lawyer realized his mistake and brought a motion to substitute the son as plaintiff.

The applicable rule, Ontario rule 136(1) gave the court discretion to substitute or add a person as plaintiff "where an action has through a bona fide mistake been commenced in the name of the wrong person as plaintiff . . .". Although the mistake in Ladouceur was bona fide, the local master, a high court judge and this court all refused the amendment. The Supreme Court of Canada, however, allowed the appeal and permitted the son to be substituted as plaintiff. Spence J. relied on the following salutary general principle, at p. 1116 S.C.R.: "[t]he general principle underlying all the cases is that the court should amend, w here the opposite party has not been misled, or substantially injured by the error."

[80] Spence J. did not suggest that the plaintiff had to show "special circumstances". Indeed, the phrase "special circumstances" does not appear in his judgment. Instead, what the Supreme Court of Canada in effect said was that, in general, the court should add or substitute a plaintiff even after the expiry of a limitation period unless the other side would be prejudiced by the amendment. Implicitly, the court found that the discretion to refuse the amendment, absent prejudice, should rarely be exercised.

[81] To the same effect is Witco, where the plaintiff's lawyer did not realize until after the relevant limitation period that his client had amalgamated with another company under the latter's name. Again, Spence J., writing for the court, allowed the amendment, concluding at p. 418 D.L.R. that "the defendants could not have been in any way misled or prejudiced". Again, he made no mention of any need to show special circumstances.

[82] The approach to motions to add or substitute a plaintiff taken by the Supreme Court of Canada in Ladouceur and Witco is a reasonable approach to motions under rule 5.04(2). Indeed, the case for doing so under the current rule is even stronger because it, unlike former rule 136(1), expressly focuses on whether the proposed amendment would prejudice the other side. This approach strikes an appropriate balance between the interests of the plaintiff and the interests of the defendant.

[83] Admittedly in Ladouceur, Spence J. characterized the plaintiff's lawyer's error as a "misnomer" and this characterization influenced the result in that case. But the general principle invoked by Spence J. should apply regardless of how the error is characterized. As Cronk J.A. points out in her reasons, the court's power under rule 5.04(2) is not limited to correcting misnomers.

[84] I would eliminate "special circumstances" from the lexicon for motions under rule 5.04(2). Absent non-compensable prejudice, these motions should ordinarily be granted. The court retains a discretion to refuse the motion, but that discretion should not be invoked often. Courts should work out when it is appropriate to do so case by case.

2. Deliberate and Unintentional Mistakes

[85] Typically, as was the case here, motions to add or substitute a party after the expiry of a limitation period arise because a lawyer has mistakenly named the wrong plaintiff. In deciding these motions, the case law has distinguished between different kinds of mistakes: between mistaking the correct name of the plaintiff and mistaking who had the right to sue, and between deliberate and unintentional mistakes. It seems to me that these distinctions are problematic, even confusing, and have not been consistently applied. We should be concerned not with the kind of mistake the lawyer has made but with the effect of the mistake, with whether the mistake has prejudiced the defendant.

[86] The courts have regularly granted relief in cases of "misnomer", that is a misnaming of the correct plaintiff. But as Ladouceur demonstrates, they have also granted relief in cases where the wrong plaintiff was chosen, by characterizing that mistake too as a misnomer. I find it difficult to characterize the mistake in Ladouceur -- naming the father instead of the son -- as a misnomer, but the Supreme Court of Canada was undoubtedly correct in focusing on the effect of the mistake and in finding that it did not prejudice the defence. Moreover, I agree with my colleague that little turns on the distinction between misnaming the right plaintiff and choosing the wrong plaintiff, because in either case the court may grant an amendment under rule 5.04(2).

[87] However, in deciding whether an amendment should be granted, Cronk J.A. stresses the importance of considering whether the mistake in naming the wrong plaintiff was unintentional or a "deliberate and informed" decision. If the former, presumably the motion to add or substitute a plaintiff will likely succeed; if the latter, the motion will likely fail. Although this distinction has been made in other cases, I do not find the distinction helpful and I do not agree that it should dictate the result. Again, the focus should be on the prejudice caused by the mistake regardless of its characterization.

[88] The idea that a deliberate mistake in naming the plaintiff should defeat a motion to substitute the proper plaintiff seems to have originated with this court's decision in London (City) Commissioners of Police v. Western Freight Lines Ltd., supra. In that case, a police car was damaged by a car owned by Western Freight. The plaintiff's

lawyer started the action for damage to the police car by naming The Board of Commissioners of Police of the Corporation of the Township of London as the plaintiff. After the limitation period had expired, the lawyer discovered that The Corporation of the Township of London owned the police car and that the Board was merely a bailee. The lawyer brought a motion to substitute the Corporation of the Township as plaintiff.

[89] Although the defendant did not suggest that it was misled or prejudiced by the proposed change, a majority of this court refused to allow the amendment. Writing for the majority, Laidlaw J.A. held that the lawyer was aware of the existence of two separate entities and "deliberately" chose the wrong one as plaintiff. In his view, this was not an error in naming the plaintiff and the proposed amendment could not be characterized as correcting a misnomer. Mackay J.A. dissented. He would have allowed the amendment because the defendant was always aware of the claim and was not misled or prejudiced by the misnaming of the owner of the damaged car.

[90] The result in the Western Freight case gave effect to the technical pleading arguments that at times held sway in this province 30 to 40 years ago. I cannot conceive that a modern court faced with a similar motion under rule 5.04(2) would reach the same result. The dissenting reasoning of Mackay J.A. is surely correct.

[91] Moreover, how can it be said that the lawyer's mistake in Western Freight was in any real sense "deliberate"? He did not deliberately choose to name a plaintiff that had no cause of action. He made a mistake because he did not appreciate which entity, the Board or the Township, owned the car until after the limitation period had expired, a mistake, I might add, that is perhaps understandable. Was his mistake any more deliberate than the mistake in Ladouceur v. Howarth, where the lawyer was aware of the existence of both the father and the son? Or really any more deliberate than the lawyer's mistake in this case in naming Elsa Mazzuca instead of La Gondola Ltd. as the plaintiff because he did not appreciate who owned the business? I would have thought that the answer to these questions is "no". Holding that motions under rule 5.04(2) may turn on whether the lawyer's mistake is deliberate or unintentional is bound to produce some unjust results, results that, in my view, would be inco nsistent with the philosophy of our current rules.

3. This Case

[92] The reasons of the motions judge Molloy J. and of my colleague Cronk J.A. amply demonstrate that substituting La Gondola Ltd. for Elsa Mazzuca would not prejudice the defendant Silvercreek Pharmacy Limited, and no other considerations warrant refusing the amendment. I, too, would dismiss the appeal with costs.

Appeal dismissed.

Notes

Note 1: See, for example, Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs), 1971 CanLII 176 (SCC), [1972] S.C.R. 471 at pp. 477-78, 22 D.L.R. (3d) 115 wherein Laskin J. (as he then was) commented: "Legislative changes may reasonably be viewed as purposive, unless there is internal or admissible external evidence to show that only language polishing was intended." This interpretation of rules 26.01 and 5.04(2) is also consistent with the rule of statutory interpretation that the drafters of legislation are assumed to avoid stylistic variation, and to strive for uniform and consistent expression. Thus, it was held by the Supreme Court of Canada in Prassad v. Canada (Minister of Employment and Immigration), 1989 CanLII 131 (SCC), [1989] 1 S.C.R. 560, 57 D.L.R. (4th) 663, that when the legislature wishes to deprive adjudicators of discretion, it does so by giving them an express and mandatory direction. As Driedger points out in his text Driedger On the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994), at pp. 170-71, if the legislature is consistent, it will use the same pattern each time it intends this result. Where it does not do so, the legislature must be taken as not having intended to deprive adjudicators of discretion.

Note 2: See, Report of the Civil Procedure Revision Committee, Ministry of the Attorney General (Ontario), June 1980, at p. 15.

Note 3: The test is drawn from Weldon v. Neal, supra.

Financialinx Corporation v. K & D Auto Ventures Inc. (Oakville Mitsubishi), 2009 CanLII 55320 (ON SC)

Date: 2009-10-07

File number: 07-CV-325757 PD1

Citation: Financialinx Corporation v. K & D Auto Ventures Inc. (Oakville Mitsubishi), 2009 CanLII 55320 (ON SC), <http://canlii.ca/t/264g1>, retrieved on 2020-06-25

COURT FILE NO.: 07-CV-325757 PD1
DATE: 20091007

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Financialinx Corporation v. K & D Auto Ventures Inc., operating as Oakville Mitsubishi, 6447171 Canada Ltd., operating as Autohire Rent-a-Car, Steven Rudman, also known as Stephen Rudman, and also known as Steve Rudman, Anthony Kirupal, Michele Dennis, also known as L. Michele Dennis and also known as Michele L. Dennis, and Riyad Elbard

BEFORE: Madam Justice Stewart

COUNSEL: *Benjamin Frydenberg*, for the Plaintiff

Heather Weir, for Anthony Kirupal

Doug Cunningham, for K & D Auto Ventures Inc. and Khosrow Khamneli

James Morton, for Riyad Elbard

Anthony D. Katz, for Mona Elbard

DATE HEARD: March 19, 2009

E N D O R S E M E N T

[1] The Plaintiff Financialinx Corporation ("Flinx") has brought an omnibus motion in this action which includes a motion pursuant to Rule 20.01 of the *Rules of Civil Procedure* for partial summary judgment against the Defendant Riyad Elbard, a motion for an order permitting Mona Elbard ("Mona") and 2175990 Ontario Ltd. to be added as defendants to the action, and a motion for an order granting leave to issue a certificate of pending litigation against property at 35 Empress Avenue, Apartment 807, North York, Ontario. The Plaintiff also seeks an order extending the deadline for disposing of this action or setting it down for trial to February 28, 2010.

[2] Most aspects of the motion have been either resolved by the parties or dealt with in my lengthy endorsement of March 19, 2009. If there is any matter outstanding that was not covered by that endorsement or is not addressed herein, I may be spoken to.

Background Facts

[3] Flinx has sued the Defendants in connection with what it alleges to be an elaborate fraudulent vehicle-financing scheme. The Defendant, 6447171 Canada Ltd. ("Autohire") was a start-up daily car rental agency which lacked the capital required to amass a sufficient fleet of vehicles. K & D Auto Ventures Inc. ("KD") is an authorized Mitsubishi dealership. Steven Rudman and Anthony Kirupal were salesmen at KD.

[4] Flinx alleges that KD participated with Autohire in a fraudulent scheme by which individuals connected to Autohire posed as retail car buyers seeking lease financing to acquire vehicles, ostensibly for personal use. These individuals leased or financed multiple vehicles in this fashion, and title was then flipped to Autohire, who acquired more than 20 vehicles in this fashion. Numerous funders, including Flinx, were defrauded.

[5] The individuals involved allegedly include the Defendants Riyad Elbard, as well as two other lessees who are now bankrupt. The Defendant Michele Dennis is also alleged to be involved in the scheme. Dennis and Elbard have also been sued under the leases which they signed. KD has also been sued in contract, for breaching its Dealer Agreement with Flinx, and on the basis of vicarious liability for the actions of its employees, Rudman and Kirupal.

Issues:

A. Should partial summary judgment against Riyad Elbard be granted?

B. Should Mona Elbard and 2175990 Ontario Inc. be added as Defendants to this action? If so, should leave to issue a certificate of pending litigation on property which is purportedly the subject of the action against Mona Elbard also be granted?

Issue A: Should partial summary judgment against Riyad Elbard be granted?

[6] On December 27, 2005, Elbard entered into a 60-month lease agreement with Flinx for a 2005 Mitsubishi Montero (the "Elbard Lease").

[7] Elbard failed to make the required payments under the lease. On April 21 and 24, 2006, a bailiff retained by Flinx attended at the business premises of Autohire to repossess the vehicle. The bailiff was advised that the vehicle had been involved in an accident. The vehicle was not insured, either in the name of Flinx, Elbard or Autohire. The vehicle was also subject to a repairer's lien. It was not cost-effective for Flinx to satisfy the claim for the lien. As such, Flinx says it was unable to mitigate the damages which it has suffered in connection with the Elbard Lease.

[8] Flinx asserts that the failure to keep the vehicle in a state of good repair and the subjection of the vehicle's lien to a repairer's lien, constituted further events of default under the Elbard Lease.

[9] On May 10, 2006, Flinx issued a termination letter pursuant to the terms of the Elbard Lease. On August 15, 2006, Flinx demanded payment from Elbard of the sum of $70,604.83, owing pursuant to the Elbard Lease. Despite demand, payment has not been made in whole or in part. Interest accrues on the balance at the rate of 18% per annum, compounded monthly, in accordance with the terms of the Elbard Lease.

[10] Elbard admitted during his examination for discovery in the action that:

1. He signed a lease with Flinx, the first four payments were made, and no payments were made thereafter, with the lease consequently falling into default; and

2. He does not dispute the fact that he stopped making payments under his lease with Flinx;

3. He consents to judgment being granted against him, based on his admitted breach. Furthermore, he takes no issue with the amount claimed against him for breach of contract, being $70,604.83.

[11] Elbard vigorously denies any involvement in any fraudulent activities and denies that he bears any responsibility to the Plaintiff for any damages sustained other than those referable to the single lease agreement which he has signed.

[12] There is no real disagreement as to the law that applies to a motion for summary judgment pursuant to Rule 20. The Plaintiff, in order to succeed, must establish that there is no genuine issue for trial.

[13] In my view, there is no genuine issue for trial insofar as Elbard's liability under the lease is concerned. He has admitted its validity and the amount owing pursuant to its terms. There is nothing in the material submitted on his behalf that would suggest that he is not obligated by contract to pay the $70,604.83 owing to the Plaintiff. Accordingly, partial summary judgment in that amount is granted.

[14] Of course, Elbard is at liberty to continue to defend the balance of the Plaintiff's claims against him, including all claims for fraud.

Issue B: Should Mona Elbard and 2175990 Ontario Inc. be added as defendants to this action? If so, should leave to issue a certificate of pending litigation on property which is purportedly the subject of the action against Mona Elbard be granted?

[15] The Plaintiff has set forth in its materials and factum (at paras. 23-26) the basis upon which it seeks to add and make claims of fraud against 2175990 Ontario Inc., a company incorporated on June 12, 2008 and of which Khamneli is an officer and director.

[16] Further, the Plaintiff has set out in its materials that, on December 8, 2006, Mona Elbard and her brother, Riyad Elbard, transferred 35 Empress Avenue, Unit 407, Toronto (the "Elbard Property") to Mona Elbard alone for a stated consideration of $76,420.00. The transfer was registered against title to the Elbard Property as Instrument No. AT1328030.

[17] On his examination for discovery, Riyad Elbard testified that:

1. he contributed to the purchase price of the Elbard Property;

2. he transferred the Elbard Property to Mona after losing his job at Canadian Imperial Bank of Commerce;

3. as of the date of the transfer, Elbard had already received the demand for payment from Flinx, as well as a series of demands from other lenders with whom he had leased or financed vehicles for the ultimate use by Autohire; and

4. after the transfer had occurred, he continued to reside at the Elbard Property.

[18] Mona Elbard opposes the motion to add her as a defendant to allege a fraudulent conveyance of the Elbard property and for leave to issue a certificate of pending litigation. She has filed three affidavits in response to the motion: her own affidavit, an affidavit from counsel who acted for her on the joint acquisition of the Elbard Property and its transfer to Mona Elbard alone, and the affidavit of the spouse of the party who sold the Elbard Property to Elbard and Mona Elbard.

[19] Mona Elbard's position is that at the time of her acquisition of the Elbard Property jointly with her brother in 2002, Riyad Elbard signed a Trust Declaration which stated that he had no beneficial interest in the Elbard Property, and was holding title for Mona Elbard's sole benefit. She contends that this was done in order to facilitate her obtaining a mortgage from Maple Trust to finance the acquisition.

[20] On cross-examination, Mona Elbard made the following admissions:

1. Mona Elbard and Elbard each contributed 50% of the $40,000.00 used to acquire the Elbard Property and were co-mortgagees under the mortgage which financed the balance of the purchase price;

2. Riyad Elbard made all of the mortgage payments to Maple Trust. Mona Elbard paid the condominium fees, which were less than the mortgage payments;

3. Elbard continued to reside at the Elbard Property despite the transfer of his interest to Mona Elbard;

4. When Mona Elbard purchased a locker unit in the condominium in 2004, two years after the acquisition of the Elbard Property, title for the locker unit was taken jointly by her and Elbard; and

5. Despite the statement in the Transfer document that Mona Elbard had paid cash consideration of $76,420.00 to Elbard for her acquisition of his interest in the Elbard Property, no actual cash ever changed hands.

[21] Rule 5.04(2) of the *Rules of Civil Procedure* provides that at any stage of an action the Court may by order add a party on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[22] The proposed amendment must disclose a reasonable cause of action or defence. Alternatively, an amendment may be allowed where the proposed amendment relates to an already existing or pleaded issue (see: *Kane Yee Pharmacy Ltd.* v. *TDM Drugs Inc.* (1997), 17 C.P.C. 4th 126 (Ont. Div. Ct.)).

[23] The right to amend a pleading is not dependent upon establishing by affidavit or otherwise that there is evidence to support the amended pleading; the Court must assume that all of the facts pleaded in the proposed amendment are true (see: *McNaughton* v. *Baker* (1988), 1988 CanLII 3036 (BC CA), 28 C.P.C. (2d) 49 (B.C.C.A.)).

[24] On a motion for leave to amend and/or add a party, the Court should neither consider the factual and evidentiary merits of the proposed amendments nor concern itself with the credibility of the case set forth by the party seeking the amendment (see: *Seaway Trust Company* v. *Markle* (1988), 25 C.P.C. (2d) 64).

[25] I consider that Flinx has established a satisfactory basis upon which to add 2175990 Ontario Inc. as set out in the Motion Record and factum filed by it. 2175990 Ontario Inc. did not attend to respond to the motion, although counsel for KD and Khamneli opposed the amendment. It is not for me at this stage to judge the merits of the Plaintiff's additional proposed claim and there appears to be no prejudice that would arise to the proposed defendant or the other parties that would mitigate against granting the order sought. Accordingly, an order shall go granting leave with respect to 2175990 Ontario Inc. on the same basis as set forth in paragraphs 3 and 4 of the draft Order supplied by counsel.

[26] In my view, Flinx has also satisfied the requirements for the amendments to its pleading as sought to add Mona Elbard as a defendant to a claim of fraudulent conveyance and to similarly plead against Elbard. Based on the foregoing, and in the absence of any evidence disclosing prejudice that would result if the proposed amendments and the addition of the party sought by Flinx were permitted, the request is hereby granted.

[27] With respect to the certificate of pending litigation, a certificate of pending litigation may be issued in an action if any title to or interest in land is brought into question. An action to set aside a fraudulent conveyance has been found to be an action in which title to or interest in land is brought into question (see: *Bank of Montreal* v. *Ewing* (1982), 1982 CanLII 1794 (ON SC), 35 O.R. (2d) 225 (Ont. H.C.J.); *Vettese* v. *Fleming*, [1992] O.J No. 1013 (Ont. G.D.)).

[28] A certificate of pending litigation may issue in an action to set aside a fraudulent conveyance even if the Plaintiff has no interest in the land and is not yet a judgment creditor. The standard to be met by the Plaintiff in order to obtain a certificate of pending litigation in an action to set aside a fraudulent conveyance is a *prima facie* case of fraud (see: *Nordic Insurance Co. of Canada* v. *Harkness*, [2001] O.J. No. 1123 (Ont. S.C.J.)). In this case, I consider that Flinx has met that standard.

[29] Counsel for Flinx points out that the test outlined in *Grefford et al.* v. *Fielding et al.* (2004), 2004 CanLII 8709 (ON SC), 70 O.R. (3d) 371 (Ont. S.C.J.) appears to impose a higher threshold to be met by a plaintiff in a fraudulent conveyance action where the plaintiff has not yet obtained judgment in the main action for damages and has not claimed an interest in the land in the main action. In my view, even if this test were considered to be applicable to this case, the sequence of events set forth in the materials before me serves to satisfy that test. There is a high probability that the Plaintiff will recover judgment in the main action and will be able to show that the transfer, the timing of which is very suspicious, was made with the intent to defeat or delay creditors. Further, the balance of convenience favours the issuance of a certificate of pending litigation in the circumstances.

[30] As a result, the necessary amendments to plead the fraudulent conveyance issue and to add Mona Elbard as a party defendant are granted. In addition, leave is hereby granted to issue a certificate of pending litigation against the Elbard Property.

Conclusion

[31] An order reflecting the above dispositions shall issue accordingly.

Costs

[32] If the parties cannot agree as to costs, written submissions may be delivered to me by the Plaintiff within 20 days of the date of release of this decision and by any interested responding party within 10 days thereafter.

_____

Stewart J.

DATE: October 7, 2009

CanLII

Plante v. Industrial Alliance Life Insurance Co., 2003 CanLII 64295 (ON SC)

Date: 2003-07-28

Other citations: 66 OR (3d) 74 — 39 CPC (5th) 323 — [2003] OJ No 3034 (QL)

Citation: Plante v. Industrial Alliance Life Insurance Co., 2003 CanLII 64295 (ON SC), <http://canlii.ca/t/233zs>, retrieved on 2020-06-25

Plante et al. v. Industrial Alliance Life Insurance Company
[Indexed as: Plante v. Industrial Alliance Life Insurance Co.]

