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

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

JOINT MEMORANDUM OF LAW

SUBMITTED ON BEHALF OF THE DEFENDANTS, ROB COPELAND, WEST FACE CAPITAL INC., GREGORY BOLAND, CLARITYSPRING INC., NATHAN ANDERSON, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT AND BRUCE LIVESEY

(SECTION 137.1 MOTIONS RETURNABLE MAY 17, 2021)

May 3, 2021

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PART I ~ INTRODUCTION

1. This Joint Memorandum of Law is submitted on behalf of Rob Copeland, West Face Capital Inc., Gregory Boland, Clarityspring Inc., Nathan Anderson, Kevin Baumann, Jeffrey McFarlane, Darryl Levitt and Bruce Livesey (the "**Moving Parties**"), each of whom is a Defendant in one of the actions (the "**Actions**") commenced by The Catalyst Capital Group Inc. and Callidus Capital Corporation (the "**Catalyst Parties**"). The Moving Parties have brought motions to have each of the Actions dismissed as a SLAPP – that is, as a "**S**trategic **L**awsuit **A**gainst **P**ublic **P**articipation" – pursuant to s. 137.1 of the *Courts of Justice Act* (the "**CJA**").[1]

2. Although this Court need not find that the Actions bear the traditional hallmarks of a SLAPP in order to find in favour of the Moving Parties under s. 137.1, the following description of SLAPPs offered by the Supreme Court in its recent ruling, *1704604 Ontario Ltd. v. Pointes Protection Association* ("***Pointes***"), is highly apt in the current context:

> …SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a *façade* for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.[2]

3. This Memorandum provides the Moving Parties' joint submissions on the legal principles that this Court will need to apply when deciding the motions currently before it. In addition to this Memorandum, each Moving Party will submit a separate Factum providing the facts relevant to their individual motion, addressing the application to those facts to the law set out herein, and making any supplemental legal submissions that they deem relevant.

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1 R.S.O. 1990, c. C.43.

2 *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para. 2 ["***Pointes***"], Joint Memorandum of Law Book of Authorities ("**JMLBOA**"), Tab 1.

PART II ~ STATEMENT OF ISSUES, LAW & AUTHORITIES

4. The only issue to be resolved in these motions is whether the Actions should be dismissed as against the Moving Parties under s. 137.1 of the CJA. The Moving Parties respectfully submit that this question must be answered in the affirmative.

A. Dismissal of An Action Under Section 137.1 of the CJA

5. In *Bent v. Platnick* ("***Bent***"), the companion ruling to *Pointes,* the Supreme Court identified the two policy goals embodied in Ontario's anti-SLAPP regime: ***First***, "[s]ection 137.1 of the CJA is intended 'to function as *a mechanism to screen out lawsuits that unduly limit expression on matters of public interest* through the identification and pre-trial dismissal of such actions';" and ***second***, "in addition to protecting expression on matters of public interest, s. 137.1 must *also 'ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it*'."[3] The reconciliation of these potentially competing goals is reflected in the multi-faceted, multi-stage statutory process established by s. 137.1:

> *Order to dismiss*
> 137.1(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
>
> *No dismissal*
> [137.1](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

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[3] *Bent v Platnick*, 2020 SCC 23 at para. 74 (emphasis added) ["***Bent***"], JMLBOA, Tab 9. And see *Pointes, supra,* at paras. 16 & 46, JMLBOA, Tab 1.

> permitting the proceeding to continue outweighs the public interest in protecting that expression.

6. As the Supreme Court explained in each of *Pointes* and *Bent*,[4] the foregoing provisions establish a complex analytical process. The Moving Parties must first establish on a balance of probabilities that the proceeding "arises from" an "expression" made by the Moving Parties that "relates to a matter of public interest" (the "**Threshold Burden**").[5] If the Moving Parties meet the Threshold Burden (under s. 137.1(3)) the proceeding must be dismissed *unless* (under s. 137.1(4)) the Catalyst Parties demonstrate both:

(a) That there are "grounds to believe" (i) that there is "substantial merit" to their claims, and (ii) that the Moving Parties have "no valid defence" (the "**Merits-Based Hurdle**"); and

(b) That the public interest in allowing the Catalyst Parties to pursue their claim outweighs the public interest in protecting the Moving Parties' right of expression (the "**Public Interest Hurdle**").

B. The "Threshold Burden" Under Section 137.1(3): Did the Proceeding Arise From an Expression Relating to a Matter of Public Interest?

(i) General Principles Governing Section 137.1(3)

7. Section 137.1(3) places on the Moving Parties the Threshold Burden of demonstrating that: (a) the Actions "arise from" an "expression" made by the Moving Parties; and (b) the "expression" itself "relates to a matter of public interest." The Courts have confirmed that the Moving Parties must establish these criteria on a balance of probabilities.[6] More particularly:

(a) **The Meaning of "Expression":** Section 137.1(2) defines "expression" to include "any

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4 *Pointes, supra,* at para. 18 (and more generally at paras. 20-82), JMLBOA, Tab 1; and *Bent, supra,* at para. 76 (and more generally at paras. 78-88, 101-104 & 139-142), JMLBOA, Tab 9.

5 The evocative phrases "**Threshold Burden**," "**Merits-Based Hurdle**" and "**Public Interest Hurdle**" were endorsed and applied by the Supreme Court in both *Bent, supra,* at paras. 78 & 175, JMLBOA, Tab 9, and in *Pointes, supra,* at paras. 21, 22, 31, 48, 53 & 92, JMLBOA, Tab 1.

6 *Pointes, supra,* at para. 23, JMLBOA, Tab 1; and *Bent, supra,* at para. 85, JMLBOA, Tab 9.

communication," whether verbal or non-verbal, whether public or private, whether directed at a person or entity or not.[7] The Supreme Court has affirmed that the drafters of s. 137.1 intended the word "expression" to be construed "expansively."[8]

(b) **The Meaning of "Arise From":** The Supreme Court has likewise emphasized that the words "arise from" should be given "a broad and liberal interpretation," and that this criterion will be satisfied provided that "the expression is *somehow causally related to* the proceeding," whether directly or indirectly.[9]

8. The second burden under s. 137.1(3) requires the Moving Parties to demonstrate on a balance of probabilities that the "expressions" complained of by the Catalyst Parties "relate[d] to…matter[s] of public interest." More particularly:

(a) **The Meaning of "Public Interest":** As confirmed by the Supreme Court, the phrase "relates to a matter of public interest" should be given a "liberal," "broad," "generous and expansive" interpretation.[10] Citing its own earlier authority, the Supreme Court explained that there exists "no single test" to determine what is and is not a matter of "public interest." Rather, because the "'[t]he public has a genuine stake in knowing about many matters' ranging across a variety of topics," the key question is whether "some segment of the community would have a genuine interest in receiving information on the subject."[11]

(b) **The Scope of "Matters Relating to Public Interest":** Consistent with the Supreme Court's determination that the phrase "public interest" should "be given a broad interpretation,"[12] the concept has been found to extend far beyond overtly political issues. As discussed under the next heading, Ontario Courts have confirmed repeatedly that expressions relating to *commercial* topics also raise matters of "public interest."

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7 See also *Bent, supra,* at para. 79, JMLBOA, Tab 9.

8 *Pointes, supra,* at para. 25, JMLBOA, Tab 1; and *Bent, supra,* at para. 79, JMLBOA, Tab 9**.**

9 *Pointes*, *supra*, at paras. 24 & 102 (emphasis added), JMLBOA, Tab 1; and *Bent, supra,* at para. 80, JMLBOA, Tab 9.

10 *Pointes, supra,* at paras. 26, 28 & 30, JMLBOA, Tab 1; and *Bent, supra,* at para. 81, JMLBOA, Tab 9**.**

11 *Pointes, supra,* at para. 27, JMLBOA, Tab 1, citing *Grant v Torstar Corp,* 2009 SCC 61 at paras 101-103 & 106 ["***Grant***"], JMLBOA, Tab 25.

12 *Pointes, supra,* at para. 28, JMLBOA, Tab 1.

(c) **Under s. 137.1(3), Tone, Content and Motivation are Irrelevant:** Although these issues become important later in the s. 137.1 analysis, in assessing the Threshold Burden of whether the proceeding "arises from" an "expression" that relates "to a matter of public interest," the Motion Judge must not consider either: the tone, tenor or accuracy of the "expression" in question; or whether the moving party was animated by malice, vitriol or self-interest in making the impugned statements.[13] As explained by the Supreme Court, in the context of the Threshold Burden, "it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest."[14]

(ii) Applying the Section 137.1(3) Principles to the Catalyst Parties' Claims

9. The Moving Parties respectfully submit that they have established on a balance of probabilities that the Actions commenced against them by the Catalyst Parties "arose" from "expressions" that "related to matters of public interest," thereby satisfying their Threshold Burden. In support of these assertions, the Moving Parties rely upon the following submissions as well as on the further discussion of these issues in their individual Facta.

