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

FACTUM OF THE DEFENDANTS, MOVING PARTIES, DOW JONES & COMPANY, ROB COPELAND, AND JACQUIE MCNISH

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

Tel: 647.245.2121
Fax: 647.245.8285

Lawyers for the Defendants, Moving Parties, Dow Jones and Company, Rob Copeland and Jacquie McNish

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: **JEFFREY MCFARLANE**
558 Sunset Drive
Durham, NC 27713

jmcfarlane@triathloncc.com

Defendant

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PART I - INTRODUCTION

1. After three and a half years of litigation, and nearly 18 months of intense document production and cross-examination since these motions pursuant to section 137.1(3) of the *Courts of Justice Act* ("**SLAPP Motions**") were initiated, two things are clear beyond doubt. The Wall Street Journal ("**WSJ**") publications in issue in this action (the "**Defamation Action**") were accurate in all respects, in the public interest, and based on a careful journalistic review of the facts; and the Defendant, Rob Copeland, did not engage in any "short-and-distort" conspiracy with any of the other Defendants in the companion action ("**Conspiracy Action**"). The Plaintiffs have adduced no evidence capable of supporting their claims in either respect.

2. This Factum supports the motion by the Defendants, Dow Jones and Company, Copeland and Jacquie McNish (the "**Dow Jones Defendants**") to dismiss this action as against them pursuant to section 137.1(3) of the *Courts of Justice Act* ("**SLAPP Motion**"). It incorporates the Joint Submissions of Law on S. 137.1 ("**Joint Submission**") filed by all SLAPP Moving Parties.

3. As detailed in the Joint Submission, there is no issue that both Actions arise out of "expression" by the Dow Jones Defendants that "relates to a matter of public interest":[1] namely an online article, "Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers", published on the WSJ website on 9 August 2017 (the "**Online Article**"),[2] and republished in the WSJ print edition the next day (the "**Print Article**" and together the "**WSJ Publication**s").[3]

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[1] Joint Memorandum of Law at paras 5-19

[2] Affidavit of Rob Copeland affirmed 8 November 2019 ("**Copeland First Affidavit**"), Motion Record of the Defendant Rob Copeland (Motion under s. 137.1 of the Courts of Justice Act) ("**Copeland MR**"), Tab 2, Exhibit M, ("**Online Article**") p 104.

[3] Copeland First Affidavit, Copeland MR, Tab 2, Exhibit N, ("**Print Article**") p 104.

4. Section 137.1(3) therefore requires that this Court "shall" dismiss this Defamation Action, because the Plaintiffs cannot satisfy this Court that their claims herein have "substantial merit"; nor that the Dow Jones Defendants have "no valid defence"; nor that there is harm to the Plaintiffs that outweighs the restrictions on free expression created by the action.

PART II - SUMMARY OF FACTS

A. THE PARTIES

5. Dow Jones is a corporation with its head office in New York, NY, and is the publisher of the WSJ.[4] Copeland and McNish are journalists employed by Dow Jones. The WSJ is the premiere business news publication in North America. It is renowned both for its high journalistic standards and for the quality of its analysis and insights into business matters of all kinds. The WSJ maintains its high standards through a variety of means, starting with having principled and reputable reporters with access to excellent, credible and trustworthy sources. Articles submitted to the WSJ are also vetted in a multi-layered and rigorous editing and standards review process.[5]

6. The WSJ Publications were co-authored by Copeland and McNish. Together, they have more than three decades of experience working at highly reputable business media organizations, including the WSJ and, in the case of McNish, the Globe and Mail.[6]

7. At all times, Copeland and McNish were subject to the Dow Jones Code of Conduct, and were supported by editorial staff, standards editors, and an in-house legal team, to ensure that the WSJ's high journalistic standards and reputation for fair, balanced reporting were met.[7]

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[4] Copeland First Affidavit at para 3, Copeland MR, Tab 2, p 17.
[5] Copeland First Affidavit at para 28, Copeland MR, Tab 2, p 24.
[6] Copeland First Affidavit at paras 5 and 6, Copeland MR, Tab 2, p 18.
[7] Copeland First Affidavit at para 26 and Exhibit O, Copeland MR, Tab 2, p 24 and 110.

8. The Plaintiffs are related corporations with head offices in Toronto, that engaged in the business of lending in distressed and other high-risk situations. Both are led by Newton Glassman ("**Glassman**"), who has famously described the business of distressed lending as a "blood sport".[8]

9. At the material times, Callidus was a reporting issuer whose securities were listed on the TSX and other North American stock exchanges, with attendant public reporting obligations. It claimed to carry on business as an asset-based lender, providing capital on a bridge basis to meet the financing requirements of borrowers that cannot access traditional lending sources.[9]

10. Catalyst is a privately owned investment company. It exercised control over more than 60% of Callidus's publicly traded securities, which were held in investment funds Catalyst offered to the public (the "**Catalyst Funds**"). In its own words, Catalyst was a leader in "investments in distressed and undervalued Canadian situations for control or influence".[10] In some investment transactions, both companies were involved or had an interest. As such, there was a high public interest in relevant information and commentary about the business practices of both.

B. PRIOR DEVELOPMENTS IN THE PLAINTIFFS' BUSINESSES

11. When Copeland and McNish began their investigation and news gathering leading to the WSJ Publications, events had already brought the Plaintiffs' businesses and relationships under scrutiny, both in the press and in the courts.

12. First, they were involved in extensive, high profile litigation with individuals and businesses they viewed as business competitors or threats, including the co-Defendant, Jeff McFarlane, and other borrowers who were claiming accounting irregularities in the Plaintiffs'

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[8] Transcript from the Cross-examination of James Riley held 27 October 2020 ("**Riley Cross**"), Exhibit 2
[9] Fresh as Amended Statement of Claim dated 19 July 2019 at para 4, Copeland MR, Tab 4E.
[10] Fresh as Amended Statement of Claim dated 19 July 2019 at para 2, Copeland MR, Tab 4E.

transactions with them. This and other litigation also highlighted the adversities created by the Plaintiffs' use of distressed debt financing to acquire control of borrowers' businesses.

13. Second, they had recently sued their former Chief Credit Officer, Craig Boyer, alleging he had artificially inflated certain of their investments, in breach of his duties to them.

14. Third, they had announced a search for a purchaser to take the shares of Callidus private, in part due to increased scrutiny of Callidus's investment and public reporting practices by the OSC, and the imposition of public disclosure standards the Plaintiffs "were not going to be able to satisfy".[11]

15. Fourth, as a result of these events and other business conditions, the Plaintiffs had experienced a steady decline in reported revenues, in new investment transactions, and in the value of Callidus's publicly traded shares, which fell steadily from its high point to $15.36 per share just before the WSJ Publications appeared on 9 August 2017, with significant percentage drops at the announcement of each recent quarterly earnings for Q3 and Q4 in 2016 and Q1 and Q2 in 2017.