66 O.R. (3d) 74
[2003] O.J. No. 3034
Court File Nos. 53946/99 (Newmarket) and 99-CT-053946 (Toronto)

Ontario Superior Court of Justice
Master MacLeod
July 28, 2003

Civil procedure -- Pleadings -- Amendment -- Proposed amendment to statement of claim should be scrutinized to ensure that it raises tenable plea and that it is proper pleading complying with Rule 25 -- Plaintiff bringing action against insurer after insurer denied claim for life insurance -- Plaintiff moving to amend statement of claim to add claim for aggravated and punitive damages -- Amendments disclosing tenable claim for aggravated and punitive damages -- Insurer failing to show that amendment created irremediable prejudice -- Amendment permitted -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 25, 26.01.

Civil procedure -- Parties -- Adding parties -- Plaintiff bringing action against insurer after insurer denied claim for life insurance -- Plaintiff moving to join insurance adjuster and claims examiner as defendants in their personal capacities -- Motion dismissed -- Addition of those parties would delay and complicate action -- Insurer was not alleging that any employee acted outside scope of employment but instead fully adopted actions and decisions of its employees and agents -- Adjuster and claims examiner not necessary parties -- Attempt to add parties constituting abuse of process. [page75]

Twelve days after applying for life insurance with the defendant, P died suddenly of acute coronary thrombosis. The defendant had not yet decided whether it would assume the risk and a medical examination had not been conducted, but coverage was provided under an interim binder. That document stated that "All proposed insureds are covered for accidental death or death by natural causes on condition that they did not suffer or did not suspect that they suffered from the affliction that caused their death or they had not consulted or been treated for the affliction that caused their death". P had complained of chest pains several months before applying for life insurance, and had been referred for a stress test that indicated a cardiac irregularity. Further tests had been scheduled. The defendant took the position that P's death was excluded. P's wife brought an action against the defendant asserting her claim to life insurance. She brought a motion to amend her pleading to add a claim for bad faith and punitive damages. She also wished to join the insurance adjuster and claims examiner as defendants in their personal capacities.

Held, the motion to amend the statement of claim should be granted; the motion to add parties should be dismissed.

As a general rule, the court should not engage in substantive review of the merits on a pleading amendment motion. However, the court is entitled to scrutinize the proposed claim to ensure that it is meritorious in the sense of raising a tenable plea. In addition, it must be scrutinized to ensure it is a proper pleading complying with Rule 25 of the Rules of Civil Procedure. Rule 26.01 requires that a properly framed proposed amendment that is tenable at law will be

allowed providing that it does not result in prejudice that cannot be addressed in costs. The proposed pleading in this case was far from perfect.

It lumped punitive and exemplary damages together with aggravated damages. These are not the same thing. The prayer for relief should separate the claims for aggravated and punitive damages. As well, there was no basis for the "general and special damages" claim in the proposed statement of claim as no facts were pleaded that would justify damages at large. Either the plaintiff was entitled to the benefit due under the insurance or she was not. If she was, and if the circumstances were such as to justify compensation for the damages consequential on improper denial of the claim, aggravated damages may be awarded. If the conduct was found to be high- handed, capricious and malicious misconduct that offended the court's sense of decency and was deserving of punishment, and if compensatory damages were insufficient to express the court's disapproval such that punitive damages were rationally required, an award of punitive damages may also be made. These were all defects that were readily cured. Read broadly and generously, however, and assuming the truth of the allegations in the pleadings, the amendments disclosed a tenable claim for aggravated damages and punitive damages. The defendant failed to show that the amendment of the original pleading created irremediable prejudice. The amendment had to be allowed pursuant to rule 26.01.

Addition of a party engages a slightly different analysis because rule 5.04(2) is discretionary and not mandatory. The court retains a discretion to refuse addition of a party even when the test for addition is met. It would be appropriate to withhold consent if joinder would unduly complicate or delay the proceeding or if any of the circumstances existed that would justify relief against joinder under rule 5.03(6) or rule 5.05. It would also be appropriate to withhold consent if the addition of a party appeared to be an abuse of process. Properly pleaded, it may be possible to assert a cause of action against individual adjusters or claims examiners. However, the discretion to add these parties should not be exercised in the circumstances of this case. The action would be delayed, particularly as one of the proposed parties was unidentified at this stage. The action would be complicated. [page76] There was no need to have individual employees bound by the result of the litigation and there was no legitimate benefit to the plaintiff in adding them. The statement of defence did not allege that any employee acted outside the scope of his or her employment. On the contrary, the defendant fully adopted the actions and decisions of its employees and agents. The adjuster and claims examiner were not necessary parties. The only advantage of joining the employees would be to obtain discovery of the individuals without leave of the court or to apply more pressure on the defendant to settle the claim. These were improper purposes. The attempt to add the individuals at this time was an abuse of process. The addition of parties was refused.

MOTION by the plaintiff to amend a statement of claim and to add parties.

Cases referred to Mota v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2003), 2003 CanLII 47526 (ON CA), 63 O.R. (3d) 737, 225 D.L.R. (4th) 295, 32 C.P.C. (5th) 23, [2003] O.J. No. 1100 (QL) (C.A.); Refco Futures (Canada) Ltd. v. Keuroghlian, [2002] O.J. No. 2981 (QL) (S.C.J.), consd Other cases referred to 728184 Ontario Ltd. v. Ontario (Minister of Transportation), [2000] O.J. No. 4238 (QL) (S.C.J.); Atlantic Steel Industries, Inc. v. CIGNA Insurance Co. (1997), 1997 CanLII 12125 (ON SC), 33 O.R. (3d) 12 (Gen. Div.); Belsat Video Marketing Inc. v. Astral Communications Inc. (1999), 1999 CanLII 1092 (ON CA), 86 C.P.R. (3d) 413, 118 O.A.C. 105 (C.A.), affg (1998), 1998 CanLII 14783 (ON SC), 81 C.P.R. (3d) 1 (Ont. Gen. Div.); Concord Concrete & Drain (1986) Inc. v. B.G. Schickedanz Investments Ltd., [1996] O.J. No. 500 (QL) (Gen. Div.); Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co. (2002), 2002 CanLII 45070 (ON CA), 61 O.R. (3d) 481, 217 D.L.R. (4th) 34, [2003] I.L.R. Â1-4149, 24 C.P.C. (5th) 216 (C.A.) [Leave to appeal to S.C.C. denied July 10, 2003, [2002] C.S.C.R. No. 488]; Gloucester Organization Inc. v. Canadian Newsletter Managers Inc. (1996), 1996 CanLII 10247 (ON CA), 27 O.R. (3d) 578n (C.A.), affg (1995), 1995 CanLII 7144 (ON SC), 21 O.R. (3d) 753, 37 C.P.C. (3d) 111 (Gen. Div.); Kane Yee Pharmacy Ltd. v. TDM Drugs Inc. (1997), 17 C.P.C. (4th) 126 (Ont. Div. Ct.); Keneber Inc. v. Midland (Town) (1994), 1994 CanLII 7221 (ON SC), 16 O.R. (3d) 753 (Gen. Div.); Kings Gate Developments Inc. v. Colangelo (1994), 1994 CanLII 416 (ON CA), 17 O.R. (3d) 841, 23 C.P.C. (3d) 137 (C.A.), revg (1993), 23 C.P.C. (3d) 121 (Ont. Gen. Div.) (sub nom. Kings Gate Developments Inc. v. Drake); MacRae v. Lecompte (1983), 1983 CanLII 3052 (ON SC), 143 D.L.R. (3d) 219, 32 C.P.C. 78 (Ont. H.C.J.); National Trust Co. v. Furbacher, [1994] O.J. No. 2385 (QL) (Gen. Div.); Nelson Estate v. Seguin (2000), 44 C.P.C. (4th) 361, [2000] O.J. No. 508 (QL) (S.C.J.); Neogleous v. Toffolon (1977), 1977 CanLII 1290 (ON SC), 17 O.R. (2d) 453, 4 C.P.C. 192 (H.C.J.); Robertson and Robertson v. Joyce, 1948 CanLII 88 (ON CA), [1948] O.R. 696, [1948] 4 D.L.R. 436, 92 C.C.C. 382 (C.A.); Seaway Trust Co. v. Markle (1990), 40 C.P.C. (2d) 4 (Ont. H.C.J.), affg (1988), 25 C.P.C. (2d) 64 (Ont. Master); Simrod v. Cooper, [1952] O.W.N. 720 (Master); Spiers v. Zurich Insurance Co. (1999), 1999 CanLII 15089 (ON SC), 45 O.R. (3d) 726 (S.C.J.) [Leave to appeal refused [1999] O.J. No. 4912 (QL)]; Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd., [2002] 1 S.C.R. 678, 98 Alta. L.R. (3d) 1, 209 D.L.R. (4th) 318, 283 N.R. 233, [2002] 5 W.W.R. 193, 50 R.P.R. (3d) 212, 2002 SCC 19, 20 B.L.R. (3d) 1, [2002] S.C.J. No. 20 (QL); Vaiman v. Yates (1987), 1987 CanLII 4345 (ON SC), 60 O.R. (2d) 696, 41 D.L.R. (4th) 186, 20 C.P.C. (2d) 33 (H.C.J.) [Leave to appeal refused (1987), 1987 CanLII 4245 (ON SC), 63 O.R. (2d) 211, 47 D.L.R. (4th) 359, 24 C.P.C. (2d) 135, [1987] O.J. No. 1137 (QL)]; Vorvis v. Insurance Corp. of British Columbia,

1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085, 36 B.C.L.R. (2d) 273, 58 D.L.R. (4th) 193, 94 N.R. 321, [1989] 4 W.W.R. 218, 42 B.L.R. 111, 25 C.C.E.L. 81, 90 C.L.L.C. Â14,035; Web Offset Publications Ltd. v. Vickery (1999), 1999 CanLII 4462 (ON CA), 43 O.R. (3d) 802, [1999] O.J. No. 2760 (QL), 123 O.A.C. 235 (C.A.) [Leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 460 (QL)]; Whiten v. Pilot Insurance Co., 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 283 N.R. 1, [2002] I.L.R. Â1-4048, 2002 SCC 18, 20 B.L.R. (3d) 165, [2002] S.C.J. No. 19 (QL) [page77] Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 5, 5.02, 5.03, 5.04, 5.05, 20, 21.01, 22, 24.1, 25, 25.06, 25.11, 26.01, 34.07, 48.04, 77 Authorities referred to Watson, Gary, Amendment of Pleadings, in Holmested and Watson, Ontario Civil Procedure, looseleaf, Vol. III (Toronto: Carswell, 1988-)

Leanne Rapley, for plaintiffs.
Eliot N. Kolers, for defendant and proposed defendants.

[1] MASTER MACLEOD: -- This case involves the sudden death of Rene Plante and his family's claim for life insurance. As in many disputes over life insurance, there is on the one hand, personal tragedy and financial disaster, and on the other, a question of legal entitlement, contractual interpretation and business practice. These are difficult cases. Families denied insurance proceeds in a time of need and then forced to litigate may find an already difficult time turned into a nightmare. Insurance companies that pay out claims they intended to exclude if there is no legal entitlement will have to raise their premiums or go out of business.

[2] In the motion before me the plaintiff seeks to amend her pleading to add a claim for bad faith and punitive damages. She also wishes to join the insurance adjuster and claims examiner as defendants in their personal capacities, to put in a jury notice and to have full oral discovery of the defendants. The question before me is whether or not this relief should be granted and on what terms?

Factual Background

[3] Rene Plante died suddenly on July 18, 1999, of "acute coronary thrombosis". Some 12 days previously he had applied for life insurance with the defendant. Although a policy had not yet been issued, what was in force was interim coverage. During the initial period of time -- before the defendant had decided whether or not it would assume the risk of insuring the deceased and before a medical examination had been conducted -- coverage was provided under an interim binder. That document states inter alia as follows:

Binding Receipt Upon Death

All insureds are covered by a temporary insurance starting on the date the insurance application containing the same number and date as this binding [page78] receipt is signed and submitted to Industrial Alliance Life Insurance Company under the following conditions and limitations:

Conditions

> An amount equal to the first monthly premium must be paid when the application is signed . . .
>
> All proposed insureds are covered for accidental death or death by natural causes on condition that they did not suffer or did not suspect that they suffered from the affliction that caused their death or they had not consulted or been treated for the affliction that caused their death.

(emphasis added)

[4] It is common ground that the first premium of $75.40 was paid and the interim insurance was in force at the time of death. Apparently the deceased had gone to hospital emergency complaining of chest pain in April of 1999. As a result of that visit he was referred for a "stress test" which indicated a cardiac irregularity and further tests had been scheduled. The proof of death also records treatments for hypercholesterolemia and smoking cessation. When Mr. Plante died and Mrs. Plante applied for payment, the insurer took the position the death was excluded under the provisions of the binding receipt. It declined to pay the $100,000 benefit and this action ensued.

[5] At the time of his death Mr. Plante was survived by his wife and two children. Mrs. Plante was pregnant and gave birth to a third child shortly after the death. I am advised that one of the motivating factors in seeking life insurance had been the recent purchase of a home and without the proceeds Mrs. Plante could not make the mortgage payments. The house was subsequently lost. The impact of Rene Plante dying without insurance was catastrophic.

Procedural History

[6] It appears plaintiffs' previous counsel adopted a focused litigation strategy intended to expeditiously determine whether or not the facts of this case fit within the exclusion, or whether the plaintiff was entitled to payment of the $100,000 available under the "binding receipt upon death". He appears to have made decisions designed to keep costs down and to minimize the risks to the plaintiff if the exclusion was held to apply. Specifically he did not make a claim for punitive damages, did not serve a jury notice, opted to examine the defendant by written interrogatory (although reserving the right for oral discoveries) and set the matter down for trial without pursuing all refusals or undertakings. There were apparently settlement and procedural discussions. Plaintiff and defence counsel had discussed obtaining a [page79] ruling on the interpretation of the exclusion by means of a stated case under Rule 22 [R.R.O. 1990, Reg. 194]. The action was ultimately pre-tried in Newmarket and was on the trial list there. [See Note 1 below] It is now to be transferred to Toronto and subject to case management under Rule 77, but at the time this motion was launched it was an ordinary action under the ordinary rules.

[7] The plaintiff has retained new counsel who wish to adopt a very different strategy. They seek to significantly raise the stakes in the litigation by adding a bad faith claim to the action, seeking aggravated and punitive damages, adding the adjuster and claims examiner as parties, seeking new discoveries and requesting a jury. This "raises the stakes" because it will dramatically increase the cost, complexity and length of the trial by introducing issues not part of the original claim. The focus of the action will change from whether or not the beneficiary is entitled to the proceeds of the temporary life insurance policy, to include whether or not the insurer acted reasonably and in good faith in processing the claim.

[8] Since the decision of the Supreme Court of Canada in Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18, and the evolving case law in this area, there can be no doubt that claims for aggravated damages and punitive damages [See Note 2 below] properly pleaded are hypothetically available against an insurer. That is to say that such claims if pleaded in the first instance would require a defence and raise a triable issue. I say hypothetically because, of course, pleading bad faith and asking for punitive damages is not the same thing as proving and receiving them. This is a critical point to which I will return momentarily. The question of the moment is whether the pleading amendment as proposed should be allowed at this stage in the litigation?

[9] In argument the plaintiff appeared to be proceeding on an assumption that the claim was denied because the insurer thinks Mr. Plante knew he had heart disease. The statement of defence does not make any reference to Mr. Plante's knowledge or non disclosure. Neither the evidence put before me nor the pleading make any allegation of dishonesty or fraud. Rather, the insurer simply takes the position that death was a result of a pre-existing [page80] ailment. The insurer construes the exclusion to preclude recovery for death from any condition which pre-existed the application whether or not the applicant knew it existed. From the point of view of the insurer, the risks assumed when a binder of life insurance is issued are limited risks of accidental death or death from a condition that arises entirely after the application is made.

[10] In support of the amendment is the clear, unambiguous and mandatory wording of rule 26.01, which reads as follows:

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[11] Apart from a technical analysis of the proposed pleading, factors which the defendant identifies in opposition to the amendment include the following:

(a) The plaintiff set the matter down for trial on April 10, 2001, and under rule 48.04 [See Note 3 below] no further motion may be brought without leave of the court.

(b) Even without rule 48.04, the matter is ready for trial and the defendant will be prejudiced by an amendment which expands the scope of the action and essentially puts the matter back to the pleading stage.

(c) After the matter was set down for trial, and prior to the trial scheduling court, the defendant obtained and served an expert report purporting to assess Mr. Plante's condition at, and shortly before, death. If the amendments are granted, the plaintiff will now have an inordinate amount of time to respond to that report.

(d) As currently framed, there is only one real issue
-- whether or not the "affliction" that resulted in Rene Plante's death is an affliction which existed before he applied for life insurance. The trial of the existing action would be short and the action could easily be concluded within the next six months. As proposed, even under case management, the action may be two years or more away from trial. [page81]

(e) There is no basis for the proposed amendment as it is without foundation in fact. The insurer has declined to pay because it legitimately believes the claim is excluded under the terms of the binding receipt upon death. The insurer

has not alleged misrepresentation or fraud, nor accused the insured or the beneficiaries of any dishonesty. The defence is based simply on the plain wording of the exclusion.

The test for amending a pleading

[12] Before beginning an analysis of the pleading amendment, it would be well to review the tests that are to be applied. This is necessary because notwithstanding consistent interpretation of the rule in recent years, there is some confusion in the practice of counsel appearing before the court. It is possible to read older case law as permitting inquiry into the merits of a proposed amendment. The desire to do this is understandable. It is one thing entirely for a plaintiff to raise hypothetical allegations in an original pleading when few of the facts may be known. At that, a defendant forced to respond to what it regards as baseless fabricated speculation -- or worse -- will frequently be outraged. The outrage is more intense when a plaintiff seeks to amend pleadings later in the process when facts are known, and pleads facts that are either at odds with the evidence or without evidentiary foundation.

[13] The practice question is the extent to which evidence is important on a pleading amendment motion. As an example of this, the material before me in the plaintiff's motion record included the Life Insurance Application, Proof of Death, correspondence and other documents. Those documents disclose that Rene Plante was a smoker, that he had a history of high cholesterol, that he had been to hospital for chest pain, was referred for a stress test and had been referred to a cardiologist prior to his death. The application for life insurance also discloses that he had not completed the declarations of insurability because he was to have a paramedical examination and HIV test before the application for insurance was considered.

[14] If I am entitled to consider those as evidence of the merits of the proposed amendments, they demonstrate little prospect of success. That is because the only material before me suggests there is a reasonable argument the exclusion applies. The factual legal issue is whether high cholesterol, chest pain, a stress test and referral to a cardiologist is "suffering or suspecting he suffered" or "seeking treatment for" the "affliction which caused" his death. I know of no case, nor was I directed to any case that conclusively [page82] determines this issue. On the face of it, it seems plausible that coverage is excluded. If it is a reasonable interpretation of the contract, even if the court ultimately disagrees with the interpretation, it is improbable that it would be bad faith to rely upon it. [See Note 4 below] I should not, however, permit that impression to guide my decision unless I am entitled to enter into an evaluation of the merits. On the basis of numerous authorities on this point, I am not.

[15] Rule 26.01 was enacted in its present form on January 1, 1985, when the "new" Rules of Civil Procedure were introduced. While the wording of the rule appears to give the court far less discretion than the "old" rule 132, it may well be the case that rule 26.01 simply codified the pre-existing case law. [See Note 5 below] In any event, cases based on the "old" rules must be read carefully, as rule 26.01 is clearly written in different and mandatory language. Rule 132 in the "old" rules simply stated that an amendment may be made by leave of the court or by the judge at trial. The notion that it is necessary to tender evidence to show the case is winnable in order to demonstrate that the amendment is prima facie meritorious, is a misreading of the older case law.

[16] The leading case prior to enactment of rule 26.01 was Simrod v. Cooper, [1952] O.W.N. 720 (Master). That case established the following tests:

> (a) An amendment should be allowed unless it will cause injustice to the other side which can not be compensated for in costs ...
>
> (b) The material filed in support of the motion must indicate that the proposed amendment is prima facie meritorious ...
>
> (c) No amendment should be allowed which if originally pleaded would be struck out [under what is now Rule 25] ...
>
> (d) The proposed amendment must contain sufficient particulars to enable the other side to answer it ...

[17] In Neogleous v. Toffolon (1977), 1977 CanLII 1290 (ON SC), 17 O.R. (2d) 453, 4 C.P.C. 192 (H.C.J.), Grange J. stated that under those tests "neither the master nor a judge in dealing with the amendment should go into the merits of the matter." "They should merely determine if there [page83] is a prima facie meritorious case set forth in the pleading." In Seaway Trust Co. v. Markle (1988), 25 C.P.C. (2d) 64 (Ont. Master), [See Note 6 below] Master Sandler concluded that Neogleous had effectively amended the second of the tests in Simrod v. Cooper by removing any factual consideration of the merits, or as Master Sandler put it, "the court is not to concern itself with the credibility of the case set forth by the moving party seeking the amendment." This was significant because it precluded cross-examination on the merits of the proposed amendments by depriving such questions of relevance on the pleading amendment motion. Master Sandler concluded that was the intention of the Rules Committee in enacting both rule 26.01 and rule 5.04(2) in their present language.