10. First, the current Actions clearly "arose" from "expressions" attributed to the Moving Parties. The pleadings of the Catalyst Parties make clear that every allegation they have made – and every cause of action they have asserted – is inextricably linked to one or more "expression" attributed to the Moving Parties. While the Catalyst Parties have not asserted every cause of action against every one of the Moving Parties, a clear theme connects all of their allegations:

(a) The Catalyst Parties allege that at least some of the Moving Parties participated in publishing ***defamatory statements*** and/or ***injurious falsehoods***;

(b) They allege that in relation to these statements, at least some of the Moving Parties committed the ***unlawful means tort*** against the Catalyst Parties through their commission of the separate

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13 *Levant v. Day*, 2019 ONCA 244 at paras. 9-12 ["***Levant***"], JMLBOA, Tab 30; and *Ontario College of Teachers v. Bouragba*, 2019 ONCA 1028 at paras. 18, 31 & 32 ["***Bouragba***"], JMLBOA, Tab 40.

14 *Pointes, supra,* at para. 28, JMLBOA, Tab 1; and *Bent, supra,* at para. 85, JMLBOA, Tab 9.

tort of ***deceit*** against various ill-defined parties (the "**Third Parties**");[15] and

(c) Lastly, they allege that, in agreeing to publish and in publishing these statements, at least some of the Moving Parties participated in both a ***predominant purpose conspiracy*** and an ***unlawful means conspiracy***.[16]

11. In a recent and instructive ruling, the Court of Appeal for Ontario confirmed the analytical flexibility that should be applied when determining whether a proceeding "arises from" an "expression" for the purpose of a s. 137.1 motion. In that case, a laboratory had tested products sold by a fast food chain at the request of a broadcaster. The laboratory shared the results of its testing with the broadcaster. The broadcaster then cited those results in a story that was critical of the chain. In addition to suing the broadcaster, the chain sued the laboratory for negligence in carrying out the testing in question. In dismissing the negligence claim against the laboratory under s. 137.1, the Court of Appeal ruled that for the purposes of s. 137.1(3), there had been an "expression" (namely, the laboratory's reporting of its findings to the broadcaster), and that the negligence claim against the laboratory consequently "arose from" this sharing of information behind-the-scenes.[17]

12. Accordingly, in the case at bar, it cannot seriously be argued that the Actions commenced by the Catalyst Parties did not "arise" from "expressions" attributed to the Moving Parties.

13. Turning to the second branch of the Threshold Burden, the Moving Parties' expressions were clearly "related to matters of public interest." The Catalyst Parties are high-profile and controversial participants in the capital markets in Canada. The "expressions" they complain of addressed a variety

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15 The role supposedly played by these groups of so-called Third Parties is further discussed below.

16 The "unlawful means" identified by the Catalyst parties are (i) ***defamation***, (ii) ***injurious falsehood***, (iii) ***statutory breach*** and (iv) ***unjust enrichment***.

17 Although the negligence claim against the laboratory was dismissed as a SLAPP under s. 137.1, the parallel defamation claim against it continued as it had not been similarly challenged (see *Subway Franchise Systems of Canada, Inc. v. C.B.C.*, 2021 ONCA 25 at paras. 9, 18-24, 34-47 & 133, JMLBOA, Tab 45).

of connected topics, including: (a) serious flaws in the Catalyst Parties' business practices and investment models (including, in particular, those of Callidus, a public company); (b) their improper conduct when dealing with commercial counter-parties; (c) litigation and potential litigation prosecuted (or threatened) by or against the Catalyst Parties; and (d) investigations of the Catalyst Parties commenced (or contemplated) by regulatory authorities.

14. Both this Court and the Court of Appeal for Ontario have held repeatedly that "expressions" that address these types of commercial questions constitute "matters relating to the public interest."[18] As this Court has noted on several occasions:

> **Comments or conversations relating to corporations or businesses will more obviously have a public dimension to them**. Members of the public or at least segments of the community will have an interest in knowing something about the companies that offer them services. **This is true** not only from the perspective of the "quality" of the services offered, but also **from the perspective of whether or not a member of the public would want to contribute funds to the business/corporation**.
>
> In this respect, **a company's business practices, the conduct of its management**, **and even the company's activities in the community will often have significance to the community** [emphasis added].[19]

15. Where, as in this case, the "expression" addresses the functioning of the capital markets, the link to the "public interest" is clear: "*It is not in dispute that the statement complained of relates to a matter of public interest*…[*T*]*he management of a publicly traded corporation is a matter of public interest*."[20] As explained by the Court of Appeal for Ontario, statements that raise concerns about certain categories of investment – or that alert the public to the risks of dealing with certain individuals or companies (including because those parties have been or are being scrutinized by securities regulators) – clearly

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18 See for example, *New Dermamed Inc. v. Sulaiman*, 2019 ONCA 141 at paras. 3-8 ["***New Dermamed CA***"], *affirming*, 2018 ONSC 2517 at paras. 3a, 22 & 25-27 ["***New Dermamed SC***"], JMLBOA, Tab 38.

19 *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587 at paras. 31-33 (emphasis added), JMLBOA, Tab 13, which was quoted in part in *910938 Ontario Inc. v. Moore*, 2020 ONSC 4553 at paras. 21 & 22 ["***910938***"], JMLBOA, Tab 2.

20 *Thompson v Cohodes*, 2017 ONSC 2590 at paras. 1-3 & 12 (emphasis added), JMLBOA, Tab 47.

involve matters of "public interest" for the purpose of s. 137.1(3).[21]

16. The Catalyst Parties have accused the Moving Parties of mounting unfair attacks on their character and conduct, and of doing so for improper motives. This assertion is untrue. It is also irrelevant to an assessment of the Threshold Burden.[22] To cite an extreme example, this Court has affirmed that expressions commenting on commercial activity can "relate to matters of public interest," even though they are "vicious" "personal attack[s]" tainted by "invective and malice."[23]

17. It is accordingly submitted that the requirements of s. 137.1(3) have easily been satisfied.

C. The "Merits-Based Hurdle" under Section 137.1(4)(a): Do the Claims Have Substantial Merit and Do Valid Defences Exist?

(i) General Principles Governing Section 137.1(4)(a)

18. As the Moving Parties have satisfied the Threshold Burden under s. 137.1(3), this Court must next consider the two-pronged Merits-Based Hurdle imposed by s. 137.1(4). Under that provision, the onus shifts from the Moving Parties to the Catalyst Parties, and the burden of proof changes from the well-recognized "balance of probabilities" standard to the less-common "grounds to believe" standard.[24] To satisfy the Merits-Based Hurdle, the Catalyst Parties must persuade the Motion Judge that there are "grounds to believe": (a) that each of their claims "has substantial merit" (as required by s. 137.1(4)(a)(***i***)); and (b) that the Moving Parties have "no valid defence" to such claims (as required by s. 137.1(4)(a)(***ii***)).[25]

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21 *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686 at paras. 7, 8, 12-18, 24-26 & 36-41 ["***Fortress***"], JMLBOA, Tab 21.

22 *Pointes, supra,* at para. 28, JMLBOA, Tab 1; *Bent, supra,* at para. 85, JMLBOA, Tab 9; *Levant, supra,* at paras. 9-12, JMLBOA, Tab 30; and *Bouragba*, *supra*, at paras. 18, 31 & 32, JMLBOA, Tab 40.

23 See, for example, *910938, supra,* at paras. 3 & 19 (and also para. 25), JMLBOA, Tab 2.

24 *Pointes, supra,* at para. 31, 33 & 35, JMLBOA, Tab 1; and *Bent, supra,* at paras. 86 & 87, JMLBOA, Tab 9.

25 The two branches are cumulative -- if the "substantial merit" test is not satisfied by the responding party, there is no need for the Court to proceed to consider the "no valid defence" test. See *Pointes, supra,* at para. 112, JMLBOA, Tab 1.

19. In the case at bar, a key question raised by the Merits-Based Hurdle is the substance of the burden imposed on the Catalyst Parties – *i.e.*, what must they establish in order to satisfy the "grounds to believe" standard? The Supreme Court has settled this question, as follows:

(a) **The Substantive Content of the "Grounds to Believe" Standard:** To satisfy this standard, the Catalyst Parties must point to a basis in the law and a basis in the evidentiary record for asserting that their claims have "substantial merit," and that *all* of the defences of the Moving Parties lack "validity." Although a "single basis" in law and a "single basis" in fact will suffice, the Motion Judge must be satisfied that the positions proffered by the Catalyst Parties are "legally tenable" and "reasonably capable of belief." In conducting this assessment, the Motion Judge must bear in mind the preliminary stage of the litigation.[26]

(b) **How is the "Grounds to Believe" Standard Satisfied?** This standard is distinct from the tests applied in motions to strike and motions for summary judgment. To meet the "grounds to believe" standard, the Catalyst Parties must establish "something *more than* a mere suspicion, but *less than*…proof on the balance of probabilities."[27]

20. The Supreme Court has also provided the following guidance in respect of the content of the "substantial merit" test that the Catalyst Parties must satisfy under para. 137.1(4)(a)(i):

(a) **The Meaning of "Substantial Merit":** To satisfy the "substantial merit" test, the Catalyst Parties must marshal sufficient law and evidence to convince the Motion Judge that each claim they have asserted has "a real prospect of success" – *i.e.,* "a prospect of success that…tends to weigh more in favour of the [Catalyst Parties]" than in favour of the Moving Parties.

