CITATION: The Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc. et al., 2021 ONSC 7957
COURT FILE NOs.: CV-17-587463-00Cl and CV-18-593156-00CL
DATE: 20211202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	*Richard G. Dearden, Benjamin Na, Matthew Karabus,* and *Marco S. Romeo*, for the Plaintiffs/Defendants by Counterclaim
Plaintiffs	*David Moore* and *Ken Jones,* for the Plaintiffs/Defendants by Counterclaim
– and –	
WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC., C.O.B. ANSON GROUP CANADA, ADMIRLTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10	*Kent E. Thompson, Matthew Milne-Smith, Andrew Carlson, Maura O'Sullivan,* and *Anthony Alexander*, for the Defendants/Plaintiffs by Counterclaim West Face Capital Inc. and Gregory Boland
	Lucas E. Lung and *Rebecca Shoom*, for the Defendants ClaritySpring Inc. and Nathan Anderson
	Dimitri Lascaris and *A.J. Freedman*, for the Defendant Bruce Livesey
	Mark Wiffen, for the Defendants Daryll Levitt and Kevin Baumann
	Phil Tunley, for the Defendant Rob Copeland
Defendants	*Jeffrey McFarlane,* self-represented

	Stacey Reisman, for the Defendants M5 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, ACF GP, Moez Kassam, Adam Spears and Sunny Puri
AND BETWEEN	
WEST FACE CAPITAL INC. and GREGORY BOLAND	*Devin Jarcaig,* for the Defendant Bruce Langstaff
Plaintiffs by Counterclaim	
– and –	
THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSEN, B.C. STRATEGY LTD. D/B/A BLACK CUBE, B.C. STRATEGYUK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP	
Defendants to the Counterclaim	
AND BETWEEN	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	*Richard G. Dearden, Benjamin Na, Matthew Karabus,* and *Marco S. Romeo*, for the Plaintiffs
Plaintiffs	
– and –	
DOW JONES AND COMPANY, ROB COPELAND, JACQUIE MCNISH and JEFFREY MCFARLANE	*Phil Tunley*, for the Defendants Dow Jones and Company, Rob Copeland and Jacquie McNish
Defendants	*Jeffrey McFarlane,* self-represented
	HEARD: May 17, 18, 19, 20, 21, 2021

Table of Contents

REASONS FOR DECISION

MCEWEN, J.

[1] In 2015, Ontario amended the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), by introducing ss. 137.1 to 137.5. These sections are generally referred to as the *CJA's* "anti-SLAPP" provisions.

[2] The amendments were designed to deal with the harmful effects of strategic lawsuits against public participation ("SLAPPs"). SLAPPs were described by the Supreme Court of Canada in *1704604 Ontario Limited v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1, at para. 2, as lawsuits initiated by plaintiffs who use litigation not as a direct tool to vindicate a *bona fide* claim, but rather as an indirect tool to limit the expression of others. SLAPPs are 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 or to deter that party (or other potential interested parties) from participating in public affairs.

[3] In these motions I am being asked to determine whether certain claims in three proceedings ought to be dismissed based on the provisions of s. 137.1. More specifically:

(i) certain defendants in Action No. CV-17-587463-00CL (the "Wolfpack Action")[1] seek to dismiss the action brought against them by the Catalyst Capital Group Inc. ("Catalyst") and Callidus Capital Corporation ("Callidus"), (collectively the "Catalyst Parties");

(ii) all defendants in Action No. CV-18-593156-00CL (the "Defamation Action") seek to dismiss the action of the Catalyst Parties;

(collectively the defendants involved in these two anti-SLAPP motions will be referred to as the "Moving Defendants");

(iii) in the Wolfpack Action, West Face Capital Inc. ("West Face") and Gregory Boland ("Boland"), (collectively the "West Face Parties") have commenced a Counterclaim against the Catalyst Parties (the "West Face Counterclaim") and others. The Catalyst Parties seek the dismissal of four discrete claims brought by the West Face Parties for defamation, while conceding that the remainder of the defamation claims by the West Face Parties would continue.[2]

---

[1] The Wolfpack Action derives its name from a term in the financial industry that refers to a group of people who join forces against another company.

[2] In addition to the Catalyst Parties, the motion is also brought by the executives of the Catalyst defendants. For ease of reference I will continue to use the description "the Catalyst Parties".

[4] For the reasons that follow, given the exceptional circumstances of the Wolfpack Action and the Defamation Action, I grant the Moving Defendants' motions in those cases. However, I dismiss the Catalyst Parties' motion in the West Face Counterclaim.

PART I — INTRODUCTION

[5] The Catalyst Parties and West Face are significant players in the Canadian private equity and financing markets. The Catalyst Parties have commenced a number of lawsuits against the West Face Parties. These are outlined in greater detail below. The Catalyst Parties have also been engaged in other litigation with various other Wolfpack Action defendants.

[6] Generally speaking, both the Wolfpack Action and the Defamation Action find their genesis in three articles that were published by the Wall Street Journal ("WSJ"), as well as "tweets" that were later published by the WSJ reporter Robert Copeland ("Copeland"). The articles were generally based on whistleblower complaints that were filed with the Ontario Securities Commission ("OSC"). The Catalyst Parties take exception to these publications which repeat, amongst other things, accusations of fraud and other inappropriate financial dealings against them.

[7] The first article was posted on the WSJ website on August 9, 2017. Later that evening, a second online article was published. On August 10, 2017, the WSJ published a printed article in a slightly different form.

[8] The Catalyst Parties agree that the three articles are essentially the same. However, they take greater issue with the first article that was published on the WSJ website. That article and the second online article contained a photo of a Toronto Police Service vehicle and other details that were not included in the print article.

[9] For the purposes of these Reasons, I will therefore focus on the first website article (the "WSJ Article").[3] The WSJ Article contains all of the alleged defamatory comments contained in the subsequent online article (the "Online Article") and the print article (the "Print Article"). The Catalyst Parties submit that the WSJ Article defamed them to an international audience of approximately 2.4 million readers. They further argue that the WSJ Article had a devastating effect on their businesses, including causing Callidus to suffer at least CAD $144-161 million in damage.

[10] The details surrounding these proceedings are convoluted and complex. They were comprehensively set out by Justice Boswell in a previous proceeding: *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125. I have also set out additional background facts

---

[3] For ease of reference, I have attached the WSJ Article as Appendix "A" to these Reasons. The Catalyst Parties attached numbers to each paragraph in the WSJ Article which I will refer to in these Reasons. As noted, it is sufficient to focus on the online WSJ Article. It forms the primary basis of the Catalyst Parties' complaints although, as noted, there were two subsequent articles as well as tweets published by Copeland. The Catalyst Parties almost exclusively focused on the WSJ Article in their submissions.

in three previous endorsements: see *The Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc. et al.*, 2021 ONSC 1140; *The Catalyst Capital Group Inc and Callidus Capital Corporation v. West Face Capital Inc. et al.*, 2021 ONSC 1454; *The Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc. et al.*, 2021 ONSC 1191. I will borrow, as necessary, from those decisions as I set out the background facts germane to these motions.

[11] The motions were argued over five days. Of significance is the fact that in advance of the motions, over 30,000 documents were produced, in addition to over 9,000 pages of affidavits and exhibits. Obviously, it is not possible to reference all of the documents delivered for these motions or every argument raised. In any event, it would be improper to do so in the context of these motions given the Supreme Court of Canada's direction precluding a deep dive into the full factual record.

[12] In order to simplify these Reasons, I will first identify and provide a brief description of the parties who participated in these motions along with their principal players:

- Catalyst is a private equity firm specializing in investments in distressed and undervalued entities. Callidus is an asset-based lender that provides financing to companies that cannot obtain financing from traditional lending sources. Callidus traded on the TSX from April 2014 to November 2019, when it was then taken private by Catalyst pursuant to a court approved Plan of Arrangement. While Callidus was a publicly traded company, a number of Catalyst Funds held, in the aggregate, a majority of the shares in Callidus.

- Newton Glassman ("Glassman") is a co-founder and Managing Partner of Catalyst and was formerly the Executive Chairman and Chief Executive Officer of Callidus.

- James Riley ("Riley") is a Managing Director of Catalyst and was its Chief Operating Officer until his retirement. Riley was also an Officer and Director of Callidus until 2019 when Callidus went private.

- West Face is a private equity investment firm. Gregory Boland ("Boland") is its Chief Executive Officer (collectively the "West Face Parties").

- Dow Jones and Company owns the WSJ, the media company which employs Copeland and Jacquie McNish ("McNish") (collectively the "Dow Jones Defendants"). Copeland and McNish are the reporters that authored the WSJ Article.

- Nathan Anderson ("Anderson") is a US business analyst, a professional short seller, and a whistleblower.[4] He is the principal of ClaritySpring Inc. (collectively the "Anderson

[4] Shortselling is based on the expectation that a stock price is going to drop. Typically, a short-seller borrows stock from a broker and then sells it to a third-party. Eventually the borrowed stock must be returned to the broker. When

Defendants"). Anderson prepared two whistleblower complaints that were forwarded to the OSC. Anderson also forwarded them to Copeland. Anderson's whistleblower complaints formed two of the four whistleblower complaints referenced in the WSJ Article (collectively the "Whistleblower Complaints").[5] Only the Anderson Defendants' Whistleblower Complaints, however, were quoted from in the WSJ Article.

- Kevin Baumann ("Baumann") is the former president of Alken Basin Drilling Inc. ("Alken"), a borrower of Callidus. Baumann guaranteed loans made by Callidus to Alken. Baumann is now being sued by Callidus on his guarantee.

- Jeffrey McFarlane ("McFarlane") is the former president and Chief Executive Officer of Xchange Technology Group ("XTG"), a borrower of Callidus. McFarlane guaranteed the XTG loan and was successfully sued by Callidus on the guarantee. McFarlane is quoted in the WSJ Article. McFarlane also filed a whistleblower submission with the OSC, which is briefly referenced in the WSJ Article.

- Darryl Levitt ("Levitt") is a Toronto-based corporate lawyer who invested in a company that entered into a loan agreement with Callidus. He, too, is being sued on a guarantee he made to Callidus. Levitt also filed a whistleblower submission with the OSC, which is also briefly referenced in the WSJ Article.

- Bruce Livesey ("Livesey") is a freelance journalist who co-authored two articles about the Catalyst Parties and Glassman. Livesey's articles were not referenced in the WSJ Article.

[13] In the Wolfpack Action there are several additional defendants not referenced above. However, only the above defendants – i.e., the West Face Parties, Copeland, the Anderson Defendants, Baumann, McFarlane, Levitt, and Livesey (collectively, the "Wolfpack Defendants") – have brought anti-SLAPP motions. The remaining defendants did not participate in the anti-SLAPP motions and are therefore only briefly referenced, as needed, in these Reasons.

---

that time arrives, the borrower must go into the market and purchase shares to be returned. If the market price has dropped between the sale of the borrowed shares and the purchase of the replacement shares, the short-seller will profit. Whistleblowing occurs when a person exposes information or activity within an organization that is often deemed to be illegal or unethical.

[5] In these reasons, the term "Whistleblower Complaints" should be understood as referring to the four complaints referenced in the WSJ Article collectively. By contrast, I will use the term "whistleblower complaint" when referring to individual whistleblower submissions.

PART II — BACKGROUND

Previous Litigation between Catalyst and West Face

[14] As alluded to above, the Catalyst Parties/Glassman and the West Face Parties are longtime business and legal adversaries. The Catalyst Parties and the West Face Parties have been involved in years of acrimonious litigation, initiated by the Catalyst Parties.

[15] Previously, both Catalyst and West Face were interested in purchasing WIND Mobile Corp. ("WIND"), a wireless telecommunications provider. West Face and a consortium of other investors were able to provide a more attractive offer than Catalyst and, consequently, ended up acquiring WIND. They then sold WIND to another party, realizing a $1.3 billion profit in the process. Catalyst took issue with West Face's conduct in relation to the WIND transaction and, in 2014, sued West Face and several other parties for what it perceived to be improper conduct on their behalf (the "Moyse Action"). This action was dismissed by Justice Newbould in August 2016.

[16] In June 2015, the Catalyst Parties issued a second claim against West Face, as well as an independent equity research firm (the "Veritas Action"). The Catalyst Parties alleged that the defendants in this action published defamatory statements about Callidus with the intention of driving down its share value so that they could profit from short selling Callidus stock. The Veritas Action has not proceeded past the stage of exchanging affidavits of documents and has not been pursued by the Catalyst Parties for approximately five years.

[17] In May 2016, Catalyst initiated a third claim against the West Face Parties (and several other defendants). This claim alleged a conspiracy with respect to the sale of WIND (the "VimpelCom Action"). In April 2018, Justice Hainey held that the issues in the VimpelCom Action were similar to those at issue in the Moyse Action and that, as a result, the former was barred on the basis of issue estoppel, cause of action estoppel, and abuse of process.

[18] The Catalyst Parties appealed Justice Newbould's decision, as well as Justice Hainey's decision, to the Court of Appeal for Ontario. At the Court of Appeal, both appeals were dismissed. The Catalyst Parties filed motions for leave at the Supreme Court of Canada, which were denied.

The Catalyst Parties' Out-of-Courtroom Conduct

[19] While some of the above referenced litigation was still ongoing, the Catalyst Parties were also engaged in extensive operations aimed at tilting the litigation landscape in their favour.

[20] The best place to start to understand the nature of the Catalyst Parties' out-of-courtroom conduct is August 2016, which is the month Justice Newbould dismissed the Moyse Action. As described by Justice Boswell (see Justice Boswell's Reasons, at paras. 53-106), the Catalyst Parties took exception to Justice Newbould's ruling – particularly his unflattering observations about Glassman's testimony and overall lack of credibility – and began to publicly accuse Justice Newbould, amongst other things, of having displayed "severe indications of possible bias".

[21] In Summer 2017, Glassman claims that he developed concerns that he, his family, and business partners were under attack by various unknown persons (see Justice Boswell's Reasons, at para. 55). According to Glassman, these concerns stemmed, in part, from the publication of the WSJ Article on August 9, 2017. As described below, it seems that the Catalyst Parties' lack of success in the Moyse and VimpelCom Actions also played a role.

[22] Glassman's fears were exacerbated, at least initially, on August 11, 2017, when he received an email from someone named "Vincent Hannah". Mr. "Hannah" advised Glassman, amongst other things, that a "cabal of conspirators" caused the publication of the WSJ Article and that a group of investment funds were targeting Callidus and Glassman. The cabal reportedly included the West Face Parties, as well as some of the other defendants in the Wolfpack Action. Of interest, however, is that the Catalyst Parties immediately knew that "Vincent Hannah" was a pseudonym and, within a few weeks, knew that the true author of the email was an investor by the name of Danny Guy ("Guy"). Although Guy later told the Catalyst Parties that an investigator Derrick Snowdy ("Snowdy") could substantiate the allegations he made in his email, the Catalyst Parties determined that neither Guy nor Snowdy possessed any substantiating documentation. In a now infamous email, dated October 7, 2017, Glassman wrote that the information provided by Snowdy was "less valuable than what my dogs left for me on our lawn this [morning]."

[23] Nevertheless, Glassman claims that he still had fears that various parties – including the West Face Parties – might be trying to harm him. Given Justice Newbould's critical comments in the Moyse Action, Glassman also appears to have had a misplaced concern that Justice Newbould held biases against him. He therefore reached out to a man named Yossi Tanuri ("Tanuri"), a friend of Glassman's who served in a commando unit in the Israeli Defence Forces. At the time Glassman contacted him, Tanuri was operating an investigation and security company called Tamara Global ("Tamara").

[24] The purpose of Glassman's meeting with Tanuri was to determine whether he could help him obtain information about the West Face Parties, Justice Newbould, and various other parties who Glassman thought might be acting against him. As it turns out, Tanuri did have the resources necessary to assist Glassman. On August 31, 2017, Glassman thus had one of Catalyst's lawyers formally retain Tamara on behalf of Catalyst.

[25] Tamara then engaged additional companies – namely, B.C. Strategy Ltd. d/b/a Black Cube, B.C. Strategy UK Ltd. d/b/a Black Cube (collectively "Black Cube") and Invop Ltd. d/b/a Psy Group ("Psy Group") – to assist with intelligence gathering. Black Cube is a private investigation firm based in Israel comprised of former members of the Israeli Defence Force and the Mossad (the latter being the national intelligence agency of Israel). Now insolvent, Psy Group was an Israeli public relations firm known for, amongst other things, its ability to spread misinformation. Its motto was, "Shape Reality."

[26] Shortly after committing Catalyst to a retainer agreement with Tamara, on September 6, 2017, Glassman flew to London, England to meet with representatives of Black Cube. The next day, Black Cube emailed Tanuri a draft Letter of Engagement providing for the payment of a $1.5 million USD base fee to Black Cube, as well as additional "success fees".

[27] Neither the amount of the "success fees" nor the circumstances in which they were payable were spelled out in the original Letter of Engagement. In the days that followed, Glassman filled in this gap. He did this by asking Rocco DiPucchio ("DiPucchio"), counsel at Catalyst's law firm at the time, to email him a "Wish List of Evidence/Information" that he regarded as important in prosecuting the various pieces of litigation that the Catalyst Parties were pursuing against the West Face Parties. Glassman then created a handwritten, five tiered "Bonus Legend", and applied his bonus scheme to each item listed in DiPucchio's email. Glassman's handwritten Bonus Legend and markup of DiPucchio's email were incorporated as "Annex A" to the executed version of Black Cube's Letter of Engagement, dated September 11, 2017.

[28] According to Glassman's handwritten notes, Black Cube was to be paid $75,000 USD "per item" if its operatives could obtain evidence that Justice Newbould:

- was bias[ed] against Catalyst [or] Glassman;
- was an anti-Semite;
- had a "deal" with West Face for his decision in the Moyse Action;
- had some other "inappropriate connection" to West Face or Boland; or
- had a "deal" with the law firm Justice Newbould moved to following his retirement from the bench.

[29] Black Cube was only given until September 20, 2017 to obtain this evidence due to the fact that the Court of Appeal was scheduled to hear Catalyst's appeal of the Moyse Action on September 26 and 27, 2017.

[30] Incentivized by Glassman, Black Cube operatives went to work. They quickly placed Justice Newbould under extensive surveillance, following him to various places — including his Bay Street office, home, and a dry-cleaning store.

[31] On September 18, 2017, operatives from Black Cube went a step further and attempted to execute a "sting" on Justice Newbould. Pursuant to this "sting", a Black Cube operative posed as a prospective client interested in retaining Justice Newbould to conduct a private arbitration. The operative managed to arrange two meetings with Justice Newbould, both on September 18th, in which he unsuccessfully sought to entrap Justice Newbould into making anti-Semitic comments. Both meetings were surreptitiously recorded by the operative without Justice Newbould's knowledge.

[32] This was not the only "sting" operation Black Cube operatives were working on concerning Justice Newbould. A second "sting", to take place at Justice Newbould's golf club, was also planned. The plan envisioned a Black Cube operative entrapping an associate golf professional there and then arranging for a golf outing with Justice Newbould, where another effort would be made to entice him into making inappropriate comments. For whatever reason, the planning fell through.

[33] As Justice Boswell's Reasons make clear, Justice Newbould was not the only one being subjected to Black Cube "sting" operations. The Catalyst Parties, through their operatives, also targeted a number of West Face's current and former employees, including Moyse, Alexander Singh ("Singh"), and Bei Huang Yujiazhu. Singh in particular was aggressively pursued. Black Cube agents posing as recruiters for an Eastern European private equity firm indicated an interest in "hiring" Singh. Black Cube agents went so far as to meet with Singh in Toronto and subsequently flew him to London, England to meet again. There, he was questioned about the hiring of Moyse, as well as the Moyse litigation more generally, in an effort to obtain evidence to support the Catalyst Parties' appeal of the Moyse Action.

[34] Around the same time that these "sting" operations were unfolding, Glassman was also meeting with representatives of Psy Group, another company retained by Tamara. On September 14, 2017, Glassman flew to New York to meet with Phil Elwood ("Elwood"), a public relations consultant retained by Psy Group. Several Psy Group officials were also present at this meeting.

[35] Although Elwood initially undertook work for Glassman, he has sworn an affidavit on behalf of the West Face Parties for use in these motions. According to Elwood, the September 14 meeting lasted all day. During the first half of the meeting, Glassman voiced concerns that a "Wolfpack" of hedge funds were conspiring against him. During the latter half of the meeting, Royi Burstein ("Burstein"), Chief Executive Officer of Psy Group, responded to Glassman's concerns by outlining a two-pronged operation known as "Project Maple Tree". The first prong, dubbed the "white prong", involved utilizing the media to generate positive publicity for Glassman and Catalyst. The second prong, dubbed the "black prong", involved generating negative stories about the Wolfpack conspiracy, publishing negative information concerning the West Face Parties, and portraying Justice Newbould as corrupt and anti-Semitic. The above referenced "sting" operations were also components of Project Maple Tree.

[36] On September 16, 2017, two days after the New York meeting, Burstein circulated an email to several Psy Group agents outlining the finer details of Project Maple Tree. The email included instructions from Glassman that, "NOW or VERY SOON is the perfect time to hear/see 'chatter' on social media etc of rumors of an alleged Wolfpack, rumors of west face/anson partners[6] involvement therein, rumors of 8 or more victims, rumors of boland being looked at (not yet criminal investigation) for criminality etc. [*sic*]." Soon after, a wave of accusations against the West Face Parties appeared on the internet and social media. These accusations claimed that the West Face Parties were involved in criminal misconduct, including racketeering, money laundering, and illegal stock manipulation.

[37] At around the same time that all of this was unfolding, Psy Group was also providing instructions to Virginia Jamieson ("Jamieson"), an independent public relations consultant based in New York City. On September 17, 2017, Psy Group sent Jamieson an email with the subject

[6] A number of Anson related companies, which are a related group of hedge funds and their principals, are defendants in the Wolfpack Action. They did not actively participate in these motions.

line, "The Story". A proposed article, entitled "Judge Frank Newbould's record might unravel September 20th", was attached to the email. The article was critical of Justice Newbould's decision in the Moyse Action and suggested that he ignored various confidential documents provided by Moyse to West Face. It also suggested that Justice Newbould was biased.

[38] Two days later, on September 19, 2017, Jamieson emailed a document to Christie Blatchford ("Blatchford"), a journalist at the *National Post*. The document contained edited extracts from Justice Newbould's ruling in the Moyse Action. Although Blatchford has since passed away, she swore an affidavit on May 21, 2019, outlining her involvement with Jamieson. In her affidavit, Blatchford states that she was provided with a USB flash drive containing edited portions of the recorded conversations between a Black Cube operative and Justice Newbould (referenced above). Blatchford goes on to depose that, on October 12, 2017, she met with Emmanuel Rosen ("Rosen") of Psy Group, who encouraged her to publish a story portraying Justice Newbould as corrupt.

[39] Eventually, on November 24, 2017, Blatchford published a story concerning Justice Newbould. Rather than criticizing his conduct, however, the article discussed Catalyst's dissatisfaction with the Moyse Action ruling, its hiring of Black Cube, and the "sting" perpetuated on Justice Newbould. Overall, the article is highly critical of Catalyst's conduct.

[40] According to the Moving Defendants all of the aforementioned conduct constitutes powerful evidence of a malicious scheme devised by the Catalyst Parties, under the leadership of Glassman, to attack and discredit all those who oppose them. The West Face Parties, as noted, claim that these activities have caused them to sustain significant losses. The Moving Defendants further submit that it is ironic that the Catalyst Parties now complain about the WSJ Article after having engaged in an unprecedented and carefully orchestrated campaign to smear their perceived enemies, including a retired judge of the Superior Court of Justice, as criminals and racists. Last, the Moving Defendants stress that the Catalyst Parties' alleged motive to commence Project Maple Tree came from the Vincent Hannah email, which the Catalyst Parties quickly determined was anonymously sent and unreliable. Nonetheless, they continued on with Project Maple Tree, which, in the words of Justice Boswell (with which I agree), was an "ethically dubious" endeavor.

The Moving Parties' Out-of-Courtroom Conduct

[41] In or about the time the Moyse and Veritas Actions were being pursued, the Catalyst Parties allege that the defendants in the Wolfpack and Defamation Actions were involved in conspiratorial and defamatory activities against them.

[42] Around this time, generally in the spring of 2016, Baumann, McFarlane, Levitt, and others began discussing their grievances against the Catalyst Parties and Glassman. Some of them were in contact with Boland and West Face's President, Philip Panet ("Panet"). West Face had made a previous complaint to the OSC regarding Catalyst in December 2014 and had been short selling Callidus shares in 2014 and 2015. At that time, Boland had also been discussing West Face's OSC complaint with McNish, although nothing further occurred.

[43] Baumann, McFarlane, Levitt, and others also discussed whether actions should be brought against the Catalyst Parties and approached US law firms in this regard. They also considered filing whistleblower complaints and publishing accusations against the Catalyst Parties via Twitter. Levitt, for one, in fact began tweeting in this regard.

[44] In or around this time frame, Anderson who had not yet become acquainted with the other Moving Defendants, began reviewing the online complaints against the Catalyst Parties and later became involved in the conversation with some of the defendants in the Wolfpack Action. Thereafter, numerous emails passed between Anderson and Levitt, McFarlane, and Baumann. They began working on a coordinated effort to not only file Whistleblower Complaints with the OSC, but to also contact the media. Anderson met with McFarlane and Levitt in Toronto and, in early 2017, there were various phone calls between Baumann, Anderson, and others.

[45] Beginning in 2015, Livesey, a licensed private investigator and journalist, also began conducting investigations into Callidus' loan operations on behalf of the defendant, George Wesley Voorheis ("Voorheis").[7] In 2016 and 2017, the evidence reveals that Livesey was also speaking with the West Face Parties. Eventually, Livesey ended up selling an article concerning Callidus to the Southern Investigative Reporting Foundation ("SIRF").[8]

[46] With respect to Anderson's whistleblower complaints, he filed the main complaint on May 22, 2017 and provided a supplemental submission on May 30, 2017. Around the same time, he also delivered similar versions of these submissions to the US Securities and Exchange Commission (the "SEC"), with which Callidus was listed.[9]

[47] Anderson's main whistleblower complaint is a 28-page document to which 73 attachments were affixed, many of which were generated by the Catalyst Parties or were contained in court filings. Anderson stated, amongst other things, that the Catalyst Parties had engaged in a scheme to artificially inflate the value of the assets and obscure asset impairments. He made allegations of fraud and noted that the Catalyst Parties were engaged in a "shell game" with respect to impaired assets, which misled investors as to the value of those assets.

[48] Anderson focused on a number of companies in his whistleblower complaints, including McFarlane's company, XTG.

[49] In the weeks leading up to the publication of the WSJ Article, discussions amongst Anderson, Levitt, McFarlane, Langstaff, and other guarantors continued. West Face filed its own complaint with the OSC in April 2017. In addition, Levitt, McFarlane, Baumann, and others

---

[7] Voorheis is one of the defendants not participating in the motion.
[8] SIRF ultimately published two of Livesey's articles on April 11, 2018 and November 27, 2018 (the "SIRF Articles"). These articles do not, however, factor into these SLAPP motions.
[9] These Reasons, however, focus on the OSC Whistleblower Complaints that were referenced in the WSJ Article. The Whistleblower Complaints that were forwarded to the SEC were not mentioned in the WSJ Article.

contacted the Toronto Police and disclosed their complaints. Although the Toronto Police asked them not to disclose their complaints publicly, some did so and reference to the police complaint was made in the WSJ Article.