[18] By and large Master Sandler's interpretation of the "new" rules has stood the test of time and it appears settled law that as matters stand, a party seeking an amendment need not prove the truth of the facts being alleged. It also seems settled -- although less self evident - that it is not open to a party opposing an amendment to defeat the motion by introducing evidence that the facts alleged are not true. In the case at bar, the defendant did not lead evidence on this point but did rely on the evidence tendered by the plaintiff. For the sake of completeness on this point, I consider that documents referred to, and relied upon in the proposed pleading are incorporated in the pleading [See Note 7 below] and should form part of the motion materials. As a general rule then, the court should not engage in substantive review of the merits on a pleading amendment motion.

[19] While the court will not, therefore, conduct a detailed examination of the evidentiary merits of a proposed amendment, [See Note 8 below] the court is required to scrutinize the proposed claim to [page84] ensure it is meritorious in the sense of raising a tenable plea. [See Note 9 below] In addition it must be scrutinized to ensure it is a proper pleading complying with Rule 25. Put another way, a pleading amendment should be reviewed to ensure it would withstand scrutiny under Rule 25.11 and 21.01(1)(b), but does not engage a summary judgment analysis under Rule 20. This level of legal technical review is the same whether a master or a judge hears the motion. [See Note 10 below]

[20] Although it appears that Simrod v. Cooper, as interpreted by Neogleous and Seaway Trust, remains good law (see Keneber v. Midland, at note 5, supra) rather than continually reinterpreting 50-year-old case law developed under the previous rules of practice, it is preferable to state the tests for amending a pleading succinctly and clearly in modern language. My colleague, Master Dash, has done just this in Refco Futures (Canada) Ltd. v. Keuroghlian, [2002] O.J. No. 2981 (QL) (S.C.J.). [See Note 11 below] After a careful review of the case law, he summarized the tests.

[21] I agree wholeheartedly with his summary but since the decision was released, the Court of Appeal released reasons in Mota v. Hamilton Wentworth Police Services Board (see below). That decision is not specifically relevant to the case at bar. It modifies the first of the tests enunciated by Master Dash by settling the law that prejudice is presumed if a limitation period has expired. The three tests enunciated in Refco may then be restated as follows:

(a) The amendments must not result in irremediable prejudice. The onus of proving prejudice is on the party alleging it unless a limitation period has expired. In the latter case, the onus shifts and the party seeking the amendment must lead evidence to explain the delay and to displace the presumption of prejudice: Mota v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2003), 2003 CanLII 47526 (ON CA), 63 O.R. (3d) 737, 225 D.L.R. (4th) 295 (C.A.), at p. 748 O.R. [page85]

(b) The amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting: Atlantic Steel Industries, Inc. v. CIGNA Insurance Co. (1997), 33 O.R. (3d) 12 (Gen. Div.).

(c) The proposed amendments must otherwise comply with the rules of pleading. For example, the proposed amendments must contain a "concise statement of material facts" relied on "but not the evidence by which those facts are to be proved" (rule 25.06(1)), the proposed amendments are not "scandalous, frivolous or vexatious" (rule 25.11(b)), the proposed amendments are not "an abuse of the process of the court" (rule 25.11(c)), the proposed amendments contain sufficient particulars -- for example, of fraud and misrepresentation (rule 25.06(8)).

[22] In short, rule 26.01 requires that a properly framed proposed amendment that is tenable at law will be allowed providing it does not result in prejudice that cannot be addressed in costs. This brings a logical consistency to the rules. In the absence of prejudice, it would be peculiar if the mandatory language of the rule were interpreted to prevent a pleading that could have been advanced in the first instance. It would be equally illogical to permit a pleading by way of amendment that would not have been permitted in the first place. That is why the pleading amendment analysis should incorporate the tests in rules 25.11 and 21.01(1)(b) because those rules are available before a defendant pleads. Rule 20, on the other hand, the summary judgment rule, is only available after a defence has been delivered. By analogy an evidence-based analysis of the merits is not appropriate on a pleadings motion.

[23] The Court of Appeal has made it abundantly clear in Kings Gate Developments Inc. v. Drake (1994), 1994 CanLII 416 (ON CA), 17 O.R. (3d) 841, 23 C.P.C. (3d) 137 (C.A.) that rule 26.01 means what it says. Amendments must be permitted even if sought on the eve of trial and even if it results in delay through adjournment of the trial. Conversely, the case stands as authority for the proposition that [page86] substantial indemnity for wasted costs should be the consequence of amendments late in the day.

[24] The Court of Appeal did not address the consequence of rule 48.04 in Kings Gate, but it is obvious the plaintiff could not have obtained a trial date (under the ordinary rules) without setting the matter down for trial. Other cases have addressed this issue directly. Leave is required under rule 48.04 for a motion to amend after setting the action down for trial, but such leave is generally to be granted or rule 26.01 would be meaningless. See Gloucester Organization Inc. v. Canadian Newsletter Managers Inc. (1995), 1995 CanLII 7144 (ON SC), 21 O.R. (3d) 753, 37 C.P.C. (3d) 111 (Gen. Div.), affd (1996), 1996 CanLII 10247 (ON CA), 27 O.R. (3d) 578n (C.A.); Concord Concrete & Drain (1986) Inc. v. B.G. Schickedanz Investments Ltd., [1996] O.J. No. 500 (QL) (Gen. Div.).

The test for adding parties

[25] Addition of a party engages a slightly different analysis because rule 5.04(2) is discretionary and not mandatory. The wording is similar to rule 26.01 and therefore is subject to the same tests as discussed above. Notwithstanding that those tests may be met, the court retains a discretion to refuse addition of a party. Such discretion of course is not whimsical but based on the principles of fairness and judicial efficiency. It would be appropriate to withhold consent if joinder will unduly complicate or delay the proceeding, or if any of the circumstances exist which would justify relief against joinder under rule 5.03(6) or rule 5.05. It would also be appropriate to withhold consent if the addition of a party appears to be an abuse of process.

[26] Rule 5.04(2) reads as follows:

> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party . . . on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[27] The tests for adding a party under rule 5.04(2) may therefore be stated as follows:

(a) The proposed amendment must meet all of the tests under rule 26.01.

(b) Joinder should be appropriate under rule 5.02(2) or required under rule 5.03. The addition of the parties should arise out of the same transaction or occurrence
(rule 5.02(2)(a)), should have a question of law or fact in common (rule 5.02(2)(b)), or the addition of the party should promote the convenient administration of justice
(rule 5.02(2)(e)). Adding a party will [page87] be particularly appropriate if it is unclear which of the original defendant or the proposed defendant may be liable
(rules 5.02(2)(c) or (d)), or if it is necessary that the proposed defendant be bound by the outcome of the proceeding or his or her participation is otherwise necessary to allow the court to adjudicate effectively
(rule 5.03(1)).

(c) Joinder should not be inappropriate under rule 5.03(6) or 5.05. The addition of a party should not unduly delay or complicate a hearing or cause undue prejudice to the other party. In a case-managed proceeding, it may also be appropriate to withhold consent if it will cause significant disruption to the court-ordered schedule:
Belsat Video Marketing Inc. v. Astral Communications Inc.
(1999), 1999 CanLII 1092 (ON CA), 86 C.P.R. (3d) 413, 118 O.A.C. 105 (C.A.). [See Note 12 below]

(d) Addition of a party will not be permitted if it is shown to be an abuse of process. Abuse of process will exist where the addition of a party is for an improper purpose such as solely to obtain discovery from them, to put unfair pressure on the other side to settle, to harass the other party or for purely tactical reasons. National Trust Co. v. Furbacher, [1994] O.J. No. 2385 (QL) (Gen. Div.); MacRae v. Lecompte (1983), 1983 CanLII 3052 (ON SC), 143 D.L.R. (3d) 219, 32 C.P.C. 78 (Ont. H.C.J.).

[28] I have taken the time to review the tests at length because although I am extremely reluctant to grant the proposed amendment, I have concluded that I am bound to do so. I am troubled because despite my conclusion (in the words of Seaway Trust) that I am not entitled to "take a peek at the merits" and must assume the facts in the proposed pleadings are true, I have been given a peek, and that peek is not encouraging. My purpose in stating this is not to second guess the plaintiff and her counsel -- I have only the limited facts put before me on the motion -- but to illustrate the tension which exists between the rules of pleading and various other rules, including the case management rules. It is important to resolve that tension in a coherent and principled manner. It is of course a fact that granting a pleading amendment is neither devoid of consequences nor the last word [page88] on pre-trial resolution. After the pleading stage, various processes are available and various consequences may flow if the claim, as amended, is in fact without merit. We are concerned here only with whether the proposed amendment is permissible, not with whether or not it is a good idea.

The Proposed Amendment

[29] Other than some housekeeping amendments such as adding a claim for pre-judgment interest, changing where the plaintiff resides, and changing the claim for "solicitor and client costs" to "substantial indemnity" costs, the proposed amendments are as follows:

(i) addition to the prayer for relief of the following paragraphs:

> (b) general and special damages in the sum of $100,000;
>
> (c) aggravated, punitive and/or exemplary damages in the sum of $100,000,000;

(ii) addition of the following para. 6:

> 6. The Defendants Carole Frederick and Doe Claims Supervisor were at all material times the claims adjuster or examiner and supervisor employed by the insurer, the former of whom was responsible for communicating the insurer's denial of the plaintiff Pauline Plante's claim on the policy of life insurance she and her husband had purchased and which is the subject of the within litigation.

(iii) addition of a para. 17 stating that Pauline Plante has fully complied with the claims process but has been refused the life insurance benefits by the defendants.

(iv) addition of the following para. 18:

> 18. The insurer and its employees and agents, as well as Frederick and her supervisor, have behaved with negligence, arrogance and high handedness, have shown a callous disregard and complete lack of care for the Plaintiffs and specifically of the rights of Pauline Plante, and have breached the duty of utmost good faith to the Plaintiffs, the particulars of which include but are not limited to:
>
> a) They took an adversarial and hostile approach to Pauline, her family, and her claim, treating the claim with suspicion from the outset;
>
> b) They failed to devote proper time and attention to the Plaintiff's claim, failed to respond in a timely manner or at all to questions from Pauline or her representative and sent confusing and contradictory correspondence to the Plaintiffs or her representatives;
>
> c) They failed to follow their own claims manuals or guidelines or accepted industry practices for the handling of claims, or in the alternative, they [page89] failed to have a proper and reasonable claims manual or guideline for the handling of claims and a proper training procedure therefor;
>
> d) They relied on inaccurate and irrelevant information and considerations in withholding, delaying, and denying the Plaintiffs' claim;
>
> e) They failed to fully and fairly consider all of the evidence before them;
>
> f) They failed to treat the Plaintiffs fairly;
>
> g) They hired incompetent employees to handle claims and failed to provide proper training to the employees, adjusters and agents handling the Plaintiff's claim;
>
> h) They were or ought to have been aware of the probable consequences of their conduct and the damages and emotional and financial distress such conduct would cause to the Plaintiff Pauline;
>
> i) They failed to honour and act in accordance with the representations their Agent was expressly authorized by them to make to Pauline and Rene for which they are vicariously and otherwise responsible at law;
>
> j) They improperly and without foundation breached their own contract of insurance and improperly, negligently and with bad faith denied the payment of the Plaintiff's claim.

(v) addition of a para. 19 stating that the above conduct constitutes bad faith and stating that the plaintiff is entitled to "aggravated, punitive and exemplary damages" from the defendants; and,

(vi) addition of the following para. 21:

> 21. As a result of the conduct of the Insurer and its employees, agents and contractors, the Plaintiff Pauline has suffered emotional stress and aggravation, and financial stress and loss, and has been put to considerable out of

> pocket expense. As a result of the Insurer's breach of contract, negligence and bad faith, Pauline lost the home she and Rene had purchased prior to his untimely death, and in respect of which the life insurance had been purchased, and as a result los[t] an opportunity to profit from the real estate transaction and an opportunity to enjoy the security of the home for herself and her young family.

[30] This proposed pleading is far from perfect. For one thing, it lumps punitive and exemplary damages together with aggravated damages. These are not the same thing. Aggravated damages may be available in breach of contract cases if there has been conduct which justifies more than the benefit that should have been paid under the contract, but also the consequential losses which flow from the failure to pay in a timely manner. That is to say, the kind of damages asserted in the proposed para. 21. These are beyond the normal measure of damages (the money due under the contract together with interest) but they remain [page90] compensatory in nature. This distinction was clarified in Vorvis v. Insurance Corp. of British Columbia, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193, at para. 16:

> Before dealing with the question of punitive damages, it will be well to make clear the distinction between punitive and aggravated damages, for in the argument before us and in some of the materials filed there appeared some confusion as to the distinction. Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, The Law of Damages (2nd ed. 1983), at p. 562, para. 979, in these words:
>
> > An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in Cassell & Co. Ltd. v. Broome, but "punitive" has also been used in many Canadian courts including the Supreme Court of Canada in H.L. Weiss Forwarding Ltd. v. Omnus. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.
>
> Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

[31] The prayer for relief should therefore separate the claims for aggravated and punitive damages. As well, I see no basis for the "general and special damages" claim in the proposed para. 1(b), as no facts are pleaded which would justify damages at large. Either the plaintiff is entitled to the benefit due under the insurance or she is not. If she was, and if the circumstances are such as to justify compensation for the damages consequential on improper denial of the claim, aggravated damages may be awarded. If the conduct is found to be high-handed, capricious and malicious misconduct that offends the court's sense of decency [page91] and is deserving of punishment, and if compensatory damages are insufficient to express the court's disapproval such that punitive damages are rationally required, an award of punitive damages may also be made. [See Note 13 below] The proposed para. 18(i) is inappropriate. It introduces an element of misrepresentation, but no particulars of misrepresentation are pled and the claim is not based on misrepresentation.

[32] These are all defects that are readily cured. Read broadly and generously, however, and assuming the truth of the allegations in the pleading, the amendments disclose a tenable claim for aggravated damages and punitive damages. In the absence of prejudice, the amendment of the claim -- as opposed to the amendments adding parties which I will address in a moment -- must be allowed pursuant to rule 26.01.

Prejudice and the Impact of the Amendment

[33] If this amendment is granted and the plaintiff is successful in proving entitlement to the temporary policy, and she is also successful in proving bad faith and breach of duty, it is possible she might then become entitled to

damages in addition to the $100,000. Obviously, however, it cannot be bad faith to rely upon an exclusion that properly applies. Accordingly, the plaintiff will receive nothing if the death was properly excluded under the definition in the temporary coverage. If the amendment is granted, that remains the central factual legal issue and becomes the threshold issue upon which the claims raised by the amendments depend.

[34] As noted above, it is entirely possible that the plaintiff could succeed in proving entitlement to the $100,000 benefit and yet not succeed in the bad faith claim. If parties are added, there is the additional possibility of succeeding against the insurer but failing to establish any liability on the personal defendants. These possibilities involve risks to the plaintiff, but they also expose the defendant to the cost and risk of defending against a much expanded claim that may or may not have merit at the end [page92] of the day. Since the affidavit filed on behalf of the plaintiff asserts that she is impecunious, a costs award at the end of the day will be cold comfort. Nevertheless, it is clear that the prejudice referred to in rule 26.01 is something more than the prejudice of having to defend the action or incur additional costs. The prejudice must be such that it would be unfair to now have to respond to the claim even if it would have been legitimate in the first instance.

[35] This is not a very happy result. Days of discovery will now be sought. Production of documents will be broadened. The trial will be lengthened by the need to explore the conduct of the insurer and the financial and psychological impact of denial of the claim on the plaintiff and her family. There is now a possibility that the costs of this action will approach or exceed the amount of the policy. Unless I conclude that the amendments are simply designed to leverage a settlement and are not serious, which would be an abuse of process, that is insufficient reason to deny the amendment. Given the current state of evolution in the cases since Whiten and the frequent reports of punitive damage awards against insurers in recent months, the plea as drafted is tenable. This is a developing area of law and I cannot conclude that the claim is frivolous. There is insufficient evidence for me to conclude that it is an abuse of process.

[36] I have no doubt the risks to the plaintiff have been carefully explained to her before counsel took instructions to launch this motion. Particular care will have been taken because I was advised that the new firm believes it was negligent of previous counsel to adopt the strategy he pursued, and furthermore, that he did not explain the consequences of setting the action down for trial under rule 48.04. I need not comment on that submission other than to observe that if the amendments are granted, time will tell whose advice was more prudent and which strategy more sound. [See Note 14 below]

[37] Of course the potential prejudice to the plaintiff in increased costs, complexity and risk are also prejudice to the defendant. These however are forms of prejudice that may be remedied in costs -- at least in theory. The defendant must show that the amendment of the original pleading creates irremediable prejudice and it has been unable to do so. [page93]

Addition of Parties

[38] As noted above, the test for the addition of parties is different than that for amending the pleadings. The rule is discretionary and there are numerous criteria in Rule 5 that guide the exercise of that discretion.

[39] Properly pleaded, it may be possible to assert a cause of action against individual adjusters or claims examiners. In Spiers v. Zurich Insurance Co. (1999), 1999 CanLII 15089 (ON SC), 45 O.R. (3d) 726 (S.C.J.) (leave to appeal refused, [1999] O.J. No. 4912 (QL)), the possibility of a concurrent duty in contract and in tort was recognized. That, of course, was a motion under rule 21.01(1)(b) and it simply concluded the claim was not impossible of success and should not be struck out. That is not the same thing as a finding that the duty does in fact exist, but it is sufficient, of course, to dispose of the suggestion that the plea is untenable at the pleading stage.

[40] I am nevertheless unprepared to exercise my discretion to add parties. The action will be delayed -- particularly as one of the proposed parties is unidentified at this stage. The action will be complicated. There is no need to have individual employees bound by the result of the litigation and there is no legitimate benefit to the plaintiff in adding them. The pleading alleges that the employees were acting within the scope of their employment and the insurer is vicariously liable for any wrongdoing. The statement of defence certainly does not allege that any employee acted outside the scope of employment and no such suggestion was made before me. On the contrary, the insurer fully adopts the actions and decisions of its employees and agents. Since the employer is fully liable for any wrong committed by an employee -- even if independently actionable -- there is no possibility of greater recovery by joining the individual defendants and there is no possibility of divided liability. The employees are not necessary parties.

[41] The only advantage of joining the employees would be to obtain discovery of the individuals without leave of the court or to apply more pressure to the insurer to settle the claim. These are improper purposes. Given the history of the discovery process, and in particular, a previous demand to examine Carole Frederick, I find the attempt to add

the individuals at this time is an abuse of process. Even if it was not intended as such, that is the effect and no useful or necessary purpose is served by joinder. The addition of parties is refused.

Jury Notice and Discovery

[42] The effect of permitting these amendments is to fundamentally restructure the action. New pleadings will be required [page94] and, apart from the production and discovery that have already taken place, focused only on the exclusion and its application, the action is essentially put back to a preliminary stage. It follows that pleadings are essentially reopened. As such, if it is reasonable to allow this amended claim, it is also reasonable to permit a jury notice to be served. I follow my own reasoning in Nelson Estate v. Seguin, [2000] O.J. No. 508 (QL), 44 C.P.C. (4th) 361 (S.C.J.). It is of course open to the defendant to seek to dismiss the amended claim prior to trial or to seek to strike the jury notice. For example, it may be argued that the application and interpretation of the exclusionary language should not be put to the jury. These are questions for the motions judge or trial judge.

[43] Both parties will require discovery on the new allegations. Since it appears that the plaintiff's original counsel reserved his right to conduct oral discovery without objection by the defendant, and since there has been a change in counsel and the pleading amendments, the parties should have the right to continue the discovery orally if they wish. The plaintiff may not revisit the questions that were asked in writing. Any unanswered undertakings are to be answered.

[44] The plaintiff requests an order that discoveries take place in Toronto because of the expense of discovering the representative of the defendant in Quebec and the limited resources of the plaintiffs. It is premature to make that determination. In light of the altered nature of the action, the defendant may consider producing a different representative and it is conceivable the defendant may decide it is more cost effective to conduct examinations in Toronto in any event. Under rule 34.07, it is always open to the court to give directions on discovery of a person who resides outside Ontario and this may be addressed at a case conference if counsel are unable to reach agreement on the point.

[45] Since the parties have agreed that the action is to be governed by Rule 77, and as new pleadings are required, rule 24.1 should apply. The parties shall have 30 days from delivery of an amended defence to name a mediator and a date for mediation, failing which the mediation coordinator will appoint a mediator from the roster.