(b) **Satisfying the "Substantial Merit" Test:** As with the "grounds to believe" standard, the "substantial merit" test is *more* stringent than the test that applies on a motion to strike, but *less* stringent than the test for summary judgment. It is *not* sufficient for the Catalyst Parties to merely show that their claims possess "some merit," "technical validity," "some chance of

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26 *Bent, supra,* at para. 88, JMLBOA, Tab 9; and *Pointes, supra,* at paras. 36-39 & 42, JMLBOA, Tab 1.

27 *Pointes, supra,* at paras. 38, 40 & 41 (emphasis added), JMLBOA, Tab 1.

success," or a "reasonable prospect of success." Nor can the Catalyst Parties prevail by showing that they have an "arguable case." They are not required, however, to prove that their claims have "a demonstrated likelihood of success" or constitute a "strong *prima facie* case."[28] In this regard:

(i) Each Claim Must have "Substantial Merit" as a Question of Law: From a legal perspective, the "substantial merit" criterion requires the Catalyst Parties to establish "grounds to believe" that *each* of their causes of action is "legally tenable" – *i.e.*, that every mandatory element of each cause of action has been properly pleaded and particularized and has "a real prospect of success."[29]

(ii) Each Claim Must have "Substantial Merit" as a Question of Fact: From an evidentiary perspective, the "substantial merit" criterion requires that *each* of the Catalyst Parties' claims "be supported by evidence that is reasonably capable of belief." Where the evidence is disputed or conflicting, neither "a deep dive into the evidence" nor a final assessment of credibility is appropriate at this stage. The Motion Judge must also take care not to accept the evidence of the Catalyst Parties at face value, or to treat their bald factual assertions as sufficient to establish the "substantial merit" of their claims. Bearing in mind the early stage of the Actions, the Motion Judge must undertake "a limited weighing and assessment of the evidence adduced" and "a preliminary assessment of credibility" in order to determine whether each cause of action asserted by the Catalyst Parties has "a real prospect of success."[30]

21. The Moving Parties submit that the Catalyst Parties have not met, and indeed cannot meet, the foregoing requirements under para. 137.1(4)(a)(i). However, even if they do satisfy the first prong of the Merits-Based Hurdle, the Catalyst Parties must still overcome the *second* prong of this hurdle by establishing (under para. 137.1(4)(a)(ii)) that there are "grounds to believe" that the Moving Parties have "no valid defences" to any of their claims. More particularly:

(a) **The Meaning of "No Valid Defences":** In demonstrating that there are "grounds to believe" that the Moving Parties have "no valid defences," the Catalyst Parties must establish "that

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28 *Bent, supra,* at para. 90, JMLBOA, Tab 9; and *Pointes, supra,* at paras. 45-54, JMLBOA, Tab 1.

29 *Bent, supra,* at paras. 91-100, JMLBOA, Tab 9; and *Pointes, supra,* at paras. 54 & 105-112, JMLBOA, Tab 1.

30 *Bent, supra,* at paras. 94-100, JMLBOA, Tab 9; and *Pointes, supra,* at paras. 50, 52, 54 & 105-112, JMLBOA, Tab 1.

the defence, or defences, put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success" at trial.[31] If a single "valid defence" survives this scrutiny, the anti-SLAPP motions of the Moving Parties must be granted *vis-à-vis* the cause(s) of action to which this defence applies.

(b) **Demonstrating that there are "No Valid Defences":** To establish "grounds to believe" that there are "no valid defences," the Catalyst Parties must demonstrate that there is a basis in the record and in the law – taking into account the stage of the Actions – to support a finding that the defences put in play do *not* tend to weigh more in favour of the Moving Parties than the Catalyst Parties.[32] This question must be assessed from both a legal and factual perspective – *i.e.,* the question is whether *none* of the defences is "legally tenable" and/or supported by evidence "that is reasonable capable of belief."[33]

(ii) Applying the Section 137.1(4)(a) Principles to the Catalyst Parties' Claims:

22. Applying the foregoing principles, the Moving Parties respectfully submit that the Catalyst Parties have failed to establish "grounds to believe" *either* that their claims have "substantial merit" *or* that the Moving Parties have "no valid defences." Each Moving Party's Factum will address particular facts and evidence demonstrating that the claims of the Catalyst Parties against that Moving Party lack "substantial merit," and that the defences proffered by that Moving Party are "valid." The following discussion offers more general, law-driven submissions addressing the causes of action asserted by the Catalyst Parties and the primary defences of the Moving Parties.

(a) The Convoluted Causes of Action Asserted by the Catalyst Parties

23. The s. 137.1(4)(a) jurisprudence makes clear that, in assessing the "substantial merit" of the Catalyst Parties' claims and the "validity" of applicable defences, the Court must critically assess each

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31 *Pointes, supra,* at paras. 56-60, JMLBOA, Tab 1; and *Bent, supra,* at paras. 101-103, 109 & 116, JMLBOA, Tab 9.

32 *Pointes, supra,* at paras. 39, 49, 56, 57, 59 & 60, JMLBOA, Tab 1; and *Bent, supra,* at paras. 103, 105, 120, 125 & 138, JMLBOA, Tab 9.

33 *Pointes, supra,* at paras. 50, 52, 58, 59 & 105-112, JMLBOA, Tab 1; and *Bent, supra,* at paras. 117, 118, 125 & 131, JMLBOA, Tab 9.

element of every cause of action. Although not every cause of action has been asserted against every Moving Party, the causes of action pleaded by the Catalyst Parties are: (a) the ***tort of defamation***; (b) the related ***tort of injurious falsehood***; (c) the ***unlawful means tort***,[34] which, in this case, requires the establishment of the independently actionable "unlawful act" of ***tortious deceit*** (allegedly committed by the Moving Parties against several vaguely identified groups of Third Parties); and (d) both forms of the ***tort of civil conspiracy*** (*i.e.,* both "predominant purpose conspiracy" and "unlawful means conspiracy"), the latter of which requires the establishment of "unlawful conduct" by the Moving Parties in the form of (i) ***defamation***; (ii) ***injurious falsehood***; (iii) ***breaches of section 126.1 or section 126.2 of the Ontario* Securities Act**;[35] and/or (iv) ***unjust enrichment***). Each of these causes of action is examined below.

(b) The Defamation Claims of the Catalyst Parties Lack Substantial Merit and are Subject to Valid Defences

24. Under para. 137.1(4)(a)(i), the Catalyst Parties must establish in law and on the evidence that there are "grounds to believe" that their defamation claims possess "substantial merit" – *i.e.*, that they have "a real prospect of success" at trial. The elements of this cause of action are as follows:[36]

(a) the Moving Parties published the impugned words;

(b) those words refer to the Catalyst Parties; and

(c) the words are defamatory (*i.e.*, they would tend to lower the Catalyst Parties' reputation in the eyes of a reasonable person), which in turn requires an assessment of:

(i) the meanings that are capable (as a matter of law) of arising in the minds of reasonable persons from the "expression" in issue;

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[34] This cause of action is known more compendiously as "***the tort of causing loss by unlawful means***" and was historically described as the tort of "***intentional interference with economic relations***."

[35] R.S.O. 1990, c. S.5

[36] *Grant*, *supra*, at para. 28, JMLBOA, Tab 25; *Bent, supra,* at paras. 92 & 96-99, JMLBOA, Tab 9; and *Lysko v Braley*, 2006 CanLII 9038 (ONCA) at paras. 108, 116 & 117 ["***Lysko***"], JMLBOA, Tab 31.

(ii) the meanings that a trier of fact could find (in fact) arose in the minds of such viewers in all the circumstances; and

(iii) whether (in fact) the "expression" lowered or tended to lower the reputation that the Catalyst Parties actually enjoyed prior to the expression in issue.

25. As established in the Moving Parties' individual Facta, the Catalyst Parties have failed to demonstrate the "substantial merit" of *any* of their claims of defamation. Furthermore, under para. 137.1(4)(a)(ii), they have likewise failed to show that there are "grounds to believe" that *not a single one* of the following defences is "valid":

(a) **Defence of Justification**: This defence applies where the alleged defamation results from statements or inferences of fact, and those facts are true or substantially true.[37]

(b) **Defence of Responsible Communication of Statements of Fact**: This defence applies in circumstances where the publisher cannot establish that its reporting of facts was accurate, such that the defence of justification is not available. As the Supreme Court noted when it created this defence, "sometimes the public interest requires that untrue statements should be granted immunity, because of the importance of robust debate on matters of public interest". This defence requires that two elements be established:

(i) the impugned statements of fact must be on a matter of public interest; and

(ii) the publisher must demonstrate that it was reasonably diligent in validating the accuracy of the statements before they were made, and that its efforts in gathering and communicating the impugned information were responsible.[38]

(c) **Defence of Fair Comment:** This defence applies if the defamatory statement or inference is an opinion or comment, rather than a statement of fact. The fairness of the stated opinion is assessed, first, based on proof that the facts on which the opinion or comment is based are true. This defence requires that five elements be established:

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37 *Grant*, *supra*, at paras. 32 & 33, JMLBOA, Tab 25.

38 *Grant, supra,* at para. 126 (and paras. 98-125), JMLBOA, Tab 25; and *Cusson v. Quan,* 2009 SCC 62 at para. 28, JMLBOA, Tab 19.