[50] Ultimately, Anderson provided his whistleblower complaints to Copeland. Other Wolfpack Defendants simultaneously contacted other media outlets to see if they too would publish the results of the Whistleblower Complaints.

[51] Anderson, as per his business model, shorted Callidus stock, and on August 1, 2017 executed trades of Callidus stock and made a modest profit. After the WSJ Article was published, Anderson closed out his short position in Callidus, again making a modest profit. The evidence reveals that Voorheis and the Anson Defendants also made a profit from shorting Callidus around the time that the WSJ Article was published.

[52] In this motion, the Catalyst Parties do not object to the fact that Whistleblower Complaints, particularly Anderson's whistleblower complaints, were made to the OSC and SEC. They submit, however, that the Whistleblower Complaints ought to have remained confidential. Instead, however, Anderson provided copies of his whistleblower complaints to Copeland and the Whistleblower Complaints, along with the interview Copeland conducted with McFarlane, formed the basis of the WSJ Article. The Catalyst Parties submit that this was all part of a well-designed scheme by adversaries of the Catalyst Parties, short sellers, and journalists to make defamatory expressions against the Catalyst Parties to drive down the share price of Callidus and profit through a "short and distort" campaign, being a tactic of publicizing negative information about a company and profiting from a short position taken against that company.

[53] The Catalyst Parties submit that the WSJ Article caused them significant harm. They rely upon two reports prepared by US experts. The first was prepared by Mark Sunshine, the Chief Executive Officer of MA Sunshine Capital, (the "Sunshine Report"). The second report was prepared by Vinita Juneja, Managing Director of NERA Economic Consulting (the "Juneja Report"). They both opine that the WSJ Article caused damage to Callidus.

[54] The Moving Defendants deny that any damages were sustained as a result of the WSJ Article. They submit that the Catalyst Parties' losses were a direct result of Callidus' reckless loan making practices which are confirmed, they say, in Callidus' own "Strategic Review and Remediation Plan" prepared by its Interim Chief Executive Officer, Patrick Dalton, dated February 25, 2019 (the "Dalton Report"). They submit this is also reflected, in part, in Callidus' poor Q2 report, which was released after the WSJ Article was published and which noted significant Q2 losses. They further rely upon an affidavit sworn by Callidus' Chair of its Special Committee of Independent Directors, David Sutin (the "Sutin Affidavit"). The Sutin Affidavit is dated September 12, 2019 and was prepared during the privatization of Callidus. Both of these reports will be discussed in further detail in these Reasons.

[55] The Moving Defendants further point out that the OSC and the SEC shared the concerns set out in the Whistleblower Complaints. The OSC correspondence to Callidus is dated July 27, 2017 and July 16, 2018. In the July 2017 letter, the OSC identified a number of what it considered

to be "deficiencies", including a failure to identify material factors of assumption supporting unrecognized yield enhancements that formed part of Callidus' $110.7 million valuation relating to one of its own companies, Bluberi Gaming Technologies Inc., a company identified by Anderson in his whistleblower complaints. They also point to the fact that, in general, unrecognized yield enhancements[10] had been the source of ongoing friction between Callidus and the OSC.

[56] As also pointed out in the July 2018 letter, Catalyst was repeatedly placed on the OSC's Refilings and Errors List. The OSC noted that "the frequency and nature of the Company's refilings are concerning and may suggest a culture of noncompliance."

PART III — THE LEGISLATION AND THE LAW

Section 137.1 of the *CJA*

[57] The purposes of the anti-SLAPP provisions are set out in s. 137.1(1) of the *CJA*:

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

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

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

(iv) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[58] The legislation is meant to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pretrial dismissal of such actions: *Pointes*, at para. 16.

[59] With respect to the motion itself, the relevant portions of s. 137.1 are as follows:

> (3) On a motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the

---

[10] The term "unrecognized yield enhancements" is a term of art used by Callidus. Callidus describes an unrecognized yield enhancement as a component of a lending arrangement that Callidus negotiates in addition to the original loan agreement including additional fees, profit participation arrangements and equity and equity like instruments. Should a value be determined for the enhancement and depending on its contractual nature, the related amount may be recognized in the statements of comprehensive income as a part of interest income, fee income or as a financial instrument at fair value through profit or loss ("recognized yield enhancements") or may be unrecognized, which includes yield enhancements relating to controlling interests, depending on the appropriate accounting treatment under IFRS. The OSC, on a number of occasions, had difficulty with, amongst other things, Callidus' lack of disclosure concerning unrecognized yield enhancements

> 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.
>
> (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.

[60] As noted in *Bent v. Platnick*, 2020 SCC 23, 449 D.L.R. (4th) 45, at para. 74, the companion ruling to *Pointes*, the two primary policy goals of s. 137.1 are: first, "to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pretrial dismissal of such actions", and second, to "also ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it".

[61] The reconciliation of these two policy goals requires an analysis of a rather complex statutory framework set out in s. 137.1. Below, I provide an overview of the various elements underlying that statutory scheme.

Section 137.1(3): The Threshold Burden

[62] As set out in *Pointes* and *Bent*, the moving party (i.e., defendant) must first establish, on the balance of probabilities, that the proceeding "arises from an expression made by the person that relates to a matter of public interest."

[63] As noted in *Pointes*, at para. 21, this is a two-part analysis. The burden is on the moving party to show that:

- the proceeding arises from an expression made by the moving party; and
- that the expression relates to a matter of public interest.

[64] The term "expression" is defined in s. 137.1(2) as:

> 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 an entity.

[65] As noted in *Pointes*, at para. 25, "it is abundantly clear that 'expression' is defined expansively".

[66] The Supreme Court of Canada has similarly emphasized that the words "arise from" in s. 137.1(3) should be given a broad and liberal interpretation and, critically, will be satisfied provided that "the expression is somehow casually related to the proceeding" (whether directly or indirectly): *Pointes*, at paras. 24, 102; *Bent*, at para. 80.

[67] The second prong of s. 137.1(3) requires the moving party to demonstrate, again on a balance of probabilities, that the expressions complained of relate to matters of public interest. Here, the Supreme Court has determined that the phrase "relates to a matter of public interest" should also be given a liberal, broad, generous, and expansive interpretation: *Pointes*, at paras. 26, 28, and 30; *Bent*, at para. 81. In *Pointes*, the Court explicitly noted the public has a genuine stake in knowing about many matters ranging across a variety of topics and that, therefore, courts must ask whether "some segment of the community would have a genuine interest in receiving information on the subject": at para. 27.

[68] If the moving party meets its threshold burden under s. 137.1(3), the proceeding will then be dismissed unless, pursuant to s. 137.1(4), the responding party (i.e., plaintiff) can demonstrate:

(a) there are grounds to believe that there is (i) substantial merit to their claims and (ii) the moving party has no valid defence (the "Merits-Based Hurdle"); and

(b) establishes on a balance of probabilities that the harm likely to be or which has been suffered by them 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 the expression (the "Public Interest Hurdle").

Section 137.1(4)(a): The Merits-Based Hurdle

[69] In considering the Merits-Based Hurdle, a plaintiff must satisfy the court that there are "grounds to believe" that there is substantial merit to their claims (*per* s. 137.1(4)(a)(i)) and that, furthermore, the defendant has no valid defences (*per* s. 137.1(4)(a)(ii)).

[70] In interpreting the words "grounds to believe", the Supreme Court has held that there must be a basis in the record and the law, taking into account the stage of the litigation at which s. 137.1 motions are brought, for a finding that the underlying proceeding has "substantial merit" and that the moving party has no valid defence: *Pointes*, at para. 39. The Court went on to adopt the wording of its earlier decision in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114, that this standard requires "something more than mere suspicion but less than…proof on the balance of probabilities": *Pointes*, at para. 40.

[71] As for the meaning of "substantial merit", the Supreme Court in *Pointes* concluded that for an underlying proceeding to have substantial merit, it must have a real prospect of success - in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in the plaintiff's favour: at para. 49. The Court went on to state that

when read in context of the "grounds to believe" standard, this means that the motion judge must be satisfied that there is a basis in the record and in the law – taking in account the stage of the proceeding – for drawing such a conclusion. This, in turn, requires the claim to be legally tenable and supported by evidence reasonably capable of belief: *Pointes*, at para. 49.

[72] Importantly, the Court in *Pointes*, at para. 52, stressed that, in light of the above, it is important to recognize how s. 137.1 motions differ from summary judgment motions. Unlike judges hearing summary judgment motions, *Pointes*, at para. 52 stresses that judges hearing s. 137.1 motions must only engage in a limited weighing of the evidence and must defer ultimate assessments of credibility and other questions requiring a "deep dive" into the evidence to a later stage, where pleadings are more fully developed and judicial inquiry powers are broader. Although preliminary assessments of credibility are permissible, s. 137.1(4)(a)(i) does not allow for an adjudication of the merits of the underlying proceeding: *Pointes*, at para. 52.

[73] Insofar as the interpretation of "no valid defence" is concerned, the Supreme Court in *Pointes* held that it is not up to the plaintiff to anticipate every defence that may be raised by the defendant. Rather, the defendant must first "put in play" the defences it intends to rely on: at paras. 56-57.

[74] Once this is done, the plaintiff must establish that none of the defences put in play by the defendant are valid. More particularly, the plaintiff, who again bears the statutory burden at this stage, must show that there are grounds to believe that the defendant's defences have no real prospect of success – that is, do not tend to weigh more in their favour: *Bent*, at para. 103. As with the substantial merit analysis, this is assessed from both a legal and factual perspective. In other words, the court must engage in a limited assessment of the evidence to consider whether the defences raised are legally tenable and supported by evidence reasonably capable of belief: *Pointes*, paras. 50, 52, 58-59, and 105-112; *Bent*, at paras. 117, 125, 131, and 188.

[75] Taken as a whole, s.137.1(4)(a) is fundamentally concerned with the strength of the underlying proceeding: *Pointes*, at para. 60.

Section 137.1(4)(b): The Public Interest Hurdle

[76] Section 137.1(4)(b) requires the responding party to show that the harm it has suffered (or is likely to suffer) 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 the underlying expression.

[77] Under s. 137.1(4)(b), the grounds to believe standard is replaced with the more onerous balance of probabilities standard: *Pointes*, at paras. 82, 103, and 126; *Bent*, at paras. 141, 174. This means that the responding party must demonstrate on a balance of probabilities that the harm they have suffered (or are likely to suffer) 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": s. 137.1(4)(b).

[78] In conducting the analysis under s. 137.1(4)(b), the responding party must not only point to the existence of harm, but also evidence that such harm was caused by the moving party's expression: *Pointes*, at para. 68. However, while pleaded claims should not be taken at face value nor bald assertions considered sufficient, the Court in *Pointes* stressed that fully developed damages briefs are not required: at para. 71. The Court did stress, however, that evidence of a causal link between the moving party's expression and the responding party's harm will be important where there may be alternative sources of the plaintiff harm: *Pointes*, at paras. 71-72.

[79] If the responding party can establish harm causally related to the expression at issue, s.137.1(4)(b) then requires them to show that the harm and corresponding public interest in permitting the proceeding to continue outweighs the public interest in protecting the moving party's expression. At this stage, the quality of the moving party's expression and the motivation behind it are relevant factors: *Pointes*, at para. 74. As the Supreme Court further held in *Pointes*, at paras. 75-76, while judges should be wary of descending into moralistic taste tests, the public interest in protecting speech will generally be diminished if the expression contains deliberate falsehoods or gratuitous personal attacks.

[80] In addition, the Court noted that the analysis at this stage is informed by its jurisprudence under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court further approved of comments made by the Court of Appeal for Ontario in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99, where Doherty J.A. recognized four indica of a "SLAPP suit" being: (1) a history of the plaintiff using litigation or the threat of litigation to silence critics, (2) a financial or power imbalance that strongly favours the plaintiff, (3) a punitive or retributory purpose animating the plaintiff's bringing of the claim and, (4) minimal or nominal damages suffered by the plaintiff.

[81] It also highlighted some additional factors that may inform "the public interest weighing exercise under s. 137.1(4)(b)": *Pointes*, at para. 78. Such factors include: (1) the importance of the expression, (2) the history of litigation between the parties, (3) broader effects on other expressions on matters of public interest, (4) the potential chilling effect on future expressions either by a party or by others, (5) the defendant's history of activism in the public interest, (6) any distortion between the resources used in the lawsuit and the harm caused or the expected damages awarded, and (7) the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation: *Pointes*, at para. 80.

[82] In its conclusion on s. 137.1(4)(b), the Supreme Court emphasized that the weighing exercise under s.137.1(4)(b) lies at the "core" of the s. 137.1 analysis: *Pointes*, at para. 82. As the Court emphasized earlier in its reasons, s. 137.1(4)(b) operates as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest and serves as a "robust backstop" for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression giving rise to the proceeding outweighs the public interest in allowing the proceeding to continue: *Pointes*, at para. 62. The Court thus emphasized the importance of giving this provision due regard in assessing a SLAPP motion: *Pointes*, at para. 82.

PART IV — THRESHOLD BURDEN ANALYSIS

[83] Having set out the basis of the test and the guidance provided by the Supreme Court of Canada, I now apply s. 137.1 to the motions before me.

[84] The same expressions underlie both the Defamation and Wolfpack Actions. As a result, I will only conduct one Threshold Burden analysis.

[85] Given the different causes of action pleaded by the Catalyst Parties in the Wolfpack and Defamation Actions, however, the Merits-Based Hurdle and the Public Interest Hurdle will require separate analyses, which I will consider after I deal with the Threshold Burden.

[86] Last, I will conduct my analysis of the Catalyst Parties' anti-SLAPP motion concerning the West Face Counterclaim.

Discussion

[87] For the reasons that follow, I find that the Moving Defendants have satisfied their burden under s. 137.1(3).

[88] As noted above, in conducting my s. 137.1(3) analysis I must have regard to two issues:

(i) Do the Wolfpack and Defamation Actions arise from an "expression" made by the Moving Defendants?

(ii) Does the expression relate to a matter of public interest?

I must also consider the following issue raised by the Catalyst Parties:

(iii) Does the fact that some of the Moving Defendants deny they were involved in WSJ Article preclude them from asserting that they made an expression?

[89] The first question can be answered with relative ease. The parties agree that both the Defamation and Wolfpack Actions arise from expressions. The expressions in issue are the WSJ Article and the Whistleblower Complaints referenced therein. Both of these clearly constitute an "expression" in light of *Pointes*.

[90] With respect to the second question, however, the Catalyst Parties submit that the above referenced expressions do not relate to a matter of public interest. During oral argument, the Catalyst Parties clarified that they were not advancing an argument similar to the one accepted by the Court of Appeal for Ontario *Grist v. TruGrp Inc.*, 2021 ONCA 309. There, the Court of Appeal found that the impugned expressions arose out of a fundamentally private dispute involving several parties – none of which were publicly-traded corporations. Instead, the Catalyst Parties advised that they were taking the position that expressions at issue do not "relate to" a matter of public interest but, rather, merely "makes reference" to a matter of public interest.

[91] In advancing this argument, the Catalyst Parties place great weight on the fact that the Whistleblower Complaints were initially provided to the OSC pursuant to its formal Whistleblower Program. The Catalyst Parties stress that the OSC Whistleblower Program is highly confidential in that whistleblower submissions are neither disclosed to the public nor accessible by members thereof. In addition, the Catalyst Parties point out that the confidential allegations contained in the Whistleblower Complaints never proceeded beyond the intake or inquiry stage (i.e., they did not lead to a formal proceeding with the OSC). Taken together, then, the Catalyst Parties submit that while the public may be curious in learning that confidential Whistleblower Complaints have been filed against the Catalyst Parties and that, furthermore, the OSC was inquiring into these complaints, such expression does not relate to a matter of public interest.

[92] The Catalyst Parties' argument contains two fatal flaws. The first has to do with one of its premises. As noted above, the Catalyst Parties submit that whistleblower complaints submitted pursuant to the OSC Whistleblower Program are highly confidential. Nothing, however, legally prevents whistleblowers from making their complaints public. Indeed, during oral argument, the Catalyst Parties could not point to a single legislative or regulatory provision supporting their submission that whistleblower complaints must remain confidential. Although they did reference an OSC inter-office memorandum instructing staff to keep whistleblower complaints confidential,[11] this instruction in no way prevents whistleblowers themselves from disclosing their complaints to the public. While the Catalyst Parties attempt to define the expression at issue as being highly confidential in nature – such that it may not be said to relate to a matter of public interest – the evidence filed on this motion does not support such a proposition.[12]

[93] Second, and more importantly, a review of the jurisprudence considering s. 137.1(3) suggests that the subject matter of the Whistleblower Complaints and the resultant WSJ Article – which, again, constitute the expression at issue in both the Defamation and Wolfpack Actions – do in fact relate to a matter of public interest.

[94] I begin with *Pointes* and *Bent*. There, it will be remembered, the Supreme Court held that the phrase "relates to a matter of public interest", should be given a "liberal", "broad", and "generous and expansive" interpretation: *Pointes*, at paras. 26, 28, and 30; *Bent*, at para. 81. Citing its previous decision in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 103, 106, the Court in *Pointes* stressed that "'the public has a genuine stake in knowing about many matters' ranging across a variety of topics" and that the key question is whether "some segment of the community would have a genuine interest in receiving information on the subject": at para. 27.

---

[11] OSC Staff Notice 15-703 (Guidelines for Staff Disclosure of Investigations)

[12] My observations here are also applicable with respect to the Moving Defendants who advised Copeland and McNish that they had also made a complaint to the Toronto Police Service. Because nothing prevents one from disclosing police complaints, it follows that there is nothing improper about making this disclosure to the media.

[95] Consistent with the Supreme Court of Canada's call for an expansive interpretation of s. 137.1(3), Ontario courts have confirmed that expressions involving commercial topics will often relate to matters of public interest. For example, in *Thompson v. Cohodes*, 2017 ONSC 2590 Justice Kristjanson held – and the plaintiff conceded – that expression relating to the management of a publicly traded corporation was a matter of public interest.

[96] More recently, in *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1, Doherty J.A., speaking for a unanimous Court of Appeal for Ontario, held that a defendant's "tweets" – which touched on a commercial topic in that they sought to alert the public to potentially risky real estate investments – related to a matter of public interest. At para. 40, Justice Doherty explained:

> I read the tweets as intended to educate and caution the investing public about the risks associated with certain kinds of real estate-based investments. The identified risks include sudden downturns in the real estate market, false predictions of future investments, and "shady," inadequately regulated operators who understate the risks associated with certain kinds of investments. In my view, alerting the investing public to risks associated with the purchase of certain products in the public marketplace is a matter of public interest.

[97] Interestingly, in March 2018 Justice Conway dealt with a situation where Catalyst was seeking an urgent interim injunction to prevent *The Globe and Mail* from publishing a portion of a Catalyst Confidential Update to its investors.[13] Justice Conway dismissed Catalyst's motion and held, amongst other things, that, even though Catalyst is a private company, its activities were a matter of public interest.

[98] In *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, at paras. 31-33, Justice De Sa provided the following helpful remarks:

> 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.

---

[13] *The Catalyst Capital Group Inc. v. The Globe and Mail*, unreported court file CV-18-594988-00CL

> 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.
>
> Accordingly, I am satisfied that the Plaintiff has met its onus of demonstrating that the conversations address an issue of public interest.

[99] More recently, in *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 25, at paras. 38-47 ("*Subway No. 1*"), the Court of Appeal provided some additional guidance on the criteria set out in s. 137.1(3). In *Subway No. 1*, one of the defendants, CBC, aired an episode of its television show "Marketplace". The episode was in the form of an investigative report which compared the contents of chicken sandwiches sold by five Canadian fast-food chains. The sandwiches sold by Subway were reported to have a substantially lower chicken content than the other chains. Subway disputed this claim and sued the CBC, Trent University ("Trent") (who carried out the testing of the chicken sandwiches), as well as several Trent personnel. In response, CBC and Trent brought motions under s. 137.1.

[100] Subway argued, in relation to the motion brought by Trent, that the expression at issue – described as being Trent's communication of its test results to the CBC – did not relate to a matter of public interest. The Court of Appeal rejected this argument. The court held that "[t]he very essence of Subway's claim is that the purpose of Trent's testing was for it to be the basis of conclusions that would be broadcast about the chicken content of sandwiches sold by Subway and certain of its competitors" and that this was "the very matter the motion judge found to be, and that Subway does not contest is, a matter of public interest.": at para. 46.

[101] Taking this case law into account, then, I am satisfied that the expression at issue here relates to a matter of public interest. The Threshold Burden is not intended to be particularly onerous: *Pointes*, at para. 28. Moreover, a number of Ontario judges have found that expressions similar to the ones at issue here relate to matters of public interest. In addition, the expression at issue here is structured similar to *Subway No. 1*. There, one defendant made an expression to another defendant which the latter defendant subsequently disclosed to the public by way of a television program. Similarly, in this case a set of defendants is alleged to have provided Whistleblower Complaints to another set of defendants who subsequently published a news article making reference to the expressions contained in the Whistleblower Complaints. Both the structure and subject matter of the expression at issue here are thus similar to *Subway No. 1*, where the moving defendants were found to have met their burden under s. 137.1(3).

[102] If that were not enough, it is also important to recognize that some of the parties involved in the litigation before me are relatively high-profile. Catalyst and West Face, in particular, are major players in Canada's private equity market. As mentioned earlier, both companies also have a history of litigation between them, much of which has been recounted by the Canadian press. And while Catalyst and West Face are private companies, Callidus was a publicly traded company at the time of the expressions at issue.

[103] Therefore, it can hardly be said that the Catalyst Parties' business practices, which the Whistleblower Complaints and the resultant WSJ Article ultimately revolve around, did not relate to a matter of public interest. The expression deals with private (Catalyst) and public (Callidus) corporations of significance. At the very least, certain segments of the public – for example, those who have an interest in investing and those who have already invested with the Catalyst Parties – would find this expression to be of interest. Indeed, this is so even though the Whistleblower Complaints to the OSC were only at a preliminary stage. A review of the Whistleblower Complaints reveals that they were detailed and contained a number of conclusions which were supported by research. As a result, the public would be interested in learning more about them.

[104] This then brings me to the third and final issue: the Catalyst Parties' submission that the fact that the West Face Parties, Levitt, Baumann, and Livesey deny being involved in the expressions at issue precludes them from moving under s. 137.1 in relation to the Wolfpack Action.

[105] To support their submission, the Catalyst Parties rely on Justice Nishikawa's decision in *Walsh v. Badin*, 2019 ONSC 689. In *Walsh*, all of the parties resided in the same condominium building. The plaintiffs commenced an action in defamation against the defendants for statements made in three anonymous letters that were distributed to the condominium's residents.

[106] The defendants brought a motion to dismiss the action pursuant to s. 137.1. At the same time, however, the defendants denied drafting or distributing the letters and, as a result, claimed that they did not make the statements at issue in that lawsuit. They made this denial despite photographic and video evidence suggesting that they were in fact responsible for the letters. Justice Nishikawa held, amongst other things, that "[a] defendant cannot both demonstrate that the proceeding arises from an expression made by them and deny making the expression.": at para. 27. In Justice Nishikawa's view, a defendant who brings a motion pursuant to s. 137.1 must be prepared to admit making the impugned expression.

[107] The Moving Defendants submit that *Walsh* was wrongly decided. I do not propose to comment on *Walsh's* correctness, as the decision is distinguishable and therefore does not assist the Catalyst Parties.

[108] *Walsh* was a relatively straightforward action. It involved two defendants, both of whom baldly denied having made the expression at issue despite evidence to the contrary. The Wolfpack Action, by contrast, is highly complicated. To date, numerous transcripts of conversations between the Moving Defendants have been exchanged, in addition to thousands of emails, text messages, phone records, and business documents. In total, over 30,000 documents have been produced. There are over twenty-five named defendants, as well as several "John Doe" defendants. In such circumstances, it is not surprising that some of the defendants might deny having been involved in the expressions at issue. The Catalyst Parties have cast their net wide.

[109] More to the point, unlike *Walsh*, there is no bald denial of the expression in this case. For instance, although the West Face Parties, Livesey, and Baumann deny making the accusations contained in the Whistleblower Complaints, they do admit to having made various other expressions. Importantly, not only do most of these other admitted expressions relate to the

Catalyst Parties' business practices – a topic which I have found relates to a matter of public interest – but the Wolfpack Action also arises from these other admitted expressions. Indeed, the Catalyst Parties rely upon many of these expressions to advance claims in civil conspiracy and joint tortfeasance. For example, Riley's affidavit impugns the West Face Parties for, *inter alia*: (a) collecting and exchanging information about Catalyst and Callidus; (b) supplying information about the Catalyst Parties to the guarantors; and (c) sending and receiving emails about the Catalyst Parties. Riley's affidavit makes similar accusations against Baumann. To use the language of *Pointes*, at para. 102, then, there is thus a "clear nexus" between the West Face Parties, Livesey, and Baumann's admitted expressions and the Wolfpack Action.

[110] The same can be said for Levitt. While Levitt denies contacting the WSJ and having been an author of the WSJ Article, in his factum he admits that he made a whistleblower complaint to the OSC and that also contacted the Toronto Police. Further, Levitt notes that the underlying damages alleged by the Catalyst Parties are largely the loss of value of Callidus arising from the public disclosure of the accusations contained in the Whistleblower Complaints. Without these communications to the police, the OSC, and the WSJ, the Catalyst Parties would not have commenced the Defamation Action nor the Wolfpack Action.

[111] In the result, then, I find the Catalyst Parties' reliance on *Walsh* to be misplaced. This is not a case where the defendants have baldly denied making any expression. Rather, this is a case where some defendants deny involvement in the Whistleblower Complaints and/or the publishing of the WSJ Article, but admit to making additional expressions on a matter of public interest that are causally connected to the Catalyst Parties' proceedings.

[112] Having determined that the Moving Defendants have met their burden under s. 137.1(3), I now turn to the provisions of s. 137.1(4). This will require a separate analysis with respect to the Wolfpack Action and the Defamation Action. I begin with the Defamation Action, which is somewhat more straightforward.

PART V — THE DEFAMATION ACTION

[113] In this action the Catalyst Parties allege that the Dow Jones Defendants and McFarlane made false and defamatory statements about the Catalyst Parties in the WSJ Article attached as "Appendix A". For ease of reference, the paragraphs in the WSJ Article have been numbered and I will refer to this numbering sequence in my Reasons going forward.

[114] The elements of defamation are well established:

(i) the impugned words must be defamatory, in the sense they would tend to lower the plaintiff's reputation in the eyes of the reasonable person;

(ii) the words complained of refer to the plaintiff; and

(iii) the words complained of were published, meaning they were communicated to at least one person other than the plaintiff: *Grant*, at para. 28.

[115] In this action there is no debate about elements (ii) and (iii). It is conceded by all parties that the words complained of were published and that they refer to the Catalyst Parties. The only issue in dispute is whether the contents of the WSJ Article are defamatory.

[116] In the context of a s. 137.1(4) analysis, the Catalyst Parties must satisfy me that:

- there are grounds to believe that the Defamation Action has substantial merit (s. 137.1(4)(a)(i));
- there are grounds to believe that defendants in the Defamation Action have no valid defence in the proceeding (s. 137.1(4)(a)(ii)).