C. THE NEWSGATHERING FOR THE WSJ PUBLICATIONS

1. *The Information Provided by Nathan Anderson*

16. In the course of reporting for another story, Copeland learned in February 2017 from Nathan Anderson that concerns were being raised about the lending and accounting practices of Catalyst and Callidus.[12] It was Anderson who initiated this contact with Copeland, to ask if he had

[11] Riley Cross, November 17, 2020 at p. 678-679, Q. 2002
[12] Copeland First Affidavit at para 7, Copeland MR, Tab 2, p 18.

any information about Catalyst and Callidus. Copeland stated at that time that he did not.[13]

17. Anderson is a business analyst, with impressive qualifications and experience as such.[14] As of February 2017, he had an established track record of success in filing a whistleblower complaints, starting in 2014 with one to the SEC, resulting in a successful prosecution of RD Legal Capital LLC and its founder for fraud.[15] Anderson was aware that Copeland had reported on RD Legal, and other fraud investigations. After his call to Copeland, Anderson contacted other reporters, including freelancer, Bruce Livesey, and Reuters, about his interest in the Plaintiffs.[16]

18. Anderson recounts that in November 2016, after learning about the Plaintiffs from an anonymous Twitter account, he had contacted Callidus borrowers, including McFarlane.[17] He then conducted extensive research into the Plaintiffs, including information obtained from investors, former senior executives of the Plaintiffs, including a founding CEO and a former CFO,[18] and other sources which led him to form the view that they were engaging in fraudulent conduct to artificially inflate the value of their assets.[19] On May 22 and 30, 2017, he submitted his lengthy complaints about the Plaintiffs to the OSC whistleblower program and an equivalent program at the SEC, in the US.[20] Both complaints meticulously analysed and attached numerous

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[13] Affidavit of Nathan Anderson sworn 8 November 2019 ("**Anderson Affidavit**") at para 31, Motion Record of the Defendant Nathan Anderson (Motion under s. 137.1 of the Courts of Justice Act) ("**MRAND**"), Tab 2, p 23; Supplementary Affidavit of Nathan Anderson sworn 20 August 2020 ("**Anderson Supplementary Affidavit**") at para 15, Supplementary Motion Record of the Defendants Anderson and ClaritySpring (Motion under s. 137.1 of the Courts of Justice Act) ("**SMRAND**"), Tab 3, p 586; Transcript from the Cross-examination of Rob Copeland held 13 November 2020 ("**Copeland Cross**"), Exhibit 2, Tab 91

[14] Anderson Affidavit at paras 4-8, MRAND Tab 2, pp 13-14.

[15] Anderson Affidavit at para 15, MRAND Tab 2, p 16.

[16] Anderson Affidavit at para 32, MRAND Tab 2, p 23.

[17] Anderson Affidavit at para 19, MRAND Tab 2, p 19.

[18] OSC Submission, May 22, 2017, Anderson Affidavit, Exhibit "I", p 290, MRAND, Tab 2.

[19] Transcript from the Cross-Examination of Anderson held April 28, 2021 ("**Anderson Cross #2**"), p 53, q 942 and p 307, q 972: and see the evidence assembled at Anderson Factum, para 12.

[20] Anderson Second Affidavit at paras 19-26 and Exhibits "I", "J", "K", "L" and "M", Anderson Supplementary 137.1 MR, Tab 3, pp 587-594 and 717-840. The OSC regulated Callidus as the issuer of publicly traded securities in the Ontario market, and the SEC regulates Callidus as a registered advisor to the Catalyst Funds.

documentary exhibits to assist readers in understanding and verifying the findings and conclusions he reached.[21]

19. After a break in communications, Anderson resumed contact with Copeland by text message sent on July 13, 2017 over a secure application called Signal, saying "Got something".[22] Before providing any information, however, Anderson secured a commitment from Copeland that he would be treated as a "confidential source": that is, at his request, Copeland promised that he would protect Anderson's identity both in any resulting WSJ publications and any ensuing litigation arising out of his provision of information to the WSJ.[23]

20. Such promises of confidentiality are a standard practice of WSJ journalists, and those employed by other major media.[24] They give such commitments where necessary to learn information needed to produce fair, complete and accurate journalism, and in order to further the public interest in having the best possible information available for their reporting.[25] Most of the sources Copeland and McNish ultimately spoke to for the WSJ Publications were also confidential sources in that sense,[26] because they would not otherwise have spoken to the WSJ for fear of retribution and repercussions by the Plaintiffs. Specifically, Glassman was cited as the basis for that concern.[27] This Court has already found this confidentiality was essential to their relationship

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[21] Anderson Supplementary Affidavit at para 24, SMRAND, Tab 3, pp 589-590.
[22] Transcript from the Cross-Examination of Anderson held November 20, 2020 ("**Anderson Cross #1**"), p 176, q 518.
[23] Affidavit of Rob Copeland affirmed 23 October 2020 ("**Copeland Third Affidavit**") at para 9, Motion Record of the Respondent Source Privilege Motion ("**Source Privilege MR**"), Tab 1, pp 3-4.
[24] Copeland Third Affidavit at para 10, Source Privilege MR, Tab 1, p 4.
[25] Copeland Third Affidavit at para 12, Source Privilege MR, Tab 1, pp 4-5.
[26] [26] Copeland First Affidavit at para 8, Copeland 137.1 MR, Tab 2, p 18; Copeland Third Affidavit at para 9, Source Privilege MR, Tab 1, pp 3-4.
[27] Copeland Third Affidavit at paras 10-11, Source Privilege MR, Tab 1, p 4.

with sources, because of Glassman, Catalyst and Callidus's frequent resort to litigation, and aggressive pursuit of litigation, against anyone who questioned their business practices.[28]

21. Based on this commitment, Anderson provided Copeland with a link to a DropBox folder containing his whistleblower submissions to the OSC and the SEC, and related research and supporting documents, to see if he and the WSJ would be interested in pursuing an investigation of their own.[29] Copeland advised Anderson that McNish would work with him on the matter.[30]

22. After reviewing those documents, Copeland contacted McNish to see if she could assist with the newsgathering required in Canada.[31] They both recognized from the outset that, unlike other whistleblowers, Anderson himself was neither a borrower from the Plaintiffs, nor a guarantor of their investments, nor was he in litigation with them. Rather, he was a "professional" whistleblower, who had developed a business of filing such complaints to public agencies. They saw these as indicators that he could provide quality information without personal bias or malice.[32]

23. Together, Copeland and McNish pursued investigations over the next month to see if these matters could be the subject of a news publication for the WSJ.