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

(ii) The comment must be based on true or substantially true facts that are referred to in the publication or that are well known and widely understood by the audience. This knowledge allows members of the audience to make up their own minds on the merits of the defendant's comment;

(iii) Although the statement in question can refer to or include inferences from facts, it must be recognizable as comment. Words that appear to be statements of fact may, in substance, be properly construed as comment. What is comment and what is fact must be determined from the perspective of a "reasonable viewer or reader." Comment includes deduction, inference, conclusion, criticism or judgment. This test is generously interpreted;

(iv) The comment must be capable of being honestly made on the proved facts; and

(v) The defence can be defeated if the comment was actuated by express malice. As in the context of qualified privilege (*below*), malice can be established in two ways: (A) by showing that the defendant's dominant purpose in making the impugned statements was to injure the plaintiff; or (B) by showing that the defendant made the impugned statements knowing they were not true or did so with reckless indifference to their truth or falsity.[39]

(d) **Defence of Qualified Privilege:** This defence focuses on the occasion on which an expression is published, rather than on its content, and can also be defeated by malice:

(i) A privileged occasion arises when the person making the expression has an interest or a duty -- whether legal, social or moral -- to make the expression to the person to whom it is made, and that latter person has a corresponding interest or duty in receiving it. The rationale for qualified privilege is that, on such occasions, the risk of private injury is outweighed by the importance of the occasion on which the speech occurs. Employment references, business and credit reports, and complaints to police, regulatory bodies or public authorities, are all classic examples of occasions of qualified privilege. The categories for qualified privilege are never closed, however.

(ii) The privilege is "qualified" in the sense that it can be defeated upon proof of malice.

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[39] *Grant, supra,* at para. 31, JMLBOA, Tab 25; and *WIC Radio Ltd. v Simpson*, 2008 SCC 40 at paras. 26-28, 31, 34 & 63 ["***WIC Radio***"], JMLBOA, Tab 50.

As noted above, malice can be shown in the same ways as for the defence of fair comment – *i.e.,* where there is a showing of spite or ill-will, or upon proof that the defendant knew the statement in question was false or was reckless as to its truth or falsity. In addition, however, malice in the context of qualified privilege may be shown where the expression is made for an ulterior purpose, unrelated to the occasion giving rise to the qualified privilege.[40]

(e) **Defence of Absolute Privilege:** This defence applies to communications which take place during, incidental to, or in furtherance of judicial or quasi-judicial proceedings. Communications to quasi-judicial regulatory bodies like the OSC are covered by absolute privilege and therefore are not actionable, regardless of the cause of action alleged.[41] Delivery of the whistleblower complaints to the OSC and/or the SEC cannot be the basis of a viable cause of action in defamation against any of the Moving Parties.

26. As established in the Moving Parties' individual Facta, the Catalyst Parties' defamation claims lack "substantial merit" and, in any event, are rebutted by one or more of the "valid defences" described above. Accordingly, they cannot survive scrutiny under s. 137.1(4)(a).

(c) The Injurious Falsehood Claims of the Catalyst Parties Lack Substantial Merit and are Subject to Valid Defences

27. Under para. 137.1(4)(a)(i), the Catalyst Parties must establish in law and on the evidence that there are "grounds to believe" that their injurious falsehood claims possess "substantial merit" – *i.e.*, that they have "a real prospect of success" at trial. The elements of this cause of action are as follows:

(a) the Moving Parties published untrue statements;

(b) these statements reflected adversely on the Catalyst Parties' business;

(c) the statements were calculated to induce third parties not to deal with the Catalyst Parties;

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40 *Grant, supra,* at paras. 30 & 34, JMLBOA, Tab 25; *Bent, supra,* at paras. 121 & 136, JMLBOA, Tab 9; and *Weisleder v. OSSTF*, 2019 ONSC 5830 at paras. 8-12 & 15-23, *affirmed,* 2020 ONCA 181 at paras. 1-4, JMLBOA, Tab 49.

41 *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2019 ONSC 128 at para. 49 ["***Catalyst 2019***"], JMLBOA, Tab 15; *Fraleigh v. RBC Dominion Securities Inc.*, 2009 CanLII 92109 (ONSC) at paras. 31-35, JMLBOA, Tab 23; and *Hung v. Gardiner*, 2003 BCCA 257 at paras. 30-37, JMLBOA, Tab 27.

(d) the statements were made maliciously; and

(e) the Catalyst Parties have suffered special damages as a result.[42]

28. As established in the Moving Parties' individual Facta, the Catalyst Parties have failed to demonstrate the "substantial merit" of *any* of the foregoing elements of their injurious falsehood claims. Furthermore, under para. 137.1(4)(a)(ii), they have likewise failed to show that there are "grounds to believe" that *not a single one* of the following defences is "valid":

(a) **Defences to Defamation:** The defences to the Catalyst Parties' defamation claim apply generally to their injurious falsehood claims as well, and are equally "valid."[43]

(b) **Defence of Truth:** The Moving Parties' expressions contained only factually accurate statements, and as a result – even if those statements reflected adversely on the Catalyst Parties' business – they cannot support a claim for injurious falsehood.[44]

(c) **Defence of Intention:** Many of the statements that the Catalyst Parties complain of were (for example) mere exchanges of public information about pending litigation, and were not calculated to dissuade third parties from dealing with the Catalyst Parties.

(d) **Defence of Absence of Malice:** Unlike defamation,[45] injurious falsehood requires proof of malice as a mandatory element of the tort.[46] For purposes of injurious falsehood, "malice" is the making of false statements "without just cause or excuse" (*i.e.*, dishonestly), although an actual and improper desire to harm will also suffice. The Catalyst Parties have offered no evidence that the Moving Parties did not believe reasonably in the truth of the "expressions"

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42 *Lysko, supra,* at paras. 133-34, JMLBOA, Tab 31. Pursuant to s. 17 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12, the requirement to prove financial loss is relaxed "if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing…"

43 See for example the s. 137.1 decision in *Joshi v. Allstate Insurance Co.*, 2019 ONSC 4382 at para. 49 (and see more generally paras. 51-63) ["***Joshi***"], JMLBOA, Tab 28.

44 *Carbone v. DeGroote*, 2014 ONSC 6146 at paras. 59-60 ["***Carbone***"], JMLBOA, Tab 14; *Arcelormittal Tubular Products Roman S.A.v. Canadian Natural Resources Ltd.*, 2013 ABQB 578 at para. 115, JMLBOA, Tab 6; and *Muir v. 403570 B.C. Ltd*., 2003 BCSC 575 at paras. 51-55, JMLBOA, Tab 37.

45 *Grant, supra,* at para. 128, JMLBOA, Tab 25.

46 Bald pleadings of malice will not suffice -- see Rule 25.06(8) and *Ontario v. Gratton-Masuy Environmental Technologies Inc.*, 2010 ONCA 501 at paras. 88 & 89, *leave to appeal discontinued*, [2010] S.C.C.A. No. 397, JMLBOA, Tab 39.

attributed to them. This alone is fatal: in the absence of an established improper motive, the Moving Parties' honest belief in their statements negates the mandatory element of malice, and defeats their claims.[47]

(e) **Defence of No Special Damages:** In contrast to defamation claims, injurious falsehood claims require proof of actual *monetary damages.*[48] However, as Callidus's own internal reporting (*i.e.*, the "Dalton Report") and its external disclosure to the Court (*i.e.,* the "Sutin Affidavit") make clear, Callidus's downfall was caused entirely by its own mismanagement, rather than by any "expressions" made by the Moving Parties.

29. As established in the Moving Parties' individual Facta, the Catalyst Parties' injurious falsehood claims lack "substantial merit" and, in any event, are rebutted by "valid defences." Accordingly, they do not survive scrutiny under s. 137.1(4)(a).

(d) The Unlawful Means Tort Claims of the Catalyst Parties Lack Substantial Merit and are Subject to Valid Defences

30. Under para. 137.1(4)(a)(i), the Catalyst Parties must establish in law and on the evidence that there are "grounds to believe" that their unlawful means tort claims possess "substantial merit" – *i.e.*, that they have "a real prospect of success" at trial. The elements of this cause of action are as follows:

(a) the Moving Parties were responsible for conduct that was directed at the Third Parties;

(b) harm to the Catalyst Parties was the direct and intended consequence of this conduct directed against the Third Parties; and

(c) the conduct thus directed by the Moving Parties towards the Third Parties was "unlawful" in the narrow sense that the Third Parties have the right to sue the Moving Parties for the harm

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47 Failure to prove malice had led to claims being defeated under s. 137.1 – see *Joshi, supra,* at paras. 40 & 41, JMLBOA, Tab 28; and see more generally, *Langdon's Coach Lines Limited v. The T.T.C.*, 1956 CanLII 117 (ONSC) at pp. 14-16 (unofficial pagination), *affirmed* 1956 CanLII 376 (ONCA) at p. 111 (D.L.R.), JMLBOA, Tab 29; and *Procor Ltd. v. U.S.W.A.*, 1990 CanLII 6637 (ONHCJ) at pp. 12-16 (unofficial pagination) ["***Procor***"], JMLBOA, Tab 43.