If the Catalyst Parties succeed under s. 137.1(4)(a)(i) and (ii), I must then consider whether:

- the harm likely to be or which has been suffered by the Catalyst Parties 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 the expression (s. 137.1(4)(b)).

Section 137.1(4)(a)(i): Are there Grounds to Believe that the Defamation Action has Substantial Merit?

[117] The Catalyst Parties bear the burden of proof in establishing that there are "grounds to believe" that their claims for defamation have substantial merit. As noted, the Catalyst Parties must establish "something more than mere suspicion, but less than…proof on the balance of probabilities": *Pointes*, at paras. 38, 40, and 41.

The Position of the Parties

The Catalyst Parties

[118] The Catalyst Parties submit that the text of the WSJ Article and the photograph of the Toronto Police Service squad car lead to the inescapable impression that the Catalyst Parties are engaged in fraudulent activities, criminal wrongdoings, and other unsavoury practices; therefore, the third element of defamation is satisfied.

[119] In support of their submission, the Catalyst Parties rely on the Court of Appeal for Ontario's decision in *Baglow v. Smith*, 2012 ONCA 407, 110 O.R. (3d) 481, at para. 24. There, Blair J.A. held that:

> [T]he Courts have recognized that the threshold over which a statement must pass in order to be capable of being defamatory of a plaintiff is relatively low…the question whether a statement is in fact defamatory has long been considered the purview of a trier of fact. Whether impugned words are defamatory of an individual in fact is the type of decision better

> made on the basis of a full factual record with cross examinations and possible expert testimony.

[120] Based on the foregoing, the Catalyst Parties submit that, for the purposes of an anti-SLAPP motion, to determine whether the words complained of are capable of being defamatory and that a determination of whether the words are in fact defamatory I must conduct a deep dive of a full factual record – something not permitted in an anti-SLAPP motion. The Catalyst Parties further submit that I must consider the following factors in determining whether the text of the WSJ Article and the photograph of the Toronto Police Service squad car are capable of being defamatory: any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published, and the manner in which they were presented: *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, at para. 39.

[121] In addition, the Catalyst Parties argue that I must consider the WSJ Article as a whole and must not dwell or concentrate on isolated passages. In this regard, they submit that when one considers: (1) the WSJ Article headline, (2) the statement below the headline, which states, "Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers" (the "Deck"), (3) the picture of a police car, and (4) the WSJ Article itself, that, cumulatively, it takes on a defamatory meaning. They argue that the broad impression conveyed by the WSJ Article must be considered as opposed to the meaning of each individual word. According to the Catalyst Parties, the "sting" or innuendo is often not so much in the words that are used but rather in what an ordinary person would infer from them: Raymond E. Brown, *Brown on Defamation,* 2nd ed. (Toronto: Thomson Reuters, 2020), at ¶5.3(1)(a).

[122] The Catalyst Parties go on to submit that the allegations of unlawful conduct or criminal conduct are very serious in and of themselves and will have a significant effect on their reputation: *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2019 ONSC 1730, at para. 44.

[123] In addition, the Catalyst Parties specifically rely on a number of statements in the WSJ Article that they claim amount to "stings" or innuendo:

(i) the Catalyst Parties engaged in fraudulent activities and wrongdoing (paras. 1 and 2 of the WSJ Article).

(ii) the Catalyst Parties engaged in financial crimes (paras. 1-3).

(iii) the Catalyst Parties violated Ontario securities laws (paras. 1-2, 8, and 31).

(iv) Catalyst deceived borrowers (paras. 2, 21-22).

(v) Catalyst overpaid Callidus $34 million for XTG/the integrity of Callidus's accounting around XTG (paras. 24-27).

[124] In addition to the above complaints, the Catalyst Parties submit that the WSJ Article included several "false facts":

(i) Catalyst Funds overpaid Callidus for XTG (paras. 22-26).

(ii) Catalyst artificially inflated the value of some of its assets (paras. 2, 24-26).

(iii) Catalyst deceived borrowers (para 2).

(iv) Catalyst delayed and underreported losses (para. 24).

(v) Catalyst seized XTG (paras. 9, 19-21).

(vi) The PNC bank loan was USD$23.9 million not USD$11.6 million (para. 21).

(vii) The Catalyst Parties would not comment for the article (para. 7).

[125] Based on the foregoing, the Catalyst Parties submit that there are grounds to believe that their Defamation Action has substantial merit. The Catalyst Parties submit that allegations of unlawful or criminal conduct are unequivocally conveyed to the reader. They add that there is no escaping that the WSJ Article creates the impression that the Catalyst Parties have engaged in fraudulent activities, criminal wrongdoings, and have conducted their business in a fraudulent and illegal manner. They stress that this impression is conveyed notwithstanding the fact that no charges were ever laid by the police nor OSC prosecutions commenced.

The Dow Jones Defendants

[126] The Dow Jones Defendants submit that there are no grounds to believe that the Catalyst Parties' Defamation Action has substantial merit.

[127] The Dow Jones Defendants submit that a reasonable reader would not conclude that the Catalyst Parties were engaged in actual criminal or quasi-criminal conduct as a result of the WSJ Article. Amongst other things, they submit that the WSJ, which is a reputable publication, has truthfully reproduced allegations made in the Whistleblower Complaints and the additional comments made by McFarlane. The Dow Jones Defendants argue that public disclosure is a good thing. They add that the WSJ Article repeatedly makes it clear, beginning with its headline, that the Catalyst Parties were only facing accusations and that the OSC and the police were only conducting inquiries, which do not necessarily lead to investigations. In this regard, the Dow Jones Defendants submit that it is well-established that merely reporting that an investigation is being conducted does not lead to an inference of actual criminal or quasi-criminal wrongdoing in the minds of reasonable readers: *Lewis v. Daily Telegraph*, [1964] A.C. 234 (H.L.), at p. 260.

[128] The Dow Jones Defendants further submit that the overall presentation of the WSJ Article cannot ground a defamation claim. With respect to the photograph, they submit that the photo itself is not sensational but was simply added to the WSJ Article because police were making inquiries. Once again, they stress that the actual text of the WSJ Article repeatedly states that the Catalyst Parties have only been accused of wrongdoing and that there have only been inquiries at the time of publication.

[129] Overall, they argue that a reasonable reader – which, in this case, would generally consist of businesspeople – would understand that the police and the OSC reviews remained at a very preliminary stage. As such, they submit that a reasonable reader would not interpret the WSJ Article to have the extreme meanings alleged by the Catalyst Parties.

[130] In addition, the Dow Jones Defendants argue that the allegations concerning improper conduct towards investors and borrowers do not convey any imputation of wrongdoing to the Catalyst Parties beyond the fact that they have been accused of such conduct — which is true. Read fairly and in context, the Dow Jones Defendants therefore submit that the WSJ Article does not adopt or validate the allegations made by the whistleblowers, including McFarlane, but simply reports on allegations that have been made.

[131] Finally, the Dow Jones Defendants submit that I must also consider the reputation of the Catalyst Parties, without taking a deep dive, in determining whether there are grounds to believe that the WSJ Article was defamatory. They say that this consideration is especially important in this case given that (1) the Catalyst Parties have a history of aggressively pursuing unmeritorious litigation and (2) Glassman has, rather infamously, described the distressed lending market as a "blood sport". Placed in this context, the Dow Jones Defendants submit that the WSJ Article would not have undermined the Catalyst Parties' reputations.

McFarlane

[132] McFarlane, it will be remembered, is the former President and CEO of XTG, a borrower of Callidus. Ultimately, Catalyst transferred funds to Callidus and purchased XTG. McFarlane, who filed a whistleblower complaint alleging that Catalyst overpaid Callidus in acquiring XTG, was quoted in the WSJ Article as saying, "I have serious concerns about the integrity of Callidus's accounting around XTG". His whistleblower complaint was also referenced.

[133] Although McFarlane admits to having made this statement, he argues that his comments surrounding the XTG transaction are fair and true. In this regard, he relies on a letter provided to Callidus by the OSC on February 23, 2017, which raises concerns about Callidus potentially misleading investors, as well as a SEC letter to Catalyst, dated May 11, 2018, in which the SEC called for corrective action with respect to certain transactional deficiencies. The SEC specifically referenced the XTG transaction between Catalyst and Callidus and suggested that there were potential conflicts and misleading statements.

[134] Aside from the information concerning the XTG transaction and his comments in reference to it, McFarlane submits that there are no other portions of the WSJ Article concerning him that the Catalyst Parties could possibly take issue with.

Discussion

[135] I find that the Catalyst Parties have failed to establish that there are grounds to believe that their Defamation Action as against the Dow Jones Defendants has substantial merit. They have, however, satisfied me that there are grounds to believe that their Defamation Action as against McFarlane has substantial merit.

[136] Insofar as the law is concerned, I am guided by *Lewis*, one of the Commonwealth's leading libel cases. In that case, the claimant, Lewis, sued the defendant, the Daily Telegraph, because it reported that the "fraud squad" was looking into his activities and the activities of his company. Lewis claimed that the Daily Telegraph article essentially called him a crook.

[137] The following passages from Lord Reid's judgment are germane to this action and are thus worth re-producing at length:

> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning. Here there would be nothing libelous in saying that an inquiry into the appellants' affairs was proceeding: the inquiry might be by a statistician or other expert. The sting is in inferences drawn from the fact that it is the fraud squad which is making the inquiry.
>
> …
>
> In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question. So let me suppose a number of ordinary people discussing one of these paragraphs which they read in the newspaper. No doubt one of them might say – "Oh, if the fraud squad are after these people you can take it they are guilty." But I would expect the others to turn on him, if he did say that, with such remarks as – "Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless. We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard."

> What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot. And, if that is so, then it is the duty of the trial judge to direct the jury that it is for them to determine the meaning of the paragraph but that they must not hold it to impute guilt of fraud because as a matter of law the paragraph is not capable of having that meaning.
>
> Before leaving this part of the case I must notice an argument to the effect that you can only justify a libel that the plaintiffs have so conducted their affairs as to give rise to suspicion of fraud, or as to give rise to an inquiry whether there has been fraud, by proving that they have acted fraudulently. Then it is said that if that is so there can be no difference between an allegation of suspicious conduct and an allegation of guilt. To my mind, there is a great difference between saying that a man has behaved in a suspicious manner and saying that he is guilty of an offence, and I am not convinced that you can only justify the former statement by proving guilt. I can well understand that if you say there is a rumour that X is guilty you can only justify it by proving that he is guilty, because repeating someone else's libelous statement is just as bad as making the statement directly. But I do not think that it is necessary to reach a decision on this matter of justification in order to decide that these paragraphs can mean suspicion but cannot be held to infer guilt.: pp. 258-260.

[138] In brief, *Lewis* explains that there is a significant difference between the Dow Jones Defendants reporting that the OSC and police are making inquiries into fraud, on the one hand, and reporting that the Catalyst Parties have engaged in fraudulent (and related) activity, on the other. The former is not capable, as a matter of law, of lowering the reputation of the Catalyst Parties in the eyes of an ordinary person. The latter, by contrast, is. Because the Dow Jones Defendants were merely reporting that various public authorities were making inquiries into, amongst other things, fraud it therefore follows that there are no grounds to believe that the Catalyst Parties have a real prospect of success in establishing the defamation tort's third element as against them.

[139] In light of the above, I do not propose to go through each of the aforementioned "stings" or "false facts." Insofar as the "stings" are concerned, I rely upon my comments above and, consequently, find that the innuendo suggested by the Catalyst Parties is not made out. Reasonably interpreted, the WSJ Article is not capable of suggesting that the Catalyst Parties are criminals who engaged in fraudulent and other improper business practices. Again, this is because the WSJ Article merely reports on accusations and inquiries made by others and, more importantly, clearly states that such accusations and inquiries are just that: accusations and inquiries. To use the

language of Lord Reid, a reasonable person would not "infer guilt of fraud merely because an inquiry is on foot": *Lewis*, at p. 260. Or put another way, a "reasonable person" has common sense, is reasonably thoughtful, is well informed and does not have an overly fragile sensibility. He or she is not naïve or unduly suspicious or avid for scandal: *Miguna v. Toronto (City) Police Services Board*, [2004] O.J. No. 2455, at paras. 3-4, aff'd [2005] O.J. No. 107 (C.A.). He or she would understand the difference between allegations and proof of guilt: *Frank v. Legate*, 2015 ONCA 631, 390 D.L.R. (4th) 39, at para. 40.

[140] Insofar as the "false facts" are concerned, while there may or may not be inaccuracies underlying the accusations the WSJ Article reported on, the WSJ Article merely reports on the presence of such accusations. It does not opine on their truthfulness.

[141] Furthermore, many of the alleged "false facts" are not actually false. An obvious example is the Catalyst Parties' complaint that the WSJ Article states that they would not provide a comment for the article (false fact (vii)). In reality, the Catalyst Parties were given an opportunity to comment but declined to do so. In my view, what the Catalyst Parties really take issue with when it comes to this particular "false fact" is not its untruthfulness, but the way it was worded. The Catalyst Parties submit that because several of their officials spoke with Copeland and McNish the day before the publication, the WSJ Article should have stated that "company officials declined to provide comment for publication". In my view, this complaint amounts to nitpicking.

[142] The other alleged "false facts" deal with the information that was provided to Copeland and McNish by way of the Whistleblower Complaints and McFarlane. Again, this information was correctly described as constituting mere allegations. In my view, then, upon reviewing the totality of the WSJ Article, an ordinary person would simply conclude that the Catalyst Parties were facing accusations by whistleblowers, including McFarlane, which had yet to be proven. Moreover, an ordinary person would likely treat such accusations with caution, particularly given that the Catalyst Parties are aggressive players in the distressed lending and private equity industries and are therefore likely to have no shortage of adversaries.

[143] In summary, then, while I understand the Catalyst Parties' unhappiness with the WSJ Article, there is nothing in the WSJ Article that leads to the conclusion that there is a basis in law and in the record, at this stage in the proceeding, to support a finding that the Catalyst Parties' Defamation Action as against the Dow Jones Defendants has a real prospect of success. In this regard, I also note, that the photograph of the Toronto Police Services squad car provided a certain colour but was not of a sensational nature given the fact the Toronto Police Service had begun inquiries.

[144] Insofar as McFarlane is concerned, however, I find that the Catalyst Parties have satisfied me that there are grounds to believe that their Defamation Action as against him has substantial merit. In other words, I find that there is a basis in the law and in the record, taking in account the early stage of these proceedings, to support a finding that their defamation claim against him has a real prospect of success.

[145] Unlike the Catalyst Parties' claim against the Dow Jones Defendants, who were merely reporting on accusations made by others and clearly stated that these accusations have yet to be proven, McFarlane makes very specific accusations against the Catalyst Parties which are reproduced in the WSJ Article. Specifically, McFarlane accuses Catalyst of overpaying Callidus to acquire XTG, the company at which McFarlane previously served as President and CEO.

[146] Following the guidance espoused in *Lewis*, it therefore follows that there are grounds to believe that the Catalyst Parties' claim against McFarlane have substantial merit of satisfying the test for defamation against McFarlane. Reasonably interpreted, McFarlane's comments suggest that the Catalyst Parties were engaged in improper business practices. As Lord Reid himself noted in *Lewis*, directly accusing a party of fraud is clearly capable, as a matter of law, of lowering the party's reputation in the eyes of a reasonable person.

[147] In all of the circumstances, then, there is a basis in law and the record, taking into account the stage in the proceeding, to support a finding that the Catalyst Parties' Defamation Action as against McFarlane possesses a real prospect of success.

Section 137.1(4)(a)(ii): Are there Grounds to Believe that the Dow Jones Defendants and McFarlane have no Valid Defences in the Defamation Action?

[148] I will now consider s. 137.1(4)(a)(ii) in relation to both the Dow Jones Defendants and McFarlane. I find that the Catalyst Parties have failed to establish that the defences put into play by the Dow Jones Defendants do not tend to weigh more in the Dow Jones Defendants' favour. As regards McFarlane, however, I find that the Catalyst Parties have discharged their burden.

Defence of Justification

[149] In *Grant* the Supreme Court held that once a prima facie case of defamation is made out, the words complained of are presumed to be false. A defendant can rebut that presumption by adducing evidence that the main thrust of the statement was substantially true. Partial truth is not a defence: *Bent*, at para. 107.

[150] The Dow Jones Defendants and McFarlane submit that all of the facts reported in the WSJ Article are true. As a result, they argue that all the factual inferences that reasonable readers would draw from the plain and ordinary meaning of the words used in the WSJ Article are also protected by the defence of justification.

[151] The Catalyst Parties, by contrast, make five submissions in respect of the defence of justification. First, they submit that while the Dow Jones Defendants have pleaded the defence of justification in their statement of defence (McFarlane has not delivered a statement of defence in the Defamation Action), they do not plead that the "stings" of the libel are true.

[152] Second, they argue that none of the alleged true facts pleaded in the Dow Jones Defendants' statement of defence plead the truth of the meanings pleaded by the plaintiffs. On this basis alone, they submit that there are grounds to believe that there is no valid basis for the truth defence.

[153] Third, the Catalyst Parties submit that a resolution of whether the meanings of the words complained of are substantially true requires both findings of credibility and a deep dive of the record – something not permitted on an anti-SLAPP motion. Therefore, at this stage of the proceedings, they submit that there are grounds to believe that neither the Dow Jones Defendants nor McFarlane will not be able to prove the truth of the "stings" of the defamatory statements in the WSJ Article.

[154] Fourth, citing *Bent*, at para. 107, the Catalyst Parties argue that a defendant can only rely on the defence of justification if they are able to show that all of the meanings of the words complained of are true. In other words, the Catalyst Parties submit that the defence will fail if one of the main thrusts or "stings" of the libel are shown not to be true. According to the Catalyst Parties, this is the case here.

[155] Last, the Catalyst Parties rely on the "repetition rule" referenced in *Grant*. There, the Court stated, at para. 119, "that repeating a libel has the same legal consequences as originating it. This rule reflects the laws concerned that one should not be able to freely publish a scurrilous libel simply by purporting to attribute the allegation to someone else." Thus, the Catalyst Parties submit that by repeating the Whistleblower Complaints accusing the Catalyst Parties of fraud and other misdeeds, the Dow Jones Defendants have themselves accused them of fraud.

[156] Beginning with McFarlane, I find that there are grounds to believe that his defence of justification lacks validity. While McFarlane stands by his accusations, the Catalyst Parties have adduced evidence on this motion which suggest that he wrongly described the transaction between Catalyst and Callidus. For instance, Riley has deposed that McFarlane confused the "carrying value" of XTG with the applicable "gross loan receivable" value. According to Riley, this is problematic because it is only the "gross loan receivable" value that matters. Moreover, according to Riley, the value of the gross loan receivable was CAD $101 million: the amount Catalyst ultimately paid Callidus. In any event, Riley also deposes that Catalyst was contractually obligated to make the CAD $101 million payment to Callidus according to the terms of a guarantee agreement. In light of this evidence, I am satisfied that a reasonable trier might reject this defence.

[157] Insofar as the Dow Jones Defendants are concerned, however, I find that the Catalyst Parties have failed to show that there are grounds to believe that this defence does not weigh more in favour of the Dow Jones Defendants. Unlike McFarlane, the Dow Jones Defendants truthfully reported that Whistleblower Complaints had been filed against the Catalyst Parties and that regulatory inquiries, which do not necessarily lead to prosecutions, had been commenced. In addition, I note the following.

[158] First, I do not see the relevance of the Catalyst Parties' argument that the Dow Jones Defendants' defence of justification must fail because none of the alleged true facts pleaded in their statement of defence plead the truth of the meanings pleaded by the plaintiffs. A plaintiff is not required to deliver a statement of defence in order to bring forth a s. 137.1 motion.

[159] Second, the main thrust of the WSJ Article is true. The WSJ Article does not purport to comment on the innocence or guilt of the Catalyst Parties; rather, it states that Whistleblower

Complaints had been submitted to the OSC concerning the Catalyst Parties and that, as a result, inquiries were being made. This is the most reasonable interpretation of the WSJ Article. No deep dive is required. I agree with the Dow Jones Defendants that the Catalyst Parties are advancing the worst possible interpretation of the WSJ Article, which I must avoid: *WIC Radio v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 56.

[160] Third, I do not think that any of the case law the Catalyst Parties cite to support their position assists them. For example, the Catalyst Parties cite *Thompson*, at para. 27, wherein Justice Kristjanson held that, "the sting one has committed or participated in fraud is an allegation of fact." In my view, this case is distinguishable in that the publication with respect to the allegation of fraud was made by the defendant himself in *Thompson*, whereas in this case the Dow Jones Defendants were merely repeating allegations contained in the Whistleblower Complaints and by McFarlane. The Dow Jones Defendants also made it clear that the Whistleblower Complaints were only at an early stage of inquiry by the OSC and the police.

[161] Fourth, I find the Catalyst Parties' reliance on the repetition rule cited in *Grant*, at para. 119 to be equally misplaced. As the Supreme Court noted in *Grant*, at para. 119, the repetition rule is aimed particularly at the "bald retailing of libels." In this case, however, the WSJ Article, as I have noted on a number of occasions, qualified the allegations contained in detailed Whistleblower Complaints. In this sense, this case is distinguishable from *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246, on which the Catalyst Parties rely, where the published statements were based on statements of completely unknown reliability and which were not properly qualified.

[162] In the result, then, had I been required to consider s. 137.1(4)(a)(ii) in relation to the Dow Jones Defendants, I would have found that the Catalyst Parties have failed to show that there are grounds to believe that the Dow Jones Defendants' reliance on the defence of justification does not tend to weigh more in favour of the Dow Jones Defendants.

Defence of Fair Comment

[163] In *WIC*, at paras. 1, 52, the Supreme Court of Canada outlined the elements of the fair comment defence:

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

(ii) The comment must be based on fact;

(iii) The comment, though it can include inference of fact, must be recognizable as comment;

(iv) The comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?

(v) The defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice, in the sense of improper motive. The

> defendant must prove the four elements of the defence before the onus switches back to the plaintiff to establish malice.

[164] The Catalyst Parties submit that the fair comment defence is only available if the facts on which the comment are based are sufficiently stated or otherwise known to the readers such that they are able to make up their own minds as to the editorial comment. If the factual foundation is unstated in the article, is unknown, or turns out to be false, the Catalyst Parties submit that the fair comment defence is unavailable: *WIC*, at para. 31. Further, the Catalyst Parties submit that the requirement to state true facts means that the Dow Jones Defendants and McFarlane cannot omit important or material facts that would falsify or alter the complexion of the facts stated in the commentary: *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61, 90 B.C.L.R. (4th) 328, at para. 61.

[165] Citing *Thompson*, at paras. 27-28, the Catalyst Parties also submit that the defence of fair comment cannot stand insofar as the Dow Jones Defendants are concerned because the "sting" that someone has participated in a fraud is an allegation of fact as opposed to a comment. Similarly, as regards McFarlane's comments (at para. 27 of the WSJ Article), the Catalyst Parties argue that they are not "comments" but rather false allegations of fact.

[166] In addition, the Catalyst Parties submit that there are grounds to believe that there is not a valid defence of fair comment because there is no true factual foundation underlying any of the alleged comments: *WIC*, at para. 31.

[167] Finally, the Catalyst Parties argue that there is evidence that both the Dow Jones Defendants and McFarlane were actuated with malice and that, importantly, this prevents them from relying upon the defence of fair comment: *WIC*, at para. 52.

[168] In response, the Dow Jones Defendants and McFarlane submit that they meet the five-part definition set out in *WIC*. They argue that their comments were (1) in the public interest, (2) based on facts, (3) recognizable as comment, (4) honestly expressed opinions that a reasonable person could hold, and that (5) there is no evidence of malice in this case.

[169] For the reasons that follow, I find that the Catalyst Parties have discharged their onus under s. 137.1(4)(a)(ii) with respect to both McFarlane and the Dow Jones Defendants.

[170] Beginning with McFarlane, I accept that there is a basis in the record for concluding that the first four elements of the defence of fair comment are met. More specifically, I accept that there are grounds to believe that his statement that he had "serious concerns" about XTG transaction was (1) in the public interest, was (2) based on facts, is (3) recognizable as comment, and (4) was an honestly expressed opinion capable of being held by a reasonable person.

[171] However, there is evidence which suggests that there is a real prospect that McFarlane will be found to have been actuated by malice in making his statement. For example, the record reveals that McFarlane created a website specifically designed to shine light on what he perceives to be improper conduct on the part of the Catalyst Parties. It also reveals that the Catalyst Parties have also been successful in having a court-approved receiver appointed over XTG when it defaulted

on its loan with Callidus, a company at which McFarlane served as President and Chief Executive Officer prior to the receivership proceedings. The record also reveals that in a separate proceeding, the Court of Appeal for Ontario recently upheld a decision of this court finding that McFarlane was liable to Callidus for a personal guarantee. In this proceeding, McFarlane unsuccessfully raised similar allegations of fraud and improper lending practices on behalf of Callidus. The evidence at this stage of the proceeding reveals that McFarlane blames the Catalyst Parties for XTG's downfall.

[172] Taking all of this evidence of animosity between McFarlane and the Catalyst Parties into account, then, and keeping in mind the limited nature of the dive that is permissible at this stage of the proceedings, there are grounds to believe that the defence of fair comment will be defeated by malice at trial.

[173] Turning to the Dow Jones Defendants, I find that the Catalyst Parties would have also discharged their onus under s. 137.1(4)(a)(ii) in relation to the fair comment defence. As noted, to rely on the defence of fair comment, a defendant must be able to show that their expression is "recognizable as comment". That is to say, the defendant must be able to show that their statement was more in the way of a statement of opinion, as opposed to a statement of fact: *Thompson*, at para. 26.

[174] While, admittedly, the distinction between statements of fact and statements of opinion is not always straightforward, in this case I am satisfied that, reasonably interpreted, the statements contained in the WSJ Article are statements of fact. Generally speaking, a fact is something that is susceptible to proof: its truth or falsity can be determined: Erika Chamberlain, *Fridman's The Law of Torts in Canada*, 4th ed. (Toronto: Carswell, 2020), at p. 798. Conversely, "comments are statements of opinion that cannot be proved or disproved, such as the statement that a performance was lackluster or boring": Chamberlain, at p. 798. In this case, the statements in the WSJ Article were (and are) susceptible to proof. For example, either public authorities were inquiring into the Catalyst Parties' business practices, or they were not. Either four individuals had filed Whistleblower Complaints against the Catalyst Parties, or they had not. Because statements such as these are susceptible to proof, and are thus statements of fact rather than comment, it follows that the Catalyst Parties would have satisfied their burden under s. 137.1(4)(a)(ii) in relation to the Dow Jones Defendants' ability to rely on the defence of fair comment.

[175] I reject, however, the Catalyst Parties' argument that the Dow Jones Defendants acted with malice and that this, too, results in their defence of fair comment lacking a real prospect of success. Admittedly, there were some inappropriate text messages that flowed between Anderson and Copeland where they made unflattering comments about Glassman and the Catalyst Parties and the effect that the WSJ Article would have upon them. The Catalyst Parties make much of these electronic messages and suggest that they are not only indicative of malice, but, as will be seen in the Wolfpack Action, conspiracy.