2. *The Focus on the Plaintiffs' Investment in XTG*

24. The first company example cited in Anderson's initial complaint to the OSC[33] was an investment by Callidus in Xchange Technology Group ("**XTG**"), then owned by McFarlane,

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[28] Copeland Third Affidavit at paras 11, Source Privilege MR, Tab 1, p 4; Justice McEwen's March 15 Endorsement.
[29] Anderson Cross #1, p 57, q 120; Anderson Cross #2, p 307, q 972.
[30] Anderson Cross #1, p. 15, q. 23.
[31] Copeland First Affidavit at para 7, Copeland 137.1 MR, Tab 2, p 18.
[32] Affidavit of Rob Copeland affirmed 17 August 2020 ("**Copeland Second Affidavit**") at para 12, Supplementary Motion Record of the Defendant Rob Copeland ("**Copeland SMR**"), Tab 5, p 415.
[33] OSC Submission, May 22, 2017, Anderson First Affidavit, Exhibit "I", p 290, MRAND, Tab 2.

which began in 2012.[34] McFarlane initially believed that Callidus would provide sufficient operating liquidity to increase revenues and to stabilize and improve XTG's working capital position. This did not materialize, however, and he claimed Callidus devalued XTG's business, leading to default.[35] By 2017, questions were being raised by McFarlane and others about the value of the investment, and the accounting underlying it.

25. Initially, McFarlane also provided information to Copeland as a confidential source, including via a DropBox data room of documents related to XTG.[36] However, after the Ontario Court of Appeal held in his favour in the action by Callidus on his guarantee, he agreed to be named as a source.[37] Since he was prepared to go on record with his concerns, Copeland and McNish decided to make XTG a focus. McFarlane sent Copeland a "for attribution" quote for potential inclusion in the WSJ Publications.

26. Both Anderson and McFarlane have confirmed that, apart from providing information, they had no input into, or control over, the content or timing of the resulting WSJ Publications.[38]

27. The facts related to the Plaintiffs' investment in XTG are not in dispute. They were confirmed by Copeland and McNish through interviews – including with the Plaintiffs – and from primary documents from court files, from other sources. Those facts are admitted by the Plaintiffs' witness, James Riley, as follows, and they were accurately reported in the WSJ Publications.

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[34] OSC Submission, May 22, 2017, pp 9-12, Anderson Affidavit, Exhibit "I", p 290, MRAND, Tab 2.
[35] Affidavit of Jeffrey McFarlane sworn on 8 November 2019 ("**McFarlane First Affidavit**") at paras 13-14, Motion Record of the Defendant, Jeffrey McFarlane (Motion Under S. 137.1 of the Courts of Justice Act) ("**McFarlane MR**"), p 8.
[36] Copeland Cross, p 153, q 366
[37] Anderson, Bauman and Levitt, also waived protection and self-identified as sources for the WSJ and as whistleblowers during the SLAPP Motions.
[38] Anderson Affidavit at para 33, MRAND, Tab 2, pp 23-24; Anderson Cross, November 20, 2020, Q. 625-635, Anderson Transcript Brief, Tab 1, p. 198-201; McFarlane First Affidavit at para 64, McFarlane MR, p 23.

28. In 2012, with the US and Canadian dollars about at par, XTG was in default of its US$23.9 million loan from PNC Bank. It did not have sufficient working capital to purchase inventory for its business.[39] On October 11, 2012, Callidus, then privately owned by Catalyst, purchased the PNC Bank loan position for US$11.6 million.[40]

29. Importantly, what Callidus bought was not the whole of the US$23.9 million loan amount. It was just US$11.6 million of that loan, with the balance of US$12.3 million being forgiven, and the borrower and guarantors being discharged to that extent.[41] What Callidus ended up with was a loan of US$11.6 million amount, as the WSJ accurately reported: "[McFarlane] said his company began borrowing from Callidus in late 2012 after the lender purchased its $11.6 million loan…"[42]

30. Callidus charged XTG an immediate one-time fee of US$2.5 million, and then increased XTG's available credit back to US$22 million: the US$11.6 million existing loan, a new advance of US$7.9 million for working capital, and payment of the US$2.5 million Callidus fee. Callidus admits that its efforts to sell its interest in XTG at anything close to this amount failed.[43]

31. After default by XTG occurred, and a lengthy insolvency controlled by Callidus ensued, only one arms length offer was made to purchase XTG from the Court-appointed Receiver, for US$17 million.[44] Callidus rejected that offer,[45] and instead made a "stalking horse" offer to purchase XTG for about twice that amount, ensuring that no market value offer could compete. That offer was recommended for approval in the Receiver's first report at "approximately $35

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[39] Affidavit of James Riley sworn on 29 May 2020 ("**Riley Libel Affidavit**") at paras 110 and 112, pp 35-36.
[40] Public Riley Libel Affidavit at para 111, p 35-36.
[41] Affidavit of Jeffrey McFarlane sworn on 11 September 2020 ("**McFarlane Second Affidavit**") at para 16, Supplemental Motion Record of the Defendant, Jeffrey McFarlane ("**McFarlane SMR**"), p 8.
[42] Print Article, Copeland First Affidavit, Copeland MR, Tab 2, Exhibit N, p 104.
[43] Riley Libel Affidavit at para 111, p 35-36.
[44] McFarlane Second Affidavit at para 19, McFarlane SMR, p 10.
[45] Riley Libel Affidavit at para 117-119, p 37-38.

million".[46] As the WSJ reported: "Within a year, [XTG] was in insolvency proceedings. Callidus purchased the company for about $34 million, according to court documents." By that time, Riley admits the "face-value" of Callidus's loan had already risen to at least US$37 million.[47]

32. When Catalyst took Callidus public in 2014, it agreed to cover future losses by Callidus on several existing investments, including XTG, under a loan-loss instrument referred to as the "**Catalyst Guarantee**".[48] As at December 31, 2014, Callidus reported XTG as an "asset held for sale" at $60.2 million (Canadian) "net of a loan loss provision".[49] As the WSJ accurately reported, by the time of Callidus' September 2015 earnings report, that amount had risen to $66.9 million.[50]

33. Then, on December 31, 2015, Callidus made a call on the Catalyst Guarantee, requiring (as the WSJ accurately reported) that Catalyst pay a total of Can $101.314 million to Callidus to assume ownership of this "asset". That payment was made in March 2016.[51] Catalyst then transferred XTG to the Catalyst Funds at a loss in December 2016, reporting the asset, now in US dollars again, at just US$55 million.[52] The WSJ accurately reported:

> "In December 2016, Catalyst told its investors that the [XTG] stake was only worth a fraction of what it had paid that March, triggering losses on two of its funds, according to one of the whistleblower complaints and documents reviewed by the [WSJ].
>
> Mr. McFarlane confirmed he filed one of the whistleblower complaints. His complaint, and one other, alleges that Catalyst funds overpaid Callidus to acquire the [XTG] investment, and delayed and underreported potential losses." [53]

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[46] First Receiver's Report, October 25, 2013 at para 7.1, OSC Submission, May 22, 2017, Exhibit 27, Anderson Affidavit, Exhibit "I", p 290, MRAND, Tab 2.
[47] Riley Libel Affidavit at para 119, 127, and 131, pp 38 and 40-41
[48] As accurately reported by the WSJ "When Callidus went public in 2014, Catalyst, its majority shareholder, agreed to cover future losses on loans including [XTG]."
[49] Riley Libel Affidavit at para 136-137 and 147, p 42-43 and 45
[50] Print Article, Copeland First Affidavit, Copeland MR, Tab 2, Exhibit N, p 104.
[51] Riley Libel Affidavit at para 174-176, p 52-53
[52] Riley Libel Affidavit at para 185, p 55.
[53] Print Article, Copeland First Affidavit, Copeland MR, Tab 2, Exhibit N, p 104.