Wasted Costs

[46] When a claim is amended late in the process, in this case after the action has been set down for trial, the amending party should generally be liable for the wasted costs. In Kings Gate, supra, the amendments were made when the parties were fully ready for trial. The Court of Appeal ordered immediate payment [page95] of a pre-estimate of the wasted costs and authorized the trial judge to further fix those costs in order to ensure full recovery of solicitor-client costs. This case is not so advanced. There has not been full trial preparation and the amendments do not alter the issue that was in dispute previously. That is to say, the applicability of the exclusion remains in dispute and the discovery and production going to that issue remain relevant. There will be a new statement of defence and there will have to be new affidavits of documents. There may be other wasted costs.

[47] The formula adopted by the Court of Appeal appears appropriate to this case. The plaintiff shall pay the unnecessary costs of the defendant occasioned by the amendment. This shall be accomplished by an installment of $2,000 within 30 days and if this is insufficient to indemnify the defendant, the costs may be fixed by me at the request of counsel or by a motions or trial judge at the time of final disposition.

[48] There may be other terms that are appropriate but they can be addressed at the case conference that will subsequently take place. I anticipate other procedural, discovery or delay concerns will be addressed through case management.

Summary

[49] In conclusion, for the reasons given above, an order will go as follows:

(a) On consent, this action is subject to case management under Rule 77 and the place of trial is moved to Toronto.

(b) The court file will be permanently transferred to Toronto. The plaintiff is responsible for filing a praecipe with the court in Newmarket, for arranging the file transfer, and for advising all parties and my office of the new permanent Toronto file number once it is assigned.

(c) Leave is granted to bring this motion and to amend the pleading in substantially the form proposed on the following terms:

(i) the proposed amendments shall be redrafted to delete the claim for "general and special damages" and to separate the claims for aggravated and punitive damages;

(ii) the proposed amendments shall be redrafted to delete para. 18(i) alleging misrepresentation;

(iii) the allegations against the proposed individual defendants in paras. 6 and 18 shall not be included; and, [page96]

(iv) the plaintiff shall pay the defendant costs of $2,000 within 30 days and shall be liable for such other wasted costs as may subsequently be fixed by me or by a judge rendering a final disposition of the action.

(d) Leave is not granted to add the personal defendants.

(e) The plaintiff will immediately take the steps required to transfer the court file to Toronto and will issue and serve the amended claim within 45 days from today or as soon thereafter as the file is available in Toronto.

(f) Leave is granted to the plaintiff to serve a jury notice with the amended claim providing the conditions are complied with.

(g) The defendant shall deliver an amended defence within 20 days of being served with the amended claim.

(h) Counsel shall confer and attempt to agree on a timetable and any necessary arrangements to complete discoveries in a timely fashion.

(i) This action shall be subject to mandatory mediation. The parties shall have 30 days from the delivery of the amended defence to select a mediator and a mediation date failing which the mediation coordinator shall appoint a roster mediator.

(j) All trial scheduling court dates, the time for completing mediation and the date for a settlement conference under Rule 77 are adjourned or extended to a date or dates to be established by means of an approved timetable or at a case conference.

(k) There will be a case conference on October 22, 2003, at 9:00 a.m., by telephone. Counsel for the plaintiff will make arrangements for the call.

[50] I may be spoken to regarding the form of the order and the amended claim if counsel are unable to agree.

Motion to amend statement of claim granted; motion to add parties dismissed. [page97]

Notes

Note 1: I am advised that following an attendance at trial scheduling court in Newmarket, the action could not be scheduled because the court calendar for May 2002, was not available and counsel were not available in April. Subsequently, counsel agreed to change the venue to Toronto. On consent, Rule 77 is to apply.

Note 2: These terms are not synonymous, as discussed below.

Note 3: Rule 48.04(1) reads as follows: "Any party who has set an action down for trial and any party who has consented to the action being placed on a trial list shall not initiate or continue any motion or form of discovery without leave of the court."

Note 4: See Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co. (2002), 2002 CanLII 45070 (ON CA), 61 O.R. (3d) 481, 217 D.L.R. (4th) 34 (C.A.), leave to appeal denied July 10, 2003, [2002] C.S.C.R. No. 488.

Note 5: See Gary Watson, Amendment of Pleadings, in Holmested and Watson, Ontario Civil Procedure, looseleaf, Vol. III (Toronto: Carswell, 1988-), p. 26-6, referring to Robertson and Robertson v. Joyce, 1948 CanLII 88 (ON CA), [1948] O.R. 696, [1948] 4 D.L.R. 436 (C.A.). See also Neogleous v. Toffolon (1977), 1977 CanLII 1290 (ON SC), 17 O.R. (2d) 453, 4 C.P.C. 192 (H.C.J.).

Note 6: Aff'd (1990), 40 C.P.C. (2d) 4 (Ont. H.C.J.).

Note 7: Web Offset Publications Ltd. v. Vickery (1999), 1999 CanLII 4462 (ON CA), 43 O.R. (3d) 802, [1999] O.J. No. 2760 (QL)(C.A.), leave to appeal refused, [1999] S.C.C.A. No. 460 (QL).

Note 8: One should always be careful with the words "never" and "always". It would be ludicrous to conduct a mini-trial on the merits of a proposed amendment, but there may be cases when evidence going to the lack of merits would be admissible. An example might be to demonstrate abuse of process. See National Trust Co. v. Furbacher, [1994] O.J. NO. 2385 (QL)(Gen. Div.). Belsat Video Marketing Inc. v. Astral Communications Inc. (1999), 1999 CanLII 1092 (ON CA), 86 C.P.R. (3d) 413 (C.A.) is a case where the Court of Appeal upheld the refusal of Rosenberg J. (as he then was) to permit pleading amendments brought in response to a summary judgment motion. It appears from the report that evidence played a role in the decision. That, however, was a summary judgment motion heard with a cross motion to amend the pleadings. It is apparent that the Court of Appeal would have granted summary judgment even if the amendments had been allowed.

Note 9: See Vaiman v. Yates (1987), 1987 CanLII 4345 (ON SC), 60 O.R. (2d) 696, 41 D.L.R. (4th) 186 (H.C.J.), leave to appeal refused (1987), 1987 CanLII 4245 (ON SC), 63 O.R. (2d) 211, 47 D.L.R. (4th) 359 (H.C.J.); Kane Yee Pharmacy v. TDM Drugs Inc. (1997), 17 C.P.C. (4th) 126 (Ont. Div. Ct.); Keneber Inc. v. Midland (Town) (1994), 1994 CanLII 7221 (ON SC), 16 O.R. (3d) 753 (Gen. Div.); 728184 Ontario Ltd. v. Ontario (Minister of Transportation), [2000] O.J. No. 4238 (QL)(S.C.J.).

Note 10: See note 8, supra. Vaiman v. Yates is frequently cited for this proposition to avoid a two-step process.

Note 11: Affirmed on appeal per Jarvis J., July 4, 2002, not yet reported.

Note 12: The Court of Appeal had this to say: "While the case management system does not demand slavish adherence, in the circumstances presented here it was quite proper, indeed perhaps essential, for the motions judge to be shown a very good reason for departing at such a late date from the course which had been set on a peremptory basis. Otherwise, the efficiency of the case management system risks a serious compromise."

Note 13: Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18, is the seminal case that is seen as opening the floodgates to this type of claim in insurance cases. Whiten, however, was a case where unsubstantiated and spurious fraud claims were made against the insured. Whiten also makes it clear that punitive damages continue to be appropriate only in exceptional cases. In an almost simultaneous decision, Sylvan Lake Golf & Tennis Club Inc. v. Performance Industries Ltd., [2002] 1 S.C.R. 678, 2002 SCC 19, the Supreme Court stated that even in fraud cases, not every case of malicious conduct will attract punitive damages if they are not rationally required.

Note 14: While I find the suggestion that a focused, efficient no-frills litigation strategy may be negligent to be a troubling suggestion for obvious reasons, there may be facts I am not aware of and I make no finding in this regard. Previous counsel was not before the court and there is no need for me to make a finding concerning appropriate standard of practice.

Tessaro v. DH Collins & Associates Ltd., 2009 CanLII 51258 (ON SC)

Date: 2009-09-25

File number: 07-CL-007235

Citation: Tessaro v. DH Collins & Associates Ltd., 2009 CanLII 51258 (ON SC), <http://canlii.ca/t/25v3r>, retrieved on 2020-06-25

COURT FILE NO.: 07-CL-007235
DATE: 20090925

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michelle Tessaro Plaintiff/Applicant

DH Collins & Associates Ltd. Respondent

BEFORE: Justice F. Marrocco

COUNSEL: *Ms. Joyce Harris*, for the Applicant

Justin Heimpel, for the Respondent

DATE HEARD: September 21, 2009

E N D O R S E M E N T

[1] The Applicant moves to add DH Collins & Associates Ltd. as a Respondent and as well seeks an order requiring the defendant Dan Collins to answer questions 222 and 239. The Applicant also seeks to amend the application to claim that all of the defendants including the Respondent on this motion acted together and deprived her of the benefits of her shareholding in Retail Food Brands Inc. and as well converted the assets of that corporation to benefit themselves.

[2] The Respondent opposes the proposed amendment on the basis that the Applicant is proposing to add the Respondent after the limitation period for commencing such a claim expired and that section 21(1) of the *Limitations Act 2002* prevents it from being added. That section provides that if a limitation period in respect of a claim has expired, the claim shall not be pursued by adding the person as a party to existing proceedings.

[3] In 1999 the Applicant and the defendant John Ferraro created Retail Food Brands Inc. to develop and market a line of fully cooked food entrées. The defendant Dan Collins was responsible for dealing with key corporate accounts. On June 6, 2007 the Applicant was summoned to a meeting with John Ferraro and Dan Collins. At that meeting she was told that Dan Collins would be resigning from Retail Food Brands Inc. and the John Ferraro and Dan Collins had established or would be establishing a new partnership. She was also advised that they would likely be taking the entire revenue stream from Retail Food Brands Inc. with them.

[4] In October 2007 the Applicant commenced a proceeding for an order winding up Retail Ready Foods Inc. and Retail Food Brands Inc. or in the alternative an order requiring the Respondents to buy the Applicant's interest in those corporations. It is to that proceeding that the Applicant wishes to add as a defendant DH Collins & Associates Ltd.

[5] The Respondent argues that the limitation period of two years from the time the cause of action arose has expired. The Applicant argues that there is a discoverability issue which in effect extends the limitation period.

[6] Section 21(1) does not apply. That section eliminated the power of a court to extend a limitation period by adding a person as a party despite the fact that the limitation period for proceeding against that party had expired. See *Inez Joseph v. Paramount Canada's Wonderland* (2008), 2008 ONCA 469 (CanLII), 241 O.AC. 29. In this application there is a live issue concerning the expiration of the limitation period. Specifically there is a discoverability issue. It is uncontested that the applicant hired DH Collins and Associates Ltd. to be its agent on August 28, 2007. It is at least arguable that this proves that the applicant was unaware of the diversion of corporate opportunities and the cancellation of a key corporate agency agreement with Farmland Foods. Not only was the Farmland Foods agency agreement cancelled but DH Collins and Associates Ltd. was appointed as Farmland's new agent.

[7] Where the evidence demonstrates a discoverability issue the appropriate result is to add the party but grant leave to raise the limitation defense. See *Tom Hughes and 142-6924 Ontario Limited v. Kennedy Automation Limited at all* (2008), 2008 CanLII 8603 (ON S.C.) at para. 24.

[8] The Applicant also seeks answers to questions from the defendant Dan Collins concerning two customers of DH Collins & Associates Ltd.; namely National Beef and Smithfield Packing. The Applicant contends that National Beef and Smithfield Packing are two corporate opportunities that were diverted to DH Collins & Associates Ltd. by the defendant Dan Collins. At question 222 the Applicant asked for the revenue streams that those two companies generated for DH Collins & Associates Ltd. If corporate opportunities were diverted from Retail Food Brands Inc. by the defendants John Ferraro and Dan Collins then the revenue streams generated by those two companies would be relevant in the amended action. Accordingly Dan Collins will answer question 222 and any related questions.

[9] At question 239 the Applicant asked for financial statements for DH Collins & Associates Ltd. The financial statements of DH Collins & Associates Ltd. are not relevant to this action at this stage and accordingly there will be no order requiring Dan Collins to answer question 239 and no order to produce DH Collins & Associates Ltd. financial statements.

[10] The Respondent's final argument was that it was not appropriate to add this kind of claim to an oppression remedy application. In *Jabalee v. Abalmark Inc.* [1996] O.J. No. 2609 (Ont. C.A.), the Court allowed a post-oppression company to be added as a party because the company arguably "aided and abetted" the alleged oppression. See also *Gautier v. Telerate Canada Inc.*, 2000 CarswellOnt 4019. The same claim is made here.

[11] Accordingly, this application is allowed. An order will issue amending the application in the manner proposed by the Applicant, adding DH Collins and Associates Ltd. as a party and granting leave to DH Collins and Associates Ltd. to raise a limitation defense. An order will also issue requiring the respondent Dan Collins to answer question 222 and any related questions.

[12] The Applicant will have its costs payable forthwith. If the parties cannot agree on the quantum of costs, **brief** written submissions may be made.

_____

MARROCCO J.

DATE: September 25, 2009.

OSLER

Livent decision and the scope of auditor liability

Author(s): Christopher Naudie, Allan Coleman, Robert Carson, Jeremy Fraiberg

Dec 22, 2017

In a significant decision on December 20, 2017, the Supreme Court of Canada provided important guidance on the scope of responsibility of auditors in Canada. The Supreme Court found that Livent's auditor was liable to the corporation due to its negligence in performing an audit and thereby failing to uncover fraud committed by Livent's management. The Supreme Court reaffirmed the general principle established in *Hercules Management Ltd. v. Ernst & Young (Hercules)* that an auditor performing a statutory audit will generally owe its duty of care to the audit client, not to shareholders or other third parties. In the *Livent* case, the Supreme Court found that a court-appointed receiver of an audit client could pursue claims against the auditor, even though the ultimate beneficiaries of the claims are creditors. In allowing the underlying appeal, the Supreme Court also placed some significant limits on the scope of liability of an auditor, and substantially reduced the trial judge's original damages award. The Supreme Court's decision will have significant implications for the auditing profession in Canada, as well as the prosecution of securities class actions in Canada.

For years, the courts in Canada and the United Kingdom have struggled to articulate the scope of an auditor's potential liability at common law, given the numerous stakeholders that may seek to rely on audited financial statements for a range of diverse purposes. At the heart of this jurisprudence, the courts have addressed a fundamental policy question about auditor liability: given the wide circulation and use of audited financial statements, it may arguably be foreseeable that negligence by an auditor could affect the audit client, its shareholders or its creditors. But what responsibility should the auditor bear for negligence and to whom, particularly when financial statements are primarily the responsibility of the company and the directors of the company have committed fraudulent acts? Moreover, would the imposition of liability create a risk of indeterminate liability for an indeterminate class of users of financial statements? In the modern world of commerce, should the auditor be the insurer of last resort, particularly in circumstances of misstatement or fraud?

In the *Livent* decision, the Supreme Court of Canada provided the following important guidance on these questions.

- An auditor owes a duty of care to its audit client in respect of the performance of its statutory audit. Any duty of care in respect of other services or undertakings, such as helping the client solicit investment, will be limited by the specific purpose for which the service is being provided. In *Livent*, the Supreme Court found that the auditor's liability was limited to losses claimed in respect of the statutory audit, and did not extend to other services the auditor provided in connection with an earlier financing.
- With respect to auditor liability to persons other than the audit client, *Hercules* remains the governing law in Canada. Absent special circumstances, there is no duty of care owed by an auditor to shareholders and persons other than the auditor's client in relation to an audit.
- In the unique circumstances of *Livent*, the Supreme Court found that the auditor performed a negligent statutory audit and that the auditor was held liable for the increase in the company's "liquidation deficit" following the audit, on the basis that, had the management's fraud been disclosed in the audit, Livent would have immediately sought insolvency protection.
- The majority held that on the particular facts of the case, the auditor could not rely on the defences of contributory negligence or illegality based on the non-applicability of the corporate identification doctrine.
- The *Livent* decision suggests that auditors may have an increased risk of liability when negligence in an audit fails to uncover a fraud, particularly where that fraud conceals the true finances of an insolvent company.
- This decision, however, also supports important protections for auditors against misrepresentation claims by shareholders. Shareholders will likely have to pursue misrepresentation claims against auditors under the Ontario *Securities Act* (which are subject to various checks and balances) rather than as common law claims.

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Background

This appeal arose from the trial judgment in an action brought by Livent (through its receiver) against Livent's former auditor. Livent claimed that the auditor breached the duty of care to its client in failing to detect financial manipulation and, had the auditor exposed the fraud, Livent would have ceased operations and sought insolvency protection to prevent further diminishment of its assets.

The trial judge found the auditor liable for negligence in respect of two events: (1) providing a clean audit opinion, and (2) providing a comfort letter and approving a press release to assist Livent in obtaining investment. The trial judge held that the damages equalled the difference between Livent's value when the first breach occurred and Livent's value at the time of insolvency. But he reduced the damages by 25% (to about $85 million) to account for losses sustained by Livent's unprofitable theatre business, which he held were too remote.

The Court of Appeal for Ontario upheld the trial judge's award and dismissed the appeal.

The Supreme Court's decision

In a 4-3 decision, the Supreme Court of Canada allowed the appeal in part, reducing the damages to about $40 million. The majority held the auditor liable only in relation to the audit, applying the duty of care analysis strictly to foreclose the claims relating to the investment. Justices Gascon and Brown, writing for the majority, held that the damages could be assessed as the increase in the liquidation deficit of the company following the audit, less the 25% "contingency." They declined to apply the defences of illegality, attribution or contributory negligence on the facts of the case, where the controlling minds of the company were the perpetrators of the fraud.

The minority would have gone much further, finding that the auditor should not be liable for the loss that befell Livent because that loss did not fall within the scope of the auditor's duty of care (as it was not reasonably foreseeable to the auditor), causation had not been established, and the damages were too remote. Chief Justice McLachlin, writing for the minority, also expressed concern that the majority's approach could make an auditor the underwriter for any losses suffered by a client following a negligent audit report, if the consequences of every decision made by the company thereafter are attributed to the auditor's negligence.

The complex issues of proving damages

Read together, the minority and majority decisions suggest that, as a practical matter, it will often be difficult for plaintiffs to establish the auditor's liability for damages – particularly where it would require proof of what management or the collective shareholders would have done "but for" the negligence. On the facts of this case, the majority inferred that Livent's shareholders would have caused Livent to cease operations if Livent's true financial position (i.e., its insolvency) had been detected by the audit, principally because that was what occurred when the fraud was ultimately disclosed. In most situations, though, there will be complex hurdles in proving that the cause of a non-insolvent company's losses was the auditor's negligence. This suggests that particular risk to auditors may arise when a negligent audit fails to detect a company's underlying insolvency, prolonging the company's life and thereby deepening its insolvency.

Hercules and securities class actions

Although the Supreme Court was deeply divided on key issues, it confirmed that its 1997 decision in *Hercules* remains the law regarding there generally being no duty of care of an auditor to persons other than its client (e.g., shareholders) in relation to an audit. While shareholders may be able to pursue misrepresentation claims against auditors under the Ontario *Securities Act*, those claims are generally subject to checks and balances. For secondary market investors, these usually include damages caps that limit the auditor's liability to the greater of (i) $1 million, and (ii) the revenue that the expert and its affiliates earned from the issuer and its affiliates during the 12 months preceding the misrepresentation. Based on the duty of care analysis in this case and the confirmation that *Hercules* is binding law, it is difficult to see circumstances in which shareholders could use common law negligent misrepresentation claims to circumvent those damages caps.

Conclusion – What does this mean for auditors?

An audit client can sue its auditor in some circumstances for negligence or breach of contract in relation to the audit. It remains to be determined, on the facts of individual cases, what types of damages may be recoverable and what defences may apply. For other services, the potential exposure will be limited by the purpose for which the services were provided.

Shareholders can sue auditors in some circumstances for misrepresentations in prospectuses and other disclosure documents under Parts XXIII or XXIII.1 of the Ontario *Securities Act* (and equivalent legislation). The auditor may be able to rely on statutory defences and other protections, including liability limits for secondary market claims. Absent exceptional circumstances, it seems unlikely that shareholders will be able to advance common law claims against auditors.

RELATED EXPERTISE

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Mergers and Acquisitions

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Auditor's Exposure Expanded to Potential Investors? Case comment on the *Castor* decision

By Emily Stock, LL.B., M.B.A.

Editor's note: The ICABC encourages members to consider Ms. Stock's argument that practitioners need to better protect themselves by using specific language in their engagement letters, but also reminds members of their professional obligations to consider clients' interests, recognizing that this is a delicate balance.

After 16 years of active litigation, the Superior Court of Quebec has found the auditors of the former firm Coopers & Lybrand liable for material misstatements in the audited financial statements of Castor Holdings Ltd. in *Widdrington* (2011 QCCS 1788) (*Castor*).

Castor Holdings Ltd. was a real estate investment company that collapsed into bankruptcy in 1992. Coopers & Lybrand issued auditors' reports for Castor's consolidated financial statements for the years 1988, 1989, and 1990.

The Plaintiff alleged that the auditors failed to perform their professional services in accordance with GAAP and GAAS and that the financial statements accompanying the auditors' reports were materially misstated and misleading. The Defendants took the position that if the financial statements were incorrect; it was because of the fraud by senior management of Castor which was so pervasive that the auditors could not be liable for failing to uncover the true nature of the business.