[176] To provide some context, however, it is worthwhile noting that a review of the record discloses that Glassman's own electronic messages with others demonstrate that his tone was often similar to, or worse, than those the Catalyst Parties complain of vis-à-vis Anderson and Copeland.

In my view, this is more indicative of the sometimes unfortunate attitudes and tones used in the business milieu in which the parties operated. Therefore, the Catalyst Parties cannot suggest that the tone of the messages passing between Anderson and Copeland constitute evidence of malice unless they are prepared to concede that they too, led by Glassman, engaged in malicious activity via their own communications.

Defence of Responsible Communication

[177] Only the Dow Jones Defendants raise the defence of responsible communication. The defence of responsible communication was outlined by the Supreme Court of Canada in *Grant*, at para. 98:

> (i) the publication must be on a matter of public interest; and
>
> (ii) the defendant must show that the publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all of the relevant circumstances.

[178] As regards the second element, *Grant*, at para. 126, instructs courts to consider the following factors:

> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;
>
> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;
>
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("Reportage"); and
>
> (h) any other relevant considerations.

[179] In *Grant*, the Supreme Court, at para. 55, also went on to the state that, "sometimes the public interest requires that untrue statements should be granted immunity, because of the importance of robust debate on matters of public interest."

[180] In *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26 ("*Subway No. 2*"), the Court of Appeal, building off the Supreme Court of Canada's judgement in *Grant*, provided some additional guidance as concerns the defence of responsible communication in anti-SLAPP motions specifically. Citing Justice Cavanagh in *Hamlin v. Kavanagh*, 2019 ONSC 5552, at para. 45, the Court of Appeal held that "where a trier

could reasonably conclude that the defendants did not conduct a sufficiently diligent investigation…a trier could reasonably conclude that the defence of responsible communication would not succeed": at para. 57.

[181] For the reasons that follow, I find that the Catalyst Parties have failed to satisfy me that there is a basis in the law and the record, taking into account the early stage of this proceeding, to support a finding that the Dow Jones Defendants' defence of responsible communication lacks validity.

[182] As regards the first element of the defence, I find that the WSJ Article relates to a matter of public interest. Indeed, given that I have already found the "matter of public interest" requirement to be satisfied in my analysis of the Threshold Burden, it follows that I must also find that this element of the defence is satisfied. In *Pointes*, at para. 27, the Supreme Court explicitly relied upon – and indeed embraced – courts' interpretation of the phrase "matter of public interest" in the context of the defence of responsible communication to shine light on what that phrase means in the context of a s. 137.1(3) analysis.

[183] As regards the second element of the defence, whether the publication was responsible, I begin by noting that I accept that the allegations contained in the WSJ Article are of a serious nature. The WSJ Article references the fact that the Catalyst Parties are being investigated for fraud, which is "one of the most egregious securities regulatory violations": *Lehman Cohort Global Group Inc. et al.*, 2010 ONSEC 15, at para. 86.

[184] I also accept that the publication was of public importance. As I noted earlier, the Catalyst Parties are important players in Canada's private equity and distressed lending markets. It is therefore important that members of the public are alerted to the fact that accusations have been made against them. The fact that these accusations were only at the inquiry stage does not alter my conclusion on this point. Notwithstanding the early stage of the OSC proceedings against the Catalyst Parties, the public still has an interest in being alerted to them.

[185] As regards the third factor, the urgency of the matter, the Catalyst Parties criticize the Dow Jones Defendants' desire to "scoop the competition" as well as their "rush to print". In my view, this criticism is unfounded for two reasons. First, there is always going to be pressure to print when it comes to the news reporting industry. That is simply the nature of the business. As a result, the Dow Jones Defendants cannot be criticized for acting with some sense of urgency. Second, notwithstanding this inherent pressure to publish, the record reveals that both Copeland and McNish did in fact spend some time researching the story before publishing it. Indeed, in his affidavit, Copeland notes that "[t]his story received the absolute full gauntlet of editing". The WSJ Article was subjected to a multi-tiered vetting process, which included a "final read" by the head of the WSJ Standards and Ethics Team, before it was published. Importantly, they also gave the Catalyst Parties an opportunity to comment on the WSJ Article before it was released. The state of the record before me therefore does not support a finding that Dow Jones Defendants acted as irresponsibly as the Catalyst Parties submit.

[186] With respect to the status and reliability of the source, the Catalyst Parties argue that the Dow Jones Defendants' sources were not of a suitable status nor did they have the requisite reliability. More specifically, they argue that the Dow Jones Defendants had reason to believe that Baumann, one of the sources for the WSJ Article and a defendant in the Wolfpack Action, was unreliable. They also argue that the two of the primary sources for the WSJ Article – McFarlane and Anderson – were biased and agenda driven.

[187] Beginning with the accusations levelled against Baumann, while there is evidence in the record suggesting that the Dow Jones Defendants may have had reason not to trust him, I do not place much weight on this. As the Catalyst Parties note in their own factum, the Dow Jones Defendants primarily relied on McFarlane and Anderson in drafting the WSJ Article (as opposed to Baumann). Indeed, aside from referencing the fact that at least four individuals filed Whistleblower Complaints, there is nothing in the WSJ Article that stems solely from Baumann. At best, then, Baumann appears to have been a minor source for the WSJ Article.

[188] As regards McFarlane and Anderson, I offer the following comments. First, as I mentioned earlier, although it is true that Anderson shorted Callidus stock, there is no evidence suggesting that the Dow Jones Defendants were aware of this fact at the time he supplied them with his whistleblower complaints. Furthermore, as mentioned earlier, it bears noting that Copeland and Anderson share a relationship dating back to at least 2014 and which, importantly, has led to the publication of several financial news stories. Ultimately, this relationship seems to have caused Copeland to place a high degree of trust in Anderson. For instance, there is evidence in the record revealing that Copeland vouched for Anderson's reliability during the publishing process. Therefore, I am not prepared to accept, at this stage of the proceeding, that Copeland should have viewed Anderson with suspicion.

[189] Further, notwithstanding the fact that I have found that McFarlane possessed animus against the Catalyst Parties, I do not think that this means that he was an illegitimate source. The Dow Jones Defendants were not relying on McFarlane for the truth of his accusations. Rather, they were merely providing an outlet for him to express his accusations against the Catalyst Parties. Equally importantly, the Dow Jones Defendants made it explicitly clear that McFarlane's accusations were just that: accusations. Given the purposes for which the Dow Jones Defendants were relying on McFarlane, then, I do not think that they can be faulted for retaining a source such as him.

[190] Turning to the next factor, whether the plaintiff's side of the story was sought and accurately reported, I have already noted that the Dow Jones Defendants provided the Catalyst Parties with an opportunity to comment on the WSJ Article.

[191] The next factor, whether the WSJ Article was justifiable, is met given my comments in my analysis concerning the substantial merit test.

[192] Insofar as the "reportage" factor is concerned, I am of the view that the WSJ Article (1) specifically attributes the accusations contained within it to their authors, (2) indicates that the truth of the accusations had not been proven, (3) sets out both sides of the dispute fairly, and (4)

provides the context in which the accusations were made. While the Catalyst Parties criticize the Dow Jones Defendants on the ground that they did not identify the Toronto Police Officer who made a statement contained at para. 3 of the WSJ Article, in *Grant*, at para. 120, the Supreme Court explicitly noted that identification is preferable but not necessary. Moreover, despite this potential shortcoming, the Dow Jones Defendants explicitly noted that inquiries by public officials do not necessarily lead to formal investigations. On balance, then, I find that the Dow Jones Defendants acted responsibly – which is the "ultimate" issue I need to consider as concerns this factor: *Grant*, at para. 120.

[193] Taking all of the above into consideration, then, I find that the Catalyst Parties have failed to establish that there are grounds to believe that the Dow Jones Defendants' defence of responsible communication is not valid. Rather, I am of the view that this particular defence tends to weigh more in favour of the Dow Jones Defendants.

Defence of Qualified Privilege

[194] Both the Dow Jones Defendants and McFarlane raise the defence of qualified privilege.

[195] The defence of qualified privilege applies to the "occasion" upon which a communication is made. An occasion is privileged if the person making the communication has an interest or legal, social, or moral duty in making the communication to the person to whom it is made, and if the recipient has a corresponding interest or duty in receiving the communication: *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, at para. 143. The privilege is qualified in the sense that it can be defeated upon proof of malice: *Grant*, at paras. 30, 34.

[196] In my view, the Catalyst Parties have satisfied their burden under s. 137.1(4)(a)(ii) in relation the Dow Jones Defendants for two reasons. First, it remains unclear whether a media outlet, such as the WSJ, can avail itself of this defence: *Grant*, at para. 37. Second, qualified privilege does not generally extend to publications that were extended to the world at large: *Canadian Standards Association*, at para. 58. Here, however, the WSJ Article was provided to an international audience of 2.4 million readers; therefore, there is a basis in fact for a finding that this defence has no real prospect of success.

[197] As concerns McFarlane, as I have already found that there are grounds to believe that the Catalyst Parties have a real prospect of establishing malice against him, it therefore follows that they have also met their burden under s. 137.1(4)(a)(ii) when it comes to his ability to rely on the defence of qualified privilege.

Defence Under the *Libel and Slander Act*, R.S.O. 1990, c. L.12, s .3(1)

[198] Although pleaded, the Dow Jones Defendants did not deal with this defence during oral argument. As a result, only a few brief comments are warranted.

[199] Subsection 3(1) of the *Libel and Slander Act* states:

> **3** (1) A fair and accurate report in a newspaper or in a broadcast of any of the following proceedings that are open to the public is privileged, unless it is proved that the publication thereof was made maliciously:
>
> 1. The proceedings of any legislative body or any part or committee thereof in the British Commonwealth that may exercise any sovereign power acquired by delegation or otherwise.
>
> 2. The proceedings of any administrative body that is constituted by any public authority in Canada.
>
> 3. The proceedings of any commission of inquiry that is constituted by any public authority in the Commonwealth.
>
> 4. The proceedings of any organization whose members, in whole or in part, represent any public authority in Canada.

[200] In their pleadings, the Dow Jones Defendants rely on the fact that the Whistleblower Complaints were made to the OSC, which they submit is an "administrative body" for the purposes of s. 3(1), para. 2.

[201] While I am prepared to accept that the OSC is an administrative body within the meaning of s. 3(1), para. 2, the OSC inquiries were arguably not at the "proceeding stage" as required. Nor were these inquiries open to the public, as also required under s. 3(1). In the result, I am satisfied that the Catalyst Parties have shown that this defence does not weigh more in the Dow Jones Defendants' favour. Whether OSC inquiries can satisfy s. 3(1) is very much an open question, the answer to which does not necessarily favour the Dow Jones Defendants.

[202] In summary, with respect to the issue of valid defences pursuant to s. 137.1(4)(a)(ii), I conclude that the Catalyst Parties have failed to discharge their burden in relation to the Dow Jones Defendants. Specifically, I find that there are grounds to believe that the Dow Jones Defendants' defences of justification and responsible communication weigh more in their favour. With respect to McFarlane, however, I find that there are grounds to believe that his alleged defences of justification, fair comment, and qualified privilege do not tend to weigh more in his favour. I now turn to s. 137.1(4)(b): The Public Interest Hurdle.

Section 137.1(4)(b): The Public Interest Hurdle

[203] Strictly speaking, because I have found that the Catalyst Parties defamation claim as against the Dow Jones Defendants lacks substantial merit and that, in any event, there are grounds to believe that the Dow Jones Defendants possess several valid defences, I do not need to consider them within my s. 137.1(4)(b) analysis. In the event that I am wrong, however, I will nevertheless consider them alongside McFarlane in my public interest analysis.

[204] As I noted at the outset of my decision, s. 137.1(4)(b) is of critical importance to an anti-SLAPP analysis. Indeed, the Supreme Court of Canada in *Pointes* went so far as to describe s. 137.1(4)(b) as the "crux" of the overall anti-SLAPP motion framework: at para. 61.

[205] Further, it is important to remember that at this stage of the analysis the Catalyst Parties do not need to provide definitive proof of either harm or causation: *Pointes*, at para. 71. Rather, they simply need to provide evidence for the motion judge to draw an inference of the likelihood of harm and the relevant causal link.

[206] In addition, the motion judge's task under s. 137.1(4)(b) is not to balance the abstract public interests against one another. Instead, the motion judge must carefully consider which interest is more deserving of protection in the light of the unique context of the particular proceeding: *Pointes*, at paras. 65-67.

[207] In undertaking this analysis, based on the guidance provided by the Supreme Court in *Bent*, at paras. 142-174, I must undertake three successive steps:

- first, I must consider whether the Catalyst Parties have suffered, or will suffer, harm caused by the impugned expressions;
- second, if harm has been established, I must assess the public interest in protecting the expression; and
- third, I must weigh the public interest.

[208] I will deal with each of these issues in turn.

The Harm Analysis

[209] Subject to my comments below, I am satisfied that the Catalyst Parties have suffered harm as a result of the impugned expression.

[210] As noted earlier, the Catalyst Parties have submitted two expert reports which outline the harm they say they suffered due to the publication of the WSJ Article. The first report, the Juneja Report, values the total harm to Callidus at approximately CAD $144-161 million. The Juneja Report purports to take other factors into account before concluding that the losses sustained by Callidus were solely as a result of the WSJ Article. The second report, the Sunshine Report, opines that lenders accused of the types of activities that Callidus was accused of in the WSJ Article diminishes their chances of competing for new loans and that this, in turn, would have resulted in harm for Callidus.

[211] Although neither the Dow Jones Defendants nor McFarlane have delivered any expert reports of their own on the motions before me, they point to additional facts which they say show that any harm the Catalyst Parties suffered does not stem from the WSJ Article. In particular, they point to the fact that on August 11, 2017 (2 days after the WSJ Article was published) Callidus held its Q2 2017 earnings call. In this earnings call, Callidus noted that its earnings were below expectations and that this was likely to cause its share value to decline. In this regard they point out the fact that while Callidus's share price dropped approximately 21% after the publication of the WSJ Article, the price did rally after the Catalyst Parties released a press release and the Print Article was released which included the Catalyst Parties' rebuttal to the WSJ Article. Overall, they

submit, the stock ultimately rallied so that they net decline was approximately 8% and it was not until Callidus held its Q2 2017 earnings call that there was a further decline. They also point to the Dalton Report, which highlighted many problems with Callidus' business model. Indeed, the Dalton Report described Callidus as being a company in crisis and noted several significant problems with Callidus' viability, none of which involved the WSJ Article nor any associated allegations of conspiracy or defamation. The Dalton Report also noted that Callidus' operating and financial performance began to "decline significantly" beginning in September 2016 and that Callidus' new deal origination "virtually halted" in 2016 - all of which was well before the WSJ Article was published. Finally, the Dow Jones Defendants and McFarlane rely on the aforementioned Sutin Affidavit. Although the materials filed with the Sutin Affidavit reference the fact that Callidus was experiencing problems due to the WSJ Article, the Affidavit primarily criticizes Callidus' own business-related missteps for its problems.

[212] While these submissions have some merit, they do not lead to the conclusion that the Catalyst Parties did not suffer any harm as a result of the WSJ Article. Rather, they suggest, without undertaking a deep dive, that the harm that the Catalyst Parties allegedly suffered from the WSJ Article is less, perhaps significantly so, than the Juneja and Sunshine Reports opine. While this has a bearing on the "weighing exercise" under s. 137.1(4)(b), discussed below, all that is important at this stage of the analysis is that there is evidence in the record which suggests that the Catalyst Parties have suffered harm and that this harm, at least in part, stems from the publication of the WSJ Article: *Pointes*, at para. 68.

[213] In addition, the Catalyst Parties are suing them for defamation - a tort in which general damages are presumed: *Pointes*, at para. 71. And while this presumption may be attenuated in the case of corporate plaintiffs (see *Barrick Gold Corp. v. Lopehandia*, 71 O.R. (3d) 416 (C.A.), at para. 49), this does not mean that I should presume that the Catalyst Parties are not entitled to any general damages as a result of the WSJ Article. Indeed, the Supreme Court of Canada did not engage with this argument in its harm analysis in *Pointes* even though that case also involved a corporate plaintiff.

[214] In the result, then, while I have reservations about the quantum of harm the Catalyst Parties say they have suffered, discussed below, I am satisfied that they have suffered some harm as a result of the WSJ Article. The Dow Jones Defendants also take issue as to whether Catalyst sustained any damages since, they submit, in law, Catalyst did not own the shares of Callidus, the Catalyst Funds did and as such Catalyst suffered no direct loss. I do not plan to do a deep dive into this legal submission since it was not supported by any case law. I believe that harm has been made out. Overall, given what I have noted above, the harm suffered lies in the mid range of the spectrum.

The Public Interest in Protecting the Impugned Expression

[215] As noted, the expressions in question consist of the Whistleblower Complaints and the resulting WSJ Article.

[216] The Catalyst Parties submit that there is no public interest in protecting these expressions. They say that the WSJ Article was a repetition of unproven fraud and other accusations contained in the Whistleblower Complaints that were only at the intake/inquiries stage at the OSC. In this regard, they note that the OSC never took any enforcement action (although, as noted, corrective action was mandated). They further stress that Copeland knew that the allegations were unproven and nonetheless published them at a time when they Catalyst Parties were alleging that there was a conspiracy against them. This being the case, the Catalyst Parties submit that the WSJ Article was a one-sided piece tantamount to a smear campaign on the Catalyst Parties' reputation. This, in turn, caused them to suffer damage.

[217] I prefer the submissions of the Dow Jones Defendants and McFarlane, however, to the effect that the expressions contained in the WSJ Article are valid and important topics of public debate concerning major financial entities that solicit investments from both domestic and international actors. I further accept that in determining whether the public has an interest in protecting the expressions in question I should have regard to s. 2(b) of the *Charter* and that, in this case, the WSJ Article and McFarlane's Whistleblower Complaints aid in "the search for truth" – one of the core values underlying s. 2(b) – by drawing attention to the business practices of a major financial entity: *R. v. Sharpe*, 2001 SCC 2, [2001] 1 SCR 45, at paras. 23, 181-182; *Bent*, at para. 163.

[218] Specifically, insofar as the Whistleblower Complaints are concerned, although the Catalyst Parties submit that they were inappropriately submitted to the OSC, the fact is that the OSC, and the SEC for that matter, both mandated the Catalyst Parties to undertake corrective measures. The actions taken by the OSC and SEC are supportive of the notion that the Whistleblower Complaints raised at least some legitimate concerns.

[219] I also offer the following additional remarks. First, while the Catalyst Parties attempt to vilify the WSJ Article as an irresponsible and reckless publication, I have already found that it is the Catalyst Parties who are attempting to put the worst possible spin on this particular piece of expression. A proper review of the WSJ Article suggests that it was responsibly published and is thus worthy of protection.

[220] Second, in determining the value of the impugned expression, it bears noting that the WSJ Article was not itself accusing the Catalyst Parties of fraud. Rather, it was merely reporting the accusations contained in the Whistleblower Complaints and providing an accurate recitation of the stage of both the OSC and Toronto Police Service inquiries. In addition, the whistleblower complaints filed by Anderson, which formed the primary basis of the WSJ Article, were lengthy, detailed, and made reference to 73 documents in support of its accusations. In other words, this is suggestive of a relatively well-researched document.

[221] Further, in determining the public interest in protecting the expressions in question, *Bent*, at para. 164 instructs me to consider whether the Catalyst Parties were given an opportunity to respond. In this case, Copeland and McNish had a number of conversations with the Catalyst Parties and made a number of requests for information, position, or comment upon which they could report. Ultimately a meeting was held on August 8, 2017, the day before the WSJ Article

was published. The meeting was recorded by both sides and transcripts were prepared. Notwithstanding this and the fact that Copeland and McNish had put several questions to the Catalyst Parties prior to the meeting, the Catalyst Parties refused to go on the record and declined to provide any comment concerning the Whistleblower Complaints which included McFarlane's complaints concerning XTG. Therefore, the Supreme Court's criticism of the defendant in *Bent* does not resonate in this case.

[222] I also note that if a defendant's failure to reach out to a plaintiff before making the expression in question can render it less worthy of protection (as was the case in *Bent*), it seems to me that defendants, such as the Dow Jones Defendants, who do actually provide plaintiffs with the opportunity to comment on a story before publication, ought to have their expression afforded more protection.

[223] It is also important to note that the Print Article was published shortly after the WSJ Article went online. Notwithstanding the Catalyst Parties' refusal to provide comment for the WSJ Article, the Print Article contained statements from the Catalyst Parties in which they defended their position. The Catalyst Parties specifically took issue with the Whistleblower Complaints. They described them as being "deliberately misleading" and their defence was included in the Print Article. This demonstrates that the Dow Jones Defendants were prepared to publish comments released by the Catalyst Parties that were supportive of the Catalyst Parties made between the time of the release of the WSJ Article and the Print Article even though the Catalyst Parties had declined an opportunity to comment in the WSJ Article. It speaks of a certain fairness.

[224] Finally, I note that *Pointes* also calls for consideration of the "chilling effect on future expression" and the "broader or collateral effects of other expression on matters of public interest": at para. 80 [emphasis omitted]. If I were to find that the expressions at issue here – that is, the Whistleblower Complaints and the WSJ Article – fell at the lower end of the protection-deserving spectrum, then other whistleblowers and media outlets might be less inclined to either file whistleblower complaints or publish news stories on matters of public interest.

[225] Based on the foregoing, I am therefore of the view that the WSJ Article falls at the higher end of the protection-deserving spectrum. I am also of the view that the Whistleblower Complaints, including McFarlane's, fall in the mid to high-end of this spectrum.

The Weighing of the Public Interest

[226] At this stage of the analysis I am required to weigh the harm suffered by the Catalyst Parties, on the one hand, with the public interest in protecting the Dow Jones Defendants' and McFarlane's expression, on the other.

[227] In my view, this exercise favours the Dow Jones Defendants and McFarlane. In other words, the Catalyst Parties have failed to establish on a balance of probabilities that the harm likely to be or which has been suffered as a result of the impugned expression is sufficiently serious that the public interest in permitting their Defamation Action to continue outweighs the public interest in protecting the impugned expression: *Bent*, at para. 174.

[228] While I accept that the Catalyst Parties suffered some harm as a result of the WSJ Article, the article was nonetheless published responsibly and, as mentioned, is therefore worthy of protection. Indeed, rather than recklessly accusing the Catalyst Parties of fraud, the WSJ Article simply repeated the accusations contained in the Whistleblower Complaints and the additional comments provided by McFarlane, in which he noted that he had serious concerns about the integrity of Callidus's accounting concerning XTG. It also went on to note that McFarlane had been held liable for his personal guarantee to Callidus concerning XTG. Once again, the Catalyst Parties were also given an opportunity to comment on the accusations contained in the WSJ Article, which explicitly noted that the accusations had yet to be proven. Later, the Catalyst Parties' rebuttals were reported in the Print Article.

[229] On the whole, then, I do not believe that the content of the WSJ Article and the Whistleblower Complaints are so unreasonable that the weighing of the Public Interest Hurdle is in the Catalyst Parties' favour. As noted, I am of the view that these expressions are deserving of protection and that they deserve an elevated level of protection as they serve a public interest in publishing issues concerning the vitality and transparency of significant, publicly-traded corporations, as well as Canada's capital markets.

[230] I also pause here to note that the weighing exercise that I will undertake with respect to the Wolfpack Action resonates in the Defamation Action as well. I therefore adopt and rely upon my analysis in the Wolfpack Action – specifically my comments concerning the history of the litigation between the parties; Project Maple Tree; the financial and power imbalance with respect to McFarlane; and issues regarding access to justice. In my view, it is reasonable to incorporate those findings into this analysis given the fact that both actions arise out of the same expressions, Copeland and McFarlane are defendants in both actions, and given the overall factual matrix of the two actions; there is considerable overlap that must be considered.

[231] Ultimately, as the Supreme Court of Canada noted in *Pointes*, at para. 81, "the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them". As I set out in a more expansive fashion in the Wolfpack Action, what is really going on in both the Defamation and Wolfpack Actions is troubling. Essentially, the Catalyst Parties appear to have a lengthy history of suing (repeatedly and unsuccessfully in the case of West Face) and pursuing those who offend them. As noted, they have even gone so far as to launch the ethically dubious "Project Maple Tree", which saw "sting" operations executed on a former judge of the Superior Court of Justice.

[232] What is equally concerning, and as was noted by Justice Boswell, is that Project Maple Tree was commenced in circumstances where there was absolutely no basis to suggest that Justice Newbould was biased against the Catalyst Parties in the Moyse Action. Further, it is troubling that Project Maple Tree proceeded even though the Catalyst Parties knew that the information received in the "Vincent Hannah" email – which served as a major impetus for this extra-judicial endeavour – was not credible. Further, notwithstanding the Catalyst Parties' contention that Project Maple Tree arose out of a fear that the Catalyst Parties were being attacked, Project Maple Tree does not consist, generally, of any investigation to determine whether this was the case. Instead, it

constituted a vindictive attack on others based largely on Glassman's inability to accept defeat in the Moyse Action.

[233] I have thus concluded that what is really going on in the Defamation Action is that the Catalyst Parties have strategically tried to silence the Dow Jones Defendants and McFarlane. Their strategy has included attacking others via Project Maple Tree which would also undermine the Dow Jones Defendants and McFarlane. In other words, drawing upon the guidance in *Bent*, at para. 172, this is a case where the Catalyst Parties are attempting to silence their critics rather than address legitimate wrongs against them. It is therefore the type of case that comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage and comes within the language of the statute requiring such a dismissal.

[234] In the result, then, even if the Catalyst Parties have suffered some harm as a result of the conduct of McFarlane and the Dow Jones Defendants, and even if I had found that the Defamation Action was technically meritorious as against both McFarlane and the Dow Jones Defendants (as opposed to just McFarlane), I am of the view that the public interest in protecting the expressions at issue here outweigh the public interest in allowing the Defamation Action to proceed. To find otherwise would result in the silencing of responsible reporting on significant issues involving plaintiffs, in this case the Catalyst Parties, who have demonstrated a willingness and ability to repeatedly attack their adversaries both inside and outside of the courtroom and who have reverted to ethically dubious activities which make the circumstances of this case truly extraordinary.

PART VI — THE WOLFPACK ACTION

[235] In the Wolfpack Action the Catalyst Parties allege that the Wolfpack Defendants conspired to cause them economic harm by short-selling Callidus stock and spreading misinformation about them. They submit that this conspiracy culminated in the Whistleblower Complaints made by Anderson, McFarlane, and Levitt and the leaking of those complaints to the WSJ for publication.

[236] The allegations in the Wolfpack Action are numerous and complicated by the fact that the Catalyst Parties do not assert every cause of action against every moving party.

[237] More particularly the Catalyst Parties appear to plead the following causes of action as against the Wolfpack Defendants:

- Defamation
- Injurious Falsehood
- Predominant purpose conspiracy
- Unlawful means conspiracy
- Causing loss by unlawful means

[238] Unlike my Defamation Action analysis, given the multiple causes of action at issue in the Wolfpack Action, I propose to deal with both prongs of s. 137.1(4)(a) concurrently when reviewing each cause of action. In other words, in relation to each respective cause of action, I will:

- outline its elements;
- outline the parties' respective arguments;
- consider whether there are grounds to believe that it possesses substantial merit; and
- consider whether there are grounds to believe that the Wolfpack Defendants possess any valid defences to it.

