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, CLARITY SPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, , JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY, JOHN DOES #4-10,

Defendants

FACTUM OF THE MOVING PARTY, ROB COPELAND

May 5, 2021

ST. LAWRENCE BARRISTERS LLP
33 Britain Street, 2nd Floor
Toronto ON M5A 1R7

M. Philip Tunley (LSO# 26402J)
Tel: 647.964.3495
phil@tunleylaw.ca

Fax: 647.245.8285

Lawyers for the Defendant,
Rob Copeland

TO: **MOORE BARRISTERS**
Professional Corporation
1600-393 University Avenue
Toronto ON M5G 1E6

David C. Moore (LSO# 16696U)
Tel: 416.581.1818 ext. 222
david@moorebarristers.ca

Kenneth Jones (LSO# 29918I)
Tel: 416.581.1818 ext. 224
kenjones@moorebarristers.ca

GOWLINGS WLG LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

John Callaghan (LSO# 29106K)
Tel: 416.862.7525
Fax: 416.862.7661
John.Callaghan@gowlingwlg.com

Benjamin Na (LSO# 40958O)
Tel: 416.862.4455
Fax: 416.862.7661
Benjamin.Na@gowlingwlg.com

Matthew Karabus (LSO# 61892D)
Tel: 416.862.7525
Fax: 416.862.7661
Matthew.Karabus@gowlingwlg.com

Tel: 416.581.1818
Fax: 416.581.1279

Lawyers for the Plaintiffs

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
Barristers and Solicitors
155 Wellington Street West
37th Floor
Toronto ON M5V 3J7

Kent E. Thomson (LSO# 24264J)
Tel: 416.863.0871
kthomson@dwpv.com

Matthew Milne-Smith (LSO# 44266P)
Tel: 416.863.5595
mmilne-smith@dwpv.com

Andrew Carlson (LSO# 58850N)
Tel: 416.367.7437
acarlson@dwpv.com

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendants,
West Face Capital Inc. and Gregory Boland

AND TO: **TORYS LLP**
Barristers and Solicitors
79 Wellington Street West
Suite 3000
Box 270, TD South Tower
Toronto ON M5K 1N2

Linda M. Plumpton (LSO# 38400A)
Tel: 416.865.8193
lplumpton@torys.com

Andrew Bernstein (LSO# 42191F)
Tel: 416.865.7678
abernstein@torys.com

Stacey Reisman (LSO# 72184U)
Tel: 416.865.7537
Fax: 416.865.7380
sreisman@torys.com

Tel: 416.865.0040
Fax: 416.865.7380

Lawyers for the Defendants,
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 and Sunny Puri

AND TO: **LERNERS LLP**
Barristers and Solicitors
130 Adelaide Street West
Suite 2400
Toronto ON M5H 3P5

Rebecca Shoom (LSO# 68578G)
Tel: 416.601.2382
Fax: 416.601.4185
rshoom@lerners.ca

Lucas Lung (LSO# 52595C)
Tel: 416.601.2673
llung@lerners.ca

Tel: 416.867.3076
Fax: 416.867.9192

Lawyers for the Defendants,
Clarity Spring Inc. and Nathan Anderson

AND TO: **MATHERS MCHENRY & CO.**
161 Bay Street,
Suite 2700
Toronto ON M5J 2S1

Devin M. Jarcaig (LSO# 62223U)
Tel: 416.572.2147
devin@mathersmchenryandco.com

Fax: 647.660.8119

Lawyers for the Defendant,
Bruce Langstaff

AND TO: **KEVIN BAUMANN**
Box 109 Bluffton
AB T0C0 M0

Tel: 403.505.7784

Defendant

AND TO: **JEFFREY MCFARLANE**
558 Sunset Drive
Durham 27713

jmcfarlane@triathloncc.com

Defendant

AND TO: **DARRYL LEVITT**
Applewood Crescent
Vaughan ON L4K 073

darryl@dlevittassociates.com
Tel: 416.879.6965

Defendant

AND TO: **SOLMON ROTHBART GOODMAN LLP**
Barristers and Solicitors
375 University Avenue
Suite 701
Toronto ON M5G 2J5