34. On their face, these reported, true facts about the value of the Plaintiffs' investment in XTG over time, are indeed newsworthy. Having acquired a controlling debt interest in XTG at a distressed price of just $11.6 million in 2012, and then operated the company or allowed it to operate at a loss for the next 5 years, including a lengthy insolvency, the Plaintiffs were reporting its value to be roughly 5 times what they paid on an arms-length basis, yet much less than they paid each other to change its ownership just 9 months earlier. The WSJ Publications included the following comment from McFarlane's prepared statement: "'I have serious concerns about the integrity of Callidus's accounting around XTG'."

35. In closing its report on XTG, the WSJ also noted, accurately, that the Court of Appeal had recently found that McFarlane's liability on a personal guarantee of XTG's debt was less than Callidus had reported and claimed in court; that in February 2017, Callidus had sued Boyer, its former Chief Credit Officer, and "alleged that he was responsible for 'artificially inflating' the financial performance of some of its investments, including [XTG]";[54] and that Callidus had disclosed in May 2017 that its accounting practices "were under review from the OSC", quoting public comments made by Glassman on behalf of Callidus in that regard.[55]

3. *The WSJ's investigation and reporting on other matters regarding the Plaintiffs*

36. This report on the Plaintiffs' investment in XTG was part of a broader report in the WSJ Publications on the Plaintiffs' businesses, based on Copeland and McNish's newsgathering.

37. First, they also learned of two other "whistleblower" complaints against the Plaintiffs, in addition to Anderson's and McFarlane's: one was about Fortress Resources LLC ("**Fortress**"),

[54] *Ibid*, at p. 104
[55] Print Article, Copeland First Affidavit, Copeland MR, Tab 2, Exhibit N, p 104.

made by Levitt, who was one of its principals and guarantors; and the other was about Alken Basin Drilling Ltd. ("**Alken**"), made by its principal and guarantor, Kevin Baumann. Levitt and Bauman provided information to the WSJ only on the basis that their confidentiality would be protected.[56] After receiving confirmation from both that they had filed whistleblower complaints, Copeland and McNish were able to report, accurately, that: "At least four individuals have filed whistleblower complaints with Canadian securities regulators alleging fraud at a multibillion-dollar investment firm and its publicly traded lending arm, according to people familiar with the matter and documents reviewed by The Wall Street Journal." The Plaintiffs take issue with the words "At least four …" in this report. However, there is nothing inaccurate or inappropriate in the use of those words. In fact, Copeland and McNish had learned that a fifth person, whose identity is protected, also complained about the Plaintiffs to the TSX.[57]

4. ***Other sources for the WSJ Publications***

38. Copeland and McNish also received information from Levitt and Baumann about their dealings with the Plaintiffs. One or both of them had also filed a complaint with the Toronto Police Financial Crimes Unit. Copeland and McNish received a presentation document that had been provided to the TPS. A TPS spokesperson in July 2017 provided information, including an on-the-record quote, confirming that the complaints had been received and were under review.

39. The journalists also spoke with representatives of the OSC on a confidential basis, to obtain information about how that agency's whistleblower process worked and confirm other details.

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[56] Both Levitt and Baumann released the WSJ and its journalists from their obligation to protect their identities in or about October 19-20, 2020, after the Plaintiffs filed a motion containing documents produced to the Plaintiffs by themselves, or other parties, that disclosed some of their communications with Copeland.

[57] Order of Justice McEwen on Confidential Source Privilege Motion dated 7 April 2021 Appendix "A", Tab 29, p. 62. McNish states they decided not to make reference to it because it was "such a separate issue" that it "distracted from the main point".

They obtained documents confirming that the complaints had been formally filed, and that the "Fraud" category had been checked on those forms. Documents produced by the Plaintiffs only under compulsion of this Court during these SLAPP Motions not only confirm the truth of these facts as reported in the WSJ Publications: they also confirm that at the time of their publication, the OSC and the SEC were indeed both conducting their own reviews of the Plaintiffs accounting for various transactions with its investors, including the XTG transaction, and specifically including the intercompany payment under the Catalyst Guarantee, and the subsequent valuation of XTG as an asset held for sale by the Catalyst Funds.[58]

40. The Dow Jones Defendants estimate that Copeland and McNish spoke to numerous sources, of which many spoke only on a confidential basis, during the month prior to publication.

5. *The Plaintiffs' contact and dealings with Copeland and McNish*

41. In mid-July 2017, Copeland and McNish began discussing the matters raised by their news gathering with representatives of the Plaintiffs. The first contact was on July 17, 2017 when Dan Gagnier, a media advisor and spokesperson for the Plaintiffs, reached out to McNish after learning that the WSJ were asking questions.[59] In a call on July 19, 2017 Gagnier insisted he would only talk "on background", meaning that the information provided could not be published by the WSJ, or attributed to the Plaintiffs. Gagnier and other representatives of the Plaintiffs maintained that position right up to the date of publication, despite repeated requests by the WSJ journalists for

[58] See the evidence cited and reviewed in the Anderson Factum paras 24-26, 28, 33 which the Plaintiffs refused to produce until ordered by this Court. That evidence demonstrates that the concerns being raised by whistleblowers, and specifically including the complaints raised by McFarlane about the accounting and public disclosure relating to XTG that were reported in the WSJ Publications, were shared by these regulators at the time, and were true and valid.

[59] Copeland First Affidavit at paras 11-12, Copeland MR, Tab 2, p 20.

information, or a position or comment, that they could report.[60]

42. Also in that first call, Gagnier spoke about a group of borrowers who "were conspiring" to make allegations about Callidus. That suggestion, articulated by Gagnier from the outset, was repeated by the Plaintiffs representatives in various communications to the WSJ journalists prior to publication.[61] It is now reflected in the claims made by the Plaintiffs in the Conspiracy Action.