48 That is, "mere" reputational harm is insufficient -- see *Carbone, supra,* at paras. 56, 57 & 62-63, JMLBOA, Tab 14; and *Procor, supra,* at pp. 12-13 (unofficial pagination), JMLBOA, Tab 43.

that the actionable conduct did cause (or could have caused) to those Third Parties.[49] To satisfy this last criterion, the Catalyst Parties have pleaded the "unlawful act" of tortious deceit. This means that – if their unlawful means tort claims are to survive – the Catalyst Parties must show "grounds to believe" that there is "substantial merit" to (and "no valid defences" to) their allegations that:

(i) the Moving Parties made false representations of fact to the Third Parties;

(ii) the Moving Parties knew that (or were reckless as to whether) the representations were false;

(iii) the Moving Parties made the representations with the intention that they would be acted upon by the Third Parties;

(iv) the Third Parties relied upon the representations; and

(v) the Third Parties suffered damage as a result.[50]

31. As established in the Moving Parties' individual Facta, the Catalyst Parties have failed to demonstrate the "substantial merit" of *any* of the elements of their unlawful means tort claims (including *any* of the elements of their associated deceit claims). Furthermore, under para. 137.1(4)(a)(ii), they have likewise failed to show that there are "grounds to believe" that *not a single one* of the following defences is "valid":

(a) **Defences of Lack of Intention defence and Absence of Any Act Directed at a Third Party:** The Moving Parties made no false representations to the Third Parties with the intended goal of causing harm to the Catalyst Parties.

(b) **Defence of Lack of Harm:** The Catalyst Parties suffered no proven harm as a result of any

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49 *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 at paras. 23, 26, 62, 74, 76, 93-97 ["***A.I. Enterprises***"], JMLBOA, Tab 3; and *Catalyst 2019, supra,* at para. 84, JMLBOA, Tab 15.

50 *Chaba v. Khan*, 2020 ONCA 643 at para. 15, *leave to appeal refused*, 2021 CanLII 24825 (SCC) ["***Chaba***"], JMLBOA, Tab 17; *Paulus v. Fleury*, 2018 ONCA 1072 at para. 9, *leave to appeal refused,* 2019 CanLII 53418 (SCC) ["***Paulus***"], JMLBOA, Tab 41; and *Midland Resources Holding Limited v. Shtaif*, 2017 ONCA 320 at para. 162, *leave to appeal refused*, 2017 CanLII 86178 (SCC) ["***Midland***"], JMLBOA, Tab 34.

representations made by the Moving Parties to the Third Parties.

(c) **Defence of No Actionable "Unlawful Means":** This Court previously rejected the Catalyst Parties' unlawful means tort claim because they failed to assert a sustainable deceit allegation.[51] This remains true. The law imposes a very heavy onus on plaintiffs who make allegations of fraudulent conduct,[52] and the Catalyst Parties' impermissibly vague deceit allegations do not come close to satisfying this burden.[53] Their assertion of deceit – and, with it, their unlawful means tort claim – must be rejected because:

(i) The Moving Parties made no false representations of fact to the Third Parties;[54]

(ii) The Moving Parties did not know of (and were not reckless regarding) any falsity in any representations made to the Third Parties;[55]

(iii) The Moving Parties had no intention that any representations would be acted upon by the Third Parties;[56]

(iv) The Third Parties never relied upon any representations made by the Moving Parties;[57] and

(v) The Third Parties never suffered damage as a result of such reliance.[58]

32. As established in the Moving Parties' individual Facta, the Catalyst Parties' unlawful means tort claims (including their deceit claims) lack "substantial merit" and, in any event, are rebutted by "valid

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51 *Catalyst 2019, supra,* at paras. 87-90, JMLBOA, Tab 15.

52 See Rule 25.06(8), as well as *Midland, supra,* at para. 198, JMLBOA, Tab 34; *Mitchell v. Lewis*, 2016 ONCA 903 at paras. 10 & 11, JMLBOA, Tab 35; and *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649 at paras. 118-122 ["***Fasteners***"], JMLBOA, Tab 20. With regard to allegations of deceit against individual defendants, see also *Ceballos v. DCL International Inc.*, 2018 ONCA 49 at paras. 10-13 ["***Ceballos***"], JMLBOA, Tab 16.

53 The Catalyst Parties plead baldly and unconvincingly that the Moving Parties made deceitful misrepresentations to Third Parties – namely, (i) investors in Catalyst funds holding Callidus shares, (ii) investors who sold their Callidus shares, (iii) appraisers who valued borrowers' assets for the benefit of the Catalyst Parties, and (iv) auditors and directors of the Catalyst Parties – and that these Third Parties somehow relied to their detriment on such misstatements.

54 *T.A.W. v. J.C.L.*, 2021 ONCA 192 at para. 4, JMLBOA, Tab 46.

55 *Mariani v. Lemstra*, 2004 CanLII 50592 (ONCA) at paras. 12-14, *leave to appeal refused,* [2004] S.C.C.A. No. 355 ["***Mariani***"], JMLBOA, Tab 32; and *Paulus, supra,* at paras. 10 & 23-27, JMLBOA, Tab 41.

56 *Paulus, supra,* at paras. 10 & 31-33, JMLBOA, Tab 41; and *Mariani, supra,* at paras 12, 13 & 15, JMLBOA, Tab 32.

57 *Mariani, supra,* at paras 12, 13 & 15, JMLBOA, Tab 32.

58 Ordinarily, this would be fatal to a deceit claim – see *Mariani, supra,* at para. 15, JMLBOA, Tab 32 – but that principle may be attenuated in the context of a claim in which deceit is the "unlawful act" at the heart of the unlawful means tort.

defences." Accordingly, they do not survive scrutiny under s. 137.1(4)(a).

(e) The Conspiracy Claims of the Catalyst Parties Lack Substantial Merit and are Subject to Valid Defences

33. The Catalyst Parties assert both "predominant purpose conspiracy" and "unlawful means conspiracy."[59] Under para. 137.1(4)(a)(i), they must establish in law and on the evidence that there are "grounds to believe" that *both* of their overlapping conspiracy claims possess "substantial merit" – *i.e.*, that they have "a real prospect of success" at trial. The elements of these causes of action are follows:

(a) **Predominant Purpose Conspiracy**: (i) the predominant purpose of the conspiracy was to cause injury to the Catalyst Parties; (ii) this conspiracy was embodied in the Moving Parties' agreement to act in concert and their consequent concerted action; (iii) this concerted action took the form of either lawful or unlawful conduct; and (iv) the Catalyst Parties suffered loss caused by the Moving Parties' conduct;[60] and

(b) **Unlawful Means Conspiracy:** (i) the conspirators' agreement and concerted action involved unlawful conduct (*i.e.*, conduct contrary to statutory law, criminal law or common law);[61] (ii) the conduct in question was directed toward the Catalyst Parties; (iii) the Moving Parties knew or should have known that injury to the Catalyst Parties was likely to result; and (iv) the Catalyst Parties suffered loss as a result. In an attempt to satisfy the first element of the tort of unlawful means conspiracy, the Catalyst Parties have identified four forms of allegedly "unlawful conduct." For this conspiracy claim to survive scrutiny under s. 137.1(4)(a)(i), they must convince this Court that there are "grounds to believe" that there is "substantial merit" (and that there are "no valid defences") to their incorporated allegations of (A) defamation, (B) injurious falsehood, (C) breaches of ss. 126.1 and 126.2 of the *Securities Act*, and (D) unjust enrichment committed by the Moving Parties.

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59 *Berry v. Pulley*, 2015 ONCA 449 at para. 35, JMLBOA, Tab 10; and *Gould v. Western Coal Corp.*, 2012 ONSC 5184 at paras. 295-296 ["***Gould***"], JMLBOA, Tab 24.

60 *Fournier Leasing Co. Ltd. v. Mercedes-Benz Canada Inc*., 2012 ONSC 2752 at para. 70 ["***Fournier***"], JMLBOA, Tab 22.

61 *A.I. Enterprises, supra,* at paras. 62-64 & 67, JMLBOA, Tab 3; and and *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at paras. 24, 37 & 38 ["***Agribrands***"], JMLBOA, Tab 4.

34. As established in the Moving Parties' individual Facta, the Catalyst Parties have failed to demonstrate the "substantial merit" of *any* of the foregoing elements of their conspiracy claims. Such failures also constitute "valid" defences to these claims for the purposes of para. 137.1(4)(a)(ii), with the result that the Catalyst Parties' conspiracy allegations are fatally flawed:

(a) **No Universal Agreement and No Universal Concerted Action**: Ignoring the heavy onus that comes with alleging the "very serious" wrong of conspiracy,[62] the Catalyst Parties have failed to show that *every single Moving Party* agreed to, and that *every single Moving Party* participated in, the alleged conspiracy. This failure alone is fatal.[63]

(b) **The Moving Parties' "Predominant Purposes":** Despite alleging a predominant purpose conspiracy, the Catalyst Parties have failed to show that the predominant motivation of <u>any</u> (let alone all) of the Moving Parties was to harm the Catalyst Parties. On the contrary, the Catalyst Parties' own pleadings defeat such an allegation by emphasizing the purely economic goals (*i.e.,* profiting from the alleged "distort and short" campaign) that supposedly motivated many of the Moving Parties. Similarly, many of the Moving Parties were motivated by a simple desire to defend themselves against the (tactical and abusive) litigation commenced against them by the Catalyst Parties. This absence of a "predominant" motive to injure is fatal to these claims.[64]

(c) **The Absence of Any Demonstrated "Unlawful Means":** Despite alleging an unlawful means conspiracy, the Catalyst Parties have failed to show "grounds to believe" that *every* requisite aspect of *any* of the enumerated "unlawful" acts was committed by *every single one* of the Moving Parties. Once again, this is fatal:

(i) The many flaws associated with their defamation claims and allegations have already

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62 *Gould, supra,* at paras. 300-303, JMLBOA, Tab 24; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 at paras. 163-177*, affirmed* 2013 ONSC 1169 (Div. Ct.), JMLBOA, Tab 33; and *Penson Financial Services Canada Inc. v. Connacher*, 2010 ONSC 2843 at para. 15, JMLBOA, Tab 42. With regard to individual defendants, see also *Ceballos, supra,* at paras. 10-13, JMLBOA, Tab 16; and *Fasteners, supra,* at paras. 155-159 & 162, JMLBOA, Tab 20.