Melvyn Solmon (LSO# 16156J)
Tel: 416.947.1093 ext. 333
msolmon@srglegal.com

Nancy J. Tourgis (LSO# 37349I)
Tel: 416.947.1093 ext. 342
ntourgis@srglegal.com

Tel: 416.947.1093
Fax: 416.947.0079

Lawyers for the Defendant,
Richard Molyneux

AND TO: **WHITTEN & LUBLIN**
Barristers and Solicitors
141 Adelaide Street West
Suite 1100
Toronto ON M5H 3L5

Ben J. Hahn (LSO# 64412J)
ben@whittenlublin.com
Tel: 647.640.2667
Fax: 416.644.5198

Lawyers for the Defendant,
Gerald Duhamel

AND TO: **MCCARTHY, TÉTRAULT LLP**
Barristers and Solicitors
TD Bank Tower
66 Wellington Street West
Suite 5300
Toronto ON M5K 1E6

R. Paul Steep (LSO# 21869L)
Tel: 416.601.7998
psteep@mccarthy.ca

Daniel Goudge (LSO# 69632J)
Tel: 416.601.7598
Fax: 416.868.0673
dgoudge@mccarthy.ca

Tel: 416.362.1812
Fax: 416.868.0673

Lawyers for the Defendant,
George Wesley Voorheis

AND TO: **DIMITRI LASCARIS LAW PROFESSIONAL CORPORATION**
360, Rue St. Jacques, Suite G101
Montreal Quebec H2Y 1P5

A. Dimitri Lascaris (LSO# 50074A)
alexander.lascaris@gmail.com
Tel: 514.941.5991
Fax: 519.660.7845

Lawyer for the Defendant,
Bruce Livesey

AND TO: **JOHN DOES #4-10**

Defendant

AND TO: **CRAWLEY MACKEWN BRUSH LLP**
Barristers and Solicitors
179 John Street
Suite 800
Toronto ON M5T 1X4

Robert Brush (LSO# 40373N)
Tel: 416.217.0822
rbush@cmblaw.ca

Clarke Tedesco (LSO# 55291C)
Tel: 416.217.0884
ctedesco@cmblaw.ca

Dana Carson (LSO# 65439D)
Tel: 416.217.0110
dcarson@cmblaw.ca

Tel: 416.217.0110
Fax: 416.217.0220

Lawyers for the Defendant,
Canaccord Genuity Corp.

AND TO: **ADAIR GOLDBLATT BIEBER LLP**
95 Wellington Street West
Suite 1830
Toronto ON M5J 2N7

John Adair (LSO# 52169D)
Tel: 416.941.5858
jadair@agbllp.com

Gord McGuire (LSO# 58364S)
Tel: 416.351.2781
gmcguire@agbllp.com

Michael Darcy (LSO# 66602R)
Tel: 416.583.2392
mdarcy@agbllp.com

Tel: 416.499.9940
Fax: 647.689.2059

Lawyers for the Defendants,
B.C. Strategy Ltd. dba Black Cube and B.C. Strategy UK Ltd. dba Black Cube

AND TO: **ANDREW LEVY**
46 Baldwin Farms N.
Greenwich CT 0631

Defendant

AND TO: **EMMANUEL ROSEN**
26 Shaar Ha'amakim Street
Hod Harsron Merkus 45000

Defendant

TABLE OF CONTENTS

PART I - INTRODUCTION

1. All the claims herein against Rob Copeland fail, in all respects, as they were bound to do.

2. The essence of those claims is that Copeland, a senior financial reporter with the WSJ,[1] engaged in a deliberate "wolfpack" or "short and distort" conspiracy with third persons to publish a false report about the Plaintiffs in a prestigious business journal, in order to drive down their value in public markets and profit from the resulting short selling opportunities.

3. That is, and always was, a preposterous claim, on its face.

4. It is not just a claim alleging a civil wrong. It strikes at the heart of Copeland's professional reputation, ethics and integrity as a journalist. It is intended to punish him for his reporting on matters of obvious public interest, and to deter him and others from ever daring to do so again in matters relating to the Plaintiffs.