(A) **Defamation**

[239] As I noted in relation to the Defamation Action, the elements of defamation are well established. For convenience, I reproduce them here:

(i) the impugned words must be defamatory, in the sense they would tend to lower the plaintiff's reputation in the eyes of the reasonable person;

(ii) the words complained of refer to the plaintiff; and

(iii) the words complained of were published, meaning they were communicated to at least one person other than the plaintiff: *Grant*, at para. 28

The Position of the Parties

The Catalyst Parties

[240] The Catalyst Parties' cause of action in defamation is somewhat difficult to follow. Nonetheless, it appears to arise out of two discrete sets of statements:

- The accusations contained in the WSJ Article
- Baumann, Levitt, and Anderson's (among other defendants who are not relevant to the proceeding) statements to Copeland

(a) The First Set of Alleged Defamatory Statements

[241] The first alleged defamatory statement consists of the accusations contained in the WSJ Article. As in the Defamation Action, the Catalyst Parties submit that allegations contained in the WSJ Article are false and defamatory and that all those involved in their publication are therefore liable for defamation.

[242] Despite this similarity to the Defamation Action, the number of defendants who are allegedly liable for the statements contained in the WSJ Article is significantly expanded in the Wolfpack Action. More specifically, in the Wolfpack Action the Catalyst Parties sue Copeland

and McFarlane, once again, as well as several other defendants, including Anderson, Baumann, West Face, Boland, Levitt, and Livesey. As noted, collectively I refer to these parties as the Wolfpack Defendants.

[243] The Catalyst Parties argue that Anderson, Baumann, the West Face Parties, Levitt, and Livesey, "cooperated, lent aid, supported and encouraged" the making of the allegedly false accusations contained in the WSJ Article and are therefore liable as joint tortfeasors. By contrast, rather than alleging that McFarlane and Copeland are liable as joint tortfeasors, both of these parties are said to be directly liable for either making a defamatory statement (McFarlane) or publishing a defamatory article (Copeland).

[244] In other words, then, McFarlane and Copeland are said to be directly liable for this defamation allegation. By contrast, the remaining Wolfpack Defendants are said to be liable for assisting Copeland and McFarlane in their defamatory endeavours. This means that the liability of the remaining Wolfpack Defendants ultimately hinges on Copeland and McFarlane's liability. That is, I must find that either Copeland or McFarlane committed a tort – defamation in this instance – such that the remaining Wolfpack Defendants can be held liable as joint tortfeasors for assisting in bringing about that tort.

(b) The Second Set of Alleged Defamatory Statements

[245] The second set of allegedly defamatory statements consists of communications made by McFarlane, Baumann, Levitt, and Anderson to Copeland. Insofar as McFarlane is concerned, the Catalyst Parties' claim that he made false and defamatory statements to Copeland concerning alleged nefarious accounting practices concerning the loan that Callidus extended to XTG.

[246] Turning to the remaining defendants, Baumann, Levitt, and Anderson, the Catalyst Parties submit that they made the following false and defamatory statements to Copeland:

- Catalyst and Callidus are under active investigation by the Toronto police department and various regulators, including the OSC and the Alberta Securities Commission, regarding accounting irregularities, securities fraud, and other criminal misconduct.

- Callidus and Catalyst failed to decrease the valuations of their loan collateral when companies in the Callidus portfolio ceased making interest payments or only made partial payments.

- Callidus and Catalyst engaged in fraud by misleading borrowers about deal terms in order to withhold funds from borrowers at critical times and to allow the debt to balloon in order to assume control and ultimately ownership of borrowers.

- Catalyst misled its investors about the valuation of assets held in Catalyst's investment portfolios to collect fees and other payments to which it was not entitled and that Callidus had misled its borrowers about loans extended to them by Callidus.

- Callidus and Catalyst falsely certified that their financial statements were prepared in accordance with IRFS and, in particular, that they failed to conduct an appropriate impairment analysis on the assets of the Callidus borrowers and Catalyst funds despite disclosures in their financial statements that such analysis had been done.

The Wolfpack Defendants

[247] The Wolfpack Defendants assert that the Catalyst Parties' allegations concerning both sets of defamatory statements lack substantial merit. In any event, the Wolfpack Defendants submit that they are able to advance several valid defences: namely, the defence of justification, the defence of responsible communication, the defence of fair comment, the defence of qualified privilege, and the defence of absolute privilege.

[248] In addition to these general submissions, some of the Wolfpack Defendants specifically expand on why the defamation allegations lack substantial merit as against them. For example, as regards the first alleged defamatory act – that is, the publication of the WSJ Article – Anderson submits that he was no more than a source for the article. He stresses that he had no role in preparing or publishing the WSJ Article and was unable to influence control over or input into the article's content. According to Anderson, liability cannot attach to someone who merely contributes information to an article but has no involvement in the publication process or approval of the final product.

[249] As regards the second alleged defamatory act – that is, the making of defamatory statements to Copeland – Anderson concedes that he did in fact supply Copeland with a copy of his whistleblower complaints. However, he submits that this would not have lowered the reputation of the Catalyst Parties' reputation in the eyes of a reasonable person receiving the communication. More specifically, Anderson argues that, as a veteran journalist, Copeland would not have had his views of the reputation of the Catalyst Parties' lowered by virtue of receiving this information. Rather, he says that Copeland would have reviewed and critically assessed the information as a whole, before coming to his own independent conclusion.

[250] Similarly, the West Face Parties submit that they did not publish any of the alleged defamatory words contained in the WSJ Article and that they did not cause anyone else to do so. According to the West Face Parties, while the Catalyst Parties continue to make bald accusations to the effect that the West Face Parties worked with others to publish the defamatory WSJ Article, the evidence reveals that they had "no role whatsoever in their publication."

Discussion

[251] For the sake of clarity, I will provide a separate analysis for each of the two discrete sets of allegedly defamatory statements.

(a) The First Set of Alleged Defamatory Statements

[252] As noted in the Defamation Action, when it comes to the publication of the WSJ Article, it is indisputable that the final two elements of defamation are made out on the facts of this case.

The words complained of clearly refer to the Catalyst Parties and were clearly published. Like the Defamation Action, then, the only question is whether the contents of the WSJ Article are defamatory.

[253] In my view, employing the test set out in *Pointes,* there are grounds to believe that the Catalyst Parties' first defamation allegation has a real prospect of success against all the Wolfpack Defendants except Copeland. As I noted in the Defamation Action, McFarlane makes very specific accusations against the Catalyst Parties, which, in turn, are reproduced in the WSJ Article. While McFarlane stands by his accusations, I have already concluded that they would tend to lower the Catalyst Parties' reputation in the eyes of a reasonable person (see paras. 144-146). Given that McFarlane's comments are also at issue in the context of the Wolfpack Action, it therefore follows that the Catalyst Parties have a real prospect of succeeding on this element here.

[254] Moreover, I find that there are also grounds to believe that Anderson, Baumann, the West Face Parties, Levitt, and Livesey "co-operated, lent aid, supported, or encouraged" McFarlane to make the impugned statements and that, therefore, there is a real prospect that they will be found to be liable as joint tortfeasors at trial: *Rutman v. Rabinowitz*, 2018 ONCA 80, 420 D.L.R. (4th) 310, at para. 34. Specifically, although I will not comment on all of the evidence, I find the following evidence as against each defendant to be pertinent.

[255] Anderson:

(i) There are text messages in the record suggesting that Anderson contacted Copeland on July 13, 2017. In the weeks that followed these text messages, it is notable that McFarlane (in addition to others) began to provide Copeland with information about the Catalyst Parties. It is also notable that there are phone transcripts suggesting that conference calls between McFarlane, Anderson, and McNish were held in the weeks following these text messages.

(ii) In response to an email from McFarlane providing Anderson with the contact details of several journalists, Anderson informs McFarlane that "[he]'ll connect with all of them when the timing makes sense".

(iii) There is evidence in the form of an email, dated November 27, 2019, that a call was arranged between Anderson, Levitt, and McFarlane.

[256] Levitt:

(i) Emails from May 2016 suggest that Levitt and Baumann (among others who are not relevant to this proceeding) banded together with McFarlane and agreed to a "joint decision-making process".

(ii) On May 19, 2017, shortly before the Whistleblower Complaints were filed and the WSJ Articles were published, Levitt, McFarlane, and Baumann (among others who are not relevant to this proceeding) contacted the Toronto Police and made a criminal complaint against the Catalyst Parties.

(iii) As mentioned above, there is evidence in the form of an email, dated November 27, 2019, that a call was arranged between Anderson, Levitt, and McFarlane.

[257] Baumann:

(i) As mentioned above, emails from May 2016 suggest that Baumann was part of a "joint decision-making process" with McFarlane.
(ii) As mentioned above, Baumann worked with McFarlane (among others) to contact the Toronto Police so that a criminal complaint against the Catalyst Parties could be lodged.
(iii) Emails suggest that Baumann was in contact with many of the same media outlets that McFarlane was contacting – for example, Reuters and the WSJ.

[258] The West Face Parties:

(i) There are many phone calls which suggest that Anderson and Boland were communicating with one another through Langstaff. Indeed, recently produced records of Boland's outgoing cell phone calls reveal 170 phone calls between Boland and Langstaff from November 2016 and August 2017. Many of these phone calls between Boland and Langstaff took place shortly before/after phone calls between Langstaff and Anderson. It does bear noting, however, that many of these phone calls were brief in nature and could be missed calls. Also, Boland and Langstaff were friends and had other business dealings. Given the guidance in *Pointes*, however, I am not to do a deep dive into the nature of these phone calls but rather it is reasonable to note that the calls took place.
(ii) There is evidence of a phone call between Boland and Anderson.
(iii) There is an email contained in the record in which McFarlane suggests that "it might be helpful to connect [Anderson] with West Face".
(iv) Phone records reveal that Boland was in contact with Levitt, one of the guarantors involved in a "joint decision-making process" with McFarlane.

[259] Livesey:

(i) Riley's affidavit contains evidence which suggests that Levitt thought that it would be beneficial to put Livesey in contact with Anderson. As noted, the evidence reveals that both Anderson and Levitt were engaged in communications with McFarlane.
(ii) There is evidence of phone calls between Boland and Livesey. As noted, Boland was in communication with parties who were communicating with McFarlane directly.

[260] In light of all of this evidence of communications between the alleged joint tortfeasors and McFarlane, as well as taking into account the early, pre-discovery stage of this proceeding, I am of the view that there are grounds to believe that the Catalyst Parties joint tortfeasor allegation has a real prospect of success.

[261] As regards Copeland, however, I find that there are not grounds to believe that the Catalyst Parties' first defamation allegation has a real prospect of success. As mentioned, rather than arguing that Copeland is liable as a joint tortfeasor, at p. 109 of their Wolfpack Action factum, the

Catalyst Parties state that they are relying on the submissions contained in their Defamation Action factum to argue that Copeland is directly liable for this particular defamation allegation. However, in the Defamation Action, I have already found that the Catalyst Parties' claim against the Dow Jones Defendants lacks substantial merit. Thus, for my reasons in relation to the Defamation Action I find that, as against Copeland, the Catalyst Parties' defamation claim lacks a real prospect of success.

[262] Having found that the Catalyst Parties succeed under s. 137.1(4)(a)(i) (save as against Copeland), I must now consider whether they succeed under s. 137.1(4)(a)(ii). As noted, the Wolfpack Defendants advance the following defences in relation the defamation allegations against them: the defence of justification, the defence of responsible communication, the defence of fair comment, the defence of qualified privilege, and the defence of absolute privilege.

Defence of Justification

[263] The test for the defence of justification is set out in para. 149 in my analysis of the Defamation Action. As I have found that McFarlane cannot rely on the defence of justification in relation to the Defamation Action, it follows that he cannot rely on it here either. This is because the Catalyst Parties' defamation allegation in the Wolfpack Action is based on the same statements as were at issue in the Defamation Action (i.e., McFarlane's accusations against the Catalyst Parties which were reproduced in the WSJ Article). Having already found that the defence lacks validity in the Defamation Action, it follows that it also lacks validity here.

[264] To the extent that Anderson, Baumann, the West Face Parties, Levitt, and Livesey are said to be liable as joint tortfeasors, it also follows that they cannot advance the defence of justification. This is because, rather than having made the statements themselves, these other defendants are merely alleged to have been part of a common plan to see that McFarlane's comments were published. Thus, if the person who actually made the statements cannot rely on the defence of justification, it follows that all those who acted pursuant to a common design with the statement utterer cannot rely on it either.

[265] As regards Copeland, although I have already found that this particular defamation allegation lacks substantial merit as against him, had I been required to consider the defence of justification in relation to him, I would have found that there are grounds to believe that it weighs more in his favour. Again, this is because in the Defamation Action, I have already found that there are grounds to believe that he can rely on it. Having made this finding in the Defamation Action, it follows that it also applies in the context of the Wolfpack Action.

Defence of Fair Comment

[266] The test for the defence of fair comment is set out in para. 163 in my analysis of the Defamation Action.

[267] In the Defamation Action, I found that McFarlane could not rely on the defence of fair comment. Given that McFarlane's statements are also at issue in the Wolfpack Action, it follows that he cannot rely on it here either. Because McFarlane cannot rely on the defence of fair

comment, it also follows that none of the defendants who are allegedly liable as joint tortfeasors can rely on it either.

[268] As concerns Copeland, in the Defamation Action I also found that he could not rely on the defence of fair comment. Again, because the WSJ Article allegedly grounds Copeland's liability in both the Defamation and Wolfpack Actions, it follows that he cannot rely on the defence of fair comment here.

Defence of Responsible Communication

[269] The test for the defence of responsible communication is set out in paras. 177-178 in my analysis of the Defamation Action.

[270] In the Defamation Action, I found that the defence of responsible communication weighed in favour of the Dow Jones Defendants. As regards Copeland, then, I find there are grounds to believe that it weighs more in his favour.

[271] Importantly, however, this does not end the matter. In the Defamation Action, I did not need to consider whether McFarlane may avail himself of the defence of responsible communication as he did not raise the defence. In my view, the Catalyst Parties have succeeded in showing that there are grounds to believe that McFarlane (and thus all of the other defendants who are said to be liable as joint tortfeasors) cannot rely on the defence of responsible communication.

[272] While I accept that the WSJ Article concerned a matter of public interest, I find that McFarlane cannot rely on it because, in the Defamation Action, I already found that there is a real prospect that the Catalyst Parties will be able to demonstrate that he was actuated with malice. In *Grant*, at para. 125, the Supreme Court was explicit: "A defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly." Therefore, as there are grounds to believe that the Catalyst Parties will be able to show that McFarlane was actuated with malice, it follows that he cannot rely on the defence of responsible communication. This also means that the Wolfpack Defendants who are said to be liable as joint tortfeasors in regard to McFarlane's statements cannot rely on the defence of responsible communication either.

Defence of Qualified Privilege

[273] The test for the defence of qualified privilege is set out in para. 195 in my analysis of the Defamation Action.

[274] In the Defamation Action, I found that the Catalyst Parties were able to show that the defence of qualified privilege lacked validity in relation to both the Dow Jones Defendants and McFarlane. Having made this finding there, it follows that none of the Wolfpack Defendants, including Copeland, can rely on the defence of qualified privilege here either (i.e., there are grounds to believe that it lacks a real prospect of success). Again, this is because the Wolfpack Action is largely just an expanded version of the Defamation Action when it comes to this alleged defamatory act.

Defence of Absolute Privilege

[275] In their joint memorandum of law, the Wolfpack Defendants submit that the Catalyst Parties have failed to show that there are grounds to believe that their alleged defence of absolute privilege is invalid. However, they do not explain how this defence could apply to this alleged defamation act. Indeed, given that the defence applies only to communications which take place during, incidental to, or in the furtherance of judicial or quasi-judicial proceedings, it is hard to see how it could apply to this specific defamation allegation. As a result, I find that the Catalyst Parties have succeeded here – that is, the defence of absolute privilege lacks a real prospect of success.

Conclusion

[276] In conclusion, then, when it comes to this particular defamation allegation, I find that the Catalyst Parties have discharged their onus under s. 137.1(4)(a)(ii) in regard to McFarlane and all those defendants that are said to be liable as joint tortfeasors. As regards Copeland, however, I find that the Catalyst Parties have failed to show that there are grounds to believe that he is unable to rely on several defences, namely, the defence of justification and the defence of responsible communication.

(b) The Second Set of Alleged Defamatory Statements

[277] I now turn to the second set of alleged defamatory statements – that is, the alleged false and defamatory communications made by McFarlane, Baumann, Levitt, and Anderson to Copeland.

[278] In my view, the Catalyst Parties have succeeded in showing that there are grounds to believe that this particular defamation claim has substantial merit. As in relation to the first alleged defamatory statements – i.e., the accusations contained in the WSJ Articles – there is no real dispute that the final two elements of defamation are met: McFarlane, Levitt, Baumann, and Anderson's statements (1) referred to the Catalyst Parties and (2) were communicated to at least one other person, namely, Copeland.

[279] The question then becomes: were these statements defamatory in that they would tend to lower the Catalyst Parties' reputation in the eyes of a reasonable person?

[280] For convenience, I reproduce the alleged defamatory statements here, beginning with the statement made by McFarlane:

- McFarlane detailed to Copeland that Callidus and Catalyst engaged in allegedly nefarious accounting practices concerning a loan that Callidus extended to XTG

[281] As for the remaining defendants, Baumann, Levitt, and Anderson, the Catalyst Parties submit that they made the following false and defamatory statements to Copeland:

- Catalyst and Callidus are under active investigation by the Toronto police department and various regulators, including the OSC and the Alberta Securities Commission, regarding accounting irregularities, securities fraud and other criminal misconduct.

- Callidus and Catalyst failed to decrease the valuations of their loan collateral when companies in the Callidus portfolio ceased making interest payments or only made partial payments.

- Callidus and Catalyst engaged in fraud by misleading borrowers about deal terms in order to withhold funds from borrowers at critical times and to allow the debt to balloon in order to assume control and ultimately ownership of borrowers.

- Catalyst misled its investors about the valuation of assets held in Catalyst's investment portfolios to collect fees and other payments to which it was not entitled and that Callidus had misled its borrowers about loans extended to them by Callidus.

- Callidus and Catalyst falsely certified that their financial statements were prepared in accordance with IRFS and, in particular, that they failed to conduct an appropriate impairment analysis on the assets of the Callidus borrowers and Catalyst funds despite disclosures in their financial statements that such analysis had been done.

[282] In my view, there are grounds to believe that each of these statements are capable of being defamatory in that they would tend to lower the reputation of the Catalyst Parties in the eyes of a reasonable person. In accusing Catalyst of having engaged in improper accounting practices concerning a loan that Callidus extended to XTG, for instance, McFarlane is essentially saying that the Catalyst Parties are conducting business in an improper manner, and are therefore not to be trusted. In my view, accusations of this nature are capable of leading a reasonable person to think less of the Catalyst Parties.

[283] Similarly, in advising that the Catalyst Parties were under investigation by the Toronto Police Service and the various regulatory bodies, Baumann, Levitt, and Anderson were suggesting that the Catalyst Parties had been operating their business in an inappropriate fashion. This, too, is capable of lowering the Catalyst Parties' reputation in the eyes of a reasonable person.

[284] The same can be said of each of Baumann, Levitt, and Anderson's other communications to Copeland. For example, their statement to Copeland that "Callidus and Catalyst falsely certified that their financial statements were prepared in accordance with IRFS and, in particular, … failed to conduct an appropriate impairment analysis on the assets of the Callidus borrowers and Catalyst funds despite disclosures in their financial statements that such analysis had been done" can reasonably be understood to mean that the Catalyst Parties made material misrepresentations in their financial statements and that their financial disclosure ought not to be trusted. This is capable of lowering the Catalyst Parties' reputation in the eyes of a reasonable person.

[285] I also reject Anderson's submission that, as a veteran journalist, Copeland would not have had his views of the reputation of the Catalyst Parties' lowered by virtue of receiving the

information Anderson supplied to him because he would have reviewed and critically assessed the information as a whole before coming to his own independent conclusion. While the nature of the audience reached by the publication (i.e., Copeland) is a factor in determining whether it will be understood in a defamatory sense (see *Cimolai v. Hall et al.*, 2005 BCSC 131, at para. 178; *Brown on Defamation*, at ¶5.8), it is important to appreciate what exactly the evidence reveals about Copeland. According to Riley's affidavit, Copeland and Anderson have shared a relationship since at least September 2014 (when Copeland first used Anderson as a source for an article he published in the WSJ). Riley's affidavit also reveals that Copeland has published articles on some of the same companies against which Anderson has filed whistleblower complaints. In other words, then, Anderson was not some stranger who Copeland would have viewed as untrustworthy. Rather, the evidence suggests that he was a relatively trusted confidant. Indeed, as noted, Copeland vouched for Anderson during the editorial review process. Therefore, when Anderson made these statements to Copeland, it is more likely than not that Copeland would have viewed them as credible and that the Catalyst Parties' reputations would have declined in his eyes.

[286] In all of the circumstances there is a basis in law and the record, taking into account the stage in the proceeding, to support a finding that McFarlane, Anderson, Baumann, and Levitt's allegedly defamatory statements to Copeland have a real prospect of success.

[287] Having found that the Catalyst Parties succeed under s. 137.1(4)(a)(i), I must now consider whether they also succeed at the no valid defences stage of the analysis.

[288] In their individual facta, McFarlane, Levitt, and Baumann submit that they are relying on the defences set out in the Moving Defendants' joint memorandum of law, as well as any defences submitted in the companion facta submitted by the other defendants. Taken together, these defences include: the defence of justification, the defence of responsible communication, the defence of fair comment, the defence of qualified privilege, and the defence of absolute privilege. Anderson, by contrast, submits that he is relying on the defences of fair comment, responsible communication, and qualified privilege. Below, I consider each of these defences.

Defence of Justification (Baumann, Levitt, and McFarlane)

[289] As I have already noted, to succeed under the defence of justification a defendant must show that the alleged defamation results from statements or inferences of fact, and that those facts were true or substantially true: *Grant*, at paras. 32-33.

[290] In my view, the Catalyst Parties have met their burden of showing that there are grounds to believe that McFarlane, Baumann, and Levitt have no valid defence of justification. In their statements to Copeland, McFarlane, Baumann, and Levitt state that the Catalyst Parties were (1) engaged in improper accounting practices, (2) engaged in improper loan valuation practices, (3) failed to conduct an appropriate impairment analysis on the assets of the Callidus borrowers and Catalyst funds despite disclosures in their financial statements that such analysis had been done, (4) failed to decrease the valuations of their loan collateral when companies in the Callidus portfolio ceased making interest payments or only made partial payments, and (5) were under investigation by the Toronto police department and various regulators.

[291] While all three of these defendants stand by their comments, Riley's affidavit calls into question the truth of these various allegations. And while one may argue that Riley lacks credibility, based on the materials before me, and keeping in mind that I am only permitted to undertake preliminary assessments of credibility at this stage in the proceedings, I am not prepared to declare Riley's evidence uncredible. Therefore, taking Riley's evidence into account, and saving questions of ultimate credibility for a later stage of the proceedings, I find that there are grounds to believe that the defence of justification does not weigh more in favour of these defendants.

Defence of Fair Comment (Anderson, Baumann, Levitt, and McFarlane)

[292] Even if I were to accept that the first four elements of the defence of fair comment (as set out in para. 163) are met, the Catalyst Parties have succeeded in showing that there are grounds to believe that each of Baumann, Levitt, McFarlane, and Anderson were actuated by express malice. As I explain in more detail below, the Catalyst Parties have either commenced (in the case of Baumann and Levitt) or completed (in the case of McFarlane) guarantee enforcement proceedings against all three of these men. These various enforcement proceedings have been highly emotional. Indeed, not only have they spawned additional defamation proceedings (in the case of Baumann), but, within them, each of Bauman, Levitt, and McFarlane have accused the Catalyst Parties of fraud. In a context such as this, there are grounds to believe that the Catalyst Parties will be able to establish malice at trial.

[293] As concerns Anderson, while the evidence of animus is admittedly weaker as against him, the Catalyst Parties have established that there are grounds that Anderson has no valid defence of fair communication as there is a real prospect that Anderson's statements to Copeland were actuated with malice. For example, prior to performing due diligence on the Catalyst Parties, there is evidence in the record which reveals that he began describing Catalyst and Callidus as a "large, complex fraud" and "Ponzi scheme". Thus, while Anderson submits that he was merely acting out of financial self-interest, taking the record as a whole, and keeping in mind that I am not permitted to undertake a deep dive at this stage, I am satisfied that the Catalyst Parties have succeeded under s. 137.1(4)(a)(ii) in relation to the defence of fair comment as regards all the defendants, including Anderson.

Defence of Responsible Communication (Anderson, Baumann, Levitt, and McFarlane)

[294] A defendant who acted with malice in publishing a defamatory statement cannot raise the defence of responsible communication because they have, by definition, not acted responsibly: *Grant*, at para. 125. As I have found that there are grounds to believe that Anderson, Baumann, Levitt, and McFarlane were actuated with malice, it therefore follows that their defence of responsible communication does not possess a real prospect of success.

Defence of Qualified Privilege (Anderson, Baumann, Levitt, and McFarlane)

[295] As I noted in the Defamation Action, an occasion is privileged if the person making the communication has an interest or duty – legal, social or moral – in making the communication to the person to whom it is made, and if that person has a corresponding interest or duty in receiving

the communication: *Hill*, at para. 143. The privilege is qualified in the sense it can be defeated upon proof of malice: *Grant*, at paras. 30, 34.

[296] Again, as I have found that there are grounds to believe that Anderson, Baumann, Levitt, and McFarlane were actuated by malice, it follows that there are also grounds to believe that the qualified privilege defence is not valid.

Defence of Absolute Privilege (Baumann, Levitt, and McFarlane)

[297] Although raised in the defendants' joint memorandum of law, none of Baumann, Levitt, nor McFarlane explain how it applies to their impugned statements. Moreover, as the defence only applies to communications that take place during, incidental to, or in furtherance of judicial or quasi-judicial proceedings, it is difficult to see how it applies here. One could argue that, because many of the accusations provided by the defendants to Copeland are also contained in Anderson's whistleblower complaints to the OSC, they are "incidental to" quasi-judicial OSC proceedings. In my view, however, the link between the defendants' communications to Copeland and the OSC whistleblower complaints are too far removed to be considered incidental to it. Further, the whistleblower complaints were just that: whistleblower complaints. In other words, it was not submitted in support of a formal OSC proceeding. This being so, I find that there are grounds to believe that the defence of absolute privilege lacks a real prospect of success.

[298] In summary, then, when it comes to the second set of alleged defamatory statements, I find that the Catalyst Parties have succeeded under s. 137.1(4)(a)(i) and (ii).

(B) Injurious Falsehood

Elements

[299] The elements of injurious falsehood were summarized by the Court of Appeal for Ontario in *Lysko v. Braley* (2006), 79 O.R. (3d) 721, at para. 133. They are as follows:

(a) the published statements must be untrue;

(b) the published statements must be made maliciously (i.e., without just cause or excuse); and

(c) the plaintiff must have suffered special damage.