63 *Bhasin v. Hrynew*, 2014 SCC 71 at para. 106, JMLBOA, Tab 12; and *Agribrands, supra,* at paras. 27, 28 & 39-43, JMLBOA, Tab 4.

64 *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872 at paras. 39-44, *leave to appeal refused* 2011 CanLII 43420 (SCC), Tab 26; *Gould, supra,* at paras. 297 & 298, JMLBOA, Tab 24; *Fournier, supra,* at paras. 76-80, JMLBOA, Tab 22; and *RuggedCom Inc. v. Korona Group Ltd.*, 2014 ONSC 6674 at paras. 29 & 34, JMLBOA, Tab 44.

been shown (*above*);

(ii) The flaws in their injurious falsehood claims and allegations have also been shown (*above*);

(iii) Their allegation that the Moving Parties breached the *Securities Act* – via (A) the commission of fraud or market manipulation under s. 126.1,[65] or (B) the making of misleading or untrue statements under s. 126.2[66] – have no basis in fact, and cannot provide the "unlawful means" required for a conspiracy claim;[67] and

(iv) Their allegations of unjust enrichment fail because (A) the alleged enrichment of the Moving Parties and (B) their own alleged deprivation lack the necessary "correspondence" and causal connection to one another.[68] This Court has previously found that this is fatal to the Catalyst Parties' conspiracy claims, and so it remains.[69]

(d) **No Specific Harm was Caused:** The Catalyst Parties suffered no specific harm as a result of the alleged conspiracy. On this basis alone, these claims must be rejected.

35. As established in the Moving Parties' Facta, because the Catalyst Parties' conspiracy claims lack "substantial merit" and are subject to "valid defences," they do not survive scrutiny under s. 137.1(4)(a). More compendiously, because *none* of the Catalyst Parties' allegations has "substantial merit" and because *all* such claims face "valid defences," the motions brought by the Moving Parties must be granted by this Court in their entirety on the basis of s. 137.1(4)(a).

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65 Section 126.1(1) provides as follows, while 126.1(2) addresses "attempts" to commit the following:

"*A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know, (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or (b) perpetrates a fraud on any person or company*."

66 Section 126.2(1) provides as follows:

"*A person or company shall not make a statement that the person or company knows or reasonably ought to know, (a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and (b) would reasonably be expected to have a significant effect on the market price or value of a security, derivative or underlying interest of a derivative."*

67 *Gould, supra,* at para. 311, JMLBOA, Tab 24.

68 *Apotex Inc. v. Eli Lily & Co.*, 2015 ONCA 305 at paras. 41-43, 55 & 56, *leave to appeal dismissed*, 2016 CanLII 940 (SCC), JMLBOA, Tab 5. See more generally *Moore v. Sweet*, 2018 SCC 52 at paras. 41-43, JMLBOA, Tab 36.

69 *Catalyst 2019, supra,* at paras. 96-101, JMLBOA, Tab 15.

D. The "Public Interest Hurdle" under Section 137.1(4)(b): Does the Public Interest in Permitting the Responding Party's Claim to Proceed Outweigh the Public Interest in Protecting the Moving Party's Right of Expression?

(i) General Principles Governing section 137.1(4)(b)

36. Even if the Catalyst Parties overcome both prongs of the Merits-Based Hurdle under paras. 137.1(4)(a) (*above*) – and they cannot – they are unable to surpass the Public Interest Hurdle imposed by s. 137.1(4)(b). This critically important final test has been described by the Supreme Court as "the fundamental crux of the [anti-SLAPP] analysis" and "the core of s. 137.1."[70]

37. In contrast to the more lenient "grounds to believe" burden imposed under s. 137.1(4)(a), the onus placed on the Catalyst Parties under s. 137.1(4)(b) reverts to the more challenging *balance of probabilities* standard.[71] More specifically, under s. 137.1(4)(b), the Catalyst Parties must demonstrate on a balance of probabilities that the "harm" they have suffered or are likely to suffer as a result of the Moving Parties' expression "is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression."

38. As the Supreme Court has emphasized, the Motion Judge's task under s. 137.1(4)(b) is <u>not</u> to "balance" abstract public interests against one another – *i.e.*, the right to access the courts (generally) *versus* the right of free expression (generally) – but rather to carefully "weigh" which interest is more deserving of protection *in the unique context of this particular proceeding*.[72] This "weighing exercise" requires the Motion Judge to undertake three successive steps:

(a) **The Existence of "Harm" Suffered:** The Court must determine whether the Catalyst Parties have suffered (or will suffer) "harm" caused by the impugned "expressions" (while initially disregarding the "seriousness" of that "harm"). If this initial test is not satisfied, the motions

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70 *Pointes, supra,* at paras. 18, 33, 48, 53, 61, 62 & 82, JMLBOA, Tab 1; and *Bent, supra,* at paras. 76, 88 & 139, JMLBOA, Tab 9.

71 *Pointes, supra,* at paras. 82, 103, 126, JMLBOA, Tab 1; and *Bent, supra,* at paras. 141 & 174, JMLBOA, Tab 9.

72 *Pointes, supra,* at paras. 65-67, JMLBOA, Tab 1.

must be granted and the claims of the Catalyst Parties must be dismissed;

(b) **The Value of the Impugned "Expression":** If necessary, the Court next assesses the value (from a public interest perspective) of the Moving Parties' "expressions"; and

(c) **Weighing the "Harm" against the Value of the "Expression":** Finally, the Court must assess the "seriousness" of the specific "harm" allegedly suffered by the Catalyst Parties, and then weigh (i) that quantified "harm" against (ii) the value of the unique "expression" at issue, in order to determine which should take priority over the other.[73]

39. Consistent with the foregoing, the Catalyst Parties' first hurdle under s. 137.1(4)(b) is to establish, on a balance of probabilities, that they have suffered or are likely to suffer "harm" that was "caused" by the Moving Parties' "expression." More particularly:

(a) **Proving the "Likelihood" of "Harm" Caused by the "Expression":** The Catalyst Parties must "provide evidence for the motion judge to draw an inference" that "harm" is *likely* to be suffered and is *likely* to be caused by the relevant "expression."[74]

(b) **How is such "Likelihood" to be Established?** To establish the existence of this "likelihood," the Catalyst Parties face two insurmountable challenges:

(i) Proving the "Likelihood" of the Existence of "Harm": They must demonstrate on a balance of probabilities that they have or are likely to suffer financial loss, reputational injury or other "harm." Importantly, in determining whether or not "harm" has been or will be suffered, the Motion Judge must not simply accept "at face value" the Catalyst Parties' "bald assertions" of injury.[75]

(ii) Proving the "Likelihood" of a "Causal Connection": They must also show – again, on a balance of probabilities – that the "harm" in question "was [likely] suffered *as a result* of the [Moving Parties'] expression" (emphasis in the original). In assessing this alleged causal link, the Motion Judge must bear in mind that such "harm" can be caused by a variety of factors wholly unrelated to the impugned "expression." Moreover, causation is not an "all or nothing" concept, and the causal connection

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73 *Pointes, supra,* at paras. 61-82, JMLBOA, Tab 1; and *Bent, supra,* at paras. 142-176, JMLBOA, Tab 9.

74 *Pointes, supra,* at paras. 71 & 114-119, JMLBOA, Tab 1; and *Bent, supra,* at para. 160, JMLBOA, Tab 9.

75 *Pointes, supra,* at paras. 69-71, JMLBOA, Tab 1; and *Bent, supra,* at paras. 142-150, JMLBOA, Tab 9.