5. Indeed, the Plaintiffs allege this conspiracy was already formed by others, even before the Dow Jones Defendants began their news gathering. It was and is a prefabricated theory. As they did earlier in 2017 with Reuters and other media, the Plaintiffs outlined this theory during their very first contact with the WSJ on July 17, 2017.[2] As presented at that time, and repeatedly thereafter, it included a scarcely veiled threat of litigation, advanced for the sole purpose of deterring the Dow Jones Defendants from pursuing any reporting about the Plaintiffs' business methods.

---

[1] Capitalized terms in this Factum refer to the same terms as defined in the Factum of the Dow Jones Defendants in the Defamation Action (the "**Dow Jones Factum**"), and in the Joint Submission. Both of those facta should be read together with this one, in assessing the claims against Copeland on his SLAPP Motion in this Conspiracy Action.
[2] See the evidence cited at para 42 of the Dow Jones Factum.

6. That threat of litigation did not deter the WSJ from reporting in the public interest.

7. Now, after three and a half years of the threatened litigation, and nearly 18 months of intense document production and cross-examination since these SLAPP Motions were initiated, the evidence assembled has ultimately shown that the Plaintiffs' conspiracy theory is false. It is and always was made up.

8. On the evidence, the Dow Jones Defendants have proven that their reporting was accurate in all respects, in the public interest, and completely independent from any third party who may have had reason to harm the Plaintiffs or profit from their business adversities. On their SLAPP Motion, the Dow Jones Defendants ask this Court to dismiss the Defamation Action, because the WSJ Publications were accurate, in the public interest, and based on a careful journalistic review of the facts.

9. That motion, if granted, should also necessarily result in the dismissal of this Conspiracy Action against Copeland. Exactly the same alleged defamation is required to complete the Plaintiffs' conspiracy claim against him. Defamation ***by Copeland*** is an essential element of that claim, because without it, the Plaintiffs have failed to establish any "unlawful means" or "improper purposes" on his part that in any way furthered any alleged conspiracy.

10. However, Copeland seeks an order dismissing the conspiracy claims against him on the more fundamental ground that there is simply ***no evidence***, and no genuine issue for trial, that he ever agreed with anyone to enter any conspiracy, nor that he did or omitted to do ***anything*** in furtherance of the same.[3] The Plaintiffs' theory is wholly fabricated, and it is also false.

[3] Notice of Motion, October 10, 2019, para (n), Copeland MR, Tab 1, p. 6.

11. The Plaintiff's litigation was not just designed as a SLAPP, to deter the Dow Jones Defendants. It has been pursued as a wallop, aimed by the Plaintiffs directly at the heart of that free flow of information, commentary and analysis that is the wellspring of our public capital market system. It is now clear beyond doubt that there is absolutely no evidence whatsoever to support any element of the Plaintiffs' preposterous claim against Copeland in this Conspiracy Action.

12. The time has come to dismiss it.

PART II - SUMMARY OF FACTS

13. As noted, the Facts outlined herein supplement, and should be read with, those set out in the Joint Submission and in the Dow Jones Factum.

A. The Failure to Plead or Particularize any Conspiracy Claim against Copeland

14. From the time this Conspiracy Action was first commenced, the Statement of Claim has contained only bald allegations of Copeland's alleged involvement in any conspiracy.[4]

15. All his specific actions, as alleged by the Plaintiffs therein, consist simply of the ordinary and usual steps he took as a responsible journalist preparing the WSJ Publications. For example, it is said that the alleged conspiracy involved the facts:

(a) That some of the Co-Defendants "would disclose information relating to the fact and substance of the [whistleblower complaints] to Copeland";[5]

[4] Statement of Claim dated November 7, 2017, Copeland MR, Tab 3-A, pp 120-153.
[5] FAASOC at para 147, Copeland MR, Tab 3-E, p 241.

