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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST GROUP INC. and
CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

- and -

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST GROUP INC. and
CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

DOW JONES AND COMPANY, ROB COPELAND, JACQUIE MCNISH and JEFFREY MCFARLANE

Defendants

FACTUM OF JEFFREY MCFARLANE
(Anti-SLAPP Motion)

Date: May 5, 2021

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PART I - OVERVIEW

1. After three and a half years of litigation, extensive document production and cross-examination since these motions pursuant to section 137.1 of the Courts of Justice Act [defined below] were initiated, the record is perfectly clear. The Plaintiffs have adduced no evidence capable of supporting their claims in either action.

2. As proven by the Plaintiff's own production from the US Securities and Exchange Commission, McFarlane was factually accurate in his interpretation of Callidus' financial reporting and communications with third parties such as the Wall St Journal (the "Defamation Action").

3. McFarlane never participated in any action resembling a conspiracy (the "Conspiracy Action"), and never participated in any "short" or "short-and-distort" scheme. In fact when the aggrieved former borrowers of Callidus were contemplating joint legal action, as similarly affected parties may explore, McFarlane explicitly stated in an email on May 18, 2016 that none of the parties *"in the contemplated class action should get involved in shorting the stock"*. [1]

4. This Factum supports the motion by the Defendant, McFarlane (the "**Defendant**") to dismiss this action as against him 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.

[1] McFarlane Cross-Examination – No Short Email

5. 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 Defendant has "no valid defence"; nor that there is harm to the Plaintiffs that outweighs the restrictions on free expression created by the action.

PART II – FACTS

A. McFarlane's History with Callidus

6. Jeffrey McFarlane ("McFarlane") was the former President and CEO of Xchange Technology Group ("XTG"), – a group of companies he founded in 1996 and grew to over $135 million USD in annual revenues. As such, he is a sophisticated business executive, has intimate knowledge of the company's business model, how to interpret its financial statements and its value in the market. As a former borrower of Callidus, McFarlane has insight into the Callidus' business practices and is a self-represented defendant in both the Conspiracy and Defamations action brought by the Plaintiffs.

7. 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. In 2012, XTG sought to refinance an existing loan with PNC bank. Callidus purchased XTG's existing loan, and entered into a new loan agreement with XTG, which was intended to provide additional working capital for XTG.

9. After entering into the new loan agreement with XTG, Callidus deliberately took steps to cause the loan to go into default, including:

a) At Newton Glassman's insistence, it imposed a random, last-minute "block" or reduction of actual credit availability of $1 million;

b) It delayed making advances to XTG that were permitted under the loan agreement;

c) It delayed the collateralization and securitization of the assets of XTG's European entities to increase the actual borrowing capacity under the new facilities;

d) It improperly leveraged the "blocked accounts" that Callidus used to exert complete control over a borrower's cash, preventing XTG from carrying on its business in the normal course and to extract concessions or fees from its borrowers;

e) It removed McFarlane as President and CEO in order to install management that would act in Callidus' lone interests over the interests of XTG and the unsecured creditors.

f) It even blocked access to XTG's ability to pay for legal advice prior to signing an agreement consenting to Callidus' installment of a "Financial Advisor" or Chief Restructuring Officer. [2]

[2] McFarlane Cross Examination – Email 07/24/2013

g) It refused to sell its XTG loan or even negotiate with a serious, prospective buyer, despite that buyer offering to purchase the loan for $17 million USD substantially more money than the $9.4 million USD Catalyst Parties eventually wrote their position down to and three and a half years later after incurring a loss approaching $90 million for Catalyst Funds III and IV. [3] [4]

B. <u>McFarlane Researches Callidus' Business Practices</u>

10. McFarlane was often perplexed by the questionable tactics used by Callidus and Newton Glassman against their borrowers. During the time XTG was an arms-length borrower of Callidus, some of these tactics appeared economically irrational; whether it was the deliberate withholding or delay of funds or the unwillingness to negotiate an exit with a prospective buyer who offered to acquire the Callidus loan for well in excess of what Catalyst eventually wrote their position down to.