(a) The Published Statements Must be Untrue

[300] Injurious falsehood is similar to defamation in that truth is a defence. However, it differs from defamation in two important ways. First, while in defamation the words are presumed to be false once the plaintiff has proved their publication, in injurious falsehood claims the plaintiff has the burden of proving both the publication of the words and their falsity: *Burnett v. Tak* (1882), 45 L.T. 743 (Ch.). As to the latter requirement, the plaintiff must show that the defendant knew that their representations were false or, alternatively, that they were reckless as to their falsity: Peter

Burns & Joost Blom, *Economic Torts in Canada*, 2nd ed. (Toronto: LexisNexis Canada, 2016), at ¶2.5.

[301] Second, the single meaning rule – which applies in defamation actions and holds that defamatory comments have only the one meaning that a jury finds a reasonable-thinking person would attribute to them – does not apply to injurious falsehood claims. Therefore, a plaintiff can recover even if others might consider the meaning harmless: Burns & Blom, at ¶2.6.

(b) The Published Statements Must be Made Maliciously (i.e., Without Just Cause or Excuse)

[302] The meaning of malice in the context of injurious falsehood claims was articulated by the Supreme Court of Canada in *Manitoba Free Press Co. v. Nagy* (1907), 39 S.C.R. 340. In dealing with the issue of malice, Justice Davies stated, at p. 348, that "malice in this connection is a question of *mala fides* or *bona fides*. If the absence of *bona fides* is shown or may fairly and reasonably be inferred from the facts proved then I take it that the ingredient of malice is sufficiently proved."

[303] At pp. 352-353, Justice Idington held that "[t]here was not shewn that malice would be implied in satisfying the demands of a vindictive or wicked spirit solely bent of the specific work of destroying the value of the plaintiff's property … In the recklessness and indifference [that the] facts display [however] I find furnished abundant evidence of malice and hence a legal remedy for such a palpable wrong."

[304] As Justice Ground noted in *Boehringer Ingelheim (Canada) Ltd. v. Bristol-Myers Squibb Canada Inc.*, [1998] O.J. No. 1932 (Gen. Div.), at para. 11, *Manitoba Free Press* thus suggests that when it comes to malice:

> [I]t is not necessary to show a predetermined intention to injure the plaintiff or the plaintiff's property or trade, but that it is sufficient, if an absence of bona fides is shown or may fairly and reasonably be inferred from facts proven, and that the reckless publication by the defendant of an untruth, the natural result of which is to produce actual damage to the defendant, is sufficient evidence of malice.

[305] Finally, although not referenced by Justice Ground, it also bears noting that malice is proven on a subjective basis: Burns & Blom, at ¶2.11. This means that honest mistakes – whether they be mistakes of law or mistakes of fact – will negate the presence of malice. This also means that unreasonable mistakes, without more, are insufficient to establish malice: Burns & Blom, at ¶2.11.

(c) The Plaintiff Must Suffer Special Damage

[306] Injurious falsehood is derived from an action on the case. As a result, the plaintiff must assert and prove special damage: Burns & Blom, at ¶2.13. Special damage is pecuniary in nature

and includes loss of business: *Shapiro v. La Morta* (1923), 130 L.T. 622, at 628 (C.A.). The plaintiff must also demonstrate a "causal connection" between the injurious falsehood and the special damage that allegedly resulted from it: Burns & Blom, at ¶2.14.

The Position of the Parties

The Catalyst Parties

[307] As with their defamation claim, the Catalyst Parties' amended statement of claim pleads that the following sets of allegedly false statements give rise to a claim in injurious falsehood:

- The accusations contained in the WSJ Article.
- Baumann, Levitt, McFarlane, and Anderson's (amongst other defendants who did not participate in these motions) statements to Copeland.

[308] In their factum, however, the Catalyst Parties focus only on the first set of allegedly false statements that were contained in the WSJ Article. As a result, I will only address this particular injurious falsehood allegation.

[309] As with their defamation claim, the Catalyst Parties submit that Copeland and McFarlane directly contributed to the publication of these accusations and are thus liable on this basis. As for the remaining defendants (i.e., Anderson, Levitt, Baumann, the West Face Parties, and Livesey), the Catalyst Parties submit that each of them, "co-operated, lent aid, supported, and encouraged" the making of the accusations contained in the WSJ Article, and are thus liable as joint tortfeasors.

[310] Turning to the actual elements of the tort, the Catalyst Parties submit that the first element is met because all of the accusations contained in the WSJ Article are untrue.

[311] As regards the tort's second element, the Catalyst Parties submit that the evidence reveals that each of the Wolfpack Defendants had animus against them. For example, they note that Levitt, McFarlane, and Baumann have been embroiled in acrimonious litigation with them. The Catalyst Parties also state that all of three of these men continue to blame Callidus for the loss of their respective businesses. Further, the Catalyst Parties point to Levitt, McFarlane, and Baumann's failed attempt to bring a RICO claim and a class action against Catalyst and Callidus, as well as their failed allegations of fraudulent inducement against Callidus, as providing evidence of malice.

[312] Additionally, the Catalyst Parties submit that the West Face Parties have been embroiled in "bitter litigation with Catalyst and Callidus for years." They stress that the West Face Parties' animus is also evident from their attempt to have Livesey and the WSJ publish a negative article about Glassman and his family. They also point to notes from McNish, in which she writes that the West Face Parties were on a "crusade" against Glassman.

[313] Finally, as regards Anderson and Copeland, the Catalyst Parties submit that text messages between the two men reveal a clear animus. They also argue that Anderson described Catalyst and

Callidus as a "large, complex fraud" and a "Ponzi scheme" before doing any due diligence, and that this reveals animus against them.

[314] Turning to the tort's final element, that of special damage, the Catalyst Parties rely on the expert opinions submitted by Sunshine and Juneja.

The Wolfpack Defendants

[315] In their joint memorandum of law, the Wolfpack Defendants submit that the Catalyst Parties have failed to show that their injurious falsehood allegation possesses substantial merit.

[316] Beginning with the first element, the Wolfpack Defendants submit that the accusations contained in the WSJ Article were factually accurate statements. As a result, even if these statements reflected adversely on the Catalyst Parties business, the Wolfpack Defendants submit that they cannot ground an injurious falsehood claim.

[317] As to the second element, the Wolfpack Defendants submit that the Catalyst Parties have offered no evidence that the Wolfpack Defendants did not reasonably believe in the truth of their expressions and that this alone is fatal. According to the Wolfpack Defendants, this is fatal because in the absence of an established improper motive, a defendants' honest belief in their statements negates the mandatory element of malice (and therefore defeats the Catalyst Parties' injurious falsehood claim): *Joshi v. Allstate Insurance Co.*, 2019 ONSC 4382, at paras. 40-41.

[318] Finally, the Wolfpack Defendants submit that the Catalyst Parties have failed to demonstrate special damage. They rely on their arguments noted above concerning the Dalton Report and the Sutin Affidavit in this regard.

Discussion

[319] I begin by noting that, for my reasons articulated in relation to the first defamation allegation in the Wolfpack Action (see paras. 254-261), I find that there are grounds to believe that each of Anderson, Levitt, Baumann, the West Face Parties, and Livesey co-operated, lent aid, supported, or encouraged McFarlane (in making his statement reproduced in the WSJ Article) and Copeland (in publishing the WSJ Article).

[320] This finding is significant in that if I find that are grounds to believe that there is substantial merit to the allegation that either McFarlane or Copeland are directly liable for injurious falsehood, then the Catalyst Parties will have also met their burden under s. 137.1(4)(a)(i) in relation to Anderson, Levitt, Baumann, the West Face Parties, and Livesey. Again, this is because these latter defendants are merely said to be liable for "co-operating, lending-aid, supporting, and encouraging" McFarlane and Copeland's allegedly unlawful endeavours. Therefore, as I have already found that there are grounds to believe that Anderson, Levitt, Baumann, the West Face Parties, and Livesey, "co-operated, lent-aid, supported, and encouraged" McFarlane and Copeland, the only remaining question is: are there grounds to believe that the injurious falsehood claim against Copeland or McFarlane has substantial merit? If there is substantial merit to the injurious falsehood claim in relation to either one of these defendants, then the remaining defendants - who,

again, are only said to be liable for co-operating, lending-aid, supporting, or encouraging McFarlane and Copeland - will also be liable.

[321] In my view, while there are grounds to believe that the injurious falsehood claim possesses substantial merit as against McFarlane, the same cannot be said for Copeland. Given my finding concerning McFarlane, it therefore follows that there are grounds to believe that the injurious falsehood has substantial merit against McFarlane, Anderson, Levitt, Baumann, the West Face Parties and Livesey.

[322] Below, I explain why I find that there are grounds to believe that the injurious falsehood claim has substantial merit as against McFarlane but not as against Copeland.

(a) Copeland

[323] In my view, the injurious falsehood claim lacks substantial merit as against Copeland for two reasons: (1) his reporting does not appear to have been untrue and (2) there is insufficient evidence in the record which suggests that he was actuated with malice.

[324] Beginning with the first proposition, I rely on my reasons in the Defamation Action. There, it will be remembered, I concluded (at para. 157) that the Dow Jones Defendants, including Copeland, truthfully reported on the fact that Whistleblower Complaints had been made against the Catalyst Parties. This finding applies with equal force here. The same conduct that was at issue in the Defamation Action – that is, Copeland's publishing of the WSJ Article – is said to give rise to a claim in injurious falsehood in the Wolfpack Action. Therefore, having found that Copeland truthfully reported on the accusations in the Defamation Action, it follows that I must find that Copeland's reporting was not untrue in relation to this injurious falsehood claim.

[325] Turning to the second proposition, malice, I again rely upon the reasons in the Defamation Action in finding that Copeland did not act with malice. In conducting my analysis with respect to the defence of fair comment I concluded that there were no grounds to believe that Copeland acted with malice. Given that the same conduct is at issue again here, my findings concerning malice in the Defamation Action apply with equal force in the Wolfpack Action.

(b) McFarlane

[326] As noted, the Catalyst Parties have succeeded in establishing that there are grounds to believe that their injurious falsehood claim possesses substantial merit against McFarlane.

[327] As regards the tort's first element, on truthfulness, I rely on my reasons in the Defamation Action with respect to my analysis concerning the defence of justification. There I held that there were grounds to believe that McFarlane was making accusations against the Catalyst Parties that were, in fact, false. Those findings apply with equal force here. Moreover, I reject McFarlane's submission that there are grounds to believe he made his accusations with the subjective belief in their truth. Given the evidence of malice, there area grounds to believe that McFarlane made these statements potentially knowing that they were false.

[328] With respect to the tort's second element, malice, I also rely upon the reasons in the Defamation Action where I found that there were grounds to believe that McFarlane was actuated by malice.

[329] With respect to this tort's special damage requirement, I find that there are grounds to believe the Catalyst Parties have a real prospect of showing that McFarlane's accusations resulted in them suffering harm. Once again, I rely upon my analysis in the Defamation Action, specifically referencing the Juneja and Sunshine Reports, while noting the tension that exists between those reports and Callidus's Q2 reporting, the Dalton Report, and the Sutin Affidavit.

[330] As a result of the above, I find that there are grounds to believe that the injurious falsehood claims have substantial merit against all of the noted defendants except Copeland.

(c) No Valid Defences (McFarlane, Anderson, Levitt, Baumann, Livesey, and the West Face Parties)

[331] Having made these findings, I must now consider whether the Catalyst Parties are able to demonstrate that the defences advanced by McFarlane, Anderson, Levitt, Baumann, the West Face Parties, and Livesey lack a real prospect of success. Having found that there are no grounds to believe that the injurious falsehood claim possesses substantial merit against Copeland, I do not propose to conduct the analysis with respect to him.

[332] Once again, it is important to focus on the various defences that have been advanced by McFarlane since, as joint tortfeasors, the other defendants' liability ultimately hinges on the liability of McFarlane who is alleged to the person who maliciously published the untrue statements.

[333] Although McFarlane's factum fails to lay out specific defences to the injurious falsehood claim, he notes that he is relying on the submissions contained in the defendants' joint memorandum of law, as well as the submissions contained in the companion facta submitted by the other defendants. Taken together, the joint memorandum of law and other defendants' facta assert the following defences to the Catalyst Parties' injurious falsehood claim:

- Defence of truth: the defendants assert that the impugned statements were factually accurate and therefore cannot support a claim in injurious falsehood.

- Defence of absence of malice: the defendants' assert that they did not act with malice.

- Defence of no special damage: the defendants' assert that the Catalyst Parties did not suffer special damage as a result of the accusations contained in the WSJ Article.

- Defence on intention: the defendants' assert that the impugned statements were not calculated to dissuade third parties from dealing with the Catalyst Parties.

- Defences to defamation: according to the defendants, their defences to the Catalyst Parties' defamation claim also apply to the Catalyst Parties' injurious falsehood claim.

[334] With respect, the "defence of truth", the "defence of absence of malice", and the "defence of no special damage" are not true defences as contemplated under s. 137.1(4)(a)(ii). Rather, in making these assertions, the Wolfpack Defendants appear to be challenging the Catalyst Parties' ability to demonstrate substantial merit as regards the elements of injurious falsehood. In other words, they appear to be arguing that there is not enough evidence in the record to support a "substantial merit" finding as regards the injurious falsehood claim. As noted above, however, I have already found that there are in fact grounds to believe that each of these elements weigh more in the Catalyst Parties' favour. Even if these "defences" were applicable at the s. 137.1(4)(a)(ii) stage, I am of the view that the Catalyst Parties have satisfied me that they lack a real prospect of success for the reasons noted above.

[335] This leaves only two further defences: the defence on intention and the defences to defamation. The former defence can easily be dispelled with. McFarlane appears to be submitting that one cannot be liable for injurious falsehood if their statements were not calculated to dissuade third parties from dealing with the Catalyst Parties. Indeed, the Wolfpack Defendants' joint memorandum of law cites *Lysko*, at para. 133 for this proposition. However, it is important to appreciate what para. 133 of *Lysko* actually says. It states the following:

> Brown [on Defamation] summarizes the elements of the action for injurious falsehood at 28.1(1) as follows:
>
> > Actions for injurious falsehood involve the publication of false statements, either orally or in writing, reflecting adversely on the plaintiff's business or property, or title to property, and so calculated as to induce persons not to deal with the plaintiff. There must be a showing that the published statements are untrue, that they were made maliciously, that is without just cause or excuse, and that the plaintiff suffered special damages.

[336] Significantly, at para. 134 the Court of Appeal continues:

> Unlike the claim for defamation, the plaintiff "must plead and prove that the words were false, that they were actuated by malice, and that the plaintiff suffered special damages" (Brown, supra, at 28.1(1)).

[337] Since there are thus only three elements to injurious falsehood, there is no need to show the statements were also calculated to induce persons not to deal with the plaintiff.

[338] This leaves only the submission that McFarlane is able to rely on the defences submitted in respect of defamation. In relation to the Wolfpack Action defamation claim, however, I found that the Catalyst Parties were able to show that there were grounds to believe that all of the defences advanced by the defendants, save Copeland, lacked a real prospect of success. As McFarlane is relying on those same defences here, it therefore follows that the Catalyst Parties have succeeded under s. 137.1(4)(a)(ii) in relation to their injurious falsehood claim.

[339] In the result, I find that the Catalyst Parties have succeeded in showing that McFarlane is unable to put forth a valid defence. Ultimately, this means that the Catalyst Parties' injurious

falsehood claim succeeds under s. 137.1(4)(a)(i) and (ii) as against McFarlane, as well as all those defendants who are alleged to be liable as joint tortfeasors in respect of McFarlane's tort. As noted, however, the Catalyst Parties have not succeeded with respect to Copeland.

(C) Predominant Purpose Conspiracy

Elements

[340] A**s** noted in *Dale v. The Toronto Real Estate Board*, 2012 ONSC 512, at para. 49, a plaintiff must satisfy the following elements to succeed in a predominant purpose conspiracy claim:

(a) the defendants acted in combination, that is, in concert by agreement or common design;

(b) the predominant purpose of the defendants was to intentionally harm the plaintiff; and

(c) the defendants' conduct caused the plaintiff harm.

(a) The Defendants Acted in Combination

[341] An actionable conspiracy requires an agreement between two or more persons: *D'Agnone v. D'Agnone*, 2017 ABCA 35, 48 Alta. L.R. (6th) 8, at para. 22. Although the agreement does not need to take the form of an enforceable contract, there must be evidence of some form of agreement between the defendants: *Guilleman v. ECL Carriers LP*, 2008 CanLII 2605 (Ont. S.C.). More than mere knowledge of the existence of a conspiracy is required in order to be found to be a co-conspirator: *D'Agnone*, at para. 22.

[342] The defendants must also take acts in furtherance of their agreement. In other words, they must act in concert: Stephen G.A. Pitel, *Fridman's The Law of Torts in Canada*, 4th ed. (Toronto: Carswell, 2020), at p. 901. In the context of predominant purpose conspiracy, those acts may be either lawful or unlawful: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 74.

(b) The Predominant Purpose of the Defendants was to Intentionally Harm the Plaintiff

[343] Predominant purpose conspiracy requires an actual intent to injure the plaintiff. In *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, at para. 39, Moldaver J.A. (as he was then) explained things this way:

> To make out a conspiracy to injure, the defendant's predominant purpose must be to inflict harm on the plaintiff. It is not enough if the harm is the collateral result of acts pursued predominantly out of self-interest. The focus is on the actual intent of the defendants and not on the consequences

> that the defendants realized or should have realized would follow.

[344] The fact that the predominant purpose of the defendant's must have been to cause the plaintiff harm means that liability will not be imposed in circumstances where the defendants acted out of their own self-interest: *Positive Seal Dampers Inc. v. M & I Heat Transfer Products Ltd.* (1991), 2 O.R. (3d) 225 (Gen. Div.), aff'd 1997 CanLII 1320 (Ont. C.A.).

(c) The Defendants' Conduct Caused the Plaintiff Harm

[345] In order for predominant purpose conspiracy to be actionable, the plaintiff must show that they suffered damage that was caused by the acts of the conspirators: *Berry v. Pulley*, 2015 ONCA 449, 335 O.A.C. 176, at para. 98. The dominant view is that proof of pecuniary loss is required, although some courts have held that actual pecuniary loss may not be required in all circumstances: see *Shaw v. Lewis*, [1948] 2 D.L.R. 189 (B.C. C.A.).

[346] Once damage is established, the court has the authority to award damages at large. If appropriate, punitive damages may also be awarded: *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 59 D.L.R. (4th) 533 (Ont. C.A.); *Watson v Bank of America Corporation*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1.

Position of the Parties

The Catalyst Parties

[347] The Catalyst Parties submit that the elements of predominant purpose conspiracy are met. They remind me that agreements to conspire are rarely confessed to by the conspirators and that, consequently, I may infer a conspiracy from circumstantial evidence. They also emphasize that conspirators need not all join at the same time, nor do they all need to have the exact same aim in mind. In the present case, they argue that the defendants agreed to act in furtherance of a common design to publicize fraud accusations in the media to the detriment of Catalyst and Callidus.

The Wolfpack Defendants

[348] The Wolfpack Defendants, by contrast, argue that there is no evidence suggesting that any of them were members to, or participated in, a conspiratorial agreement. Further, even assuming there was an agreement between them, they submit that its predominant purpose was not to harm the Catalyst Parties but rather self interest. Anderson, for instance, argues that his conduct was undertaken solely out of financial self-interest. Likewise, Levitt submits that his purpose in taking the steps that he did was to defend himself against Callidus' claims against him, and to bring conduct, which he believed to be illegal, to the attention of authorities. Boland, Copeland, and the other guarantors similarly submit that none of their conduct was intended to harm the Catalyst Parties. In addition, the Wolfpack Defendants submit that the Catalyst Parties did not suffer any damage due to the alleged conspiracy. Instead, they place emphasis on the Dalton Report and Sutin Affidavit and argue that any harm the Catalyst Parties suffered stems from their own flawed business model.

Discussion

[349] I find that the Catalyst Parties have met their burden of proving that this cause of action has a real prospect of success as against all the Wolfpack Defendants except Copeland.

[350] Beginning with the first element – that of agreement or common design – as noted above in paras. 255-260, there is evidence revealing extensive communications between Anderson, Levitt, Baumann, McFarlane, the West Face Parties, and Livesey. These communications suggest that these parties may have been working on a coordinated effort to file the Whistleblower Complaints and contact the media once the Whistleblower Complaints were filed.

[351] Additionally, there is evidence of in-person meetings involving many of the Wolfpack Defendants. For example, on December 15, 2016 Anderson travelled to Toronto to meet with McFarlane and Levitt (among others). Although Baumann was not present at this meeting, Anderson's phone records reveal that Anderson contacted him shortly afterwards. These same phone records reveal that Anderson also contacted Copeland shortly after this meeting.

[352] Similarly, on March 1 and 2, 2017 Anderson visited Toronto once again. On March 1, he met with Langstaff at the Sheraton Hotel. Later that morning, phone records reveal that Boland called both Anderson and Langstaff. On this same day, West Face's legal counsel contacted the OSC to arrange a phone call with Panet and the OSC. Two days later, following Anderson's meetings in Toronto, Boland's outgoing phone records show that he spoke to Anderson twice. These same records reveal that Boland also spoke with Langstaff following his calls with Anderson.

[353] Thereafter, some Wolfpack Defendants contacted Copeland and began providing him with information about the Catalyst Parties. In the weeks that followed, Anderson, Boland, Levitt, McFarlane and Baumann began providing Copeland and McNish with additional information. Boland denies that he was a source of information for the WSJ Article but text messages between Boland and Anderson suggest that he may have been providing information to Anderson who, in turn, provided this information to Copeland and McNish. In other words, without going into a deep dive and determinatively resolving this issue, Boland may have been using Anderson as an intermediary to provide Copeland with information.

[354] In summary, then, while there is no conclusive evidence of an agreement, there is still evidence suggesting that the Wolfpack Defendants communicated with each other in the lead up to both the Whistleblower Complaints and the publication of the WSJ Article. There are therefore grounds to believe that this element has a real prospect of being satisfied by the Catalyst Parties at trial.

[355] There are also grounds to believe that the Wolfpack Defendants, save Copeland, acted with the predominant purpose of harming the Catalyst Parties. As noted on a number of occasions, there is evidence suggesting that there was a strong dislike between these defendants. The West Face Parties and Catalyst have been embroiled in significant and acrimonious litigation. Catalyst was pursuing Baumann, McFarlane, and Levitt on their guarantees and Anderson, in pursuing

financial self interest, filed his whistleblower complaints making significant allegations against the Catalyst Parties.

[356] Livesey was also involved in a number of the communications with the aforementioned defendants.

[357] As concerns Copeland, however, I am of the view that the Catalyst Parties predominant purpose conspiracy claim possesses insufficient merit. While there are text messages between Copeland and Anderson which describe Glassman in less than flattering terms, I do not believe that this evidence results in the Catalyst Parties' predominant purpose conspiracy claim possessing a real prospect of success as against Copeland. Rather, as I have previously discussed, it suggests that Copeland was engaged in childish banter with Anderson, a man with whom he had worked with on a number of stories previously. In addition, and as I noted in the Defamation Action, if Copeland was out to get the Catalyst Parties, it seems as if Anderson would have reached out to him first as opposed to other publishers. Finally, it bears repeating that Copeland and McNish provided the Catalyst Parties with an opportunity to comment on the allegations contained in the WSJ Article before it was published – it seems unlikely that Copeland would have done this had he been involved in a conspiracy.

[358] Turning to the tort's damage element, for the reasons outlined in both the Defamation Action and the Wolfpack Action's defamation and injurious falsehood claims, I find that the Catalyst Parties have a real prospect of establishing this element at trial. Again, I rely on the Juneja and Sunshine Reports to reach this conclusion.

[359] Having found that the Catalyst Parties have met their burden in proving that this cause of action has a real prospect of success as against all the defendants save Copeland, I must now consider whether the Catalyst Parties have established that there are grounds to believe that the Wolfpack Defendants have no valid defences.

[360] In this regard, the Wolfpack Defendants generally argue that they were not parties to any agreement, did not undertake in a concerted action of any type, and did not act with a predominant purpose of harming the Catalyst Parties.

[361] For example, the West Face Parties submit, amongst other things, that there is no evidence that they conspired with any of the whistleblowers. Levitt and Baumann, amongst other things, submit that there was no reference to either of them or their companies in the WSJ Article. Livesey submits, amongst other things, that there is no evidence that he collaborated with Anderson, was a source for the WSJ Article, shorted the Callidus shares, or funded any litigation of the guarantors or worked for West Face at any time. The Anderson Defendants, amongst other things, submit there is no evidence of wrongdoing on the part of Anderson as a whistleblower. Copeland, once again, submits that, amongst other things, he was not aware of Anderson short selling Callidus shares and that there cannot be a conspiracy since at the time he wrote the WSJ Article, he had not spoken to West Face.

[362] With respect, however, these are not true "defences" as contemplated by s.137.1(4)(a)(ii). Rather, in making these assertions, the Wolfpack Defendants appear to be challenging the Catalyst

Parties' ability to demonstrate substantial merit as regards the elements of predominant purpose conspiracy. As I have noted above, however, I have already found that there are in fact grounds to believe that each of these elements weigh more in the Catalyst Parties' favour (save as against Copeland). As a result, I find that the Catalyst Parties have established that there are grounds to believe that the Wolfpack Defendants have no valid defences in the proceeding with respect to their predominant purpose conspiracy claim.

[363] In summary, then, I find that the Catalyst Parties succeed under s. 137.1(4)(a)(i) and (ii) in relation to their predominant purpose conspiracy claim as against all the Wolfpack Defendants save Copeland.

(D) Unlawful Means Conspiracy

Elements

[364] The elements of unlawful means conspiracy were outlined in *Dale*, at para. 49 as follows:

> (a) the defendants acted in combination, that is, in concert, by agreement or common design;
>
> (b) the defendants committed some unlawful act such as a crime, a tort, or breached some statute;
>
> (c) the defendants' conduct was directed towards the plaintiff;
>
> (d) the defendants knew or ought to have known that injury to the plaintiff was likely to occur from their unlawful act; and
>
> (e) the defendants' unlawful conduct in furtherance of their conspiracy caused harm to the plaintiff.

(a) The Defendants Acted in Combination

[365] Like predominant purpose conspiracy, an unlawful means conspiracy cannot arise unless there is an agreement between two or more persons. As noted above, while the agreement does not need to take the form of an enforceable contract, there must be evidence of some form of agreement between the defendants.

(b) The Defendants Committed Unlawful Acts

[366] To be liable for unlawful means conspiracy, the defendants must have engaged in unlawful acts. In contrast to the unlawful means tort, which has a relatively narrow conception of "unlawful means" (discussed below), unlawful conduct in the context of an unlawful means conspiracy includes crimes, torts, a breach of contract, or a breach of statute: *Dale*, at para. 49; *Pioneer Corp. v. Godfrey*, 2019 SCC 42, 437 D.L.R. (4th) 383, at para. 83. Breaches of obligations directors owe as fiduciaries under both common law and under statutes can also suffice: *Levy-Russell Ltd. v.*

Tecmotiv Inc. (1994), 13 B.L.R. (2d) 1 (Ont. Gen. Div.). Breaches of Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, however, may not be sufficient: *Edgeworth v. Shapira et al.*, 2019 ONSC 5792, at para. 43, *per* Justice Sossin (as he was then).