(b) That Copeland interviewed McFarlane, "who provided Copeland with details" of his whistleblower complaint relating to XTG;[6]

(c) That Copeland had similar interviews with Baumann, Molyneux, Duhamel and Anderson;[7]

(d) That Copeland contacted the Plaintiffs, and eventually met with them on August 8, 2017 with McNish;[8] and

(e) That Copeland and McNish decided to proceed with the WSJ Publications.[9]

16. An Order of Justice Hainey[10] requiring the Plaintiffs to provide further particulars of the facts and wrongs alleged did nothing to improve or add to the merits of the claim against Copeland.

17. When co-Defendant, Nathan Anderson, who was alleged by the Plaintiffs to have "recruited" Copeland into the conspiracy alleged, and to have introduced him to the other alleged conspirators,[11] successfully moved for a further Order striking out the Statement of Claim as against himself, the claim against Copeland was fundamentally undermined.[12]

18. Pursuant to leave granted by that Order, however, the Plaintiffs were allowed to provide yet further "particulars" of their claims in an Amended Statement of Claim dated April 18, 2019, adding 43 more pages, and 74 more paragraphs to their already convoluted pleading. Notably, Copeland was mentioned only once in any added allegations, which were underlined in that

---

[6] FAASOC at para 148, Copeland MR, Tab 3-E, p 241.
[7] FAASOC at para 149, Copeland MR, Tab 3-E, p 242-244.
[8] FAASOC at paras 150-152, Copeland MR, Tab 3-E, p 244-245.
[9] FAASOC at para 155, Copeland MR, Tab 3-E, p 245.
[10] Endorsement of Hainey J dated May 23, 2018
[11] FAASOC at para 146, Copeland 137.1 MR, Tab 3-E, p 241.
[12] Endorsement of Wilton-Seigel J, January 9, 2019

version. Even that mention did not add any new factual allegation to the complaints against him. It simply made personal an allegation that he "took steps to hide details of the Conspiracy in order to avoid detection and make it difficult to learn about the Conspiracy", which had previously been made globally against Copeland together with others.

19. The current Fresh as Amended Statement of Claim did not add any further new allegations as against Copeland, either.[13] The pleaded claims in conspiracy against him are still utterly bald.

B. The Plaintiffs' Evidence on this Motion

20. Those allegations against Copeland are also completely baseless. They are unsubstantiated by any evidence led by the Plaintiffs.

21. In response to SLAPP Motions by Copeland and others in the Conspiracy Action, the Plaintiffs filed the Riley Conspiracy Affidavit. It consisted of 162 pages (446 paragraphs) of sworn allegations, and it attached 266 documentary Exhibits.

22. However, the only references to Copeland, in all that pile of evidence, that even remotely touch on the pleaded claim that he furthered any alleged conspiracy were the following.

(a) Copeland and Anderson had "a relationship with each other since at least September 2014", related to other articles Copeland had published in the WSJ.[14]

(b) Copeland had also previously written articles about short selling, and "was very familiar with the practice".[15]

[13] FAASOC at para 147, Copeland MR, Tab 3-E, p 241.
[14] FAASOC at para 180-181, Copeland MR, Tab 3-E, p 255.
[15] FAASOC at para 182, Copeland MR, Tab 3-E, p 256.

(c) On July 27, 2017 Copeland sent a text to Anderson saying "story should be out Tuesday",[16] which would be August 1. In fact, the Online Article did not come out until more than a week later.

(d) Copeland sent Anderson another text on August 2 stating that Catalyst and Callidus representatives would be "sitting interview" with the WSJ on Tuesday, "Allegedly".[17]

(e) Copeland sent another text to Anderson 9 minutes before the initial publication of the Online Article, stating "I have never had to lift harder to Get a story out Honestly."[18]

(f) He sent another text shortly after the close of trading that same day, observing "Shares tankinggggg".[19]

(g) Later that same evening, Copeland responded (it appears accurately) to a text from Anderson about where the article would appear in the print edition of the WSJ the following day.[20]

23. The Riley Conspiracy Affidavit also relies on a text from Copeland to Anderson acknowledging Anderson's importance as a source.[21] This text, far from imputing the fictitious motivations that Riley purports to divine, in reality only further underlines the rigorous vetting process that the WSJ Publications were put through by the WSJ editorial, standards, and legal