> may be weaker for some elements of the "harm" that has allegedly been suffered and stronger for other elements.[76]

40. Unless the Catalyst Parties can establish this "likelihood" of both "harm" and the required "causal connection," the anti-SLAPP motions against them must be granted.[77] Even if they succeed at that stage, however, they still face a second hurdle under s. 137.1(4)(b): they must persuade the Motion Judge on the balance of probabilities that the impugned "expressions" are of *relatively low value* (from a public interest perspective). Under s. 137.1, not all "expressions" on matters of public interest are equally deserving of protection. Accordingly, the Motion Judge must assess both "the *quality* of the expression, and the *motivation* behind it" (emphasis in original),[78] including by considering the following criteria:

(a) **The "Expressions" Least Deserving of Protection:** The least worthy category of "expressions" – *i.e.,* those at greatest risk of being "outweighed" by *bona fide* allegations of "harm" – are communications that contain "deliberate falsehoods," "gratuitous personal attacks," "lies" and "vitriol." At the same time, the Court should avoid applying "a moralistic taste test" when evaluating an expression's worthiness.[79]

(b) **The "Expressions" Most Deserving of Protection:** "Expressions" at the other end of the spectrum – *i.e.*, those least likely to be "outweighed" by claims of harm suffered – are communications that align with the "core values" protected by s. 2(b) of the *Charter*. These include the search for truth, participation in political decision-making, and diversity in forms of self-fulfilment and human flourishing.[80]

(c) **"Expressions" Falling between these Two Poles:** Many "expressions" will fall into neither of these categories, and must accordingly be assessed on a case-by-case basis.

41. Once the existence of causally-related "harm" and the value of the relevant "expressions" have

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76 *Pointes, supra,* at paras. 71 & 72, JMLBOA, Tab 1; and *Bent, supra,* at paras. 142 & 150-159, JMLBOA, Tab 9.

77 *Pointes, supra,* at para. 73, JMLBOA, Tab 1.

78 *Pointes, supra,* at paras. 74 & 76, JMLBOA, Tab 1.

79 *Pointes, supra,* at paras. 75 & 76, JMLBOA, Tab 1.

80 *Pointes, supra,* at para. 77, JMLBOA, Tab 1.

been established, the Catalyst Parties must convince the Motion Judge on a balance of probabilities that the "seriousness" of this "harm" *outweighs* the public interest value of the "expression." In the unlikely event that they succeed in doing so, the motions must be dismissed. However, if this Court concludes that the value of the "expression" *outweighs* the "harm" suffered, the anti-SLAPP motions must be granted and the Actions brought by the Catalyst Parties must be dismissed.

42. As noted above, it is only at this final stage of the s. 137.1(4)(b) analysis that the magnitude of the "harm" that has been or is likely to be suffered by the Catalyst Parties is considered. This is because the Court must determine whether that harm is "sufficiently serious" to outweigh the public interest in protecting "expressions" of the Moving Parties.[81] Accordingly, "harm" that is "likely" to be minor (or that is speculative in nature) will presumptively be outweighed by the importance of protecting valuable and worthy "expressions" of the Moving Party.[82]

43. The most challenging cases are those in which (a) a responding party has established a *bona fide* and sympathetic claim that it is "likely" to suffer significant "harm" caused by a moving party's "expression," *but* (b) the Court has also concluded that the "expression" in question has considerable (public interest) importance. In such a scenario, in the words of Justice Côté:

> [Section] 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves 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 [emphasis added].[83]

44. In weighing alleged "harm" against the value of the "expression," the Motion Judge may consider such "additional factors" as: (i) the history of litigation between the parties; (ii) the potential chilling

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81 *Pointes, supra,* at para. 70**,** JMLBOA, Tab 1; and *Bent, supra,* at para. 144, JMLBOA, Tab 9.

82 *Pointes, supra,* at para. 119, JMLBOA, Tab 1. The opposite is also true -- *i.e.*, the "likelihood" of devastating harm will presumptively outweigh the protection of an "expression" that has little or no public interest importance.

83 *Pointes, supra,* at para. 62 (emphasis added), and paras. 53 & 82, JMLBOA, Tab 1; and *Bent, supra,* at para. 141, JMLBOA, Tab 9.

effect of the proceeding on future expression by a party or by others; and (iii) any disproportion between the resources being used in the lawsuit and the expected damages award. These factors are relevant only to the extent that they relate to or reinforce the two mandatory elements of the weighing exercise mandated by s. 137.1(4)(b) – namely, the "significance" of the "harm" caused and the value of the "expression" at issue.[84]

(ii) Applying the Section 137.1(4)(b) Principles to the Catalyst Parties' Claims

45. The Moving Parties respectfully submit that – applying the foregoing principles – the Catalyst Parties have failed to establish on a balance of probabilities that the "harm" they claim to have suffered is sufficiently "serious" that it outweighs the self-evident public value of the impugned "expressions." In addition to the following submissions, the Moving Parties rely on the discussion of these issues in their individual Facta.

46. First, in assessing the existence (and also the "seriousness") of the "harm" allegedly suffered by the Catalyst Parties – and in further assessing the alleged "causal link" between that "harm" and the Moving Parties' "expressions" – the Moving Parties submit that:

(a) Under defamation principles, "general damages" are presumed to have been suffered by individual plaintiffs,[85] but this presumption is attenuated in the case of corporate plaintiffs like the Catalyst Parties.[86] In any event, to claim "special damages" in defamation, the Catalyst Parties must still prove actual monetary losses flowing directly from the

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84 *Pointes, supra,* at paras. 78-80, JMLBOA, Tab 1; and *Bent, supra,* at paras. 170-172, JMLBOA, Tab 9. In this context – *and subject to these narrow constraints* – the Motion Judge may also, in appropriate cases, consider whether the *indicia* of a SLAPP are present (*i.e*., (i) a plaintiff's history of misusing the judicial process, (ii) a punitive or retributory motivation in commencing the claim, (iii) an imbalance in power between the parties, and (iv) a claim for minimal or nominal damages).

85 *Grant, supra,* at para. 28, JMLBOA, Tab 25; and *Bent, supra,* at para. 144, JMLBOA, Tab 9.

86 *Barrick Gold Corp v Lopehandia*, 2004 CanLII 12938 (ONCA) at para 49, JMLBOA, Tab 8; and – in the specific context of a s. 137.1 motion -- *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128 at paras. 22, 23, 27 & 28, *leave to appeal refused*, 2019 CanLII 94476 (SCC) and 2019 CanLII 94462 (SCC) ["***United Soils***"], JMLBOA, Tab 48.

"expressions," which they have failed to do.[87]

(b) Importantly, no such presumption applies, and actual damages must be proven, in support of the Catalyst Parties' claims for: (i) injurious falsehood (where only monetary losses will suffice); (ii) the unlawful means tort; and (iii) non-defamatory conspiracy;[88]

(c) The "causal link" -- which the Catalyst Parties assert exists between the "expressions" and the "harm" they claim to have suffered -- is self-serving and tenuous at best. This itself is sufficient to decide the weighing exercise under s. 137.1(4)(b);[89] and

(d) The reality is that the repeated and well-publicized misconduct of the Catalyst Parties[90] has already inflicted so much harm on their collective reputations that any incremental damage caused by the "expressions" was minimal at most.[91]

47. Second, addressing the public interest value of the "expressions" at issue, the Moving Parties submit that the following factors are relevant to this Court's analysis:

(a) The Moving Parties are accused of sharing facts and opinions concerning the business and litigation practices of a public company (Callidus) and its controversial and notoriously aggressive private equity parent (Catalyst). These are valid and important topics of public debate that concern parties with national and international footprints, operations and reputations. Commercial speech – particularly when designed to comment on products and services offered to the public, or when addressing matters relevant to the conduct of participants in the capital markets – has been protected repeatedly under s. 137.1, even at the

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87 *Pointes, supra,* at paras. 115-116, JMLBOA, Tab 1; *United Soils, supra,* at paras. 22, 23, 27 & 28, JMLBOA, Tab 48; *Fortress, supra,* at paras. 43-46, JMLBOA, Tab 21; *New Dermamed CA, supra,* at paras. 15 & 16, JMLBOA, Tab 38; and *910938, supra,* at paras. 34-39, JMLBOA, Tab 2.

88 In a ruling that dismissed an injurious falsehood claim under s. 137.1(4)(b), this Court ruled that the expenses incurred by the responding party as a result of the impugned "expression" – namely, the cost of responding to inquiries from a regulator that had been prompted by the "expressions" – not insufficient to outweigh the importance of genuinely valuable free expression. See *Joshi, supra,* at paras. 66-69, JMLBOA, Tab 28.

89 *Pointes, supra,* at paras. 115-116, JMLBOA, Tab 1; *Fortress, supra,* at paras. 43-46, JMLBOA, Tab 21; *New Dermamed CA, supra,* at paras. 15 & 16, JMLBOA, Tab 38; and *910938, supra,* at paras. 34-39, JMLBOA, Tab 2.

90 For example: (i) the hiring of Black Cube and Psy Group; (ii) the "sting" on Justice Newbould; (iii) the numerous judicial findings of disreputable conduct and abusive litigation on the part of the Catalyst Parties; and the (iv) the courts' rejection of the unreliable evidence proffered by the Catalyst Parties in support of their unmeritorious claims.