43. Gagnier's call was followed almost immediately by an exchange of threatening letters from the Plaintiffs' then-external counsel, Rocco DiPucchio, and responses from Dow Jones' in-house counsel, Joseph Weissman, trying to encourage the Plaintiffs to engage meaningfully with McNish and Copeland, and to provide information or comment for publication.[62]

44. Despite these threats, McNish continued to correspond with Gagnier. Her email of July 31 requested a for-attribution comment from the Plaintiffs on a detailed list of questions raised and information received by the WSJ. That email was not answered by Gagnier.[63]

45. By email exchange with McNish on August 7, 2017 Gagnier confirmed a meeting between the WSJ journalists and representatives of the Plaintiffs the next day, "exclusively" to discuss Callidus's involvement with XTG. He again insisted it be "on background, not for attribution".[64]

46. Copeland and McNish agreed to proceed on the Plaintiffs' terms. Since DiPucchio was to attend for the Plaintiffs, Weissman attended for Dow Jones. The meeting on August 8, 2017 was recorded by both parties, and transcripts they each prepared provide an accurate and consistent

[60] Copeland First Affidavit at para 13, Copeland MR, Tab 2, p 20.
[61] Copeland First Affidavit at para 13, Copeland MR, Tab 2, p 20.
[62] Copeland First Affidavit, Exhibits A-H, Copeland MR, Tab 2, pp 41-61.
[63] Copeland First Affidavit at paras 19-20 and Exhibit "F", Copeland MR, Tab 2, pp 22 and 54-55.
[64] Copeland First Affidavit at para 22, Copeland MR, Tab 2, p 23.

account.[65] At the outset, the Callidus representatives again insisted the discussion be "on background, not for attribution", meaning that the WSJ could not refer to the information in its reporting, or say it was from anyone connected to Callidus or even "a person familiar or anything like that". McNish noted that had "limited value" for their reporting.[66]

47. Copeland stated:

> "You can have this meeting on whatever terms you'd like today, but we posed these questions. You've now had over a week to answer them and it's okay if you don't want to provide comment on those. …
>
> We are not agreeing in any way to wait to publish any story until some point at which you feel that you have formally commented or declined to comment. You've had over a week with these questions and that's our position. We are not committing to not publish a story until some nebulous future point. So I just want to be transparent about that."[67]

48. At one point, McNish asked: "So why wouldn't you go on the record with this? That explains everything, and we can't use this." A Callidus representative replied "I don't know how to answer those questions. You see you're tricky, tricky, tricky". McNish responded that what Callidus was now saying was "hard to reconcile" with prior public statements.[68]

49. One Callidus representative provided a "simple example" of accounting for payments under the Catalyst Guarantee, which prompted a second to say: "I'm not sure I agree with that". However, none of the people Callidus brought to the meeting were accountants.[69]

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[65] The WSJ Meeting transcript is Exhibit "J" to the First Copeland Affidavit
[66] *Ibid* p. 2
[67] *Ibid* p. 3
[68] *Ibid*
[69] *Ibid*, p. 23-24

50. It was stated repeatedly that from Callidus' perspective XTG was not "material", because it was fully indemnified under the Catalyst Guarantee, and so "Why would you waste your time disclosing anything about a loan that isn't material given the guarantee?" By contrast, when McNish asked "So in this case, what is the hit to the funds?", the response was "That's not on the public record, so we are very careful with the funds not to reveal what we consider their information."[70]

51. Very little information was provided at the meeting that was not already known to Copeland and McNish from public sources.[71] There were few direct responses to the questions posed in McNish's July 31 email, and no specific commentary that could be used in their reporting. This refusal to engage meaningfully, to allow attribution, or to provide confirmation of any new information, perspective or position, appeared to Copeland and McNish to be a deliberate strategy of refusal to commit, and even obfuscation.

D. PRE-PUBLICATION VETTING OF THE WSJ PUBLICATIONS

52. While a rigorous review on both legal and journalistic standards is an inherent part of the WSJ's DNA, the process followed in this case was particularly rigorous. The research conducted on the Plaintiffs revealed that they often engaged in litigation as part of their business.[72] This aggressive approach was reflected in their dealings with the WSJ journalists from the outset, and clearly indicated to everyone at WSJ that the Plaintiffs would likely attack the integrity of any WSJ reporting.[73] Copeland testified "This story received the absolute full gauntlet of editing".

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[70] *Ibid*, p. 24 and 27

[71] This was indeed acknowledged at p. 35 ("I think everything that we have said in relation to Callidus is in the public record.")

[72] Copeland First Affidavit at para 22, Copeland MR, Tab 2, p 24-25.

[73] Copeland First Affidavit at para 22, Copeland MR, Tab 2, p 24-25.

53. The rigorous multi-tiered vetting process described by Copeland began immediately, with the involvement of Geoff Rogow, the bureau-level editor assigned to be responsible for the WSJ Publications. The "final reader" for the publications was Neal Lipschutz, then-head of the WSJ Standards and Ethics team,[74] and the last stages of review included input from Weissman, the same in-house lawyer who had responded to the correspondence from DiPucchio, and who attended the August 8 meeting with Callidus representatives. The vetting process and resulting revisions to the WSJ Publications continued well into the day of publication on August 9.

54. Contrary to the Plaintiffs' allegations, no-one outside the WSJ had any control over or input into the contents of the WSJ Publications, apart from information sources provided to Copeland and McNish. They both deny any such control or input at any point, and Anderson, McFarlane and others who testified on the SLAPP Motions concur.[75] This entirely negates an essential element the Plaintiffs' baseless claims against Copeland in the Conspiracy Action.[76]

E. EVENTS FOLLOWING PUBLICATION

55. The Plaintiffs suggest that the release of the WSJ Publications to public markets on August 9, 2017 was the sole cause of the immediate drop in Callidus's share price by at least 21%.[77]

56. On closer review, however, the record shows Callidus's share price started the day on August 9 at $15.36 per share. It declined from there in thin trading to $14.92 at 3:38 pm, a 2.86% decline even prior to publication.[78] Then, between the initial online publication at 3:29 pm and

[74] Lipschutz is currently Deputy Editor in Chief of the WSJ
[75] Anderson Affidavit at para 33, MRAND, Tab 2, pp 23-24; McFarlane First Affidavit at para 64, McFarlane MR, p 23.
[76] See the Factum of Copeland filed on his parallel SLAPP Motion in the Conspiracy Action to dismiss those claims as against him in their entirety.
[77] Riley Conspiracy Affidavit, par. 40;
[78] Affidavit of Juneja, Exhibit "1" on page 11

the close of trading at 4 pm, in much higher trading volumes, the share price fell again from $14.92 to $12.06, a 20.4% decline for the period (or 18.6% for that portion of the day).

57. After close of trading, however, Callidus issued a press release ("**Callidus Release**"), and Catalyst sent an information release to its Fund investors ("**Catalyst Release**"). Both stated the Plaintiffs knew of "no legitimate basis" for any complaints, characterizing them as "a misuse or abuse" of the whistleblower programs, but they did not deny that the complaints had been made.[79] The WSJ updated the Online Article that evening to include portions, or fair summaries, of contents from these Releases. When markets opened on August 10, Callidus' stock price initially rallied from $11.86 per share to about $13.75, apparently based on the Callidus and Catalyst Releases, reducing the net decline since publication of the Online Article to just 7.84%.