[16] FAASOC at para 191, Copeland MR, Tab 3-E, p 258-259.
[17] FAASOC at para 188, Copeland MR, Tab 3-E, p 258.
[18] FAASOC at para 37, Copeland MR, Tab 3-E, p 200.
[19] FAASOC at para 42, Copeland MR, Tab 3-E, p 201-202.
[20] FAASOC at para 193, Copeland MR, Tab 3-E, p 261.
[21] FAASOC at para 194, Copeland MR, Tab 3-E, p 261.

teams, before they were approved for public release. This is inconsistent with the motivations imputed by Riley. Copeland's text states:

> "BTW no way we could have printed this story if you had not filed your claim too. Our side was so concerned about being used by aggrieved borrowers."

24. Even without response from Copeland or any alleged co-conspirator, the Plaintiffs' evidence never even came close to meeting their onus under s. 137.1(4) to "satisfy" this Court that their conspiracy allegation against Copeland had "substantial merit". It failed to establish even one of the essential elements required for a legally tenable conspiracy claim, as set out in the Joint Submission.[22]

25. Based on their lack of evidence, the Plaintiffs and Riley knew or must have known all along that they never had any justification whatsoever for alleging that Copeland was involved in any conspiracy. Yet they persisted in their allegations under oath.

26. Under cross-examination, the gaping holes in Riley's evidence became even more obvious. He repeatedly acknowledged that he had no personal information about the context or meaning of the documents he referred to in support of his allegations against Copeland. He admitted that he had no evidence contrary to Copeland's own sworn statements, and those of other witnesses, that refuted the suggestions he attempted to draw from those documents.[23]

27. When Riley falsely alleged that the evidence showed Anderson told Copeland he was shorting Callidus' stock, it was established by Anderson's counsel that there was no such evidence.[24] Riley's reference to a short-selling "syndicate" was shown under cross examination

---

[22] Joint Memorandum of Law at paras 38-40, Defendant MR, Tab [X], p [X].
[23] Riley Cross, q 205, 240-242, 1082-1095, 1144-1150 and 2139-2140
[24] Riley Cross, q 1073-1076

to be, in fact, not that at all, but rather a syndicate among Anderson and two of the borrowers who contributed to Anderson's research for his whistleblower complaint, to share in any reward that might be obtained as a result.[25] There is nothing unlawful or harmful to the Plaintiffs about that arrangement. Further and in any event, Riley admitted that there was no mention of Copeland in any documents relating to it.[26]

28. Riley admitted that, of the 12 Defendants or groups of Defendants to the Conspiracy Action that have produced documents prior to the SLAPP Motions, only 3 actually shorted Callidus stock in the relevant time period.[27]

(a) One of those, the Anson Defendants, are in the securities advisory business. Neither Copeland nor McNish were asked any questions in cross-examination about the Anson Defendants, or their dealings with them, if any.

(b) A second, Wes Voorheis, was a lawyer who previously worked with the Plaintiffs, who the Plaintiffs now describe as an "activist investor", presumably because he frequently represents investors. Asked about Voorheis, McNish identified him as such, but stated she had no prior information about his company or the business it was in, including any involvement in short selling securities.[28]

(c) The third is Anderson.

[25] Riley Cross, pp 346-351, q 1081-1096
[26] Riley Cross, q 2400-2407
[27] Riley Cross, q 2503-2504. And see the evidence assembled at Anderson Factum, para 13.
[28] Transcript of the Cross-Examination of Jacquie McNish held November 12, 2020, q 121-132.

29. There is no evidence of any communications between or among any of those three parties or groups of parties regarding coordination of their respective short selling plans or activities.

30. Riley admitted the Plaintiffs have and had no evidence that Copeland held shares in Callidus at the material times, or at any time;[29] or that he held a short position in Callidus shares;[30] or that he had any interest in shares or short positions held by anyone else.[31] Riley admitted that none of the many alleged conspirators named in the Conspiracy Action have produced any documents or other evidence that Copeland had any such interests, or even knowledge of such interests of others.[32] That is because these are all lies, as Copeland himself has clearly testified.