91 *Chase v. Anfinson*, 2018 BCSC 856 at paras. 116-119 & 161, JMLBOA, Tab 18; and *Bernstein v. Poon*, 2015 ONSC 155 at paras. 172-174, JMLBOA, Tab 10.

expense of otherwise meritorious actions.[92]

(b) Even more importantly, many of the impugned "expressions" embody the increasingly compelling public interest in a robust free press. As a result (as recognized by the Supreme Court), the protection of such "expressions" under s. 2(b) of the *Charter* means that they are also uniquely deserving of protection under s. 137.1;[93] and

(c) Despite the unique abrasiveness and truly abysmal behaviour of the Catalyst Parties, the tone and tenor of the "expressions" at issue was admirably measured and restrained in all of the circumstances. In any event, language that may have revealed the Moving Parties' well-deserved frustration with the Catalyst Parties does not lessen the public interest value of those expressions.[94]

48. It is clear that the "significance" of the harm allegedly suffered by the Catalyst Parties is easily outweighed by the public interest importance of the "expressions" under attack. Although the protection of previously unblemished reputations is unquestionably important, neither of the Catalyst Parties and none of their principals falls into such a category. There are situations – including the case at bar -- where "an overly solicitous regard" for such considerations can "chill" freewheeling debate on matters of public interest,[95] and where placing undue emphasis on the right to vindication through litigation comes at too high a cost to freedom of expression.[96]

49. It is submitted that this Court must bear in mind the Catalyst Parties' lengthy history of unsuccessful and abusive litigation, and the clear indication that the current Actions are SLAPPs:

> Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil

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92 *910938, supra,* at paras. 41-43, 48 & 49, JMLBOA, Tab 2; and see more generally *Fortress, supra,* JMLBOA, Tab 21; and *New Dermamed CA, supra*, JMLBOA, Tab 38.

93 *Pointes, supra,* at para. 77, JMLBOA, Tab 1; and see also *910938, supra,* at para. 9, JMLBOA, Tab 2.

94 *Fortress, supra,* at para. 51, JMLBOA, Tab 21; and *910938, supra,* at para. 50 & 51, JMLBOA, Tab 2.

95 *WIC Radio*, *supra,* at para. 2, JMLBOA, Tab 50.

96 *Armstrong v. Corus Entertainment*, 2018 ONCA 689 at para. 90, JMLBOA, Tab 7.

> society. This case is about what happens when individuals and organizations use litigation as a tool to quell such expression, which, in turn, quells participation and engagement in matters of public interest. ... [emphasis added].[97]

50. Regrettably, the Catalyst Parties' conduct in prosecuting the current Actions provides a textbook illustration of the type of abusive litigation described by Justice Côté. They are notorious for misusing the litigation process to punish and harass their critics and perceived enemies. They are the very sort of litigants that the anti-SLAPP provisions were intended to guard against.

PART III ~ ORDER REQUESTED

51. The Moving Parties make these submissions in support of their requests for an order: dismissing the Plaintiffs' actions as against them pursuant to s. 137.1(3) of the CJA; awarding them their costs of these motions and of the entire proceeding on a full indemnity basis pursuant to s. 137.1(7); and, where requested by a Moving Party, granting damages pursuant to s. 137.1(9).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2021

per 

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97 *Pointes, supra,* at para. 1, JMLBOA, Tab 1.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22
2. *910938 Ontario Inc. v. Moore*, 2020 ONSC 4553
3. *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12
4. *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460
5. *Apotex Inc. v. Eli Lily & Co.*, 2015 ONCA 305, *leave to appeal dismissed*, 2016 CanLII 940 (SCC)
6. *Arcelormittal Tubular Products Roman S.A.v. Canadian Natural Resources Ltd.*, 2013 ABQB 578
7. *Armstrong v. Corus Entertainment*, 2018 ONCA 689
8. *Barrick Gold Corp v Lopehandia*, 2004 CanLII 12938 (ONCA)
9. *Bent v Platnick*, 2020 SCC 23
10. *Bernstein v. Poon*, 2015 ONSC 155
11. *Berry v. Pulley*, 2015 ONCA 449
12. *Bhasin v. Hrynew*, 2014 SCC 71
13. *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587
14. *Carbone v. DeGroote*, 2014 ONSC 6146
15. *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2019 ONSC 128
16. *Ceballos v. DCL International Inc.*, 2018 ONCA 49
17. *Chaba v. Khan*, 2020 ONCA 643, *leave to appeal refused*, 2021 CanLII 24825 (SCC)
18. *Chase v. Anfinson*, 2018 BCSC 856
19. *Cusson v. Quan,* 2009 SCC 62
20. *Fasteners & Fittings Inc. v. Wang*, 2020 ONSC 1649
21. *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686
22. *Fournier Leasing Company Ltd. v. Mercedes-Benz Canada Inc*., 2012 ONSC 2752

23. *Fraleigh v. RBC Dominion Securities Inc*., 2009 CanLII 92109 (ONSC)

24. *Gould v. Western Coal Corp.*, 2012 ONSC 5184

25. *Grant v Torstar Corp,* 2009 SCC 61

26. *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, *leave to appeal refused* 2011 CanLII 43420 (SCC),

27. *Hung v. Gardiner*, 2003 BCCA 257

28. *Joshi v. Allstate Insurance Co.*, 2019 ONSC 4382

29. *Langdon's Coach Lines Limited v. The T.T.C.*, 1956 CanLII 117 (ONSC), *affirmed* 1956 CanLII 376 (ONCA)

30. *Levant v. Day*, 2019 ONCA 244

31. *Lysko v Braley*, 2006 CanLII 9038 (ONCA)

32. *Mariani v. Lemstra*, 2004 CanLII 50592 (ONCA), *leave to appeal refused,* [2004] S.C.C.A. No. 355

33. *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744*, affirmed* 2013 ONSC 1169 (Div. Ct.),

34. *Midland Resources Holding Limited v. Shtaif*, 2017 ONCA 320, *leave to appeal refused*, 2017 CanLII 86178 (SCC)

35. *Mitchell v. Lewis*, 2016 ONCA 903

36. *Moore v. Sweet*, 2018 SCC 52

37. *Muir v. 403570 B.C. Ltd*., 2003 BCSC 575

38. *New Dermamed Inc. v. Sulaiman*, 2019 ONCA 141, *affirming*, 2018 ONSC 2517

39. *Ontario v. Gratton-Masuy Environmental Technologies Inc.*, 2010 ONCA 501, *leave to appeal discontinued*, [2010] S.C.C.A. No. 397

40. *Ontario College of Teachers v. Bouragba*, 2019 ONCA 1028

41. *Paulus v. Fleury*, 2018 ONCA 1072, *leave to appeal refused,* 2019 CanLII 53418 (SCC)

42. *Penson Financial Services Canada Inc. v. Connacher*, 2010 ONSC 2843

43. *Procor Ltd. v. U.S.W.A.*, 1990 CanLII 6637 (ONHCJ)

44. *RuggedCom Inc. v. Korona Group Ltd*., 2014 ONSC 6674

45. *Subway Franchise Systems of Canada, Inc. v. C.B.C.*, 2021 ONCA 25

46. *T.A.W. v. J.C.L.*, 2021 ONCA 192

47. *Thompson v Cohodes*, 2017 ONSC 2590

48. *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, *leave to appeal refused*, 2019 CanLII 94476 (SCC) and 2019 CanLII 94462 (SCC)

49. *Weisleder v. OSSTF*, 2019 ONSC 5830, *affirmed,* 2020 ONCA 181

50. *WIC Radio Ltd. v Simpson*, 2008 SCC 40

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1

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.

Definition, "expression"

[137.1](2) In this section,

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

Order to dismiss

137.1(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

[137.1](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.

No further steps in proceeding

[137.1](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.

No amendment to pleadings

[137.1](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.

Costs on dismissal

[137.1](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.

Costs if motion to dismiss denied

[137.1](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.

Damages

[137.1](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.

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2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.

…

Nature of Act or Condition of Mind

[25.06](8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

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(3) *Securities Act*, R.S.O. 1990, c. S.5

Fraud and market manipulation

126.1 (1) A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or

(b) perpetrates a fraud on any person or company.

Attempts

[126.1](2) A person or company shall not, directly or indirectly, attempt to engage or participate in any act, practice or course of conduct that is contrary to subsection (1).

Misleading or untrue statements

126.2 (1) A person or company shall not make a statement that the person or company knows or reasonably ought to know,

(a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and

(b) would reasonably be expected to have a significant effect on the market price or value of a security, derivative or underlying interest of a derivative.

Same

(2) A breach of subsection (1) does not give rise to a statutory right of action for damages otherwise than under Part XXIII or XXIII.1.

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4. Libel and Slander Act, R.S.O. 1990, c. L.12

Slander of title, etc.

17 In an action for slander of title, slander of goods or other malicious falsehood, it is not necessary to allege or prove special damage,

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication,

and the plaintiff may recover damages without averment or proof of special damage.

THE CATALYST CAPITAL GROUP INC. et al. Plaintiffs	-and-	WEST FACE CAPITAL INC. et al. Defendants	-and-	CANACCORD GENUITY CORP. Third Party
WEST FACE CAPITAL INC. et al. Plaintiffs by Counterclaim	-and-	THE CATALYST CAPITAL GROUP INC. et al. Defendants to the Counterclaim		Court File No. CV-17-587463-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

Joint Memorandum of the Defendants, Rob Copeland, West Face Capital, Inc., Gregory Boland, Clarityspring Inc. Nathan Anderson, Kevin Baumann, Jeffrey McFarlane, Darryl Levitt and Bruce Livesey

(SECTION 137.1 MOTIONS RETURNABLE MAY 17, 2021)

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