58. However, also on August 10, Callidus held its Q2 2017 earnings call, which announced a further decline in revenue of 15% ($4.7 million) over Q1. A public press release confirming that decline in revenues ("**Callidus Earnings Release**") also restated comments in the Catalyst and Callidus Releases responding to the Online Article.[80] Following that announcement, the Callidus stock price resumed its pre-publication decline, to close for the day on August 10 at $11.83, and for the day on August 11 at $11.43.

59. The publication of the Print Article seems to have had only slight impact, if any, on this continued, steady decline in the stock price on and after August 10, 2017. As with the Online Article, portions of the Catalyst and Callidus Releases were incorporated in the Print Article.[81]

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[79] Riley Cross, Q944-946, October 27, 2020 at p. 304; Riley Libel Affidavit, par. 86
[80] Riley Cross, Q925-927, October 27, 2020 at p. 300; Ex. 236 to Riley Conspiracy Affidavit
[81] Print Article, Copeland First Affidavit, Copeland MR, Tab 2, Exhibit N, p 104.

60. Between the close of business on August 11, 2017 and August 16, 2019 – when Catalyst accepted an offer to purchase the shares of Callidus held in by Catalyst Funds and take Callidus' private – the trading price of the shares continued to decline from $11.47 to just $0.75. Over that period, various articles in other media cited the Plaintiffs' poor business returns and continued litigation with borrowers and others, as the main reasons for this continued decline.[82] An Affidavit (the "Sutin Affidavit") sworn by the Chair of Independent Committee of the Callidus Board of Directors, David Sutin, and filed by the Plaintiffs to support their request for this Court's approval of their going-private transaction, discussed the causes of the Plaintiffs declines in business fortunes in detail: it made no reference to the WSJ Publications.[83] To the same effect is the Strategic Review and Remediation Plan (the "Dalton Report") prepared in March 219 by interim Callidus CEO, Patrick Dalton, who was hired to carry out the privatization and to thereafter turn its business fortunes around.[84] Both conclude that the main causes of the Plaintiffs' decline in business fortunes from 2016-2019 were poor management, over-aggressive expansion, share buy-backs, and their aggressive approach to litigation with borrowers.

61. The expert witnesses called by the Plaintiffs for the purposes of these SLAPP Motions were not provided with these critically important documents for the purposes of their review of the impacts of the WSJ Publications on the Plaintiffs' stock price and new business generation.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

[82] Juneja Report, pars. 25-31 and Appendix IV
[83] Sutin Affidavit, September 12, 2019, Ex. "M" to Second Anderson Affidavit; Transcript of Riley Cross, October 27, 2020, at p. 308 Q. 954-988;
[84] Dalton Report

62. The law applicable on this motion is set out in the Joint Submission. Applying that law, since the Defendants' onus under s. 137.1(3) has been met, the issues addressed herein are whether the Plaintiffs' have met their onus under s. 137.1(4)(a)(i), (a)(ii) and (b), respectively, to show that:

(a) the defamation claims based on the WSJ Publications have "substantial merit";

(b) the Dow Jones Defendants have "no valid defence" to those claims; and

(c) the balance of harms analysis weighs in their favour.

63. It is submitted that each of those issues should be determined against the Plaintiffs.

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

64. Since the purposes of our Anti-SLAPP legislation as set out in ss. 137.1(1) are engaged in this case, and for all the reasons put forward in the Joint Submissions, the Dow Jones Defendants have unquestionably met their onus to show that the WSJ Publications constitute "expression"[85] that "relates to a matter of public interest",[86] and that this action "arises from" such expression.[87]

B. THE PLANTIFFS' CLAIMS DO NOT HAVE SUBSTANTIAL MERIT

65. The assessment under s. 137.1(4)(a) requires the Plaintiffs to show a basis in the record and the law to find that each required element of their defamation claims has "substantial merit": that is, each has a "real prospect of success", that rises above mere suspicion.[88]

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[85] *CJA* s 137.1(2)
[86] *Pointes SCC* at para 24, 26, 27, 28, 30, 74, 102 citing *Grant v Torstar Corp*. [2009] 3 S.C.R. 640, at paras. 103, 106
[87] *Pointes SCC* at para 24
[88] *Pointes SCC* para 39, 40, 42, 47, 49, 50 and 51

66. In this case, two of the three required elements of the tort of defamation – that a publication was made to a third person, and that the publication refers to the Plaintiffs – are not in issue.

67. The tort of defamation also requires, however, that any pleaded meanings be defamatory, in the sense that they tend to lower the Plaintiffs' reputations in the eyes of reasonable readers, and those defamatory meanings must be capable of arising from the publications as a matter of law, and they must be found in fact to have arisen in the minds of reasonable readers. This requires an assessment of the reputations the Plaintiffs here actually had pre-publication. The Dow Jones Defendants respectfully submit that the Plaintiffs cannot meet their onus on this third required element, because (1) the pleaded meanings cannot and do not arise; and (2) the Plaintiffs' reputations were not injured.

1. *The Pleaded Meanings Do Not Arise as a Matter of Law*

68. It is trite that plaintiffs, in making defamation claims, are bound by the meanings of the publication that are pleaded in their statement of claim.

69. The portions of the WSJ Publications that are complained of, and the pleaded meanings they are said to bear, are set out in repetitive detail in par. 34 of the Amended Statement of Claim.[89] The number and "shotgun" nature of these meanings are themselves indicative of the character of this Defamation Action as a SLAPP. Those meanings can be grouped into allegations that the Plaintiffs were engaged in, or generally engage in:

[89] FAASOC, Copeland MR Tab 4E, pages 379-384

(a) ***actual criminal or quasi criminal conduct*** including "fraudulent" activities;[90] "criminal wrongdoing";[91] "illegal" or "wrongful" activities;[92] or were "under investigation for fraud, illegal activity and/or financial crimes by the OSC and the Toronto Police Service";[93]

(b) ***otherwise improper conduct*** including "improper" or "wrongful" activities;[94] "deceptive business practices";[95] "unethical" conduct, or acting for "nefarious purposes", or in ways that "lack integrity";[96] and "intentionally" causing Callidus to be "overpaid" for the XTG investment for their own financial gain or benefit;[97]

(c) ***misconduct towards investors***, including deceiving or making misrepresentations to them, or acting "wrongfully" or "improperly" towards them;[98] and

(d) ***misconduct towards borrowers***, including generally treating them "unfairly" or "unjustly", or engaging in "wrongful" or "improper" actions against them;[99] or treating McFarlane and XTG, in that manner.[100]

70. As to the first group, it is submitted that the words used in the WSJ Publications, which are at law the "primary determinant" of any meanings they may bear,[101] simply are not capable as a