11. McFarlane's concerns as to the seemingly economically irrational business practices of Callidus were heightened when he reviewed Callidus' IPO Prospectus. It was at this time where some of motives around Callidus' treatment of XTG became clear. McFarlane discovered that Callidus' accounting practices deviated materially from the practices referenced in the Prospectus and deviated materially from McFarlane's understanding of lending industry practices. McFarlane also learned from the Prospectus that Callidus had not reported a substantial unrealized loss related to the XTG loan in advance of its IPO and likely sought to conceal and defer this looming unrealized loss until well after its IPO..

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[3] James Riley Affidavit of July 29, 2020 – Exhibit 61 – HIG Offer Letter
[4] James Riley Cross Examination – Catalyst Annual General Meeting Apr 2018

12. McFarlane continued his review of publicly available documents, such as receivership and court documents, as well as Callidus' financial statements and earnings calls as a publicly traded company. He was contacted by other individuals who had experienced similar tactics by Callidus in relation to other loans as borrowers and they shared their collective experience.

13. After reviewing these materials, McFarlane became increasingly concerned about the inherent conflict of interests between Callidus and Catalyst as well as the material misrepresentations Callidus was making as a publicly traded company and the impact it would have on the investing public. Through his research and reviews, McFarlane learned that:

a) There was a clear and common pattern of facts around Callidus' aggressive treatment of at least five of its borrowers. This included misrepresenting Callidus as a bridge lender vs a distressed investor, last minute changes to deal terms, valuation reports that would go up or down to suit their purposes, intentional withholding or delaying of cash advances, exerting control over the business by constantly requiring decisions from Newton Glassman as the head of the of "Credit Committee", incremental demands and fees to enhance their yield, imposing new managers that are friendly to Callidus to execute agreements and waivers of claim. Ultimately Callidus was exerting fiduciary control and steering many of its loans to court processes where it would take control of the assets to the detriment of the borrowers and unsecured creditors. [5]

b) There was an inconsistent application of the Catalyst "Principal" Guarantee also known as the Participation Agreement. The IPO prospectus explicitly stated that

[5] McFarlane Motion Record - Overview to the Toronto Police - pages 42-55

the guarantee only covered principle, not interest, but uniquely in the case of XTG, interest was included – again to the detriment of the Catalyst Funds. [6]

c) Catalyst and Callidus were engaging in an unlawful and fraudulent scheme to inflate the earnings of Callidus – now a publicly traded company and inflate the value of the Catalyst funds holding an investment in Callidus.

d) Callidus would artificially inflate the value of its publicly held assets and shift losses to the privately held Catalyst Funds, to the detriment of limited partners in the Catalyst Funds. Callidus was accruing interest income from borrowers in Receivership with no ability to repay, rather than putting the loan into a non-accrual status such that they could claim a higher recovery under the Catalyst Guaranty from the Catalyst Funds and crystallize it as income. In the case of XTG, it was left in receivership for a year longer than Callidus originally told the Receiver it would take to conclude the process, the whole time, accruing interest to itself as income. In the month of May 2014, seven months into receivership, with no ability to pay interest, Callidus charged XTG $131,655.71 CAD and $656,528.51 USD in interest and categorizing it as income. This was for a single month and this practice went on for 14 months quietly unchecked.

e) Publicly stated policies involving Loan Loss Allowances and Fair Value Measurement were not being followed or were unreasonable.

[6] James Riley Cross-Examination – IPO Prospectus – page 11

f) The manufacturing of non-standard, non-IFRS earnings represented as "Yield Enhancements" by Callidus; now prohibited by the OSC were used to talk up and promote the publicly traded stock of Callidus.

C. McFarlane Reports his Findings to the Appropriate Authorities

14. On November 3, 2016, McFarlane submitted a whistleblower report to the OSC submission number WBF1478225427018.

15. The whistleblower report addressed the issues discovered by McFarlane and provided documents he had relied on in support of his assertions – which were all court documents on the public record or in the public domain but required interpretation to see the pattern of facts, inconsistencies, and deception.