The Court did not accept the position that the auditors were not responsible for Castor's fraud, but instead found that the auditors should have seen a "screaming contradiction" between the financial statements and notes prepared by management versus the accounting records and loan files available to the auditors. Among other issues, the Court found that the financial statements failed to disclose that many of the loans were not producing income and should have been recorded as a loss. This failure to comply with GAAP meant that the auditors should not have been able to issue a clean opinion.

Indeterminate Liability

The 752 page decision in *Castor* includes discussion of many issues of interest to the accounting profession. Perhaps one of the more significant issues is that the auditors were found liable to an arguably "indeterminate" class: the investors and potential investors of Castor.

The issue of indeterminate liability was addressed by the Supreme Court of Canada in *Hercules Managements Ltd.* [1997] 2 S.C.R. 165 (*Hercules*). In *Hercules*, the Plaintiffs were investors that had relied on financial statements that had been negligently opined on by the auditors.

The Court found that while a prima facie duty of care was owed by the Defendant auditors to the Plaintiff investors, that duty was negated by policy concerns surrounding indeterminate liability. The Court refused to impose a duty of care upon an auditor whose Auditor's Report was not prepared for the actual purpose upon which it was relied.

Hercules reaffirmed that auditors generally do not owe a duty of care to an indeterminate class such as potential investors. However, the Supreme Court of Canada explicitly stated that there may be an exception depending on the factual situation.

This issue had not been reconsidered until last year in British Columbia in *International Culinary Institute of Canada* (2010 BCSC 541) (*ICIC).* In *ICIC,* the Plaintiff used financial statements and a review engagement report from the Defendant accounting firm when purchasing the Dubrulle French Culinary School Ltd. The accounting firm was not made aware of this possible purpose. The Honourable Mr. Justice Goepel found that this was not an exception to the principle enunciated in *Hercules* and so the Plaintiff was not owed a duty of care.

In *Castor,* the Honourable Marie St-Pierre found that there was an exception based on the specific factual situation. She found that "*the typical concerns surrounding indeterminate liability do not arise*" as they did in *Hercules* for two key reasons:

1. The Castor financial statements were prepared for a broader purpose.

In *Hercules* the auditors persuaded the Court that they were not aware of broader purposes beyond the statutory purpose. While the auditors knew the identity of the investors, and presumably knew that the investors would be interested in the financial statements, the Court was persuaded that the audited financial statements were not prepared for the purpose of providing them to the investors.

In *Castor*, an Audit Planning Memo that was prepared at the commencement of the engagement indicated that the audit team knew that the statements would be distributed to shareholders, investors, and lenders for various financing purposes. The Court, therefore, found that the auditors knew that Castor's financial statements were being used for a broader purpose.

The Court further distinguished *Hercules* on the basis that the purpose of the audit was not a statutory audit since Castor was not obliged by statute to produce audited financial statements.

2. The class of potential investors was identifiable to the auditors.

The Court found that the Defendants knew that Castor was marketing to an "investment club" (as defined by the Court) of closely connected high net worth shareholders, lenders, and potential shareholders and lenders.

It was significant in the Court's reasoning that the engagement audit partner, Mr. Wightman, had met the members of the "investment club" at receptions and dinners organized in conjunction with the shareholders' and directors' meeting.

It was also significant that Mr. Wightman kept brochures that included the five year summary of the audited financial statements for Castor in his office and had distributed them to third parties contemplating doing business with Castor.

On these facts, the Court decided that the "investment club" was a definable class of potential investors and so reasoned that the issue of indeterminate liability did not arise.

It is difficult to reconcile the reasoning on this issue in *Castor* with that in *Hercules.* In both, the auditors knew the identity of the investors.

Limiting Duty of Care

The *Castor* case serves as a reminder to Chartered Accountants to consider what steps they should take in an assurance engagement to limit the class of people to whom they owe a duty of care. Chartered Accountants seeking to ensure that their duty of care is limited to specific intended users of the financial statements should consider the following three strategies in each assurance engagement:

1. Identify the intended users in the engagement letter. Tell your client that you do not accept any responsibility for use of the assurance report by a third party who relies on your report without your written consent.

2. Ensure that the end users are noted in the working papers, including your planning memo. Ask your client to identify the end users with specificity, and document this in your working papers. If the auditor's report is intended to be distributed to a large group or class, ensure that the level of engagement and professional fees reflect this risk of exposure.

3. Include a "restriction on distribution or use" paragraph in the auditor's report when appropriate and in accordance with CAS 706. Any restriction on distribution or use should also be addressed in your working papers and the engagement letter. CAS 706 permits the assurance report to include an "other matter paragraph" that states that "the auditor's report is intended solely for [the intended users], and should not be distributed to or used by other parties."

It will be interesting to follow the next stage of the *Castor* case. An appeal is anticipated and hopefully the Court on appeal will reconsider whether *Castor* is properly an exception to the law that auditors do not owe a duty of care to an indeterminate class such as potential investors.

Guest contributor Emily Stock, LL.B., M.B.A., is a lawyer at Alexander Holburn Beaudin & Lang LLP in Vancouver. She defends financial professionals and assists them in managing their legal issues.

THE GLOBE AND MAIL

BDO pays $3.5-million fine over audit of fraudulent mutual funds

GREG MCARTHUR › SECURITIES REGULATION REPORTER
PUBLISHED JANUARY 24, 2020
FOR SUBSCRIBERS

BDO Canada LLP has agreed to pay a $3.5-million fine as part of a settlement with the Ontario Securities Commission, admitting it did not properly audit two mutual funds later found by the regulator to be fraudulent.

The fine stems from BDO's auditing of mutual funds offered by Crystal Wealth Management Systems Ltd., a Burlington, Ont.-based investment company that was later found by the OSC to have overstated the value of its assets – which Crystal Wealth had claimed were worth $193-million across 15 funds.

In 2017, Crystal Wealth founder and chief executive Clayton Smith admitted in a settlement with the OSC that he fraudulently managed two of those funds, Crystal Wealth Media Strategy and Crystal Wealth Mortgage Strategy. The funds were valued at $50-million and $40-million, respectively.

On Friday in a hearing before an OSC panel, BDO agreed that, when it signed off on the financials of both funds in 2014 and 2015, it did so without completing the necessary controls. The accounting firm, which has 125 offices across Canada, also acknowledged it did not have "sufficient appropriate audit evidence" of the existence of the funds' assets, nor did it exercise "sufficient professional skepticism" when reviewing the funds' records.

The securities regulator has not often taken action against accounting firms, but the settlement is not without precedent. In 2014, Ernst & Young LLP agreed to an $8-million settlement with the OSC for failing to catch problems with two publicly listed companies with operations in China, one of which was Sino-Forest Corp.

"This settlement holds BDO accountable for failing to adequately carry out its role as a gatekeeper," Jeff Kehoe, the OSC's director of enforcement, said in a statement.

At Friday's OSC settlement hearing, Doug McLeod, a lawyer for BDO, said it was noteworthy that the case against BDO did not include allegations of systemic failure. The problem was isolated to one audit team in one field office, Mr. McLeod said.

In an e-mailed statement late Friday, BDO said it has made "continuous efforts to improve our audit policies and

Crystal Wealth's 1,250 investors.

At Friday's hearing, OSC lawyer Anna Huculak revealed that the regulator intends to redirect $2.5-million from BDO's fine to Crystal Wealth investors. That payment is contingent, and part of, an expected settlement between BDO and Grant Thornton that has yet to be finalized in court, Ms. Huculak said. Simon Bieber, the lawyer for the receiver, said he could not comment on the proposed settlement.

As part of its total penalty, BDO was also ordered to pay the OSC's costs, which are $500,000.

The $2.5-million is a rare win for Crystal Wealth investors, who have received a spate of bad news about their recovery prospects. The receiver has recovered $65-million, but in its last report to the court, Grant Thornton said it had "significant concerns over the quality and ultimate collectability of approximately $50.25-million."

On Jan. 8, an Ontario court declined to certify a proposed class action brought by Crystal Wealth investors against BDO – a necessary step to proceed with such a claim.

Ontario Superior Court Justice Paul Perell ruled that Crystal Wealth's investors cannot proceed with a class action because they failed to meet one of the five tests for certifying such an action – what the courts refer to as having a proper "cause of action."

The investors pleaded that BDO was negligent and owed them a duty of care. Justice Perell ruled that, although BDO was liable to Crystal Wealth for alleged negligent auditing, BDO "does not have a proximate duty of care" to the Crystal Wealth investors.

Mr. Bieber, the receiver's lawyer, is also the lawyer for the investors in the proposed class action, and said investors will appeal Justice Perell's ruling.

Bob Tompson, a Crystal Wealth investor in Enderby, B.C., said in an interview that the proposed class action had given him hope, and that the certification decision was like a "kick in the teeth." Mr. Tompson, a retired mechanic and heavy equipment operator, and his wife invested $207,000 in two Crystal Wealth funds. The couple has received back about $55,000, he said.

As part of his 2017 settlement with the OSC, Mr. Smith was ordered to pay a fine of $250,000 and was barred from participating in the securities industry. He admitted that Crystal Wealth's mortgage fund transferred nearly $895,000 to companies owned or linked to him – including a yoga studio owned by his former common-law wife.

Mr. Smith also agreed that Crystal Wealth's Media Fund, which was supposed to "generate a high-level of interest income" from loans to film and television production companies, made several investments with media firms, which in turn, made transfers back to Mr. Smith or companies linked to him totalling $2.9-million.

In its efforts to recover money for investors, the receiver questioned Mr. Smith in 2018. When asked what he was doing for a living, he said he was working part-time with his brother as a roofer.

#4 @ 12 pm

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE 30th	)	TUESDAY, THE 25TH
MR. JUSTICE GLENN HAINEY JUNE, 2020	)	DAY OF AUGUST, 2020

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

ENDORSEMENT

UPON READING the Factum of the Plaintiffs and the Factum of the Defendant Kevin Baumann;

AND UPON HEARING the submissions of counsel for the Plaintiffs and of the Defendant Kevin Baumann;

1. THIS COURT ORDERS that the Defendant Kevin Baumann is prohibited by section 137.1(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, from bringing a motion to amend his Statement of Defence and adding a Counterclaim.

(Signature of Judge)

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

January 28, 2021

THE HONOURABLE) ~~TUESDAY, THE 25th~~
)
MR. JUSTICE GLENN HAINEY) ~~DAY OF AUGUST, 2020~~

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

ORDER

UPON READING the Factum of the Plaintiffs and the Factum of the Defendant Kevin Baumann;

AND UPON HEARING the submissions of counsel for the Plaintiffs and of the Defendant Kevin Baumann;

1. **THIS COURT ORDERS** that the Defendant Kevin Baumann is prohibited by section 137.1(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, from bringing a motion to amend his Statement of Defence and adding a Counterclaim.

(Signature of Judge)

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JAN 25 2021

PER / PAR:

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

THE CATALYST CAPITAL GROUP et al - and - WEST FACE CAPITAL INC et al

Plaintiffs | Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Moving Catalyst Parties

CODE OF CONDUCT AND ETHICS

1. Purpose

This code of conduct ("**Code**") provides general guidance on the conduct expected of directors, officers, employees, contractors and consultants (collectively, "**Team Members**") of Callidus Capital Corporation ("**Callidus**"). Each Team Member must be familiar with and adhere to the provisions of this Code, but must also recognize that this Code simply provides general guidance and is not a substitute for good judgment. No statement can offer a complete guide to cover all possible situations that might be encountered, and all Team Members must exercise judgment in applying the principles embodied in this Code to any particular situation. This Code is designed to promote the following:

- awareness of areas of ethical risk;
- honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and/or professional relationships;
- a culture of honesty and accountability;
- compliance with applicable governmental laws, rules, regulations and company policies; and
- the prompt internal reporting to an appropriate person of violations of the Code.

This Code has been adopted by the board of directors of Callidus (the "**Board**"). The Board reserves the right to add to, modify and rescind all or any portion of this Code at any time and from time to time. This Code governs in the event of any conflict or inconsistency between this Code and any other materials distributed by Callidus. If any law conflicts with a policy set out in this Code, Team Members must comply with the law.

2. Compliance with Law

Team Members will comply with all applicable laws, rules and regulations and to be able to recognize potential liabilities, seeking legal advice where appropriate. Without limitation, all Team Members shall comply with all laws, rules and regulations prohibiting insider trading. Insider trading is both unethical and illegal and will be dealt with decisively.

Callidus expects all Team Members to comply with this Code and all other company policies.

Team Members must not only comply with the requirements of applicable laws, rules, regulations, policies and this Code, they must ensure that their actions do not give the appearance of violating this Code or indicate a casual attitude towards compliance with laws, rules, regulations, policies and this Code.

If there are any doubts as to whether a course of action is proper or about the application or interpretation of any legal requirement, Team Members should discuss these concerns with David Reese or Jim Riley (each, a "**Designated Person**").

3. Commercial Decision Making

Decisions are to be made in Callidus' best interest, completely avoiding any illegal understandings or agreements with any other person, organization or company.

Conduct will be avoided if it violates any laws or violates the spirit of any laws or the spirit of this Code. Violating laws which prohibit any kind of understanding or agreement with others regarding prices, terms of sales, terms of provision of services, division of markets, allocation of business or any other practice which illegally restrains competition is particularly prohibited. From time to time, a Designated Person will review the law in this area with those groups of Team Members most closely affected.

4. Disclosure of Information

Confidential information is a valuable asset. Team Members should assume that all information that they receive as part of their work for Callidus is confidential, unless they know that such information is lawfully in the public domain or is otherwise approved for general disclosure. Team Members must also understand that Callidus comes into possession of confidential information belonging to third parties, and that Callidus and all its Team Members will be contractually and legally bound to maintain strict confidentiality over such information. In addition, it is important that Team Members observe reasonable measures to ensure security and control of any sensitive business information that is in documentary or other tangible form that is in their possession because of their work with Callidus.

Team Members must continue to protect all Callidus confidential information, even after they have concluded their work with Callidus.

Confidential information is not to be disclosed by any Team Member unless such disclosure is properly authorized or legally mandated. Questions regarding the appropriateness of disclosing particular information should be discussed with a Designated Person.

Confidential information shall not be used for personal gain.

5. Prohibited Payments

Callidus Team Members are prohibited from paying or accepting any bribe, kickback or any other unlawful payment or benefit from any person (including corporations) in order for that person to secure any concession, permit, loan or any other favourable treatment. Callidus Team Members will report any such attempted actions to a Designated Person.

6. Fair Dealing

Each Team Member shall endeavour to deal fairly with Callidus' customers, suppliers, competitors and employees. No Team Member is permitted to take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair dealing practice.

7. Conflicts of Interest

A conflict of interest occurs when an individual's private interest interferes in any way – or even appears to interfere – with Callidus' interests. A conflict situation can arise when a Team Member takes actions or has interests that may make it difficult to perform his or her work objectively and effectively. Conflicts of interest also arise when a Team Member, or a member of his or her family, receives improper personal benefits as a result of his or her position in Callidus. Loans to, or guarantees of obligations of, a Team Member or a member of his or her family are of special concern.

Except as provided for in this Code, every Team Member must avoid any conflict of interest. Every Team Member shall disclose all circumstances that constitute an actual or apparent conflict of interest. Disclosure shall be made, in the case of directors and officers, to Callidus' nominating, compensation and corporate governance committee (the "**Compensation and Governance Committee**"), and in the case of employees, to a Designated Person. When in doubt about whether a conflict of interest exists, directors, and officers should discuss the issue with the Compensation and Governance Committee and employees should discuss the issue with a Designated Person and receive instruction.

Team Members who find themselves in a conflict of interest must abstain from voting or taking any other action that may impact the outcome of the activity or business transaction in question. Full disclosure enables Team Members to resolve unclear situations and gives an opportunity to dispose of or appropriately address conflicts of interest before any difficulty arises. However, if the Compensation and Governance Committee determines that a potential conflict cannot be cured, the individual will resign from the board of directors of Callidus, if a director, or from their position with Callidus, if an officer or employee.

Callidus acknowledges that the nature of the businesses it carries on may give rise to potential conflicts of interest in the performance of their duties by the Team Members in the normal course of business for Callidus.

Callidus further acknowledges that, to the extent that this Code specifically contemplates and provides a means to address such potential conflicts of interest, the obligations of the Team Members in relation thereto shall be fully discharged through compliance with the applicable provisions of this Code, and that no greater or more extensive obligations will be implied on their part in relation to such potential conflicts of interest.

If a conflict of interest exists, and there is no failure of good faith on the part of the Team Member, Callidus' policy generally will be to allow a reasonable amount of time for the Team Member to correct the situation in order to prevent undue hardship or loss. However, all decisions in this regard will be in the discretion of the Designated Person, whose primary concern in exercising such discretion will be in the best interests of Callidus.

Where necessary, an employee, officer or director may refer an individual situation to a Designated Person, who may recommend actions needed to eliminate or address a conflict of interest.

8. Outside Business Interests

In this discussion, "business activity" refers to ownership, participation in decision-making as a member of a board of directors or as an officer, or engagement as an advisor or consultant or as an active employee in any position.

Team Members should declare their outside business activities at the time of engagement and are required to limit outside business activities to avoid any conflicts of interest or other breaches of the provisions of this Code. Notwithstanding any outside business activities, Team Members are required to act in the best interests of Callidus.

If any interest or relationship arises after their engagement, which will or may give rise to a conflict of interest, the individual shall make immediate disclosure of all relevant facts to a Designated Person.

Callidus recognizes that its Team Members have perfectly legitimate outside interests; however, there may also be situations that could be perceived as a conflict of interest no matter how innocent the intentions of the Team Member. When in doubt about whether a conflict exists, Team Members should discuss the issue with a Designated Person**.**

9. Corporate Opportunities

Team Members are prohibited from: (a) taking for themselves personally opportunities that are discovered through the use of corporate property, information or position; (b) using corporate property, information of position for personal gain; and (c) competing with Callidus as a whole without having first disclosed the nature of the opportunity to the Compensation and Governance Committee as well as any conflicts of interest, and receiving directions from the Compensation and Governance Committee as to the dealing with such corporate opportunity. Team Members owe a duty to Callidus to advance its legitimate interests when the opportunity to do so arises.

Directors, officers, or employees of Callidus may not invest in or trade in shares of a competitor or an actual or potential business partner of Callidus where such investment or trading may appear or tend to influence business decisions or compromise independent judgment. This prohibition does not apply to shares of a publicly traded company where such investment or trading relates to less than five percent of its issued shares. However, investing or trading in Callidus' competitors or business partners remains subject to applicable laws and regulations regarding insider trading, including prohibitions against trading in possession of material non-public information regarding such companies, whether such information is gained in the course of employment with Callidus or otherwise.

10. Insider Trading

Some of the information that Team Members receive as part of their work may constitute "inside information" for the purposes of civil and criminal legislation in jurisdictions in which Callidus carries on activities. In particular, all information that Team Members come across as part of the work with the Callidus should ordinarily be considered as "inside information" insofar as Callidus' own shares are concerned.

Accordingly, Team Members must never make use of such information for the purposes of dealing, or encouraging another person to deal in, shares or other securities whose price may be

affected by such information. Such securities may include both private securities (which are not publicly traded), and in particular, public securities that are traded on stock exchanges or futures exchanges.

There are serious potential criminal and civil penalties, including imprisonment and substantial fines, which can be levied against individuals who are involved in any insider trading.

11. Use of Company Property

Callidus' assets must not be misappropriated for personal use by Team Members. Team Members shall protect Callidus' assets and ensure their efficient use. Theft, carelessness and waste have a direct impact on Callidus' profitability. All Callidus assets should be used for legitimate business purposes.

12. Retention of Records

It is Callidus' policy to cooperate with all governmental investigative authorities. Team Members shall retain any record, document or property of Callidus that is known to be the subject of an investigation or litigation. It is a violation of this Code for Team Members to knowingly alter, destroy, conceal, cover up, falsify or make a false entry in any record, document or tangible object with the intent to impede, obstruct or improperly influence the investigation or proper administration of any matter within the jurisdiction of any federal, provincial, state or municipal department or agency, or any bankruptcy, or in relation to or contemplation of any such matter or case.

13. Employment Practices, Health, Safety and Environment

Team Members will ensure that all Team Members are treated with respect and dignity. Callidus will not tolerate discrimination or harassment against other Team Members or those with whom it conducts business based on race, nationality, ethnic origin, colour, religion, age, gender, marital status, family status, sexual orientation, political belief or disability.

Callidus is committed to assuring fair employment, including equal treatment in hiring, training, compensation, termination and corrective actions. Callidus will establish and maintain a safe and healthy working environment for its Team Members and conduct its operations in an environmentally responsible manner in accordance with applicable laws, regulations and industry standards. Callidus is committed to keeping its workplaces free from hazards. Threats or acts of violence or physical intimidation are prohibited. To protect the safety of all Team Members, Callidus' assets, the environment, and the communities within which Callidus works, Team Members must report for work fit to perform their duties and free from the influence of any substance that could prevent them from conducting their work activities safely, effectively, and in compliance with all applicable laws.