31. Riley admitted that the conduct alleged against Copeland would be a very serious ethical breach for a reporter, and that such conduct is strictly prohibited by the Dow Jones Code of Conduct.[33] Yet the Plaintiffs and Riley, on instructions from their counsel, refused to withdraw those very serious allegations, or to apologize to Copeland for having made them without any supporting evidence.[34]

C. The Evidence of Alleged Co-Conspirators All Supports Copeland

32. As this Court has already found, many sources who spoke to the WSJ warned Copeland and McNish that they would all be sued, and they agreed to speak only on the basis that their identity as sources would be protected by the WSJ both in its reporting, and in any resulting

[29] Riley Cross, q 2527
[30] Riley Cross, q 2528
[31] Riley Cross, q 2529
[32] Riley Cross, q 2531-2532
[33] Riley Cross, q 2533 and 2542-2548; Riley Libel Affidavit at Exhibit 4.
[34] Riley Cross, q 2554-2556

litigation by the Plaintiffs.[35] Given that evidence and finding, it would obviously be extremely unlikely that either they or Copeland himself would engage in the conspiracy now alleged.

33. The evidence of the West Face Parties (West Face Capital Inc. and Gregory Boland), who the Plaintiffs identify as the instigators and key participants in the alleged conspiracy, is that they acted accordingly. Having previously been the subject of similar claims by these same Plaintiffs arising out of a 2014 publication, they have established that they held no shares of Callidus nor short positions therein after June 2015, and that all their communications with other named parties, including the Dow Jones Defendants, were proper, and sought or provided only publicly available and true information, relevant to their defence of the prior litigation against them.[36]

34. The West Face Parties have established that the very root and origins of the Plaintiffs whole conspiracy theory – which began with evidence they extracted from an aggrieved borrower, and from a "disgraced private investigator", and thereafter pursued relentlessly but fruitlessly through Black Cube and other shadowy contractors retained for their "Project Maple Tree" – is a complete misunderstanding and a fabrication from beginning to end.[37]

35. The evidence of the West Face Parties and that of co-Defendant, Bruce Livesey, also completely refutes another crucial allegation by the Plaintiffs. The West Face Parties did not in fact "hire" Livesey, a freelance investigative journalist, to research and write a defamatory article about the Plaintiffs, as alleged, and that too is admitted by Riley. Rather, Livesey approached

[35] West Face Factum, para 40ff
[36] West Face Factum
[37] See the evidence cited in the West Face Factum, pars 54-57; and see the Endorsement of Boswell J., January 11, 2021

them with an independent interest in writing about the Plaintiffs for another business journal, but he never in fact published any article.[38]

36. Representatives of West Face were contacted by the WSJ, but the information they provided was on background only, and it did not materially contribute to the presentation of the facts reported in the WSJ Publications.[39]

37. The evidence McFarlane, Levitt, Baumann and others who testified on these SLAPP Motions, similarly supports a finding that no conspiracy as alleged by the Plaintiffs ever existed in fact.

38. The evidence of Anderson also confirms that.

39. He clearly states that his relationship with Copeland was simply that of a journalistic source with a reporter.[40] He denies "recruiting" Copeland for any purpose, and he denies influencing or trying to influence Copeland's reporting in any way other than by the provision of high-quality information and analysis.[41] Indeed, Anderson confirms (to the contrary) that his assumption and expectation in contacting Copeland was that Copeland would do his own investigation and make his own assessment of the matters Anderson brought forward. That just makes sense.

40. Anderson is a financial professional, and a businessman whose success depends on others being persuaded by the factual findings, opinions, and conclusions he reaches through his research. His evidence is entirely supportive of Copeland. It is straightforward and credible. There is no

[38] West Face Factum
[39] West Face Factum
[40] Anderson Affidavit at para 33, MRAND, Tab 2, pp 23-24.
[41] Anderson First Affidavit at para 33, MRAND, Tab 2, pp 23-24.

reason that it should not be accepted as establishing that Copeland was not involved in any conspiracy, as alleged.