D. McFarlane Findings Corroborated by the Catalyst Parties Productions

16. McFarlane's conversation with Dow Jones included a summary of his primary concerns with Callidus' business practices and lack of disclosure.[7] These concerns included:

a) The inherent "conflicts of interest" in the Catalyst Guaranty

b) The opaque reporting around the Catalyst Guaranty

c) The inconsistent application of the Catalyst Guaranty, including for the first time the payment of Interest and not just Principal

[7] Dow Jones Exhibit DOW000758-0001 – starting page 2

d) Overstated carrying values of valuations of assets held for sale or Unrealized Loan Losses - as evidenced by immediate write-downs after "selling" XTG to the Catalyst Funds III and IV.

e) The grossly overvalued carrying cost or valuation of the XTG business

f) Undeclared Loan Losses of over $200 million – as of November 2016. In the "Dalton Report" from February 2019, Callidus' own interim CEO noted *"CBL is in CRISIS"* [8] having generated Net Losses of *"over $312 million in the last three years"* [9] And perhaps most shocking, *"Loan Loss Provisions accounted for over $494 million as of September 30, 2018"* according to Dalton. [10]

17. As a result of these motion, and after extensive refusals, the Plaintiffs only recently produced unredacted communication from the SEC, which has confirmed McFarlane's research into the Catalyst Parties and Callidus. In the May 11, 2018 "Exit Letter" [11]the SEC examiner writes:

a) *"The staff is bringing these findings to your attention for immediate corrective action"*

b) In Section A, under the heading *"Undisclosed Conflicts Relating to Callidus Capital Corporation ("Callidus")"* the SEC examiner writes *"The examination revealed numerous contractual relationships and business practices which appear to raise conflicts of interest that were not adequately disclosed to investors in the Funds. The Adviser's failure to adequately disclose such contractual relationships and business practices, along with the related conflicts, may constitute violations of Rule 206(4)-S(a), as described below. Fund III and Fund IV also purchased a*

[8] Dalton Report – page 2
[9] Dalton Report – page 4

[10] Dalton Report – page 10
[11] SEC 4326

portfolio company, Xchange Technology Group ("XTG"), from Callidus for approximately $73 million, which equaled the total amount of principal and interest outstanding on a loan that had been extended by Callidus to XTG. Although since the inception of the Funds the Adviser included disclosures to investors regarding the potential for transactions between related parties, these disclosures appear to be inadequate."

c) The Exit Letter goes on to say: *"It appears that there are at least three categories of conflicts that arise in connection with the Funds' transactions with Callidus, as follows:*

i. *"**Conflicts between the various Funds relating to their different participation in the Callidus capital structure**"*

ii. *"**Conflicts between the Adviser and the Funds as a result of the Callidus transactions**"*

iii. "***Conflicts between Callidus and the Funds***"

1. "*In this regard, the examination identified several instances where it appears that there were conflicts resolved in favor of Callidus, potentially to the detriment of some of the Funds" " That is, after the "clarification," the Funds bore all of the credit risk, including the additional risk that resulted from extending additional principal to these borrowers, but the Funds did not receive the benefit of additional interest charged on larger principal balances because the interest payments were made to Callidus. Accordingly, for certain guaranteed loans, Callidus would be incentivized to keep the debt outstanding, increasing principal balances to increase its own income from guaranteed loans,"*

2. These facts highlighted by the examiner demonstrate exactly how Newton Glassman and his associates manipulated a large artificial gain on the books of the publicly traded Callidus resulting in a loss of approximately $90 million to the Limited Partners of Catalyst Funds III and IV – just on the XTG transaction alone. This resulted in a grossly distorted view of the performance of the then publicly-traded Callidus as the XTG disposition resulted in overtstated

income and understate debt levels than it would have otherwise. This was a serious matter of public interest.

18. The summary of concerns which McFarlane shared with the Wall Street Journal are in fact the core component of McFarlane's OSC Whistleblower Complaint and McFarlane's position is completely validated by the SEC "Exit Letter" quoted above. The two documents dispel any insinuation that McFarlane made misleading claims to the authorities as the SEC shared all of McFarlane's concerns, and as one would expect, the expert examiners identified additional concerns with the Catalyst Parties disclosure, reporting and business practices, all of which point to pattern of misrepresentation that needed to surface in the public domain.

E. <u>Callidus countersues its own head of Underwriting – Craig Boyer for $150 million</u>

19. In 2017, Callidus' former chief underwriter, Craig Boyer ("Boyer"), sued Callidus for wrongful dismissal. Boyer was responsible for the XTG loan, as well as the loans to the other individual guarantors who are defendants in the Conspiracy Action. Callidus counterclaimed against Boyer, alleging that he had among other things, failed to properly monitor loans in his portfolio and had been involved in fraudulent conduct or material misrepresentations related to loans including XTG.