14. Reporting Financial Transactions

The books and records of Callidus will reflect all business activities and transactions in a timely, fair and accurate manner. All assets and liabilities of Callidus will be properly recorded in order to reflect and maintain the business operations and activities of Callidus. Compliance with applicable and generally accepted accounting standards (including International Financial Reporting Standards as applicable), financial reporting standards and securities laws shall be

observed in the preparation and disclosure of all financial records and information. All business transactions shall be properly authorized, recorded and supported by accurate documentation and in reasonable detail to ensure that the best interests of Callidus and any confidential information or other corporate information belonging to Callidus is protected.

The intentional creation of any false or misleading entries with respect to any business activity or transaction is strictly prohibited and will be subject to appropriate disciplinary action, up to and including termination of employment or retainer for cause in appropriate circumstances.

15. Responsibility

Each Team Member must be familiar with and adhere to the provisions of this Code and to the standards set out in the applicable policies of Callidus.

Upon request, each Team Member must also complete the Code of Conduct and Ethics Certification attached to this Code as Schedule "A" and submit it to a Designated Person.

Failure to adhere to this Code may lead to disciplinary action, including dismissal or removal from office in appropriate circumstances.

16. Where to Seek Clarification

Directors and officers should refer questions relating to this Code or its application to a particular situation to a Designated Person.

All disclosure to a Designated Person shall be kept strictly confidential unless, in the sole opinion of such Designated Person, the matter disclosed constitutes an actual or potential threat of serious harm to Callidus, to another Team Member or to the general public.

Employees should refer questions relating to this Code or its application to a particular situation to a Designated Person. If the issue is one that the employee feels unable to discuss with a Designated Person, the matter should be discussed with the Compensation and Governance Committee.

If, in the course of performing their duties, Team Members identify a situation or obtain information in which there is a potential conflict between the interests of Callidus, the Team Members shall, with the prior consent of the Compensation and Governance Committee, be entitled to obtain an independent opinion from a suitably qualified professional competent to express an opinion as to the subject matter of the conflict of interest, and the Team Member shall have discharged their obligations to Callidus under this Code by compliance with the opinion. The compliance by the Team Members with the aforesaid opinion shall preclude any claim by Callidus against each other or against the directors or officers of Callidus for a breach of the terms of this Code, but shall not preclude any subsequent claim by Callidus for determination of the subject matter of the conflict of interest and recourse accordingly.

17. Non-Compliance Reporting

Directors and officers are required to report breaches of this Code, including violations of laws, rules, regulations or company policies, to a Designated Person.

Employees are required to report breaches of this Code, including violations of laws, rules, regulations or company policies, to their immediate supervisor or, if they are not comfortable reporting a violation to, their immediate supervisor, to a Designated Person.

Employees reporting in good faith a suspected breach of this Code are protected from reprisal, such as dismissal, demotion, suspension, threats, harassment and discrimination. Any reprisal would be a breach of this Code.

18. Waivers from Code

An employee, officer or director may request an exemption from this Code including the conflict of interest policy.

In extraordinary circumstances and where it is clearly in Callidus' best interest to do so, the Board may grant to a Team Member an exemption from one or more requirements of this Code following full and detailed disclosure by such Team Member of all material and relevant circumstances respecting the matter. Conditions may be attached to this exemption.

If a Team Member is granted an exemption from this Code, the Team Member must refrain from participating in any decision-making respecting the subject matter of the conflict of interest except to the extent specifically authorized in the decision granting the exemption. The Team Member granted the exemption accepts that public disclosure of the granting of any such exemption may be required by applicable securities laws, regulations, policies or guidelines.

Approved by Board effective April 23, 2014.

CALLIDUS CAPITAL CORPORATION
CODE OF CONDUCT AND ETHICS CERTIFICATION

I have read and understand this Code of Conduct and Ethics (the "**Code**") of Callidus Capital Corporation ("**Callidus**"). I agree that I will comply with the policies and procedures set forth in this Code. I understand and agree that, if I am a manager, employee or contractor of Callidus, my failure to comply in all respects with Callidus' policies, including this Code, is a basis for appropriate disciplinary action, up to and including termination of employment or retainer for cause. I agree to promptly notify David Reese or Jim Riley and, submit a written report to such person describing any circumstances in which:

1. I have reasonable basis for believing that a violation of this Code by any Team Member has occurred;

2. I have or any member of my family has, or may have, engaged in any activity that represents a breach of my obligations under this Code;

3. I have or any member of my family has, or may have, any interest in any business or activity that represents a breach of my obligations under this Code; or

4. I or any member of my immediate family is contemplating any activity or acquisition that could reasonably lead to a breach of my obligations under this Code.

I am unaware of any violations or suspected violations of this Code by any employee or contractor except as described below or on the attached sheet of paper. (If no exceptions are noted, please initial the space provided below.)

_____ No exceptions

To the best of my knowledge and belief, neither I nor any member of my immediate family has any interest or affiliation, or has engaged in any activity, which represents a breach of my obligations under this Code or would otherwise create a conflict of interest, or a perceived conflict of interest, between my own personal interests and the interest of the Callidus, except as described below or on the attached sheet of paper. (If no exceptions are noted, please initial the space provided below.)

_____ No exceptions

I am aware that this signed certification will be filed with my personal records.
.

_____ _____
Type or Print Name Signature

_____
Date

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

and

WEST FACE CAPITAL INC. et al

REPLY BRIEF OF CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION
(Teleconference with Justice Hainey--10 am Wednesday May 13, 2020)

1. This Reply Brief addresses the following three issues raised in Mr. Baumann's May 7, 2020 Brief (1) his objection to the December 20, 2019 Confidentiality Protocol (2) Mr. Baumann's motion to amend his Statement of Defence and Counterclaim by adding new parties to it and (3) alleged non-cooperation of Plaintiffs' counsel.

Issue 1: Confidentiality Protocol

2. At various times leading up to the exchange of Affidavits of Documents, the Plaintiffs indicated that there needed to be a confidentiality protocol for certain documents to be produced. On December 20, 2019, a suggested protocol was circulated and is appended as Attachment A. Further communications ensued (Attachment B) and by December 31, 2019 an interim, without prejudice Confidentiality Protocol had been agreed to by most parties.

3. As Baumann's May 7, 2020 Brief confirms, he initially agreed with the protocol but then rescinded his consent.

4. In fact, Baumann communicated his consent to the protocol at approximately 930 pm on December 31, 2019. By then it was too late to send him the Schedule A documents that night. Plaintiffs' counsel communicated with Mr. Baumann regarding his consent on January 2, 2020 but he decided to withdraw it on January 3, 2010. See Attachment C for more details about the timing and circumstances relating to the withdrawal of Baumann's consent.

5. Further discussions followed with counsel for WestFace in January and early February 2020 regarding an extension of the protocol on practical terms. This resulted in an agreement in principle which was supported and circulated by Mr. Milne-Smith in early February 2020 (Attachment D).

6. Subsequent steps were taken to arrange a case conference about the protocol, which culminated in the Request Form referred to in paragraph 24 below.

7. Contrary to what Bauman has alleged in numerous emails about this topic, the purpose of the protocol is not to prevent anyone from using any Schedule A documents in this case. Rather the intent is accurately summarized in the following March 13, 2020 email to the Court:

> **West Face and Catalyst, and virtually all of the other parties, have agreed, on a without prejudice basis, to a protocol applicable to documents which are subject to pre-existing third party contractual confidentiality provisions, or in respect of which other confidentiality concerns exist. The protocol provides for the designation of such documents by the producing party. This protocol is similar to the implied undertaking rule, but adds very simple additional protections, which would prevent unilateral filing of such designated documents on the public record, and or their posting on social media, without reasonable advance notice so that a formal protective order could be sought. In practical terms, this is consistent with the case management direction already in place for the filing of motions in this case.**

8. This matter was to be addressed at a 9:30 attendance as referred in the Request Form of March 17, 2020 (Attachment E) which Baumann consented to. As noted below, the Coronavirus intervened.

9. The Plaintiffs intended to ask the Court to consider approving the current protocol on May 13, 2020, subject to a reservation of rights, a broad claw back clause and certain other qualifications, in accordance with a draft order to be circulated under separate cover.

10. To be clear, the current protocol did not does not seek any sealing order. Rather the net effect of the December 20 letter, together with the correspondence and emails which followed, adds up to this:

    (1) any party can identify/designate Schedule A documents which that party believes warrants confidential/protective treatment;

    (2) prior to any such documents being placed on the public record—via Court filing or social media--the party who had designated any documents under the protocol would be given reasonable advance notice;

    (3) the purpose of such notice was/is to give an opportunity for the affected party to seek a sealing order or some other form of protective order;

(4) any party who agreed to or followed this protocol would not be waiving any rights to object to any motion that might be made to seek a confidentiality order or any other form of protective order;

(5) the onus to obtain any such order always remains with the party seeking same, and any motion for such an order would be decided based upon the usual principles, unaffected by the protocol, and,

(6) the designation of any documents under the protocol will not interfere with any cross-examinations in the SLAPP Motions—among other things, if documents designated under the protocol were put to witnesses on cross and were sought to be placed on the public record, any party objecting to this would have to apply for an appropriate order.

11. Providing advance notice (sub-paragraph 10(2) above) is consistent with and in substance adds nothing to the long standing case management protocol already ordered by Justice Hainey requiring the vetting and approval of prospective motions before they are delivered. In addition, the stay resulting from the SLAPP Motions would result in similar advance notice being provided.

12. We did not believe that the Court's consideration of this limited protocol would be contentious. However, if the Court concludes that this protocol (as opposed to any potential future motion for a sealing or protective order) cannot be dealt with on May 13, a teleconference date for a formal motion between now and June 15, 2020 will be requested.

13. Regardless of any issues with respect to the protocol, in so far as Baumann is concerned, any production of the Plaintiffs' Schedule A documents to Baumann should occur on the basis that there be a Court order requiring that prior to:

(1) filing such documents on the public record,or,

(2) at any time, posting such documents on any website or other form of social media or directly or indirectly disseminating such documents publicly,

Baumann must first provide counsel for Catalyst and Callidus with reasonable advance notice in writing, sufficient to enable an application to be made to Court for an appropriate order, on such terms as may be advised.

14. This is because (i) Baumann has twice been held in contempt of court by the Alberta Court of Queen's Bench ("Alberta Court") (ii) the Alberta Court has found that Bauman sought and obtained a stay order in Alberta on the basis of representations that Baumann knew were false (iii) Part 3 of Baumann's prior (March 31, 2020) brief to this Court suggests that he intends to use the productions from Plaintiffs' Affidavits of Document in the Alberta Court proceedings, and (iv) Baumann maintains a website where he posts documents from the Callidus/Catalyst

litigation - his past conduct makes it clear an order enforceable by the Court is needed to preserve confidentiality.

15. See Attachment F which contains the documents supporting Paragraph 14 (i)-(iv).

Issue 2: Motion to Amend Baumann's Pleadings

16. After serving an anti-SLAPP motion, Baumann attempts to bring a motion to amend his pleading and to add new parties such as KPMG.

17. Baumann's Motion to amend his pleading is prohibited pursuant to subsection 137.1(5) of the *Courts of Justice Act*:

> **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.

18. On the merits, there are several reasons why Baumann's Motion to Amend is fatally flawed:

    (1) the proposed amendments relate to issues arising out of Callidus loans to Baumann's Alberta companies and his guaranty;

    (2) these issues are being litigated before the Alberta Court;

    (3) in fact, over two years ago, Baumann amended his counterclaim in the Alberta Court to include claims against two of the proposed new Defendants (Scott Sinclair and Sinclair Range) in respect of the same events and circumstances sought to be raised in the proposed amendments;

    (4) there is no basis in law for any claim against KPMG or MNP under the *Hercules* and *Livent* principles, and,

    (5) the allegations are demonstrably beyond the applicable limitation periods.

19. With respect to the statements made in sub-paragraphs 18 (1)-(3) above, see the documents appended as Attachment G.

20. In addition, the materials that Baumann has filed in relation to his proposed amendments allege that he has just learned of the circumstances supporting the proposed claims but fail to disclose his 2+ year old Alberta Court amendments suing the Sinclair defendants. These representations and omissions are, to be charitable, disingenuous.

21. Further, Baumann's motion is not urgent, will be contested and, in any event, is stayed by the pending SLAPP Motions.

Issue 3: Alleged Non-Cooperation—Motion to Amend

22. In his Brief, Baumann suggests that the plaintiffs have not co-operated in obtaining an attendance relating to his proposed amendments. This is inaccurate.

23. On February 9, 2020, Baumann advised that he wished to amend his pleading and asked that this issue be added to a proposed 9:30 attendance before Your Honour. Baumann stated that the details of his impending pleading amendment request would be "going to the Service List soon".

24. On February 13, 2020 Baumann circulated his proposed amended pleading to the Service List. On February 20, 2020 Baumann circulated a 22 page Notice of Motion, which made reference to a draft affidavit of the same date (which was not circulated). This Notice of Motion was returnable on Thursday February 27, 2020, a date selected by Baumann without first confirming Plaintiffs' counsel's or Your Honour's availability.

25. Plaintiffs' counsel advised Baumann that February 27 was not a suitable date, but that counsel would attempt to arrange a 9:30 attendance before Justice Hainey on the next available date following Monday, March 2, 2020.

26. Your Honour was not sitting until the week of March 16. Plaintiffs' counsel sought your availability during the week of March 23 and circulated an email with proposed dates for that week. This proposed timing was acceptable to Baumann.

27. On March 15, 2020, the coronavirus announcement by Regional Senior Justice Morawetz made it impossible to proceed with this 9:30 attendance. Further communications occurred and on March 17, 2020 Plaintiffs' counsel filed the 930 Request Form referred to above. This Request Form did not name a return date and or seek an emergency teleconference . As noted above, Baumann consented to this 930 Request Form.

28. In response to the above Request Form, the Commercial Court office advised by email on March 24 that "We are not offering dates for non urgent matters at this point. Please follow up after June 1 via e-mail." (See Attachment H). As the Court is aware, this matter has since then been addressed by Justice McEwen and the issues raised by Baumann have been returned to Your Honour. In short, the suggestion of a lack of co-operation is without merit.

All of which is respectfully submitted, this 12 day of May 2020

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Reply Brief of Catalyst and Catalyst (May 13, 2020 Teleconference)

Attachment "G"

Form 21
[Rule 3.57]
Clerk's stamp

Court File Number	1501-05314
Court	COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre	CALGARY
Plaintiff by Counterclaim	KEVIN BAUMANN
Defendants by Counterclaim	CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR
And	
Court File Number	1501-05769
Court	COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre	CALGARY
Plaintiff by Counterclaim	KEVIN BAUMANN
Defendants by Counterclaim	CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR

Document **COUNTERCLAIM**

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Lawyers for the Plaintiff by Counterclaim Kevin Baumann
File No.: 01029563-0001

NOTICE TO DEFENDANTS BY COUNTERCLAIM

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

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

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

Statement of facts relied on:

1. The Defendant Kevin Baumann ("**Baumann**" or the "**Plaintiff by Counterclaim**") repeats each and every allegation of fact contained in his Statements of Defence in Queen's Bench Action Nos. 1501-05314 and 1501-05769, which Actions were commenced by Callidus Capital Corporation ("**Callidus**").

(I) The Parties

2. Baumann is an individual businessman residing in Bluffton, Alberta. Until his resignation on April 21, 2015, he was President, officer, and director of Alken Basin Drilling Ltd. ("**Alken**" or the "**Company**") which was founded in 1982 and purchased by Baumann in or about February, 2013.

3. Alken is a private company that provides water well drilling and associated services to oil and gas producers across Western Canada.

4. Baumann holds 60 common shares and 1,602,688 Series 1 Preferred Shares in Alken collectively amounting to 60% of the Company's shares.

5. Callidus is an Ontario corporation in the business of high risk distressed debt lending. Callidus extended a loan to Alken pursuant to an agreement dated and effective as of March 31, 2014 (the "**Credit Agreement**"), under which Callidus granted certain credit facilities to Alken bearing an aggregate credit limit of $28,500,000.00 at an interest rate of 18% (21% default rate) (the "**Credit Facilities**").

6. Scott Sinclair ("**Sinclair**") is an individual who resides in Toronto, Ontario. Sinclair is a Managing Director of Range Corporate Advisors. On April 21, 2015, Sinclair was appointed and remains the President of Alken.

7. As further detailed below and as will be further particularized at the trial of this Action, by virtue of Callidus' placement of Sinclair within Alken, Sinclair and Callidus together, or Callidus through Sinclair acting as its agent, were the legal and *de facto* controlling mind(s) or principal(s) of Alken.

8. Callidus and Sinclair are collectively referred to herein as the "**Defendants by Counterclaim**".

(II) Callidus' Negligent or Fraudulent Misrepresentation Induced Baumann

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

10. Callidus advertised its credit facilities as bearing few, if any, covenants, and as being tailored to companies in financial distress.

11. In reliance on Callidus' representations that it provided financial flexibility to distressed companies, Alken severed its relationship with Servus and commenced negotiations with Callidus.

12. Negotiations between Alken and Callidus were primarily conducted by Baumann on behalf of Alken, and by James Hall ("**Hall**"), Craig Boyer ("**Boyer**"), Mark Wilk ("**Wilk**"), Newton Glassman ("**Glassman**") and Dustin White ("**White**") on behalf of Callidus. Hall, Boyer, and Wilk were, at all material times hereto, Vice-Presidents at Callidus.

13. During negotiation of the Credit Agreement, Callidus, through its representatives Hall, Boyer, Wilk, Glassman and White and otherwise, represented to Baumann and Alken, among other things, that:

    (a) the Credit Facilities would not require as security personal guarantees of Baumann or the other Alken shareholders;

    (b) the Credit Facilities were designed to provide companies in distressed situations or in shifting markets – Alken's precise circumstances – with considerable financial flexibility; and

    (c) the reason their loans bore interest rates as high as 18-20% per year was that they did not require personal guarantees as collateral and they provided considerable financial flexibility in exchange.

    (the "**Representations**")

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

14. However, at the eleventh hour, and in breach of its representations and its duty of care to Baumann, Callidus suddenly changed its position and required personal guarantees from all of Alken's shareholders.

15. In breach of its representations and its duty of care to Baumann, Callidus demanded a personal guarantee from Baumann bearing a limit of $6,000,000.00.

16. In further breach of its representations and its duty of care to Baumann, Callidus also demanded a mortgage of real property then in Baumann's name, which was appraised at $6,000,000.00.

17. In further breach of its representations and its duty of care to Baumann, Callidus demanded a pledge of all of Baumann's shares in Alken in favour of Callidus, as further security for Alken's indebtedness to Callidus under the Credit Agreement.

18. Alken was not in a position to negotiate. The parties occupied grossly unequal positions of bargaining strength. Alken was distressed, had terminated its previous credit facilities in reliance on Callidus' representations, and required immediate access to working capital to meet its suppliers', customers', and payroll demands failing which it would not be able to continue as a going concern. In these circumstances, Callidus exerted undue influence in procuring the personal guarantee, mortgage, and share pledge of Baumann.

19. As a result, on March 31, 2014, in reliance on Callidus' representations and induced thereby, Baumann caused Alken to enter the Credit Agreement with Callidus,

whereby Baumann was personally liable pursuant to the personal guarantee associated with the Credit Agreement.

20. The Credit Agreement was executed by Baumann on behalf of Alken, and by David Reese, Chief Operating Officer of Callidus, and James Riley, Director and Secretary of Callidus.

21. Pursuant to a guarantee dated March 31, 2014 between Callidus and Baumann, Baumann guaranteed all obligations of Alken to Callidus under the Credit Agreement to a limit of $6,000,000.00 (the "**Guarantee**").

22. By a mortgage dated March 31, 2014, and registered at the Land Titles Office for Red Deer County, Alberta, on April 8, 2014, as Instrument No. 142 102 977, Baumann mortgaged to Callidus certain lands having been appraised at $6,000,000.00 (the "**Mortgage**").

23. Pursuant to a pledge and security agreement (the "**Pledge and Security Agreement**") dated March 31, 2014, Baumann pledged, among other things, all of his present and future rights, title, and interest in and to his shares in Alken. On or about May 15, 2014, following the amalgamation of Alken with 1711760 Alberta Ltd., another company Baumann owned, a further pledge and security agreement (the "**Acknowledgement**") was formed under which the initial share pledge to Callidus pursuant to the Pledge and Security Agreement was confirmed (collectively, the Pledge and Security Agreement and Acknowledgement are referred to as the "**Pledge and Security Agreements**").

24. A special relationship giving rise to a duty of care existed between Callidus and Baumann because:

    (a) Callidus had a direct financial interest in the transaction in respect of which the Representations were made;

    (b) Callidus and/or its representatives possessed special skill, judgment, or knowledge pertaining to debt financing;

    (c) the advice or information constituting the Representations was provided in the course of Callidus' business;

    (d) the Representations were given deliberately, in the context of commercial negotiations, and not on a social occasion; and,

    (e) the Representations were given in response to a specific enquiry or request by Baumann.