(c) The Defendants' Conduct was Directed Towards the Plaintiff

[367] Unlike predominant purpose conspiracy, unlawful means conspiracy does not require an intention to injure the plaintiff. Instead, the conspirators must possess both an intention to agree (discussed above) and an intention to direct unlawful acts towards the plaintiff: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452. In *Canada Cement LaFarge*, for instance, Justice Estey dismissed the plaintiff's unlawful means conspiracy action on the grounds that the defendants' conduct was directed at the public at large, rather than the plaintiff specifically.

(d) The Defendants Knew or Ought to Have Known that Injury to the Plaintiff was Likely to Occur from their Unlawful Act

[368] In addition to directing their unlawful conduct towards the plaintiff, the defendants must have known, or should have known, that injury to the plaintiff was likely. In other words, in contrast to predominant purpose conspiracy, unlawful means conspiracy "merely requires a constructive intent to injure which need not be the predominant purpose of the conspiracy.": Burns & Blom, at ¶6.50.

[369] In cases involving actual knowledge, courts must determine what suffices to be "likely": Pitel, at p. 903. In *Golden Capital Securities Ltd. v. Holmes*, 2004 BCCA 565, 33 B.C.L.R. (4th) 1, at para. 55, the Court of Appeal for British Columbia held that "likely" in this context means more than a 50% chance of injury.

[370] As noted, this element will also be met where the defendants ought to have known that injury to the plaintiff was likely. In these kinds of cases, courts must conduct an objective, rather than subjective, analysis: Pitel, at p. 903.

(e) The Defendants' Unlawful Conduct in Furtherance of their Conspiracy Caused Harm to the Plaintiff

[371] Like predominant purpose conspiracy, unlawful means conspiracy requires proof of damage. Furthermore, the plaintiff must show that the defendants' unlawful conduct was responsible for the damage it suffered. As is the case with predominant purpose conspiracy, while the dominant view is that proof of pecuniary loss is required for unlawful means conspiracy, some courts have held that actual pecuniary loss may not always be required: Burns & Blom, at ¶6.62.

Position of the Parties

The Catalyst Parties

[372] The Catalyst Parties submit that the elements of unlawful means conspiracy are met. Beginning with the first element, for the same reasons referenced in relation to their predominant purpose conspiracy claim, the Catalyst Parties submit that there is a real prospect that they will be able to demonstrate an agreement between the Wolfpack Defendants at trial.

[373] Turning to the next element, the Catalyst Parties submit that to the extent that the Wolfpack Defendants are liable for defamation, this constitutes unlawful conduct for the purposes of unlawful means conspiracy. In their factum, they also submit that the Wolfpack Defendants violated ss. 126.1 and 126.2 of the *Securities Act*, R.S.O. 1990, c. S.5 and that this also supplies the necessary unlawful conduct. For convenience, those provisions are reproduced here:

> **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**
>
> (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.

[374] As can be seen, s. 126.1(1) prohibits a person from directly or indirectly engaging or participating in an act or course of conduct that the person knows, or reasonably ought to know,

results in, or contributes to, an artificial security price. Subsection 126.1(2) goes further and prohibits a person from directly or indirectly attempting to engage or participate in any act or course of conduct that a person knows, or reasonably ought to know, results in, or contributes to, an artificial price for a security. Finally, s. 126.2(1) provides that a person shall not make a statement the person knows, or reasonably ought to know, is misleading or, alternatively, does not state a fact that is necessary to make the statement not misleading. Pursuant to s. 126.2(1)(b), the person making the statement must also know, or reasonably ought to know, that their (misleading) statement would reasonably be expected to have a significant effect on the market price of the security at issue.

[375] According to the Catalyst Parties, the Wolfpack Defendants' direct and indirect actions of cooperating, aiding, supporting, and participating in the creation and publication of the fraud allegations caused Callidus' share price to decline. They submit that there are thus grounds to believe that the Wolfpack Defendants' actions violated ss. 126.1 and 126.2 of the *Securities Act*. Further, to the extent that Anderson contributed to the decline of Callidus' stock by (1) encouraging others to short it and (2) shorting it himself, they argue that he also violated s. 126.1.

[376] In addition to these *Securities Act* violations, the Catalyst Parties plead that the Wolfpack Defendants committed both injurious falsehood and unjust enrichment and that this unlawful conduct also satisfies the "unlawful act" requirement.

[377] As regards whether the Wolfpack Defendants' conduct was directed towards them in circumstances in which they knew, or ought to have known, that injury to the Catalyst Parties was likely to result, the Catalyst Parties submit that these elements are also met. Specifically, the Catalyst Parties emphasize that allegations of unlawful or criminal conduct are extremely damaging to one's reputation, particularly in the lending context. By alleging fraud on behalf of the Catalyst Parties in media platforms such as the WSJ, then, the Catalyst Parties submit that the Wolfpack Defendants clearly knew, or should have known, that harm would result. Indeed, they point to a text message from Anderson in which he expresses a lack of surprise at the decline in value of Callidus' shares soon after the WSJ Article was released as evidence that he knew that his conduct would result in harm.

[378] Finally, for the same reasons referenced in relation to predominant purpose conspiracy, the Catalyst Parties submit that the tort's damage element is met. They point to the expert evidence submitted in the form of the Sunshine and Juneja Reports, suggesting that the conspirator's conduct caused them to suffer damage. They also point to Riley's affidavit, which states that there was a significant decline in loan origination following the publication of the WSJ Article.

The Wolfpack Defendants

[379] As with the predominant purpose conspiracy claim, the Wolfpack Defendants submit that there is no evidence that they were members to a conspiratorial agreement.

[380] For example, Boland submits that he communicated with the guarantors solely for the purposes of trading notes in respect of the various allegations made by the Catalyst Parties. He

also argues that his communications with McNish and Livesey were mere off the record discussions with credible investigative reporters.

[381] Baumann, Levitt, and McFarlane all advance similar claims, arguing that discussions between them as to their experiences with the Catalyst Parties does not rise to the level of an agreement.

[382] Livesey, in turn, relies on his affidavit, in which he swears that he never entered into an agreement with any of the defendants.

[383] Finally, Copeland and Anderson both submit that they never entered into any agreement with the other defendants. While Anderson admits to communicating with many of the other defendants, he argues that these communications do not disclose the existence of an agreement, but rather the research process employed by a fraud researcher.

[384] In addition, the Wolfpack Defendants argue that the Catalyst Parties have failed to demonstrate that they deployed "unlawful means". As noted above, in their amended statement of claim, the Catalyst Parties rely on defamation, ss. 126.1 and 126.2 *Securities Act* violations, injurious falsehood, and unjust enrichment as supplying the unlawful means required for their unlawful means conspiracy allegation. The Wolfpack Defendants submit that these alleged unlawful acts are not supported by the evidence and, consequently, cannot be relied upon to ground an unlawful means conspiracy. In other words, while the Wolfpack Defendants do not refute that these unlawful acts could constitute valid unlawful means in an appropriate case, they all advance submissions to the effect that there is no basis in fact to find that any of them engaged in this unlawful conduct in the context of this proceeding.

[385] As with the predominant purpose conspiracy claim, the Wolfpack Defendants also submit that, in any event, there is no evidence that their alleged conspiracy resulted in damage to the Catalyst Parties. Rather, as noted above, they argue that any harm the Catalyst Parties suffered stems from their own flawed business model.

Discussion

[386] I find that the Catalyst Parties have met their burden of proving that there are grounds to believe that this cause of action has a real prospect of success. For the reasons referenced in relation to the predominant purpose conspiracy claim, I find that there is a basis in the record and law to conclude that the Catalyst Parties have a real prospect of success of establishing an agreement between the Wolfpack Defendants at trial. For the sake of brevity, I will not repeat that analysis here (it is outlined at paras. 255-260). Suffice it to say that there is evidence detailing communications between the Wolfpack Defendants around the time that the Whistleblower Complaints were made, as well as the date the WSJ Article was published. Given that details about conspiracies are generally not available until the discovery stage (see *North York Branson Hospital v. Praxair Canada Ltd.*, 1998 CanLII 14799 (Ont. Gen. Div.), at para. 22), I also find that the Supreme Court of Canada's direction in *Pointes*, at para. 51, not to place too high of a burden on the "substantial merit" threshold is particularly apt in the context of a conspiracy claim.

[387] As to the "unlawful means" element, I find that the Catalyst Parties have also met their burden of proving that there are grounds to believe that it tends to weigh more in their favour in relation to all of the Wolfpack Defendants except Copeland. As noted, the Catalyst Parties rely on defamation, injurious falsehood, ss. 126.1 and 126.2 *Securities Act* violations, and unjust enrichment as supplying the unlawful means required for this conspiracy claim.

[388] Beginning with defamation, I have already found that the Catalyst Parties have established that there are grounds to believe that their defamation claim possesses substantial merit as against all the Wolfpack Defendants save Copeland. Because the Catalyst Parties are relying on this same alleged defamation claim as supplying the "unlawful means" required for their unlawful means conspiracy claim, it follows that there are grounds to believe there is also a likelihood that they will succeed in establishing this element at trial as against all the Wolfpack Defendants except Copeland. In other words, success in establishing substantial merit in regard to the defamation claim automatically results in success in establishing substantial merit as regards the "unlawful means" element of the Catalyst Parties' unlawful means conspiracy claim. The two claims are inseparably linked.

[389] The same can be said for injurious falsehood. That is, because I have found that the Catalyst Parties' injurious falsehood claim has a real prospect of success as against all the Wolfpack Defendants save Copeland, I find that to the extent that their unlawful means conspiracy claim depends upon injurious falsehood as supplying the requisite "unlawful means", it also possesses a real prospect of success against all the Wolfpack Defendants except Copeland.

[390] To the degree that the Catalyst Parties' unlawful means conspiracy claim is based on the Wolfpack Defendants' violations of ss. 126.1 and 126.2 of the *Securities Act*, I find that there are also grounds to believe that it possesses substantial merit against all the Wolfpack Defendants save Copeland.

[391] It is settled law that plaintiffs can rely on *Securities Act* violations specifically, and statutory breaches more generally, as fulfilling unlawful means conspiracy's "unlawful means" element: see *Midland Resources Holding Ltd. v. Shtaif*, 2014 ONSC 997, at para. 937. Equally important, there are also grounds to believe that the Catalyst Parties have a real prospect of succeeding in showing that the Wolfpack Defendants, save Copeland, violated these respective *Securities Act* provisions. Specifically, I find that (1) the evidence revealing that defendants cooperated in the making of McFarlane's potentially false and defamatory allegations against the Catalyst Parties and (2) the evidence demonstrating that these allegations arguably caused Callidus' share price to decline, results in there being grounds to believe that s. 126.1(1) is satisfied. Further, I find that Riley's evidence suggests that McFarlane's allegations – to which all the defendants contributed – may have (1) been misleading or untrue and (2) would reasonably be expected to have a significant effect on the market price of Callidus securities. This means that there is a real prospect that the Catalyst Parties will be able to succeed in showing that the Wolfpack Defendants also violated s. 126.2(1).

[392] As regards Copeland, however, I am not satisfied that there are grounds to believe that an unlawful means conspiracy claim which relies on *Securities Act* violations possesses substantial

merit. Unlike the other Wolfpack Defendants, who either made a potentially defamatory statement concerning the Catalyst Parties (McFarlane) or contributed to that statement (Anderson, Levitt, Baumann, the West Face Parties, and Livesey), Copeland merely published an article that truthfully reported that Whistleblower Complaints had been made against the Catalyst Parties. In my view, this kind of conduct is not captured under the *Securities Act* provisions on which the Catalyst Parties rely.

[393] I briefly want to deal with the Catalyst Parties' reliance on unjust enrichment as supplying the necessary "unlawful means." Simply put, there is no evidence to suggest that the Catalyst Parties' alleged losses correspond with any alleged gain by the Wolfpack Defendants. This is fatal to an unjust enrichment claim: *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 43.

[394] Turning now to the only remaining unlawful means conspiracy element in dispute between the parties – namely, the need to show damage – for the reasons articulated in respect of the predominant purpose conspiracy claim, I also find that there is a real prospect of success that the Catalyst Parties will succeed in satisfying it at trial.

[395] Having found that the Catalyst Parties have satisfied their burden in relation to the "substantial merit" component of the analysis, I must now consider whether they have established that there are grounds to believe that the Wolfpack Defendants have no valid defences in relation to this claim.

[396] For the most part, similar to their defence of the predominant purpose conspiracy claim, rather than advancing true "defences", the Wolfpack Defendants simply state that there is no evidence that the elements of unlawful means conspiracy are met. For the above reasons, however, I find that this is not the case. Rather, taking all of the evidence into account, and following the guidance of various authorities limiting the depth of my dive at this stage, I find that the Catalyst Parties have succeeded under s. 137.1(4)(a)(i).

[397] One party, however, namely, Anderson, has advanced a true "defence" in relation to the allegation that he is liable under ss. 126.1 and 126.2 of the *Securities Act* (and that this results in him being liable under the unlawful means conspiracy tort to the extent that it depends on this unlawful act). Specifically, Anderson asserts that he cannot be liable under these statutory provisions because the alleged *Securities Act* violations relate to communications made by him while he was in the United States and that, importantly, the *Securities Act* is not applicable to conduct that occurs outside the regulatory jurisdiction of the Ontario government.

[398] I disagree. Contrary to Anderson's assertion, the *Securities Act* has extraterritorial application where the conduct at issue has a "real and substantial connection" to Ontario: *Da Silva v. Ontario Securities Commission*, 2017 ONSC 4576, at para. 56. Anderson's conduct has a real and substantial connection to Ontario. The evidence reveals that Anderson travelled to Toronto in December 2016 to meet with several of the other Wolfpack Defendants. He was also in Toronto in March 2017. He also supplied his whistleblower complaints to the OSC.

[399] In the result, then, I find that the Catalyst Parties' succeed under s. 137.1(4)(a)(i) and (ii) in relation to their unlawful means conspiracy claim as against all the Wolfpack Defendants save Copeland.

(E) The Unlawful Means Tort[14]

Elements

[400] The elements of the unlawful means tort were summarized in *1658410 Ontario Inc. (Advance Repairs & Maintenance) v. Great Gulf (Dundas) Ltd.*, 2018 ONSC 4537, at para. 29, aff'd 2020 ONSC 428 (Div. Ct.):

(a) the defendant must have intended to injure the plaintiff's economic relations;

(b) the interference must have been by illegal or unlawful means; and

(c) the plaintiff must have suffered economic harm or loss as a result.

(a) The Defendant Must Have Intended to Injure the Plaintiff

[401] In *A.I. Enterprises Inc. v. Bram Enterprises Inc.*, 2014 SCC 12, [2014] 1 S.C.R. 177, Justice Cromwell held, at para. 96, that the unlawful means tort requires "that the defendant intend to cause loss to the plaintiff, either as an end in itself or as a means of, for example, enriching himself. If the loss suffered by the plaintiff is merely a foreseeable consequence of the defendant's actions, that is not enough." As Professor Neyers notes, in *Bram* Justice Cromwell also rejected the notion that "knowledge that the course of conduct will have the inevitable consequence of causing the claimant economic harm" falls within the scope of the tort's intention element since only the narrower understanding of means and ends represents "the core intention requirement for the unlawful means tort.": Jason W. Neyers, *Fridman's The Law of Torts in Canada*, 4th ed. (Toronto: Carswell, 2020), at p. 1003, citing *Bram*, at para. 95.

[402] In light of *Bram*, then, a plaintiff must show that the defendant intended to cause it harm either as an end in itself or as a means to some other end. Because the tort's intention element will be made out in circumstances where a defendant causes harm to a plaintiff as a "means to an end", courts must be careful not to absolve those who cause harm to the plaintiff merely because they were pursuing some other goal – even if laudable: Neyers, at p. 1006.

---

[14] As Brown and Rowe J.J. note in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, 443 D.L.R. (4th) 183, at para. 220, the jurisprudence considering the unlawful means tort has described that tort by many different names, including "unlawful interference with economic relations", "interference with a trade or business by unlawful means", "intentional interference with economic relations", and "causing loss by unlawful means" . For ease of reference, I will refer to it as the "unlawful means tort" in these Reasons.

(b) The Interference Must Have Been by Unlawful Means

[403] In *Bram*, Justice Cromwell adopted what he described as the "liability stretching" understanding of the unlawful means tort. Under this view, the unlawful means tort serves to extend:

> [A]n existing right to sue from the immediate victim of the unlawful act [i.e., a third-party] to another party [i.e., the plaintiff] whom the defendant intended to target with the unlawful conduct. … The focus of the tort on this understanding is not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm: *Bram*, at para. 37.

[404] Two important points can be gleaned from this passage. First, the unlawful means must be directed at someone other than the plaintiff: see *Legate*, at para. 82. Second, the unlawful act committed against that other party must give that other party a right to sue (i.e., it must be civilly actionable by some third-party). Importantly, however, Justice Cromwell added that the "unlawful act" requirement will also be made out in circumstances where the only reason that the third party does not possess a right to sue is because they have not suffered damage: *Bram*, at para. 76. Thus, in order to constitute valid "unlawful means" the conduct must give rise to a civil cause of action by a third party or would do so if that third party had suffered loss as a result of that conduct: *Bram*, at para. 76.

(c) The Plaintiff Must Have Suffered Economic Harm

[405] In order to succeed in an unlawful means tort action, the plaintiff must prove that they suffered harm or loss as a result of the defendant's unlawful conduct: *Murphy v. Sutton Group*, 2019 ONSC 2078, at para. 94. Upon establishing loss, plaintiffs may be entitled to an award of general damages or damages at large: *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175, at para. 82. Punitive damages are also available, provided that a plaintiff can meet the test outlined in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595.

Defence of Justification

[406] Pre-*Bram* jurisprudence held that defendants may be able to rely on the defence of justification to absolve themselves of liability under the unlawful means tort. However, now that *Bram* has limited the tort's unlawful means element to civilly actionable wrongs against third-parties, "there seems to be little room for an independent defence of justification.": Neyers, at p. 1012. This is because it is difficult to accept that even the noblest of goals can be "justified" when unlawful means are deployed: *Daishowa Inc. v. Friends of the Lubicon* (1996), 27 O.R. (3d) 215 (Div. Ct.), at 236. Post-*Bram*, then, litigants should instead consider whether there is a defence to the underlying unlawful act that is being stretched for the benefit of the plaintiff: Neyers, at p. 1013.

Position of the Parties

The Catalyst Parties

[407] The Catalyst Parties argue that the WSJ Article gives rise to actionable claims in defamation or deceit by various third parties. In particular, the Catalyst Parties allege that the WSJ Article results in each of the following third parties possessing causes of action in defamation or deceit: (1) the independent directors of Callidus and Catalyst who form the audit committee, (2) service providers such as appraisers and valuators who were engaged by the Catalyst Parties and who allegedly engaged in fraudulent conduct for the benefit of Callidus and Catalyst, (3) investors in funds managed by Catalyst that held shares in Callidus that allegedly depreciated in value as a result of the defendants' conduct, and (4) investors that sold shares in Callidus as a result of the WSJ Article. These "unlawful acts" against these third parties are, in turn, relied upon by the Catalyst Parties to ground an unlawful means tort claim.

The Wolfpack Defendants

[408] The Wolfpack Defendants submit that the Catalyst Parties have failed to demonstrate substantial merit in relation to any of the elements of their unlawful means tort claim. To the extent that the Catalyst Parties are relying on deceit to ground their claim, the Wolfpack Defendants submit that they have failed to establish any of the elements of this underlying tort. Further, to the degree that the Catalyst Parties are relying on defamation as supplying the "unlawful means", they submit that they have failed to show how any of its elements are satisfied.

Discussion

[409] Beginning with the notion that defamation supplies the "unlawful means" required under this tort, I find that the Catalyst Parties have met their burden of proving that this claim has a real prospect of success that tends to weigh in their favour against all the Wolfpack Defendants except Copeland. In particular, I find that McFarlane's statements might result in (1) the independent directors of Callidus and Catalyst who form the audit committee and (2) service providers such as appraisers and valuators who were engaged by the Catalyst Parties and who allegedly engaged in fraudulent conduct for the benefit of Callidus and Catalyst possessing defamation claims against him. This is because McFarlane's statements essentially imply that these parties were also engaged in improper conduct: see *Bernstein v. Poon*, 2015 ONSC 155, at paras. 86-87.

[410] Further, to the extent that some of the Wolfpack Defendants are liable for McFarlane's defamatory statements as joint tortfeasors (discussed at paras. 255-260), there is also a real prospect that the Catalyst Parties will be able to rely on their unlawful assistance as grounding an unlawful means tort claim against them.

[411] Because Copeland was merely reporting on allegations made by others, however, I find that the Catalyst Parties cannot rely on defamation to ground an unlawful means tort claim against him which possesses substantial merit. Again, merely reporting that inquiries were on foot is not, as a matter of law, capable of being defamatory.

[412] Continuing with the "unlawful means" element, to the extent that the Catalyst Parties are relying on deceit as supplying the requisite "unlawful means", I find that the claim lacks substantial merit as against all of the Wolfpack Defendants.

[413] As I read the Catalyst Parties' argument, they appear to be suggesting that the WSJ Article constitutes a deceitful statement that resulted in various third parties (see para. 407) suffering a loss. In order to advance a successful deceit claim, however, a plaintiff must show that the defendant made a deceitful statement with the intent that the recipient rely and act upon it: *1567440 Ontario Inc. v. 2468761 Ontario Inc.*, 2018 ONSC 4625, at para. 32. In the present case, there is no evidence suggesting that the WSJ Article was intended to be relied upon by any of the above referenced third parties. There are thus no grounds for believing that the Catalyst Parties unlawful means tort claim possesses substantial merit to the extent that it relies on deceit as supplying the necessary "unlawful means."

[414] As to the unlawful means tort's intention element, I find that there are grounds to believe that the Catalyst Parties have a real prospect of establishing it against all the Wolfpack Defendants, save Copeland. Indeed, in my predominant purpose conspiracy analysis, I already held that there is evidence suggesting that McFarlane, Anderson, Baumann, Levitt, Livesey, and the West Face Parties acted with the predominant purpose of harming the Catalyst Parties (see paras. 355-356). As the unlawful means tort's intention element can be satisfied on this basis (see *Bram*, at para. 95), I find that the substantial merit threshold concerning this element is satisfied in relation to these defendants.

[415] As concerns Copeland, however, the harm to the Catalyst Parties was merely a foreseeable consequence of his alleged defamatory and deceitful conduct towards the above referenced third parties. In other words, I do not think that there is a real prospect that the Catalyst Parties will be able to show that Copeland intended to cause harm either as an end in itself or as a means to some other end.

[416] Beginning with the former variation of intention, I rely on my predominant purpose conspiracy analysis where I already found that Copeland did not act with the end aim of harming the Catalyst Parties.

[417] Turning to the latter variation of intention, as Lord Hoffmann explained in *OBG Ltd. v. Allan*, [2007] UKHL 21, at para. 167, the question here is whether "loss to the claimant is the obverse side of the coin from gain to the defendant". That is to say, the defendant's end aim and the claimant's loss must be, to the defendant's knowledge, inseparably linked: *OBG*, at para. 167. That is simply not the case here. While Copeland may have known that the WSJ Article was likely to cause the Catalyst Parties harm, inflicting harm upon the Catalyst Parties was not "inseparably linked" to some broader end aim that he possessed. Assuming, for instance, that Copeland's end aim was to publish a widely-read article shining light on the Catalyst Parties' business practices (which the evidence suggests to be the case), it is difficult to see how harm to the Catalyst Parties was the "obverse side" of that ultimate goal. Harm to the Catalyst Parties may have been a likely – or even inevitable – consequence of this end aim, but it was not "a necessary means of achieving [that] end": *Bram*, at para. 95.

[418] Turning to the unlawful means tort's damage requirement, for the same reasons referenced in relation to my both of my conspiracy analyses, I find that there is also a real prospect of success that the Catalyst Parties will be able to satisfy this element at trial.

[419] Having found that the Catalyst Parties have satisfied their burden in relation to the substantial merit component of the analysis against all the Wolfpack Defendants save Copeland (to the extent that they rely on defamation as supplying the necessary "unlawful means"), I must now consider whether they have also established that there are grounds to believe that the Wolfpack Defendants have no valid defences in relation to this claim.

[420] Again, as in relation to both of the conspiracy claims, the Wolfpack Defendants do not advance true defences but, instead, argue that there is no basis for concluding that the elements of the unlawful means tort are satisfied on the facts of this case. For example, in their joint memorandum of law, the Wolfpack Defendants reference the following "defences":

- Defences of Lack of Intention and Absence of Any Act Directed at a Third Party.
- Defence of Lack of Harm.
- Defence of No Actionable "Unlawful Means".

[421] None of these are true defences. Rather, what the Wolfpack Defendants are arguing here is that the record does not permit me to find that there are grounds to believe that the unlawful means tort's elements are satisfied. For the above reasons, however, I have found that there is evidence which weighs in the Catalyst Parties' favour as regards each element of the tort (at least to the degree that it is based on defamation supplying the necessary unlawful means). Even if I were to consider these alleged "defences" at the s. 137.1(4)(a)(ii) stage of the analysis, then, I would have found for the Catalyst Parties.

The Public Interest Hurdle

[422] Once again, this analysis has been described in *Pointes* as the "crux" of the overall s. 137.1 analysis: at paras. 61-62.

[423] As noted earlier, I must also have regard to the general guidance set out in *Pointes* and *Bent*. Consequently, I will need to undertake the three-step analysis outlined by the Supreme Court of Canada in *Bent* at this stage in the analysis. Ultimately, the Catalyst Parties must establish on a balance of probabilities that the harm likely to be or which has been suffered as a result of the Wolfpack Defendants' expression is sufficiently serious that the public interest in permitting the Wolfpack Action to continue outweighs the public interest in protecting the impugned expression.

The Harm Analysis

[424] The Catalyst Parties allege that they have suffered harm as a result of the WSJ Article and Whistleblower Complaints. As a result, the harm analysis for the Wolfpack Action is identical to the analysis set out in the Defamation Action above.

[425] For my reasons in the Defamation Action, then, I am satisfied that the Catalyst Parties have met this element of the test.

The Public Interest in Protecting the Impugned Expression

[426] In my view, as noted in my analysis in the Defamation Action, the Whistleblower Complaints fall in the mid to high-end of the protection-deserving spectrum and the WSJ Article falls at the high end of the spectrum. Additionally, I wish to specifically address four issues.

[427] First, it bears repeating that commercial speech, particularly commercial speech discussing matters relevant to capital market participants, has been repeatedly protected by the courts under s. 137.1. Moreover, prior to the WSJ Article publication there had been an ongoing, robust public debate between the Catalyst Parties and the West Face Parties with neither side, particularly the Catalyst Parties, pulling any punches. A number of articles discussing this dispute were printed by mainstream media outlets, including *The Globe and Mail*, *Financial Post*, *National Post* and, of course, the WSJ, to name but a few. This underscores the fact that the Whistleblower Complaints lie within the mid to higher end of the spectrum.