[90] FAASOC pars 34(a)(i) and (ix); 34(b)(i), (iii), (iv) and (v); 34(c)(i)
[91] FAASOC pars 34(a)(ii); 34(b)(i) and (ii)
[92] FAASOC pars 34(a)(iii); 34(b)(iv); 34(c)(ii), (iv), (v), (v), (vii)
[93] FAASOC pars 34(b)(v)
[94] FAASOC pars 34(a)(iii) and (vii); 34(c)(ii), (v) and (ix)
[95] FAASOC pars 34(a)(vi), (vii) and (viii); 34(c)(iv) and (xiv)
[96] FAASOC pars 34(a)(v) and (vii); 34(c)(iii), (vi) and (xvii)
[97] FAASOC pars 34(c)(xiii)
[98] FAASOC pars 34(a)(vii); 34(c), (xiv), (xv), and (xvi)
[99] FAASOC pars 34(a)(vii) and (vii); 34(c)(viii), (ix), (x), (xi), (xvi); 34(d)(i)
[100] FAASOC pars 34(c)(vii), (viii), (xi), (xii); 34(d)(ii) and (iii)
[101] *Colour Your World*, 1998 CanLII 1983 ONCA

matter of law[102] of giving rise to any of the pleaded meanings of actual criminal or quasi-criminal conduct on the part of the Plaintiffs in the minds of reasonable readers. This is so, first, because the WSJ Publications repeatedly make it clear, beginning with the word "accused" in the headline of the Online Article and in similarly qualified wording throughout, that these are as-yet unproven allegations by whistleblowers. It is also well established that an inference of actual criminal or quasi-criminal wrongdoing is not, as a matter of law, capable of arising in the minds of reasonable readers from a report that police are conducting an investigation.[103]

71. Most important, the WSJ Publications properly and repeatedly make it clear that at the time of reporting, both police and securities authorities were not yet even at the formal investigation stage. The whistleblowers' allegations had simply "prompted" those authorities to make "inquiries". Both WSJ Publications prominently state that "The inquiries don't necessarily lead to an investigation." That is reinforced by a fair and accurate account of the OSC's recently created whistleblower program, in which an inquiries team "conducts interviews and other research before deciding whether to open a formal investigation." From those words, reasonable people would understand the review by authorities was at a very preliminary stage. They simply could not, as a matter of law, and would not in fact, draw any conclusion that the pleaded conduct was established.

72. It is respectfully submitted that the same analysis can and should be applied to the pleaded meanings involving deceit, misrepresentation, unethical conduct, and other forms of intentional civil impropriety or wrongdoing. There are simply no words in the WSJ Publications that convey any such imputation beyond the fact that the Plaintiffs are "accused in the complaints" of fraud, which is true. Both fairly disclose that some of the whistleblowers making these allegations "are

[102] *Mantini v. Smith Lyons,* 2003 CanLII 22736 (On.CA)
[103] *Lewis v. Daily Telegraph*, [1964] A.C. 234

in litigation with" the Plaintiffs, and even note the Plaintiffs' stated justification for resort to litigation and creditors remedies, being "if the loans aren't paid" and "against borrowers believed to have violated the terms of their loans." Reasonable viewers would recognize all of this as reporting, without adoption of either side, on the normal exchange of claims and counterclaims in civil litigation, that is routinely pursued before our courts.

73. To the extent these pleaded meanings are contradicted by, or inconsistent with, the words used in the WSJ Publications, they are untenable as a matter of law and do not arise in fact.

74. Read fairly and in context, the words of the WSJ Publications also do nothing to adopt or validate the allegations made by some of the whistleblowers, so as to constitute a republication of any defamation by them. Rather, it is the fact of these allegations being made, in itself, that is reported by the WSJ, without adoption, as a matter of public interest to business readers and to participants and investors in publicly traded securities markets and in the Catalyst Funds.

2. *The Pleaded Meanings Would Not Arise in Fact in the Minds of Reasonable Persons*

75. The second element of our law relating to defamatory meaning is to ask the trier of fact – in these cases, the motion Judge – what the reasonable viewer (someone with no vested interest and not avid for scandal) would in fact have understood by the publications. In this case, the Dow Jones Defendants submit that the reasonable reader of the WSJ would likely be a business person, with some understanding of public securities markets and their regulation, who would be even less likely to make the leap to the more extreme meanings alleged by the Plaintiffs than reasonable persons who lacked such familiarity.

3. *The Reputation of the Plaintiffs*

76. This motion also requires the Court to assess, without any need to take a deep dive into disputed evidence, whether the WSJ Publications were at all defamatory of the Plaintiffs, given their undoubted pre-publication reputation for, among other things, aggressive resort to litigation in the courts, and for the treatment of some borrowers as adversaries in a "blood sport".

77. This is not to say that some of the lesser pleaded meanings, and particularly those arising from specific facts reported, for example about the inquiries being conducted, the XTG transactions, and the treatment of McFarlane, are not capable of a defamatory imputation. They clearly are. However, for any such lesser defamatory imputation based upon the plain and ordinary meaning of the words used, the key issues on this motion will be the availability of the defences of justification, fair comment, and responsible communication, and whether the likely harms to the Plaintiffs from any defamation outweighs the impacts of this litigation on free expression.

C. THE DOW JONES DEFENDANTS HAVE VALID DEFENCES

78. The Plaintiffs also cannot meet their burden to show sufficient grounds to believe that the Dow Jones Defendants have no valid defence to the defamation alleged. The Defences put in play by the Dow Jones Defendants are:

(a) The reported facts, and any factual inferences that reasonable readers would draw from those facts, are all true.

(b) Any comments expressed, or judgments implied by those words about the Plaintiffs' conduct are fair comment on matters of public interest.[104]

[104] *Pointes SCC* para 59, 60

(c) The Dow Jones Defendants exercised extraordinary diligence in verifying the facts, and vetting the sources of the information they reported, such that even if any factual errors occurred that contribute to a defamatory meaning (which is not shown) they would be protected by the defence of responsible communication.

79. The Dow Jones Defendants submit that all of the facts as reported by the WSJ publications are shown on the evidence to be true. As a result, all of the factual inferences that reasonable readers would draw from the plain and ordinary meaning of the words used to report those true facts are also protected by the defence of justification.

80. To the extent there are any inferences that reasonable viewers could in law, and did in fact, draw from the reporting of those true facts, those inferences are by definition fair comments or conclusions that could honestly be drawn from the facts stated, and they are protected by the defence of fair comment.