20. Boyer defended the counterclaim, alleging that "Callidus is subject to multiple complaints and regulatory investigations" regarding its business practices. This dispute was covered by the press prior to the Wall Street Journal article complained of by the Catalyst Parties.

Callidus Statement of Defence and Counterclaim [Levitt Motion Record, Tab M, N]

F. McFarlane is Contacted by Journalists Interested in the Catalyst Parties

21. After the receivership of XTG and after the IPO of Callidus, McFarlane began to receive regular inquiries from reporters from reputable media outlets such as the Wall St Journal, the Globe & Mail, Reuters and BNN, as well as independent researchers such as Nathan Anderson and Bruce Livesey. When McFarlane did agree to speak with journalists it was usually to confirm or point out patterns in publicly available documents or to factually relay his own experience with Callidus as a Borrower. It was not McFarlane's practice to initiate these conversations, but when asked, McFarlane would share his concerns about the integrity of the Catalyst & Callidus Parties lending practices, accounting practices and lack of public disclosure. McFarlane would from time-to-time follow-up with reporters to inquire on the status of their independent research. McFarlane's willingness to comment on the Catalyst and Callidus– a company publicly traded on the Toronto Stock Exchange - was a matter of public interest. And as evidenced by McFarlane being only one of two parties named in both actions, he became a target for the Catalyst Parties who routinely attempted to intimidate or silence any who spoke out about their deceptive business practices. It's then no surprise that McFarlane was identified as a target in the offensive Blackcube mission that was commissioned by the Catalyst Parties and specifically Newton Glassman.

22. When speaking to any journalists, at all times, McFarlane provided accurate information as to his experience with the Catalyst Parties, and to identify publicly available documents that showed patterns of conduct by the Catalyst Parties.

23. With respect to the article published by the Wall Street Journal in August 2017, all information attributed to McFarlane is entirely accurate. With respect to the specific statements in the article related to McFarlane, the article reports on the following:

a) That XTG "began borrowing from Callidus in late 2012 after the lender purchased its $11.6 million loan from a U.S. bank". This is entirely accurate.

b) That XTG was in insolvency proceedings within a year, with Callidus purchasing it for about $34 million. This is also entirely accurate.

c) That Catalyst agreed to cover future losses on the XTG loan in 2014, that XTG was shown as a $66.9 asset of Callidus in September 2015, and that Catalyst transferred $101 million to Callidus for the principal plus accrued interest on the loan in March 2016. All of this is entirely accurate.

d) That 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". This is also accurate.[12]

[12] James Riley Cross Examination –Catalyst Annual General Meeting Apr 2018

e) That McFarlane had filed a whistleblower report, and that he had expressed an opinion that he had *"serious concerns about the integrity of Callidus's accounting around XTG*", all of which was accurate. Based on the recent productions from the Catalyst Parties communication with the OSC and SEC, which was withheld until the court ordered the Plaintiffs to produce, it is evident that McFarlane was far from the only party with serious concerns about the integrity of Callidus and Catalyst's accounting practices, further vindicating McFarlane's statement.

f) That McFarlane had been found by the Court of Appeal to be responsible for a personal guarantee in an amount "far less than Callidus was seeking in a civil suit". This was entirely accurate. The amount McFarlane was instructed to pay on appeal was $250,000 USD, reduced from the $3,000,000 USD that Callidus sued for - and in fact was the exact amount McFarlane had offered to settle for 16 months earlier – once again demonstrating Callidus' propensity to overreach with vexatious litigation and abuse the legal system incessantly. [13]

Callidus Capital Corporation v. McFarlane, 2017 ONCA 626 (CanLII), par. 45

[13] James Riley Cross-examination – Offer to Settle PG

PART III – ISSUES & LAW

24. As set out in the separately filed joint factum, the Catalyst Parties' claims ought to be dismissed under s. 137.1 of the Courts of Justice Act, as proceedings that tend to limit expression on matters of public interest. McFarlane relies upon the submissions in the joint factum, and provides the following specific submissions related to the claim against him.