25. Callidus' breach of the Representations resulted in a breach of its duty of care.

26. These breaches improperly induced Baumann to execute the Credit Agreement as Alken's representative, prevented Baumann from protecting his personal position, increased Baumann's personal liability contrary to the understanding between the parties, jeopardized his shareholdings in the Company, and harmed his position as a creditor to the Company by virtue of various shareholder loans he provided.

27. Callidus made the Representations fraudulently or negligently, as may be proven at the trial of this Action, in order to induce Baumann to cause Alken to enter into the Credit Agreement with Callidus with a view of profit and the prospect of assuming control or the assets of Alken at a liquidated price, as further detailed below and as will be further particularized at the trial of this Action.

(III) Callidus' Breach of Fiduciary Duty

28. Contemporaneous with the execution of the Credit Agreement, a fiduciary relationship arose and has persisted as between Callidus and Baumann, and as between Callidus and Alken. This relationship arose from the terms of the Credit Agreement and the nature of Callidus' performance under it, and as will be further particularized at the trial of this Action.

29. Pursuant to the Credit Agreement:

    (a) the monies made available thereunder were for use by Alken to:

        (i) provide working capital;

        (ii) payout its existing credit facilities; and

        (iii) reduce its indebtedness to certain debenture holders;

    (b) Alken made a number of covenants, representations and warranties, and assumed certain reporting obligations to Callidus regarding its finances;

    (c) Callidus has significant discretion regarding the disbursement of funds available under the Credit Facilities;

    (d) Callidus' loan is secured by, among other things, a first ranking security interest in all the assets of Alken, which were ascribed a forced liquidation value of $21,490,110.00 by an appraiser selected by Callidus; and

    (e) Baumann is a personal guarantor of all obligations of Alken to Callidus to a limit of $6,000,000.00.

30. In such circumstances:

    (a) Callidus as lender had scope for exercise of significant discretion and power;

    (b) Callidus can and in fact did unilaterally exercise that power or discretion so as to affect Baumann's and Alken's legal and practical interests; and

    (c) Baumann and Alken were peculiarly vulnerable to or at the mercy of Callidus.

31. In 2014-2015 Alken's operations were under significant liquidity pressures. Baumann, as Alken's President, had understood that in entering the Credit Agreement, Callidus intended to provide sufficient operating liquidity to increase operational revenues, and ultimately stabilize and improve Alken's working capital position. Instead, Callidus "drip fed" capital increases, while accumulating high interest charges and fees.

32. Between March 31, 2014 and in or about March 2015, and as contemplated by the Credit Agreement, Alken made multiple funding requests to draw on available monies from the Credit Facilities. Several of these requests were rejected by Callidus contrary to the terms of the Credit Agreement. The effect of these rejections was to prejudice Alken's relationships with its customers and suppliers, and further deteriorate its operations.

33. Collectively, the repeated and arbitrary denials of Alken's proper funding requests:

    (a) resulted in a deterioration of Alken's relationships with its customers and suppliers, which led to loss of work commitments and potential contracts;

    (b) caused Alken to have increasing difficulty in servicing its debt to Callidus and its debenture holders; and

    (c) ultimately stymied Alken's ability to recapitalize and pay out Callidus.

34. To date, Alken has paid Callidus in excess of $3,936,550.44 in interest and fees purportedly accrued under the Credit Agreement.

35. Callidus' failure to perform under the Credit Agreement and advance to Alken monies properly available under the Credit Facilities resulted in harm to:

    (a) Alken, in the form of, among other things, its operations significantly deteriorating and its share value dropping; and

    (b) Baumann, by exposing him to potential liability as the personal guarantor under the Credit Agreement, by deteriorating the value of his equity in Alken, by jeopardizing his ownership of his Alken shares, and by harming his position as a creditor to the Company by virtue of various shareholder loans he provided.

36. In the result, Baumann states that Callidus breached its fiduciary duty to Baumann and caused him damages.

(IV) Sinclair is Callidus' Agent

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

38. Callidus represented to Baumann that Sinclair would be an asset to the Company, that he was familiar with Callidus loan structures, and that he would liaise between Alken and Callidus. Baumann relied on these representations.

39. On December 3, 2014, Sinclair was retained by Alken pursuant to an engagement letter (the "**Engagement Letter**") executed that same day by Baumann and Michael Baumann on behalf of Alken.

40. The Engagement Letter provides, among other things, that Sinclair's services to Alken were to include:

(a) advising the Company generally;

(b) helping the Company manage its short term liquidity shortfall by assisting in the development and execution of an agreeable liquidity plan;

(c) helping the Company to turnaround its operations and financial performance by assisting in the development and execution of an agreeable turnaround plan;

(d) helping the Company prepare materials and a plan to attract new investment capital or debt to payout Callidus; and

(e) helping the Company with its business and strategic communications.

41. Pursuant to the Engagement Letter, Sinclair's fees for such services included an "Initial Work Fee" in the amount of $20,000.00, due and payable in advance of his commencing work, and a "Monthly Work Fee" of $15,000.00. Alken has paid Sinclair these amounts.

42. Baumann states and the fact is that Sinclair never performed the services Alken contracted him for.

43. Sinclair did not liaise on behalf of Alken. Sinclair did not assist in the development of any restructuring or other plan. Alken repeatedly submitted funding requests to Callidus through Sinclair – as Alken was advised by Callidus to do – but to no avail.

44. On or about January 31, 2015, Alken issued a termination letter to Sinclair terminating his engagement with Alken.

45. On or about February 19, 2015, following discussions with Callidus and on their urging, Sinclair was reinstated by verbal agreement. Following this, Sinclair continued to neglect the services the Engagement Letter contemplated him providing, while effectively acting as agent to Callidus.

46. Baumann states and the fact is that Callidus forced Sinclair upon Baumann and Alken knowing full well that Sinclair would act not as a dispassionate intermediary between the parties, but rather as Callidus' agent to effect Callidus' *de facto* control over Alken and its assets.

(V) Callidus' and Sinclair's Oppressive Conduct

47. On March 18, 2015, Callidus sent a letter to Alken, demanding immediate payment of Alken's indebtedness to Callidus. The letter cited the distressed state of the Alberta economy amongst the reasons for demanding repayment of the loan. Alken was unable to immediately satisfy the demand. At the time of this demand, Alken was not in default or otherwise in breach under the Credit Agreement.

48. On April 21, 2015, Baumann resigned from his position as President of Alken, though he remained the Company's majority shareholder. Baumann's resignation was communicated to Callidus that same day.

49. That same day, Sinclair was appointed President of Alken, a position he continues to hold. This finalized Callidus' efforts to install Sinclair as its agent within Alken and solidified its play to assume *de facto* or legal control of the Company.

50. The effect of Callidus' actions has been to systematically deteriorate the value of Alken for its sole benefit and, having maneuvered to assume control of the Company through the placement of Sinclair, Callidus now seeks to consolidate its position by engaging in oppressive conduct against Baumann, the Company's owner, majority shareholder, and shareholder creditor.

51. On May 26, 2015, Callidus, through its counsel, improperly demanded from Baumann his interest in and to his shares in Alken pursuant to the Pledge and Security Agreements. Baumann resisted the demand.

52. Baumann states and the fact is that Callidus demanded Baumann relinquish his shares in Alken to assume total and wrongful control of the Company.

53. Baumann advances this claim pursuant to Part 19 of the *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended from time to time (the "**ABCA**").

54. Baumann is a "complainant" within the meaning of s. 239(b)(ii) of the ABCA.

55. The actions of Callidus and Sinclair in respect of the conduct of the business and affairs of Alken are oppressive, unfairly prejudicial, and unfairly disregarded the interests of Baumann as security holder.

56. As a result of these oppressive acts, Callidus and Sinclair have caused serious harm and prejudice to Alken as well as to the rights and interests of Baumann as a security holder and creditor of the company.

57. Baumann is entitled to immediate relief from Callidus and/or Sinclair under the ABCA in order to remedy and redress past, present and ongoing oppression. In particular but without limitation, Baumann is entitled to immediate relief to rectify the state of corporate governance at Alken on a going forward basis. Baumann claims interim and final Orders restraining Sinclair from taking further actions as President, and removing Sinclair as President. Baumann claims Orders appointing an interim independent board of directors and President, and directing the convening of a shareholder meeting. Baumann claims interim and final Orders restraining Callidus from taking further actions through Sinclair as its agent inasmuch as those actions bear in any way upon Alken and its assets.

58. Particulars in this regard include the following:

    (a) the Defendants by Counterclaim's actions in repeatedly and improperly denying Alken's requests for funding under the Credit Facilities deteriorated the value of Alken to the sole benefit of Callidus and to the detriment of Baumann by making it increasingly difficult for Alken to service its debt to Callidus and thereby increasing the personal liability to Baumann;

    (b) Callidus forced Sinclair upon Baumann and Alken knowing full well that Sinclair would act not as a dispassionate intermediary between the parties,

but rather as Callidus' agent to effect Callidus' *de facto* control over Alken and its assets;

(c) following Baumann's resignation from the Company, Sinclair was immediately instated as President, notwithstanding his lack of independence from Callidus and his being Callidus' agent;

(d) in his capacity as President, Sinclair (or, through him, Callidus) repeatedly ignored Baumann's requests for information regarding the financial status of the Company, notwithstanding Baumann's share equity;

(e) in his capacity as President, Sinclair (or, through him, Callidus) repeatedly denied Baumann's requests to convene a shareholder meeting;

(f) Callidus purported to exercise its rights under the Pledge and Security Agreements, execution of which Callidus obtained through its negligent and/or fraudulent misrepresentations, to improperly obtain Baumann's shares in Alken; and

(g) such further particulars as may be proven at the trial of this Action.

(VI) Callidus Breached its Duty of Honest Contractual Performance

59. It is a term of the Credit Agreement, express or implied, that the Parties shall conduct themselves at all times in good faith, and engage in fair and honest dealing.

60. In breach of the Credit Agreement, Callidus has failed to conduct itself in good faith and has failed to engage fairly and honestly with Baumann in relation to its performance under the Credit Agreement.

(VII) Real and Substantial Connection to Alberta

61. A real and substantial connection exists between the subject matter of this claim and Alberta, based on the following:

(a) The claim relates to an oppressive action and breaches of various duties as described above, all of which were committed in Alberta;

(b) The claim relates to an Alberta company; and

(c) The claim relates to damages sustained in Alberta.

Place of Trial

62. The Plaintiff by Counterclaim proposes that the trial of this Action be held at the Calgary Courts Centre in the City of Calgary, in the Province of Alberta.

63. The trial of this Action will take less than 25 days.

64. The Plaintiff by Counterclaim further proposes that this Action be tried as a consolidated Action with Court of Queen's Bench Action No. 1501-05314 and Court

of Queen's Bench Action No. 1501-05769, (collectively, the "**Instant Actions**"), the basis for consolidation being that:

(a) the Instant Actions involve the same transaction and events;

(b) the parties in the Instant Actions are identical; and

(c) the Instant Actions involve common issues of law and fact.

Remedy sought:

65. Relief against Callidus for negligent or fraudulent misrepresentation.

66. An Order setting aside or varying the Guarantee, Mortgage, and Pledge and Security Agreements.

67. Damages against the Defendants by Counterclaim, and each of them, for breach of fiduciary duty and breach of honesty.

68. Relief from the oppressive, unfairly prejudicial and unfairly disregarding conduct of the Defendants by Counterclaim as such relief is particularized at paragraph 57 above.

69. Damages resulting from the oppressive, unfairly prejudicial and unfairly disregarding conduct of the Defendants by Counterclaim.

70. An Order granting that all legal costs and expenses incurred be allowed to the Plaintiff by Counterclaim on a solicitor and client basis.

71. An Order:

(a) to effect the consolidation of the Instant Actions; and

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

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

NOTICE TO THE DEFENDANT(S) BY COUNTERCLAIM

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

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

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

WARNING

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

Court File Number	1501-05314
Court	COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre	CALGARY
Plaintiff by Counterclaim	KEVIN BAUMANN
Defendants by Counterclaim	CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, ALTAIR WATER AND DRILLING SERVICES LTD. and SINCLAIR RANGE INC.
And	
Court File Number	1501-05769
Court	COURT OF QUEEN'S BENCH OF ALBERTA
Judicial Centre	CALGARY
Plaintiff by Counterclaim	KEVIN BAUMANN
Defendants by Counterclaim	CALLIDUS CAPITAL CORPORATION, SCOTT SINCLAIR, ALTAIR WATER AND DRILLING SERVICES LTD. and SINCLAIR RANGE INC.

AMENDED this 9 day of JANUARY, 2018 Pursuant to Rule 3.72 dated the 9 day of JANUARY, 2018
CLERK OF THE COURT

Document	**AMENDED COUNTERCLAIM**
Address for Service and Contact Information of Party Filing this Document	^ Scott Venturo Rudakoff LLP #1500, 222 – 3rd Avenue ^ S.W. Calgary, Alberta T2P ^0B4 Eugene J. Bodnar e.bodnar@svrlawyers.com Tel: +1 403. ^ 231.8209 Fax: +1 403. ^ 265.4632 Lawyers for the Plaintiff by Counterclaim, Kevin Baumann File No.: ^ 68058.001

NOTICE TO DEFENDANTS BY COUNTERCLAIM

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

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

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

Statement of facts relied on:

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

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

(I) The Parties

2. Baumann is an individual businessman residing in Bluffton, Alberta. Until his resignation on April 21, 2015 at the insistence of Callidus, he was President, officer, and director of Alken Basin Drilling Ltd. ("**Alken**" or the "**Company**") which was founded in 1982 and purchased by Baumann in or about February, 2013.

3. Alken is a private company that ^ provided water well drilling and associated services to oil and gas producers across Western Canada until its undertaking, property and assets were sold as described herein.

4. At all material times hereto, Baumann held 60 common shares and 1,602,688 Series 1 Preferred Shares in Alken collectively amounting to 60% of the Company's shares.

5. Callidus is an Ontario corporation in the business of high risk distressed debt lending. Callidus extended a loan to Alken pursuant to an agreement dated and effective as of March 31, 2014 (the "**Credit Agreement**"), under which Callidus granted certain credit facilities to Alken bearing an aggregate credit limit of $28,500,000.00 at an interest rate of 18% (21% default rate) (the "**Credit Facilities**").

6. Scott Sinclair ("**Sinclair**") is an individual who resides in Toronto, Ontario. Until September 29, 2016 Sinclair ^ was the Managing Director of an Ontario corporation named Range Corporate Advisors Inc. ("**Range**"). On April 21, 2015, Sinclair was appointed ^ the President of Alken. Sinclair remained the President of Alken until May 4, 2016, as described in more detail below.

7. Sinclair Range Inc. ("**Sinclair Range**") is a company which was formed on or about September 29, 2016 as a result of the merger of a number of other companies, including Range. Accordingly, Sinclair Range is the legal successor to Range. At all material times hereto, Sinclair was the President of Sinclair Range.

8. Altair Water and Drilling Services Ltd. ("**Altair**") is a wholly-owned subsidiary of Callidus, and acquired the undertaking, property and assets of Alken as described herein. At all material times hereto, Sinclair was the President of Altair.

9. As further detailed below and as will be further particularized at the trial of this Action, by virtue of Callidus' placement of Sinclair within Alken, Sinclair and Callidus together, or Callidus through Sinclair acting as its agent, either personally or through Range, were the legal and *de facto* controlling mind(s) or principal(s) of Alken from April 21, 2015 through May 4, 2016.

10. Callidus^, Sinclair, Altair and Sinclair Range are collectively referred to herein as the "**Defendants by Counterclaim**".

(II) Callidus' Negligent or Fraudulent Misrepresentation Induced Baumann

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

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

12. Callidus advertised its credit facilities as bearing few, if any, covenants, and as being tailored to companies in financial distress.

13. In reliance on Callidus' representations that it provided financial flexibility to distressed companies, Alken severed its relationship with Servus and commenced negotiations with Callidus.

14. Negotiations between Alken and Callidus were primarily conducted by Baumann on behalf of Alken, and by James Hall ("**Hall**"), Craig Boyer ("**Boyer**"), Mark Wilk ("**Wilk**"), Newton Glassman ("**Glassman**") and Dustin White ("**White**") on behalf of Callidus. Hall, Boyer, and Wilk were, at all material times hereto, Vice-Presidents at Callidus.

15. During negotiation of the Credit Agreement, Callidus, through its representatives Hall, Boyer, Wilk, Glassman and White and otherwise, represented to Baumann and Alken, among other things, that:

    (a) the Credit Facilities would not require as security personal guarantees of Baumann or the other Alken shareholders;

    (b) the Credit Facilities were designed to provide companies in distressed situations or in shifting markets – Alken's precise circumstances – with considerable financial flexibility; and

    (c) the reason their loans bore interest rates as high as 18-20% per year was that they did not require personal guarantees as collateral and they provided considerable financial flexibility in exchange.

    (the "**Representations**")

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

16. However, at the eleventh hour, and in breach of its representations and its duty of care to Baumann, Callidus suddenly changed its position and required personal guarantees from all of Alken's shareholders.

17. In breach of its representations and its duty of care to Baumann, Callidus demanded a personal guarantee from Baumann bearing a limit of $6,000,000.00.

18. In further breach of its representations and its duty of care to Baumann, Callidus also demanded a mortgage of real property then in Baumann's name, which was appraised at $6,000,000.00.

19. In further breach of its representations and its duty of care to Baumann, Callidus demanded a pledge of all of Baumann's shares in Alken in favour of Callidus, as further security for Alken's indebtedness to Callidus under the Credit Agreement.

20. Alken was not in a position to negotiate. The parties occupied grossly unequal positions of bargaining strength. Alken was distressed, had terminated its previous

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

21. As a result, on March 31, 2014, in reliance on Callidus' representations and induced thereby, Baumann caused Alken to enter the Credit Agreement with Callidus, whereby Baumann was personally liable pursuant to the personal guarantee associated with the Credit Agreement.

22. The Credit Agreement was executed by Baumann on behalf of Alken, and by David Reese, Chief Operating Officer of Callidus, and James Riley, Director and Secretary of Callidus.

23. Pursuant to a guarantee dated March 31, 2014 between Callidus and Baumann, Baumann guaranteed all obligations of Alken to Callidus under the Credit Agreement to a limit of $6,000,000.00 (the "**Guarantee**").

24. By a mortgage dated March 31, 2014, and registered at the Land Titles Office for Red Deer County, Alberta, on April 8, 2014, as Instrument No. 142 102 977, Baumann mortgaged to Callidus certain lands (the "**Lands**") having been appraised at $6,000,000.00 (the "**Mortgage**").

25. Pursuant to a pledge and security agreement (the "**Pledge and Security Agreement**") dated March 31, 2014, Baumann pledged certain collateral, including, among other things, all of his present and future rights, title, and interest in and to his shares in Alken (the "**Collateral**"). On or about May 15, 2014, following the amalgamation of Alken with 1711760 Alberta Ltd., another company Baumann owned, a further pledge and security agreement (the "**Acknowledgement**") was formed under which the initial share pledge to Callidus pursuant to the Pledge and Security Agreement was confirmed (collectively, the Pledge and Security Agreement and Acknowledgement are referred to as the "**Pledge and Security Agreements**").

26. A special relationship giving rise to a duty of care existed between Callidus and Baumann because:

    (a) Callidus had a direct financial interest in the transaction in respect of which the Representations were made;

    (b) Callidus and/or its representatives possessed special skill, judgment, or knowledge pertaining to debt financing;

    (c) the advice or information constituting the Representations was provided in the course of Callidus' business;

    (d) the Representations were given deliberately, in the context of commercial negotiations, and not on a social occasion; and,

    (e) the Representations were given in response to a specific enquiry or request by Baumann.

27. Callidus' breach of the Representations resulted in a breach of its duty of care.

28. These breaches improperly induced Baumann to execute the Credit Agreement as Alken's representative, prevented Baumann from protecting his personal position, increased Baumann's personal liability contrary to the understanding between the parties, jeopardized his shareholdings in the Company, and harmed his position as a creditor to the Company by virtue of various shareholder loans he provided.

29. Callidus made the Representations fraudulently or negligently, as may be proven at the trial of this Action, in order to induce Baumann to cause Alken to enter into the Credit Agreement with Callidus with a view of profit and the prospect of assuming control or the assets of Alken at a liquidated price, as further detailed below and as will be further particularized at the trial of this Action.

(III) Callidus' Breach of Fiduciary Duty

30. Contemporaneous with the execution of the Credit Agreement, a fiduciary relationship arose and has persisted as between Callidus and Baumann, and as between Callidus and Alken. This relationship arose from the terms of the Credit Agreement and the nature of Callidus' performance under it, and as will be further particularized at the trial of this Action.

31. Pursuant to the Credit Agreement:

(a) the monies made available thereunder were for use by Alken to:

(i) provide working capital;

(ii) payout its existing credit facilities; and

(iii) reduce its indebtedness to certain debenture holders;

(b) Alken made a number of covenants, representations and warranties, and assumed certain reporting obligations to Callidus regarding its finances;

(c) Callidus ^ had significant discretion regarding the disbursement of funds available under the Credit Facilities, but such discretion was to be used in a commercially reasonable manner;

(d) Callidus' loan ^ was secured by, among other things, a first ranking security interest in all the assets of Alken, which were ascribed a forced liquidation value of $21,490,110.00 by an appraiser selected by Callidus; and

(e) Baumann is a personal guarantor of all obligations of Alken to Callidus to a limit of $6,000,000.00.