81. Relatively few statements in the WSJ Publications are presented, and would be recognized by readers, as comments, but those that are should similarly be protected by the fair comment defence. For example:

(a) McFarlane's quoted comment on his "serious concerns" related to XTG is a comment that is demonstrably fair, because the concerns are shown to have been shared by the OSC and the SEC. There is therefore no basis in the evidence to suggest that McFarlane did not honestly hold that view, or that others could not honestly do so; and

(b) The reference by whistleblowers to "fraud", would similarly be understood as a conclusion, inference or comment that they drew on the facts they presented. In the case of Anderson, that was an informed, professional opinion that he came to. Again, there is no basis in the evidence to suggest that he did not honestly hold that view, or that others could not honestly do so, especially in light of the concerns being expressed at the time by the OSC and the SEC.[105]

82. If there is any credible suggestion of error in the reported facts, which is not admitted or shown on the evidence, then the efforts of Copeland and McNish as outlined above to avoid such errors clearly meets the requirements for a defence of responsible communication.

83. The Plaintiffs suggestions of malice on the part of McNish or Copeland, that could defeat a defence of fair comment or responsible communication, are all without substance.

84. For example, the Plaintiffs suggest the relationship between Copeland as a journalist and Anderson as a source was somehow improper. The evidence unequivocally refutes that suggestion. Both have testified without qualification that their relationship was entirely professional. Anderson confirms he did not short sell stock on any company about which he had previously been a source for Copeland.[106] Copeland does not recall knowing, prior to publication, that Anderson engaged in short selling.[107] In any event, the WSJ Publications do alert readers to the potential financial interest of the whistleblowers, by noting that each of them may receive up to $5 million from the OSC whistleblower program, if their allegations are successfully

[105] See the evidence assembled at Anderson Factum para 57, FNs 66 and 67
[106] Anderson Supp. Affidavit pars 14-15
[107] Copeland Second Affidavit, par. 12

prosecuted.[108]

85. Anderson also confirms that his own short selling activity with respect to Callidus stock in 2017 was in small quantities, and it was entirely lawful and proper.[109] Both he and Copeland have testified that Copeland was not involved in those activities, and he was not even aware of them.[110]

86. The Plaintiffs have failed to meet their onus on all points required by s. 137.1(4)(a).

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

87. The assessment under s. 137.1(4)(b) is the crux of the analysis. It stands on its own, serving as a robust backstop for motion judges to dismiss even meritorious claims if the public interest in protecting the expression in issue outweighs the interest in allowing the proceeding to continue.[111]

88. Even if there were grounds to believe that the Plaintiffs' action has substantial merit, and grounds to suggest that the available defences may not succeed, the action should nevertheless be dismissed because the harm, if any, to the Plaintiffs resulting from the expression, and corresponding interest in permitting the action to proceed, do not outweigh the high public interests in protecting expression by the WSJ and its sources in this case.

(i) The harm analysis

89. Catalyst did not own the shares of Callidus – the Catalyst Funds did. As such, it suffered no direct loss from any decline in their value attributable to the WSJ Publications. It has not alleged, let alone established, that its costs of borrowing were increased, or that it lost any

[108] Print Article, First Copeland Affidavit, Exhibit "N", at p. 104
[109] Anderson Supp. Affidavit pars 19-22
[110] Copeland First Affidavit, pars 45(i); Copeland Supp Affidavit, pars. 13-19
[111] *Pointes SCC* para 61, 62

identifiable business as a result. Indeed, any stock price decline related to the WSJ Publications facilitated Catalyst's publicly announced intention to take Callidus private, by lowering the cost of doing so. The Fund investors and minority shareholders have not sued for any loss: indeed, the WSJ Publications may have enabled them to mitigate any losses inherent in their investments.

90. The Plaintiffs also have not shown, and cannot show, loss of new loan or investment business, given the slow pace of such activity over many prior months; given the fact that one significant transaction closed within the month following publication; and given the many other causes of the Plaintiffs' business decline contained in the Sutin Affidavit, the Dalton Report, the OSC and SEC concerns, and other factors.

91. Evidence of a causal link between the expression and any harm claimed simply cannot be established here.[112]

(ii) Weighing of the public interest

92. Even if harm has been established and shown to be causally related to the WSJ Publication, once the analysis then moves on to the weighing exercise under s. 137.1(4)(b), the Plaintiffs position again fails. Any such harm is theoretical and tenuous, at best, when weighed against the public interest, which is shared by the Plaintiffs' own Fund investors and shareholders, in having factually accurate information reported in the public marketplace in order to help them to assess their existing or planned investments in the Plaintiffs' offerings.

[112] *Pointes SCC* para 72

93. The magnitude of the harm becomes relevant only at this stage, because the motion judge must determine whether it is "sufficiently serious" that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.[113]

94. This weighing exercise is informed by our s. 2(b) *Canadian Charter of Rights and Freedoms* interests and jurisprudence, which provides an elevated level of protection to expression that serves such a vital public interest as maintaining the vitality and transparency of our capital markets.[114]

95. The Supreme Court has recognized that the other factors to be considered at this stage include the history of litigation among parties, broader and collateral effects on *other* expressions by other borrowers and investors and the potential chilling effect on *future* expression of interested persons, the defendant's history of service to the public interest, any disproportion in the resources being used in the lawsuit, all of which are present here in abundance.[115]

96. The importance of freedom of expression cannot be overstated. It is "the matrix, the indispensable condition of nearly every other form of freedom … and [is] … little less vital to man's mind and spirit than breathing is to his physical existence."[116]

97. While an individual's right to vindicate their good name and reputation is of course also important, that interest is much attenuated in the case of corporations like the Plaintiffs, who have already put their own reputations in harms way by conducting their business like a "blood sport".

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[113] *Pointes SCC* para 70
[114] *Pointes SCC* para 77
[115] *Pointes SCC* para 78-80
[116] *Irwin Toy Ltd. v. Quebec (Attorney General),* 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at para. 105

98. In these circumstances, any harm likely to be or have been suffered by the plaintiffs lies at the very low end of the spectrum, and so too then does the public interest in allowing this action to continue. The motion must therefore be allowed, and the action dismissed.

PART IV - ORDER REQUESTED

99. The Dow Jones Defendants respectfully request an order dismissing this Defamation Action pursuant to 137.1(3) of the *Courts of Justice Act* and for their costs of this motion and of the entire Defamation Action on a full indemnity basis.

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.tunley@stlbarristers.ca

Tel: 647.964.3495
Fax: 647.245.8285

Lawyers for the Dow Jones Defendants

SCHEDULE "A"

LIST OF AUTHORITIES

100.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

COURTS OF JUSTICE ACT

PREVENTION OF PROCEEDINGS THAT LIMIT FREEDOM OF EXPRESSION ON MATTERS OF PUBLIC INTEREST (GAG PROCEEDINGS)

Dismissal of proceeding that limits debate

Purposes

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

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

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

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

No further steps in proceeding

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

No amendment to pleadings

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

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

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

Costs on dismissal

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

Costs if motion to dismiss denied

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

Damages

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

Procedural matters

Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

Appeal to be heard as soon as practicable

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

Application

137.5 Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading. 2015, c. 23, s. 3.

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 DOW JONES DEFENDANTS

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

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

Tel: 647.964.3495
Fax: 647.245.8285

Lawyers for the Dow Jones Defendants