A. This Proceeding Arises from Expressions on Matters of Public Interest

25. McFarlane bears the initial onus of demonstrating that this proceeding "arises from an expression made by the person that relates to a matter of public interest" pursuant to s. 137.1(3). Given the broad definition of "expression" in the statute (which is defined to include any communication, whether public or private), and the Supreme Court's direction that the term "arises from" should be given a "broad and liberal interpretation", there should be no dispute that McFarlane has met his initial onus.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 at para 28

26. The underlying claim in this proceeding against McFarlane relates to McFarlane's OSC Whistleblower Complaint, as well as McFarlane's willingness to speak publicly and be quoted in the Wall St Journal article. Without these communications to the regulators, the press and the public, there would be no claim in this proceeding.

27. As described in paragraphs 15 to 18 of the joint factum, these communications relate to a matter of public interest. Expressions regarding the operation of publicly traded companies, particularly companies such as the Catalyst Parties which have a controversial and well publicized history, is a subject matter on which the public has a genuine interest in receiving information. This is regardless of what the motives are behind the expression.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 at paras 27-28

Thompson v. Cohodes, 2017 ONSC 2590 at para 12

28. As a result, s.137.(3) has been satisfied, which shifts the onus to the plaintiffs to satisfy the requirements of s. 137(4).

B. The Plaintiffs' Claims Lack any Merit

29. Under the s. 137.1(4)(a) Merits-Based Hurdle, the plaintiffs bear the onus of satisfying the court as to the merits of its claims. As summarized by the Supreme Court of Canada, the question under this provision is:

> whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 at para 42

30. As the questions of "substantial merit" and "no valid defence" overlap substantially in the claim against McFarlane, they will be addressed together.

31. The Catalyst Parties have advanced a range of causes of action, of which many have dubious applicability. With respect to McFarlane, the substance of the claim appears to be an allegation that he is liable for a predominant purpose conspiracy for his criticisms of the Catalyst Parties, and his filing of a whistleblower complaint against them which was referenced in the Wall Street Journal. This claim, along with all claims by the Catalyst Parties, is simply without merit.[14]

32. The test for a claim of predominant purpose conspiracy is described in more detail in paragraphs 38-40 of the joint factum and requires proof that the predominant purpose of the conspiracy was to harm the plaintiffs, that the parties agreed to, and did in fact, act in concert, and that this conduct caused the plaintiffs to suffer a loss. The plaintiffs' claim is lacking in every aspect of the test. For the purposes of this factum, the claim against McFarlane suffers from the following primary fundamental flaws.

[14] The balance of the causes of action have also been dealt with in the joint factum, as well as in the companion facta filed by other defendants, which McFarlane relies upon.

33. First, the evidence of the Catalyst Parties as to the defendants' agreement to act in concert to harm the Catalyst Parties, and the existence of any real overt steps taken in connection with that agreement, is lacking. Discussions between certain defendants as to their experiences with the Catalyst Parties, and their mutual dislike of the Catalyst Parties, does not rise to the high level of an actual agreement designed on harming the Catalyst Parties. The only agreement demonstrated by the Catalyst Parties is an agreement to collaborate on regulatory filings (the contents of which were true, well researched, and are covered by absolute privilege)[15], which is far from an agreement to specifically cause harm to the plaintiffs.

34. Second, there is simply no evidence that the purpose of the actions of McFarlane, and the other defendants, were for the predominant purpose of inflicting harm on the Catalyst Parties. A party advancing their own interests, even where that has an adverse economic impact on others, does not constitute a predominant purpose of harming the plaintiff.

Gould v. Western Coal Corp, 2012 ONSC 5184 at para 298

35. Instead, McFarlane's purpose in taking the steps that he did was to defend himself against Callidus' claims against him, and to bring conduct, which McFarlane firmly believed was illegal, to the attention of the regulators and authorities – as one does when they believe a crime or other wrong-doing may have occurred.

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[15] *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2019 ONSC 128 at para 49

36. The Catalyst Parties' own evidence confirms that conduct of parties like McFarlane and Levitt, in speaking to other similarly aggrieved individuals, was to assist in the defence against the multitude of claims launched at former borrowers by Callidus. As Riley himself describes it, "in or around mid-2015 [McFarlane, Levitt and others] began contacting each other to discuss and coordinate "*their responses to the guarantee actions and their claims of fraudulent inducement against Callidus*"

Riley Conspiracy Affidavit, para 105(b)

37. Third, the cause of the Catalyst Parties' purported loss is the publishing of the Wall Street Journal article, for which there is no evidence of any agreement between the parties to cause harm to the Catalyst Parties. All other alleged acts were done privately, not broadly known to the investing community, and were not the cause of any loss to the plaintiffs. As a result, unless this specific overt act is found to be part of the alleged agreement between the defendants, then the plaintiffs cannot establish causation, and their claims fail.