32. In such circumstances:

(a) Callidus as lender had scope for exercise of significant discretion and power;

(b) Callidus ^ in fact did unilaterally exercise that power or discretion in a commercially unreasonable and unconscionable manner so as to affect Baumann's and Alken's legal and practical interests; and

(c) Baumann and Alken were peculiarly vulnerable to or at the mercy of Callidus.

33. In 2014-2015 Alken's operations were under significant liquidity pressures. Baumann, as Alken's President, had understood that in entering the Credit Agreement, Callidus intended to provide sufficient operating liquidity to increase operational revenues, and ultimately stabilize and improve Alken's working capital position. Instead, Callidus "drip fed" capital increases, while accumulating high interest charges and fees.

34. Between March 31, 2014 and in or about March 2015, and as contemplated by the Credit Agreement, Alken made multiple funding requests to draw on available monies from the Credit Facilities. Several of these requests were rejected by Callidus contrary to the terms of the Credit Agreement. The effect of these rejections was to prejudice Alken's relationships with its customers and suppliers, and further deteriorate its operations.

35. Collectively, the repeated and arbitrary denials of Alken's proper funding requests:

(a) resulted in a deterioration of Alken's relationships with its customers and suppliers, which led to loss of work commitments and potential contracts;

(b) caused Alken to have increasing difficulty in servicing its debt to Callidus and its debenture holders; and

(c) ultimately stymied Alken's ability to recapitalize and pay out Callidus.

36. To date, Alken has paid Callidus in excess of $3,936,550.44 in interest and fees purportedly accrued under the Credit Agreement.

37. Callidus' failure to perform under the Credit Agreement and advance to Alken monies properly available under the Credit Facilities resulted in harm to:

(a) Alken, in the form of, among other things, its operations significantly deteriorating and its share value dropping; and

(b) Baumann, by exposing him to potential liability as the personal guarantor under the Credit Agreement, by deteriorating the value of his equity in Alken, by jeopardizing his ownership of his Alken shares, and by harming his position as a creditor to the Company by virtue of various shareholder loans he provided.

38. In the result, Baumann states that Callidus breached the terms of the Credit Agreement and breached its fiduciary duty to Baumann and caused him damages.

39. Callidus also committed breaches of the Pledge and Security Agreement, and additional breaches of its fiduciary duty to Baumann, as described in more detail below.

(IV) Sinclair is Callidus' Agent

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

41. Callidus represented to Baumann that Sinclair would be an asset to the Company, that he was familiar with Callidus loan structures, and that he would liaise between Alken and Callidus. Baumann relied on these representations.

42. On December 3, 2014, Sinclair was retained by Alken pursuant to an engagement letter (the "**Engagement Letter**") executed that same day by Baumann and Michael Baumann on behalf of Alken.

43. The Engagement Letter provides, among other things, that Sinclair's services to Alken were to include:

    (a) advising the Company generally;

    (b) helping the Company manage its short term liquidity shortfall by assisting in the development and execution of an agreeable liquidity plan;

    (c) helping the Company to turnaround its operations and financial performance by assisting in the development and execution of an agreeable turnaround plan;

    (d) helping the Company prepare materials and a plan to attract new investment capital or debt to payout Callidus; and

    (e) helping the Company with its business and strategic communications.

44. Pursuant to the Engagement Letter, Sinclair's fees for such services included an "Initial Work Fee" in the amount of $20,000.00, due and payable in advance of his commencing work, and a "Monthly Work Fee" of $15,000.00. Alken has paid Sinclair these amounts.

45. Baumann states and the fact is that Sinclair never performed the services Alken contracted him for.

46. Sinclair did not liaise on behalf of Alken. Sinclair did not assist in the development of any restructuring or other plan. Alken repeatedly submitted funding requests to Callidus through Sinclair – as Alken was advised by Callidus to do – but to no avail.

47. On or about January 31, 2015, Alken issued a termination letter to Sinclair terminating his engagement with Alken.

48. On or about February 19, 2015, following discussions with Callidus and on their urging, Sinclair was reinstated by verbal agreement. Following this, Sinclair continued to neglect the services the Engagement Letter contemplated him providing, while effectively acting as agent to Callidus, either personally or through Range.

49. Baumann states and the fact is that Callidus forced Sinclair upon Baumann and Alken knowing full well that Sinclair would act not as a dispassionate intermediary between the parties, but rather as Callidus' agent, either personally or through Range, to effect Callidus' *de facto* control over Alken and its assets.

50. Sinclair also acted as the agent of Callidus, either personally or through Range, as set forth in more detail below.

(V) Callidus' and Sinclair's Oppressive Conduct

51. On March 18, 2015, Callidus sent a letter to Alken, demanding immediate payment of Alken's indebtedness to Callidus. The letter cited the distressed state of the Alberta economy amongst the reasons for demanding repayment of the loan. Alken was unable to immediately satisfy the demand. At the time of this demand, Alken was not in default or otherwise in breach under the Credit Agreement.

52. On April 21, 2015, Baumann resigned from his position as President of Alken at the insistence of Callidus, though he remained the Company's majority shareholder. Baumann's resignation was communicated to Callidus that same day.

53. That same day, Sinclair was appointed President of Alken. This finalized Callidus' efforts to install Sinclair as its agent within Alken and solidified its play to assume *de facto* or legal control of the Company.

54. The effect of Callidus' actions was to systematically deteriorate the value of Alken for its sole benefit and, having manoeuvred to assume control of the Company through the placement of Sinclair, Callidus ^ then sought to consolidate its position by engaging in oppressive conduct against Baumann, the Company's owner, majority shareholder, and shareholder creditor.

55. On May 26, 2015, Callidus, through its counsel, improperly demanded from Baumann his interest in and to his shares in Alken pursuant to the Pledge and Security Agreements. Baumann resisted the demand.

56. Baumann states and the fact is that Callidus demanded Baumann relinquish his shares in Alken to assume total and wrongful control of the Company.

57. Baumann advances this claim pursuant to Part 19 of the *Business Corporations Act*, R.S.A. 2000, c. B-9, as amended from time to time (the "**ABCA**").

58. Baumann is a "complainant" within the meaning of s. 239(b)(ii) of the ABCA.

59. The actions of Callidus and Sinclair in respect of the conduct of the business and affairs of Alken are oppressive, unfairly prejudicial, and unfairly disregarded the interests of Baumann as security holder.

60. As a result of these oppressive acts, Callidus and Sinclair have caused serious harm and prejudice to Alken as well as to the rights and interests of Baumann as a security holder and creditor of the company.

61. Baumann is entitled to immediate relief from Callidus and/or Sinclair under the ABCA in order to remedy and redress past, present and ongoing oppression.

62. Particulars in this regard include the following:

    (a) the Defendants by Counterclaim's actions in repeatedly and improperly denying Alken's requests for funding under the Credit Facilities deteriorated the value of Alken to the sole benefit of Callidus and to the detriment of Baumann by making it increasingly difficult for Alken to service its debt to Callidus and thereby increasing the personal liability to Baumann;

(b) Callidus forced Sinclair upon Baumann and Alken knowing full well that Sinclair would act not as a dispassionate intermediary between the parties, but rather as Callidus' agent to effect Callidus' *de facto* control over Alken and its assets;

(c) following Baumann's forced resignation from the Company, Sinclair was immediately instated as President, notwithstanding his lack of independence from Callidus and his being Callidus' agent;

(d) in his capacity as President, Sinclair (or, through him, Callidus) repeatedly ignored Baumann's requests for information regarding the financial status of the Company, notwithstanding Baumann's share equity;

(e) in his capacity as President, Sinclair (or, through him, Callidus) repeatedly denied Baumann's requests to convene a shareholder meeting;

(f) Callidus purported to exercise its rights under the Pledge and Security Agreements, execution of which Callidus obtained through its negligent and/or fraudulent misrepresentations, to improperly obtain Baumann's shares in Alken; and

(g) such further particulars as may be proven at the trial of this Action.

(VI) The Receivership Process

63. Following his forced resignation as President of Alken on April 21, 2015, Baumann was barred from having any involvement in Alken or even setting foot on the Company's premises. His requests for financial records and information about the operations of the Company were ignored and went unanswered, despite the fact that he continued to be the majority shareholder of the Company and the guarantor of its Company's debts to Callidus under the Credit Agreement.

64. In or about May of 2015, Baumann advised Sinclair that he had been contacted by several individuals interested in purchasing Alken. Sinclair made no attempt to pursue those opportunities, but instead continued to operate the Company as the agent of Callidus, either personally or through Range, until after Callidus put the Company into receivership in April of 2016.

65. Despite Baumann's repeated demands to liquidate Alken during this timeframe, Sinclair continued to operate the company as the agent of Callidus, either personally or through Range. On April 1, 2016, MNP Ltd. ("**MNP**" or the "**Receiver**") was appointed by the Court as the Receiver of the undertaking, property and assets of Alken. The application for the appointment of the Receiver was made by Callidus and supported by an affidavit sworn by Boyer, who was Vice-President of Callidus at the time.

66. MNP had acted as financial advisor to Alken for a brief period of time immediately prior to its appointment as Receiver. On March 21, 2016 MNP initiated a process for the sale of Alken's assets (the "**Sales Process**").

67. Sinclair, as the agent of Callidus, was MNP's sole or primary point of contact in its role as financial advisor to Alken, and directed or instructed MNP with respect to the Sales Process.

68. At the request of Callidus, the Receiver was appointed with the limited mandate of completing the Sales Process. Sinclair, as the agent of Callidus, continued to operate Alken and to direct or instruct MNP with respect to the Sales Process during the receivership.

69. After its appointment, the Receiver engaged in a limited advertising process with respect to Alken's assets. In this regard, the Receiver took some cursory steps to advertise the assets and relied on Sinclair's representations that he would market the assets of the Company to his allegedly extensive buyer's list.

70. The Sales Process was extremely short. The initial deadline for offers to purchase was April 13, 2016 and this was subsequently extended to April 18, 2016 – less than one month from the date MNP initiated the Sales Process.

71. Only four offers were submitted to the Receiver in accordance with the Sales Process. Three of these offers were auction proposals and one was an en bloc offer to purchase submitted by Callidus.

72. The Receiver recommended acceptance of the Callidus offer, which was structured such that Altair, a wholly-owned subsidiary of Callidus, would be the vehicle through which Callidus would acquire the undertaking, property and assets of Alken.

73. Altair was incorporated on April 28, 2016 to constitute this vehicle. Callidus is the sole shareholder of Altair, Sinclair is the President and Chief Operating Officer of Altair, and Kevin Schmidt, a former Alken employee, is the Vice-President of Altair. At the time of Altair's incorporation, its sole director was Boyer. At present, its directors are David Reese, President and Chief Operating Officer of Callidus, and Jim Riley, Secretary of Callidus.

74. On May 4, 2016, the Alberta Court of Queen's Bench granted an Approval and Vesting Order approving the sale of Alken's assets to Altair and vesting Alken's right, title and interest in and to such assets in Altair (the "**Vesting Order**"). The sale was effectively a credit bid for the entire amount of Alken's debt to Callidus less $4,500,000, which was the approximate principal amount allegedly due and owing under the Guarantee.

75. The purchase and sale of the transaction approved by the Vesting Order was completed on June 8, 2016.

(VII) The Corporate Opportunities

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

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

77. Sinclair executed both the First MOA and the Second MOA on behalf of Alken on March 23, 2016 and entered into the MOU on behalf of Alken on a date which is unknown to Baumann. Although Sinclair ostensibly acted on behalf of Alken in entering into the MOU and negotiating and executing the First MOA and the Second MOA, he took these actions as the agent of Callidus and without the knowledge of Baumann. The corporate opportunities evidenced by the First MOA, the Second MOA and the MOU are referred to collectively herein as the "**Corporate Opportunities**".

78. Sinclair, as the agent of Callidus, pursued the Corporate Opportunities and negotiated and entered into the First MOA, the Second MOA and the MOU immediately prior to and during the period of the receivership and the marketing of Alken's assets. The Corporate Opportunities were developed using Baumann's and Alken's 30-years of expertise, funds, corporate strategy, and confidential information.

79. A spreadsheet was prepared by or at the direction of Callidus or Sinclair as its agent during this time period which set out the value of the Corporate Opportunities (the "**Spreadsheet**"). However, at the direction and behest of Callidus or Sinclair as its agent, the only disclosure of the Corporate Opportunities which was made in the course of the advertising and sale process was a limited and selective degree of disclosure made to six (6) parties which had previously signed confidentiality agreements, all of which were only interested in Alken's equipment.

80. Had the First MOA, Second MOA, MOU and Spreadsheet been fully disclosed to parties with an interest in pursuing the Corporate Opportunities, this would have significantly increased the value of Alken's assets available for sale in the receivership process, and correspondingly decreased the amount for which Callidus could pursue Baumann under the Guarantee. To the best of Baumann's information and knowledge, the Corporate Opportunities and the goodwill of Alken were not appraised and no consideration was paid by Altair for the same.

81. The existence of the Corporate Opportunities and Spreadsheet was not disclosed to Baumann until after the Vesting Order was issued. Copies of the First MOA, Second MOA, MOU and Spreadsheet have never been provided to Baumann despite his requests and demands as the current President and majority shareholder of Alken.

82. Since the closing of the transaction approved by the Vesting Order, Callidus has been pursuing the Corporate Opportunities through its wholly-owned subsidiary, Altair, with the involvement and assistance of Sinclair, either personally or through Sinclair Range. In or about August of 2016, Callidus reported a $32,000,000 "yield enhancement" in connection with one of its loans in the period from March 1, 2016 to June 30, 2016 and indicated that it had helped an unnamed company go into an "additional business" which would allow it to realize potentially billions of dollars in revenue. Baumann believes this loan to be the Credit Agreement, the unnamed company to be Alken, and the "additional business" to be the Corporate Opportunities.

(VIII) Management of Alken During the Receivership Process

83. As noted above, Sinclair operated Alken as the agent of Callidus, either personally or through Range, between April 21, 2015 and May 4, 2016. During this short time, Alken's indebtedness to Callidus increased by approximately $8,000,000 and its total indebtedness to all creditors increased by over $11,000,000. The funds loaned by Callidus to Alken during this period were above and beyond the maximum amounts set out in the Credit Agreement, and contrary to sound financial logic or wisdom.

84. Baumann states, and the fact is, that Sinclair, as the agent of Callidus, ran the Company into the ground during this time period so that Callidus could put the Company into receivership and accomplish the following objectives:

(a) call on the Guarantee, foreclose on the Lands and obtain a deficiency judgment against Baumann; and

(b) wrongfully appropriate the Corporate Opportunities through its wholly-owned subsidiary, Altair.

85. In the alternative, Sinclair and Callidus operated Alken in a commercially unreasonable manner and unnecessarily increased the amount of the debt with willful or reckless disregard for the interests of Alken, its shareholders or the guarantor, Baumann. As a result, Baumann has suffered damages.

86. During the time Sinclair operated Alken as the agent of Callidus, no financial statements were prepared for the Company and the necessary corporate filings for the Company were not attended to. In particular, no financial statements were prepared for the fiscal years ending March 31, 2015 and March 31, 2016.

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

87. On May 26, 2015, Callidus purported to invoke its rights under the Pledge and Security Agreement, advising Baumann that:

(a) he had no right to vote or take any other action with respect to any of the Collateral, including his shareholdings in Alken;

(b) Callidus was entitled to vote and take all other action with respect to the Collateral, including his shareholdings in Alken; and

(c) Pursuant to an irrevocable power of attorney set out in section 7.10 of the Pledge and Security Agreement (the "**Power of Attorney**"), he had irrevocably authorized and appointed Callidus as his true and lawful attorney to do any acts relating to the Collateral, including his shareholdings in Alken.

88. From that date until the date of the Vesting Order, all actions taken by or on behalf of Alken were taken at the direction of Callidus pursuant to the Power of Attorney. This included, but was not limited to, all actions taken by Sinclair as the agent of Callidus.

89. In or about May or June of 2015, Callidus appointed Sinclair as the sole director of Alken pursuant to the Power of Attorney.

90. As Baumann's true and lawful attorney under the Power of Attorney, Callidus owed Baumann a fiduciary duty and was obligated to act with the utmost loyalty and good faith in exercising his rights as the majority shareholder of Alken.

91. In taking the actions set out above, including but not limited to directing Sinclair to take the actions set out therein or knowing that he was taking such actions as its agent, Callidus was in a conflict of interest and breached the fiduciary duties which it owed to Baumann under the Power of Attorney.

92. Utilizing the Power of Attorney, its wholly-owned subsidiary Altair, and the receivership process, Callidus and its agent, Sinclair, conspired to misappropriate the Corporate Opportunities from Alken, intentionally interfered with Alken's economic relations by misappropriating the Corporate Opportunities, and perpetrated a civil fraud on Alken and Baumann, thereby causing damages to Baumann as the majority shareholder of Alken and the guarantor of its indebtedness to Callidus.

93. Callidus has employed similar schemes, in some cases also involving Sinclair, to wrongfully and fraudulently obtain control of assets of other borrowers and guarantors and reap significant profits for itself when those assets are resold.

94. The conduct of the Defendants by Counterclaim as aforesaid was and is in deliberate, flagrant, contumelious and high-handed violation of the rights of Baumann as the majority shareholder of Alken and the guarantor of its indebtedness to Callidus. Such conduct is deserving of sanction by an award of punitive, exemplary or aggravated damages.

(X) Callidus Breached its Duty of Honest Contractual Performance

95. It is a term of the Credit Agreement and the Pledge and Security Agreements, express or implied, that the Parties shall conduct themselves at all times in good faith, and engage in fair and honest dealing.

96. In breach of the Credit Agreement and the Pledge and Security Agreements, Callidus failed to conduct itself in good faith and has failed to engage fairly and honestly with Baumann in relation to its performance under the Credit Agreement and the Pledge and Security Agreements, including but not limited to the purported invocation of its rights under the Pledge and Security Agreement as aforesaid.

97. The Plaintiff by Counterclaim pleads and relies upon the *Unconscionable Transactions Act*, RSA 2000, c U-2.

(XI) Real and Substantial Connection to Alberta

98. A real and substantial connection exists between the subject matter of this claim and Alberta, based on the following:

(a) The claim relates to an oppressive action and breaches of various duties as described above, all of which were committed in Alberta;

(b) The claim relates to an Alberta company; and

(c) The claim relates to damages sustained in Alberta.

Place of Trial

99. The Plaintiff by Counterclaim proposes that the trial of this Action be held at the Calgary Courts Centre in the City of Calgary, in the Province of Alberta.

100. The trial of this Action will take less than 25 days.

101. The Plaintiff by Counterclaim further proposes that this Action be tried as a consolidated Action with Court of Queen's Bench Action No. 1501-05314, Court of Queen's Bench Action No. 1501-05769 and Court of Queen's Bench Action No. ^ 1610-001573, (collectively, the "**Instant Actions**"), the basis for consolidation being that:

(a) the Instant Actions involve the same transaction and events;

(b) the parties in the Instant Actions are identical; and

(c) the Instant Actions involve common issues of law and fact.

Remedy sought:

102. Relief against Callidus for negligent or fraudulent misrepresentation.

103. An Order setting aside or varying the Guarantee, Mortgage, and Pledge and Security Agreements.

104. Damages against the Defendants by Counterclaim, and each of them, for breach of fiduciary duty and breach of honesty.

105. Damages against Callidus, Sinclair and Altair for misappropriation of the Corporate Opportunities, conspiracy, civil fraud and intentional interference with economic relations.

106. An accounting and disgorgement of all income and profits made and received by the Defendants by Counterclaim as a result of the wrongful and fraudulent conduct referred to above.

107. An order setting off damages payable by Callidus herein against any damages which may be ordered to be paid to Callidus in connection with its claim in this action.

108. Relief from the oppressive, unfairly prejudicial and unfairly disregarding conduct of the Defendants by Counterclaim ^ .

109. Damages resulting from the oppressive, unfairly prejudicial and unfairly disregarding conduct of the Defendants by Counterclaim.

110. Punitive, exemplary or aggravated damages in an amount to be determined by this Honourable Court;

111. An Order granting that all legal costs and expenses incurred be allowed to the Plaintiff by Counterclaim on a solicitor and client basis.

112. An Order:

(a) to effect the consolidation of the Instant Actions; and

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

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

NOTICE TO THE DEFENDANT(S) BY COUNTERCLAIM

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

20 days if you are served in Alberta

1 month if you are served outside Alberta but in Canada

2 months if you are served outside Canada.

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

WARNING

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

THE CATALYST CAPITAL GROUP et al.
Plaintiffs

-and-

WEST FACE CAPITAL INC. et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

RESPONDING MOTION RECORD OF THE PLAINTIFFS

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Lawyers for the Plaintiffs

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

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

Plaintiffs Defendants

ONTARIO
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RESPONDING MOTION RECORD OF THE PLAINTIFF

(Motion of K. Baumann to Compel Answered to Questions Taken Under Advisement and Refused – Returnable February 26, 2021

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