D. The Evidence of Copeland

41. The West Face Factum justifiably claims that "every one" of the Plaintiffs "core factual allegations" concerning their role as the alleged instigator of this conspiracy has been "specifically and unequivocally refuted" by their evidence. The same is true of the evidence of Copeland, as to any involvement by him.

42. The evidence assembled by the Dow Jones Defendants regarding their newsgathering leading to the WSJ Publications is reviewed in detail in the Dow Jones Factum.

43. It reveals that all of Copeland's activities that are referred to pejoratively in the Fresh as Amended Statement of Claim in this Conspiracy Action were in fact simply carrying out his normal, professional activities as a business reporter following up on a tip from a reliable source about a potential story of public interest.

44. Copeland has repeatedly, emphatically, and categorically denied any involvement whatsoever in a conspiracy with third persons. That evidence was untouched in cross-examination. It has the ring of truth, and there is nothing to call it into question.

45. It should be accepted in its entirety.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

46. Copeland moves under section 137.1 of the *Courts of Justice Act*, seeking an order dismissing this proceeding as a claim arising from expression by him on a matter of public interest. The purpose of that section, as set out in s. 137.1(1), are all directly triggered in the present case.

A. THE PROCEEDING ARISES FROM AN EXPRESSION MADE BY THE DOW JONES DEFENDANTS THAT RELATES TO A MATTER OF PUBLIC INTEREST

47. Section 137.1(3) places an initial burden on Copeland to "satisfy" the motion judge that the proceeding initiated against them arises from an "expression" by him relating to a matter "of public interest", as those terms are construed in the case law reviewed in the Joint Submission.[42]

48. Here, there can be no question that the action, although framed under the tort of conspiracy, arises from Copeland being the co-author of the WSJ Publications in issue.[43] The WSJ Publications clearly relate to a matter of public interest, and the conspiracy alleged by the Plaintiffs is defined to include their publication and their defamatory character as essential elements of the claim.[44]

49. As such, Copeland's threshold burden is easily met.

B. THE PLANTIFFS CANNOT SHOW THAT THERE ARE GROUNDS TO BELIEVE THAT THE PROCEEDING HAS SUBSTANTIAL MERIT

50. Given that, the burden now shifts to the Plaintiffs to satisfy this Court that there are grounds to believe their claims in the Conspiracy Action have substantial merit, and that Copeland has no valid defence. The Plaintiffs cannot meet this burden, and the claim must therefore be dismissed.

51. For a proceeding to have "substantial merit", it must have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. This requires that the claim be legally

---

[42] Joint Memorandum of Law at para 7
[43] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 24.
[44] As indeed was found by Justice Conway in her March 2018 Endorsement, reproduced as Exhibit 66 in the West Face MR. Vol. 4, Tabs B66-B67, pp. 1036-1045

tenable and supported by evidence that is reasonably capable of belief. Technical validity is not enough.[45] The Plaintiffs' conspiracy claims do not meet this test in any respect.

52. First, for reasons elaborated in the Dow Jones Factum, the Plaintiffs claims of defamation fail the s. 137.1 test. Since that defamation is also an essential element of the conspiracy alleged, that in turn results in the conspiracy claim also failing.

53. Second, it is submitted that, for reasons outlined in the Joint Submission and in the West Face Factum, the causes of action in conspiracy, and all of the other causes of action alleged by the Plaintiffs, are fatally flawed in law.[46]

54. More importantly, however, the evidence reviewed herein unequivocally establishes that no conspiracy of the kind alleged ever existed, and that none of the factual allegations from which the Plaintiffs contrived their pleaded claim stand up on the evidence.

55. No "deep dive" into disputed matters is required to reach that conclusion.

56. Even if there had been sufficient evidence to show a conspiracy among others, the Plaintiffs own evidence failed to make any viable case as to Copeland's alleged involvement. In addition, the evidence of every party, in addition to that of Copeland himself, confirms he was not involved.

C. THE MOVING PARTY HAS VALID DEFENCES TO THE PROCEEDING

57. In this case, there is no onus on Copeland to raise or "put in play" affirmative defences to these baseless conspiracy allegations.