38. Ultimately, the plaintiffs' most substantial failing in their claim against McFarlane is that McFarlane's statements in his OSC whistleblower report and his statements to the Wall St Journal are true. Beyond this, the plaintiffs are left with bald, unsupported and absurd assertions such as McFarlane and others were spreading false rumours through the "Bay Street rumour mill".

39. Detailed affidavits have been filed by the parties on this motion, which have been tested by way of extensive cross-examinations. Affidavits of Documents have been exchanged, and the completeness of those Affidavits of Documents have been litigated thoroughly.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 at para 37

40. It is therefore submitted that the plaintiffs cannot meet their onus on the Merits Based Hurdle, and the claim must be dismissed.

C. The Plaintiff's Claims are an Attempt to Silence Disclosure of their Improper Practices

41. If the plaintiffs meet their onus under the Merits Based Hurdle, the final step of the analysis, under s. 137.1(4)(b), is to weigh the any harm that the plaintiffs can prove, on a balance of probabilities, that they have likely suffered or will suffer, and the corresponding public interest in permitting the action to continue, outweighs the deleterious effects on expression and public participation.

1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 at para 82

42. As discussed in other facta filed by the defendants, the evidence regarding whether the Catalyst Parties actually suffered harm from the actions of the defendants is highly questionable. The plaintiffs' evidence of any business loss rests, in large part, on bald assertions by Riley, contradicted by Callidus' own internal report by its CEO in the "Dalton Report – specifically on page 10 in the "*How did CBL Get Here section"*[16] which included a reference to Callidus having Loan Loss Provisions of a staggering $494 million as of September 30, 2016.

Strategic Review and Remediation Plan [West Face Second Supplementary Motion Record, Tab 47]

[16] Dalton Report– page 10

43. In any event, even if damages are shown to have been caused by the defendants' conduct, the deleterious effect of this action on expression and public participation is substantial, and outweighs any purported harm suffered by the plaintiff.

44. The Catalyst Parties have, in effect, sued a number of whistleblowers, including McFarlane, for reporting concerns regarding their business, accounting and disclosure practices. Those concerns were well founded, having resulted in steps being taken by the OSC and SEC to force the Plaintiffs to amend the disclosures and improve their transparency. At a minimum, the concerns reported by McFarlane were done with a genuine belief in their accuracy that the Catalyst Parties were acting inappropriately, perhaps even unlawfully.

45. The Catalyst Parties are notorious for their extremely litigious nature and frequent attempts to weaponize the Canadian legal system. They clearly have no hesitation in deploying highly questionable tactics, regardless of the potential illegality, up to and including their "sting" of Justice Newbould and surreptitious surveillance of many of the Defendants in these actions.

46. Ultimately, this is a classic and stereotypical SLAPP proceeding. A large company, with substantial resources, brings an action against an individual whistleblower for exorbitant amounts, with no limits on their litigation spending in an attempt to financially ruin the defendant(s). This is one reason McFarlane has opted to self-represent in these actions as the financial burden would otherwise be overwhelming and has persisted for more than three and half years. Although McFarlane is not required to prove that the plaintiff's purpose is to silence him in order to succeed under s. 137.1, it is clear that this is a goal of the Catalyst Parties as this is the fourth time McFarlane has been sued by the Plaintiffs since 2015. The negative effects on future whistleblowers if this action is allowed to proceed are significant.

PART IV – ORDER REQUESTED

47. McFarlane therefore requests that the both actions against him be dismissed pursuant to s. 137.1 of the *Courts of Justice Act*, with costs on a full indemnity basis.

Dated at Toronto this 5th day of May, 2021

Jeff McFarlane

SCHEDULE "A" – List of Authorities Referenced

1. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22

2. *Thompson v. Cohodes*, 2017 ONSC 2590

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

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

5. *R. v. Delchev*, 2015 ONCA 381

SCHEDULE "B" – Relevant Statutes, Regulations and By-Laws

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.

Court File No. CV-17-587463-00CL
CV-18-593156-00CL

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

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

FACTUM

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