---

[45] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 47 and 49.
[46] Joint Memorandum of Law at paras 38-40; West Face Factum, par. 66

58. His defence is that the allegations are simply false, in every respect.

D. THE PUBLIC INTEREST IN PERMITTING THE PROCEEDING TO CONTINUE DOES NOT OUTWEIGH THE PUBLIC INTEREST IN PROTECTING THAT EXPRESSION

59. The assessment under s. 137.1(4)(b) is usually the crux of the analysis. It can serve as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.[47]

60. Here, there can be no harm to the Plaintiffs resulting from a conspiracy that does not exist – that never happened – and there is nothing to put in balance against the corresponding high public interests in protecting Copeland's expression.

61. For the same reasons outlined in the Dow Jones Factum, the harms to the Plaintiffs business that are relied on were not *as a result* of any conspiracy, or of the WSJ Publications.[48] Evidence of a causal link, or its absence, are especially important here, given the many more fundamental causes of the Plaintiffs' business decline that are revealed in the Sutin Affidavit, the Dalton Report, and the Plaintiffs' communications with the OSC and the SEC.[49]

62. In these circumstances, the Plaintiffs have utterly failed to establish that any harm has been suffered or is likely to be suffered "as a result" of Copeland's reporting in the public interest.

63. The weighing exercise under s. 137.1(4)(b), informed by the Court's s. 2(b) *Canadian Charter of Rights and Freedoms* jurisprudence, must afford the highest level of protection to the

---

[47] *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 61-62.
[48] *Ibid* at para 68.
[49] *Ibid* at para 72.

WSJ's reporting in these circumstances, where the Plaintiffs aggressive threats of litigation from first contact were deliberately calculated to deter the WSJ and other media, and to discourage sources from providing information.[50]

64. In these circumstances, the Supreme Court has recognized that the Plaintiffs' history of litigation, and its effects on *other* media such as Reuters, the Globe and Mail and Livesay, as well as the potential chilling effect on *future* expression either by them or others, are all factors that should tip the balance in Copeland's favour.[51] The WSJ's history of reporting accurately and fairly in the public interest is another such factor.

65. The public interest in protecting Copeland's reporting in these circumstances is very high. The public has a strong interest in determined reporting about the business practices of persons like the Plaintiffs, who raise money in Canada's public capital markets, and manage investments on behalf of others. That is so especially when, as here, those activities are concealed, or are obscured by technicality and complexity.

66. The express purpose of s. 137.1 is to "encourage" and "promote" public participation, and the integrity and confidence required for such participation in public capital markets can only be encouraged and promoted if courageous reporting, such as that in the WSJ Publications, is protected.

PART IV - ORDER REQUESTED

[50] *Ibid* at para 77.
[51] *Ibid* at para 78-80.

67. Copeland seeks an order dismissing the Conspiracy Action as against him pursuant to 137.1(3) of the *Courts of Justice Act* and an order for costs of this motion and of the entire proceeding on a full indemnity basis pursuant to section 137.1(7) of the *Courts of Justice Act*.

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

M. Philip Tunley

ST. LAWRENCE BARRISTERS LLP
33 Britain Street, 2nd Floor
Toronto ON M5A 1R7

M. Philip Tunley (LSO# 26402J)
Tel: 647.964.3495
phil@tunleylaw.ca
Fax: 647.245.8285

Lawyers for the Defendant,
Rob Copeland

SCHEDULE "A"

LIST OF AUTHORITIES

68.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

69.

THE CATALYST CAPITAL GROUP INC. et al.
Plaintiffs

-and-

WEST FACE CAPITAL INC. et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MOVING PARTY, ROB COPELAND

ST. LAWRENCE BARRISTERS LLP
33 Britain Street, 2nd Floor
Toronto ON M5A 1R7

M. Philip Tunley (LSO# 26402J)
phil.tunley@stlbarristers.ca
Tel: 647.964.3495

Jennifer P. Saville (LSO# 68564F)
jennifer.saville@stlbarristers.ca
Tel: 647.245.2222

Tel: 647.245.2121
Fax: 647.245.8285

Lawyers for the Defendant,
Rob Copeland