[428] Second, as noted, it is important to reiterate one of the Wolfpack Defendants, Copeland, reached out to the Catalyst Parties for comment before publishing the WSJ Article – one of the expressions giving rise to the Wolfpack Action. I say this because, in *Bent*, at para. 164, the Supreme Court of Canada criticized the defendant for not reaching out to the plaintiff in a defamation case and held that this rendered the expression at issue in that matter less worthy of protection. Therefore, if a defendant's failure to reach out to a plaintiff before making the expression in question can render it less worthy of protection, it seems to me that defendants who actually do provide plaintiffs with an opportunity to comment on a story before publication ought to have their expression afforded more protection. Indeed, in this case, Copeland went one step further yet and did actually publish the Catalyst Parties' response to the WSJ Article in the Print Article once they were finally willing to provide a comment on his story.

[429] Third, while I have found that the Catalyst Parties have discharged their onus under s. 137.1(4)(a)(i) and (ii) in relation to their various causes of action against most of the Wolfpack Defendants (Copeland being the exception), I would not go so far as to suggest that, at this stage of the proceedings at least, it is fair to conclude that the Wolfpack Defendants' statements contained deliberate falsehoods or amounted to gratuitous personal attacks: see *Pointes*, at para. 75. Beginning with the latter, in my view, the term "gratuitous personal attack" implies that a statement came out of nowhere or was uncalled for in all the circumstances. In light of the contested history between the Catalyst Parties and Wolfpack Defendants, however, which has seen both sides level accusations against one another, I cannot say that the expressions at issue here rise to the standard of a gratuitous personal attack. As has been seen, the Catalyst Parties have engaged in several attacks against their perceived enemies both inside and outside of the courtroom. There is also evidence that the Wolfpack Defendants were acting in self-interest.

[430] While I have found that the Catalyst Parties have a real prospect of showing that some of the Wolfpack Defendants' expressions were in fact false, it remains to be seen, at this early stage

of the proceedings, whether such expressions constitute "deliberate falsehoods". The fact that I have found that the first element of injurious falsehood, that of untruthfulness, has a real prospect of success in relation to some of the impugned expressions does not require me to hold otherwise.

[431] Fourth, it is ironic that the Catalyst Parties are claiming that the expressions at issue are unworthy of protection when they, themselves, have engaged in similar and much worse expressions, particularly with respect to the West Face Parties.

[432] In all the circumstances, then, I am satisfied that the public has a strong interest in protecting the Wolfpack Defendants' expressions. To hold otherwise would not strike the appropriate balance between the need to protect that Catalyst Parties' reputation and the equally important right of freedom of expression: *Bent*, at para. 168.

The Weighing of the Public Interest

[433] The weighing of the public interest favours the Wolfpack Defendants.

[434] Once again, my comments in the Defamation Action at paras. 215-225 are applicable here.

[435] Given the nature of the Wolfpack Action, however, some of my comments will need to be expanded upon. In addition, I will need to incorporate some additional considerations described by the Supreme Court in *Pointes*, at paras. 78-82.

[436] In doing so, I am mindful of the guidance provided by the Supreme Court of Canada in *Bent*, at paras. 170-172, which emphasizes that my inquiry must remain rooted in the language of s. 137.1(4)(b) and must therefore amount to a public interest weighing exercise as opposed to a simple inquiry into the hallmarks of a stereotypical SLAPP.

[437] I am also mindful of the Supreme Court's comments in *Pointes*, at para. 81 and *Bent*, at para. 172, that s. 137.1(4)(b) provides me with the powers to scrutinize what is really going on in the circumstances of this case.

[438] Bearing the above noted guidance in mind, I will now turn to the specific indicia outlined in *Pointes*, at paras. 78-80 and, respectfully, suggest a few of my own.

The Importance of the Expressions

[439] As I have already noted, I am of the view that the expressions in issue fall at the mid to high end of the spectrum. Commercial speech addressing the conduct of capital markets participants is of great importance in capitalistic societies such as Canada. This is particularly so here, where the expressions at issue refers to the Catalyst Parties who happen to be significant players in the capital markets industry.

The History of the Litigation Initiated by the Catalyst Parties Against West Face and Others

[440] The history of the litigation between the parties is of significant importance in this case, particularly as between the Catalyst Parties and the West Face Parties.

[441] As noted, Catalyst has pursued West Face (as well as a number of other defendants) in a series of lawsuits centered around West Face's purchasing of WIND.

[442] In the Moyse Action, Catalyst's first action concerning the WIND transaction, Catalyst was entirely unsuccessful. As noted earlier, Justice Newbould also made significant credibility findings against Glassman, describing him as being aggressive, argumentative, contradictory, and being "more of a salesman than an objective witness." Justice Newbould made similar adverse credibility findings against Gabriel De Alba, one of Catalyst's co-founders.

[443] Catalyst's appeal to the Court of Appeal for Ontario, as well as its leave to appeal motion to the Supreme Court of Canada, were ultimately dismissed.

[444] Unable to accept defeat, Catalyst commenced another action against West Face (and other defendants) – known as the VimpelCom Action. The VimpelCom Action also centered around Catalyst's failed attempt at purchasing WIND. As noted, Justice Hainey dismissed the action against all the defendants as an abuse of process and also dismissed the claim against West Face and some of the other defendants on the grounds of issue estoppel and cause of action estoppel. Catalyst's breach of contract claims against some of the other defendants were also dismissed.

[445] As with the Moyse Action, Catalyst's appeal to the Court of Appeal for Ontario was ultimately dismissed, as was its motion for leave to appeal to the Supreme Court of Canada.

[446] The third action, as noted, was the Veritas Action (commenced in 2015). In this action, Catalyst and Callidus alleged that West Face and Veritas published defamatory statements about Callidus with the intention of driving down its share value so that they could profit by way of short selling Callidus stock. The Veritas Action has not proceeded past the exchange of affidavits of documents. I agree with the comments of Justice Boswell, at para. 117, where he notes that the Wolfpack Action appears to be a significantly expanded version of the Veritas Action.

[447] This brings me to the Catalyst Parties' most recent litigation: the Defamation Action and the Wolfpack Action.

[448] Even if there are some legitimate aspects to both the Defamation and Wolfpack Actions, in light of the Catalyst Parties' litigation history, as well as their history of executing Project Maple Tree, it is appropriate to infer that the Catalyst Parties' present claims are underlined by a punitive or retributory purpose that relates to their failure to acquire WIND. In other words, then, rather than seeking vindication for some kind of legitimate rights infringement, the Catalyst Parties' past conduct – including its extensive history of litigation – suggests that their primary purpose is to silence critics using spiteful tactics if necessary. In my view, the public has little interest in permitting such proceedings to continue.

Project Maple Tree

[449] As set out in these Reasons and by Justice Boswell, at paras. 53, 106, Catalyst, pursuant to Glassman's leadership, hired a number of "foreign agents" under the code name Project Maple Tree. The basic thrust of Project Maple Tree was to undermine the integrity of Justice Newbould, diminish the public reputation of West Face, and to promote the public image of Catalyst. I agree with Justice Boswell that some of the tactics were ethically dubious. Indeed, I would go so far as to describe the "sting" operation against Justice Newbould as an attempt to, without any basis, attack decisions of this Court which could be seen as an attempt to manipulate the judicial system. It was an unprecedented attempt by the Catalyst Parties, led by Glassman, to pay enormous amounts of money to intelligence firms made up of ex-Special Forces members to surveil and entrap a former judge of this Court.

[450] Furthermore, emails relating to Project Maple Tree – which only came to light because of disclosure made by a public relations consultant Phil Elwood – reveal that it also had the goal of stirring up "chatter" on social media concerning the West Face Parties (and others). Essentially, this "chatter" alleged that the West Face Parties, amongst others, were part of a "Wolfpack" targeting the Catalyst Parties and were engaged in a series of other nefarious activities.

[451] In addition to all of this, it also bears repeating that another goal of Project Maple Tree was to have Blatchford publish an article critical of Justice Newbould's decision in the Moyse Action. As noted, this strategy ended up backfiring when Blatchford published a story that was remarkably unflattering to Catalyst, Glassman, and their operatives.

[452] Finally, while not strictly a part of Project Maple Tree, around the same time that Project Maple Tree was ongoing, the Catalyst Parties were releasing a number of investment letters and press releases criticizing both Justice Newbould and West Face with respect to the WIND litigation. Project Maple Tree was not used as a shield to protect the Catalyst Parties and Glassman but rather as a sharp sword to attack others.

[453] In light of all the above, similar to Catalyst's history of litigation, I am of the view that Project Maple Tree reveals a punitive or retributory purpose animating the Catalyst Parties' bringing of the Wolfpack Action. This factor bears significantly on the public interest weighing exercise, and ultimately tips the scales very much in favour of the Wolfpack Defendants.

[454] I also reject any suggestion that the Catalyst Parties were forced to resort to litigation as a result of the West Face Parties' conduct. While the West Face Parties courted media coverage and published materials that were critical of the Catalyst Parties, particularly with respect to the WIND litigation, a review of these publications demonstrates that they paled in comparison to the activities undertaken by the Catalyst Parties. Moreover, it is not as if the West Face Parties were provoking the Catalyst Parties by way of their own litigation – indeed, it is notable that the West Face Parties only sued the Catalyst Parties (by way of a Counterclaim in the Wolfpack Action) after being sued by them on four separate occasions.

[455] Finally, it is significant that Project Maple Tree found its genesis in the "Vincent Hannah" email, which the Catalyst Parties quickly determined was, in fact, sent by Guy. I say that this is

significant because even though the Catalyst Parties knew that Guy's allegations were unsubstantiated, they nevertheless carried on with Project Maple Tree. In other publications, they also trumpeted the fact that they had obtained new "helpful facts" in their lawsuit with West Face concerning WIND even though such "helpful facts" were in the form of Guy's baseless email. In my view, then, even if the Catalyst Parties have indeed suffered some form of harm, the public has little interest in permitting parties with a history of relying on uncredible private investigators to advance multiple lawsuits and extra-judicial "stings" to proceed with yet another claim.

The Financial and Power Imbalance

[456] In his decision, Justice Boswell correctly noted that the dispute between the Catalyst Parties and the West Face Parties can be described as Goliath versus Goliath - although West Face claims its business is destroyed.

[457] The same cannot be said, however, with respect to the remaining Wolfpack Defendants. Baumann, McFarlane, and Levitt have all experienced significant financial difficulty and are, or have been at various points, self-represented. Similarly, Livesey is a free-lance journalist, whereas Anderson runs his own company as a business analyst, short seller, and whistleblower. While Livesey and Anderson are not devoid of economic resources, they certainly do not come close to matching the financial resources possessed by the Catalyst Parties. The significant litigation in which they are now involved in the Wolfpack Action has thus undoubtedly been a strain on their time and resources. The same can be said for Copeland, who simply works as a reporter for the WSJ.

[458] Of course, by itself this financial and power imbalance is largely irrelevant to the weighing exercise under s. 137.1(4)(b): the mere fact that a plaintiff is wealthy does not mean that their lawsuit ought to be dismissed pursuant to s. 137.1. However, what is relevant is that this disparity of resources stems, at least in part, from the fact that the Catalyst Parties have already sued several of the Wolfpack Defendants in separate proceedings. And unlike the Catalyst Parties, most of these other defendants do not possess the resources to engage in round-after-round of litigation. When this factor is taken into account, then, the public interest does not appear to favour yet another lawsuit by the Catalyst Parties.

The Damages Suffered by the Catalyst Parties

[459] The Catalyst Parties allege that they have suffered significant harm as a result of the Wolfpack Defendants' conduct.

[460] As I have noted on several occasions by now, the Catalyst Parties have submitted experts reports, which estimate that Callidus sustained significant harm. This of course causes pause for concern when considering the dismissal of the Wolfpack Action.

[461] Despite all of this, and as I have also noted on several occasions there is other evidence in the record – namely, the Q2 Reports, the Dalton Report and the Sutin Affidavit – which suggest that at least some of the harm that the Catalyst Parties say they suffered due to the WSJ Article actually stemmed from their own flawed business model. In other words, then, and keeping in

mind the limited nature of the dive available to me on an anti-SLAPP motion, it is certainly arguable that the harm suffered by the Catalyst Parties may be much less than their experts have estimated. Thus while the actual determination of damages is an issue for trial judges as opposed to anti-SLAPP motions judges, the conflicting evidence concerning damages on the motion before me leads me to question what amount the Catalyst Parties would be able to recover. This is relevant to s. 137.1(4)(b) because, in at least some circumstances, less harm suffered by the defendant means that the public has less of an interest in permitting the proceeding to continue.

The Potential Chilling Effect on Future Expressions

[462] If I were to allow the Wolfpack Action to continue, it would have a chilling effect on future expressions of a similar nature. Whistleblower submissions to regulatory authorities are an important part of the regulatory framework (hence why the OSC has created an incentive program under which whistleblowers may be eligible for a monetary award as a result of submitting a whistleblower report). Allowing the Catalyst Parties to proceed with the Wolfpack Action might thus have the negative effect of discouraging future whistleblower reporting. The same can be said for journalists reporting on such expressions.

[463] Allowing the Wolfpack Action to proceed to trial, then, runs the risk of having a chilling effect on future expressions of a similar nature. This would run contrary to the importance of promoting free commercial speech when addressing matters relevant to the conduct of parties in the capital markets.

Access to Justice

[464] Although not specifically referenced in either *Pointes* or *Bent*, it seems to me that, in appropriate cases at least, the issue of access to justice can be a factor to be considered in the public interest weighing exercise under s. 137.1(4)(b). I also believe that this is an appropriate case for the issue of access to justice to in fact be considered.

[465] The multiple actions commenced by the Catalyst Parties referenced in these Reasons have consumed an enormous amount of court time. If it was possible to add up all of the attendances, there is no doubt that many months of court time would have been consumed. The anti-SLAPP motions themselves have taken weeks of court time, not to mention a significant amount of productions, over 30,000 documents and, days of cross-examinations. There have been numerous appeals, leaves to appeal, and at times repetitive (the VimpelCom Action) and unpursued (the Veritas Action) litigation.

[466] Not only have these lawsuits also resulted in the expenditure of an inordinate amount of court time and legal fees, but, more fundamentally, they have no doubt put a strain on an already overburdened civil justice system in Ontario. Allowing the Catalyst Parties to pursue the Wolfpack Action in all of the circumstances would be unfair to other parties trying to access our judicial system.

[467] To be clear, my reasons should not be viewed as precluding the Catalyst Parties from initiating future lawsuits. However, where litigants such as the Catalyst Parties engage in

repetitive, unsuccessful, and protracted litigation and, in addition, engages ethically dubious attacks on private citizens and former members of the judiciary, they run the risk of having their lawsuit dismissed. That is exactly what I am doing here. Indeed, as mentioned earlier, permitting the Catalyst Parties to proceed with their lawsuit in the circumstances of this case would be tantamount to condoning the litigation and associated ethically dubious investigative strategies employed by the Catalyst Parties.

Conclusion Regarding Public Interest Hurdle

[468] In the unique and exceptional circumstances of this case, I am of the view that the weighing exercise under s. 137.1(4)(b) favours the dismissal of the Wolfpack Action. In determining "what is really going on", the Wolfpack Action is a bit of a tale. Some of the Wolfpack Defendants began speaking between themselves about their acrimonious dealings with the Catalyst Parties in the business and legal worlds. Some, like Baumann, McFarlane and Levitt felt poorly treated by the Catalyst Parties. West Face had been pursued by the Catalyst Parties in acrimonious and expensive litigation. They talked of various strategies including class action lawsuits, RICO proceedings in the US, OSC and SEC whistleblower complaints as well as contacting the press. Ultimately, Anderson became involved, Whistleblower Complaints were prepared. Anderson, as per his business model and a few others, as noted, shorted Callidus stock and Anderson was successful in his goal to have the WSJ Article published. Prior to publication the Catalyst Parties were provided with an opportunity to respond. They declined to do so. The WSJ Article was printed and the Callidus share price fell. The above scenario essentially was in keeping with the ongoing feuds the Catalyst Parties were involved in generally and in keeping with Glassman's description of the distressed lending market as a "blood sport."

[469] Once again, the Catalyst Parties commenced litigation as well as launching Project Maple Tree. In all of these circumstances, and keeping in mind the balance of probabilities standard of proof that applies at this stage, the public interest in protecting the expressions at issue outweighs the public interest in allowing the Wolfpack Action to proceed against the Wolfpack Defendants.

[470] I also repeat that in *Pointes*, at para. 62, the Supreme Court of Canada emphasized that s. 137.1(4)(b) 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. Therefore, while motion judges should no doubt exercise caution before dismissing technically meritorious claims, it remains within my purview to do so here. Each case turns on its own facts. The unique, extraordinary, and likely unprecedented facts in this case point me to a conclusion that the Catalyst Parties cannot establish that the public interest in permitting the Wolfpack Action to proceed outweighs the public interest in protecting the Wolfpack Defendants' freedom of expression on a balance of probabilities.

PART VII — THE WEST FACE PARTIES' COUNTERCLAIM

[471] In their Counterclaim, the West Face Parties allege that the Catalyst Parties, led by Glassman and his accomplices, have successfully destroyed their business.

[472] More specifically, the West Face Parties argue that the Catalyst Parties, motivated by Catalyst's unsuccessful attempt to purchase WIND, engaged in a carefully coordinated scheme aimed at destroying their business. Specific conduct alleged to have been undertaken pursuant to this scheme includes: (i) the making of public comments of misconduct against the West Face Parties, (ii) calling into question the legitimacy of the decision of Justice Newbould in the Moyse Action, and (iii) commencing various "sting" operations pursuant to Project Maple Tree. The West Face Parties further submit that the Catalyst Parties succeeded in achieving their objective in the sense that the business of West Face has now been destroyed. Accordingly, the West Face Parties now seek vindication in a judicial proceeding which they say will expose the alleged insidious conduct of the Catalyst Parties and result in a substantial damages award.

[473] In light of the above, the West Face Parties submit that their Counterclaim is the very antithesis of a SLAPP. They argue that it was only commenced in the face of relentless attacks and lawsuits from the Catalyst Parties over the course of the past decade.

[474] For their part, the Catalyst Parties deny that they are liable for any of the allegations contained in the Counterclaim and, pursuant to s. 137.1, the Catalyst Parties seek to have four discrete alleged defamatory acts dismissed against it.

The Nature of the Motion

[475] As noted above, the Catalyst Parties' anti-SLAPP motion only seeks to dismiss four discrete publications that were admittedly made by Catalyst. Those statements, which the West Face Parties say give rise to a claim in defamation, are as follows:

(a) a written statement by a spokesperson of Catalyst, published in an August 19, 2016 *National Post* article (the "August 2016 Written Statement");

(b) a Press Release by Catalyst issued October 13, 2016 (the "October 2016 Press Release");

(c) a letter sent by Catalyst to certain Limited Partners to Funds managed by Catalyst, dated August 14, 2017 (the "First Investor Letter");

(d) a confidential investor letter sent on March 18, 2018 by Catalyst to certain of its Limited Partners, portions of which were published on April 18, 2018 by *The Globe and Mail* (the "Second Investor Letter").

(collectively, the "Four Statements").

[476] Even if the Catalyst Parties' anti-SLAPP motion was successful with respect to the Four Statements, the bulk of the West Face Counterclaim - including the defamation claim - would continue to proceed. The motion before me is therefore best described as a partial anti-SLAPP motion since it does not consider the Counterclaim as a whole, or even the entirety of a single cause of action. Rather, it seeks to edit out the Four Statements contained in the defamation claim while leaving the rest of the Counterclaim - including the remaining defamation allegations - intact.

[477] In light of the above, I will begin my analysis by determining whether it is permissible to bring a partial anti-SLAPP motion such as the one at issue here.

Partial anti-SLAPP motions

[478] In my view, the Catalyst Parties' anti-SLAPP motion, as it as currently framed, is improper. The language of s. 137.1 explicitly uses the term "proceeding". And while "proceeding" is not defined in the *CJA*, that legislation does provide some additional definitions which suggest that s. 137.1 is not intended to be used in the manner proposed by the Catalyst Parties. For example, s. 1 defines the term "action" as "a civil pursuit that is not an application and includes a *proceeding* commenced by…a statement of claim" [emphasis added]. An "application", by contrast, is defined as "a civil *proceeding* that is commenced by notice of application or by application" [emphasis added]. Based on these definitions, s. 137.1 would appear to contemplate anti-SLAPP motions that, if successful, would result in a dismissal of an entire statement of claim or application.

[479] In my view, there is good reason for this. If the Catalyst Parties, or any party for that matter, were able to bring a partial anti-SLAPP motion similar to the one at issue here, this would have the effect of delaying the entire proceeding until the anti-SLAPP motion was resolved. Indeed, s. 137.1(5) explicitly precludes any other steps from being taken in relation to a proceeding until the anti-SLAPP motion is resolved. And for what purpose? Rather than seeking to have the entire proceeding against it dismissed, the defendant would essentially be arguing that the scope of a specific claim (e.g., defamation) ought to be narrowed. This, however, would likely end up increasing expense and delay for all parties involved, including defendants. Such an outcome would be undesirable given that, as the Court of Appeal for Ontario noted in *Subway No. 2*, at para. 38, s. 137.1 is designed to reduce expense and delay for defendants served with unmeritorious lawsuits.

[480] Holding otherwise would essentially give parties the greenlight to bring partial anti-SLAPP motions for tactical reasons. For example, upon being served with a lawsuit by a plaintiff of scant financial means, a more well-off defendant could initiate a partial anti-SLAPP motion like the one at issue here merely for the purposes of increasing cost and delay for the plaintiff. In certain circumstances, this added expense and delay could end up precluding the plaintiff's ability to continue with their lawsuit. I do not believe this is something the legislature could have intended.

[481] I am mindful, however, of the Court of Appeal decisions in *Subway No. 1* and *Subway No. 2*. There, the moving parties, CBC and Trent, brought separate s. 137.1 motions seeking to dismiss some of Subway's claims. More specifically, CBC sought to have Subway's defamation claim against it dismissed. This was the only claim Subway had brought against CBC. Trent, however, had been sued in both defamation and negligence, Trent only sought to have Subway's negligence claim against it dismissed. Therefore, even if Trent was successful on its s. 137.1 motion, Subway would have been permitted to proceed with its defamation claim against Trent. At first glance, this seems to amount to a partial anti-SLAPP motion which causes me concern.

[482] In my respectful view, however, *Subway No. 1* is distinguishable from this case. In *Subway No. 1*, if Trent's s. 137.1 motion was successful (which it ultimately was), then Subway's entire

claim in negligence would have been dismissed. This, in turn, would have significantly simplified the issues at trial, as only Subway's defamation claim would be at issue.

[483] Here, by contrast, even if the Catalyst Parties were successful on their s. 137.1 motion, the remainder of the West Face Parties' defamation claim would still need to proceed to trial. More specifically, the trial judge would still need to consider whether the Catalyst Parties are liable for other alleged defamatory comments. In my view, this is inappropriate. It is not the purpose of the anti-SLAPP provision to prune isolated expressions that are said to give rise to a single claim in defamation.

[484] Hence, while there may be circumstances where an anti-SLAPP motion would be useful in the sense that it is able to winnow out an entire cause of action, that is simply not the case here. In the result, then, I am of the view that the Catalyst Parties' motion is not permitted under s. 137.1 and ought to dismissed.

[485] For the sake of completeness, however, and in the event that I am wrong, I will proceed to analyze whether the Catalyst Parties would have been successful under s. 137.1 had I found it applicable.

The Threshold Burden

[486] Although the Catalyst Parties submit that the WSJ Article and Whistleblower Complaints do not relate to matters of public interest, in the context of the West Face Counterclaim, they argue that the Four Statements do relate to matters of public interest.

[487] Despite the irony of this submission, I ultimately agree with it. In fact, the West Face Parties do not dispute that the Four Statements relate to matters of public interest. In short, the Four Statements clearly meet the definition of "expression" as set out in s. 137.1. They also clearly relate to a matter of public interest given the liberal and broad interpretation that *Pointes* requires. The West Face Counterclaim centres around expressions discussing a high-profile dispute between two major players in Canada's capital markets industry.

The Merits-Based Hurdle

[488] As I plan to address all Four Statements collectively, for ease of reference, I will set out the context and content of each of the Four Statements.

The August 2016 Written Statement

[489] The day after Justice Newbould's reasons for decision in the Moyse Action were released, Catalyst issued a written statement. The following excerpt, that the West Face Parties claim was defamatory, appeared in the *National Post*:

> Additional evidence [had] come out since the Moyse Litigation that [supported] the new case that alleges conspiracy and breach of contract.

> We are deeply disturbed by the decision and the severe implications of possible bias by Judge Newbould. We believe that he did not give fair consideration to all of the evidence presented, ignored contradictory statements made by the defendants that are part of the court record and delivered a judgment containing clear misstatements of facts.

The October 2016 Press Release

[490] In response to a press release issued by West Face earlier that day with respect to Justice Newbould's cost decision in which he awarded over $1.5 million in costs against Catalyst as a result of the Moyse Action, Catalyst issued its own press release. The West Face Parties claim the following statement in the October 2016 press release was defamatory:

> We can understand the increasing pressure that West Face has experienced due to its questionable and potentially unlawful actions around its acquisition of WIND and activities regarding Callidus Capital that has resulted in numerous inquiries from current and prospective investors, service providers and industry participants.
>
> In regards to our litigation against West Face and other parties, there are very few firms out there that take the role of fiduciary as seriously as we do. Our commitment to LPs and to minority shareholders in Callidus Capital is the primary consideration in all decisions we make.
>
> It is exactly because of this culture at Catalyst, as compared to how others behave, that we have chosen to be incredibly tough and demanding when our rights are trample or counterparties act unethically. Because ultimately, it is our LPs and investors that are impacted.
>
> Catalyst has put its faith in the judiciary and expect that our claims and appeals will be heard fairly and the judgment will expose the truth of West Face's actions, character and values.

The First Investment Letter

[491] The First Investment Letter was sent on August 14, 2017, five days after the WSJ Article was published.

[492] The West Face Parties allege that the following statements in the First Investment Letter were defamatory:

> As a brief update on the West Face and Wind [sic] litigation, new facts helpful to the case have been discovered. These relate not only to their stand-alone behaviour but also to the possible interference and market manipulation involving West Face and others in Callidus.

The Second Investment Letter

[493] The Second Investment Letter was sent to Catalyst Fund Limited Partners on March 19, 2018. It reported on the fact that Catalyst's appeal of the Moyse Action had been dismissed by the Court of Appeal for Ontario. It also alleged that former employees of West Face had confirmed some of Catalyst's beliefs to the effect that West Face had been engaged in commercial wrongdoing. It stated, among other things, the following:

> The interviews in Catalyst's possession include statements made by a former West Face employee, who has extensive experience as a portfolio manager. This former employee has repeatedly indicated in his interview that inside information about the WIND negotiations was improperly leaked to West Face.
>
> This former employee expressed his belief that the West Face consortium has received inside information about the WIND negotiations as a result of which West Face was able to buy WIND by making a different bit with fewer conditions than Catalyst. Consequently, this employee stated that "I didn't work in the deal because I thought it was polluted."

Section 137.1(4)(a)(i) – Are there Grounds to Believe that the West Face Counterclaim has Substantial Merit?

[494] As noted previously, in conducting this part of the Merits-Based Hurdle, I must determine whether there is a basis in the law and the record – taking in account the stage of the proceedings – to support a finding that the action has a real prospect of success.

[495] As with the Defamation Action, there is no dispute that the latter two elements of defamation are met in that each of the Four Statements refer to the West Face Parties and were published: *Grant*, at para. 28.

[496] According to the Catalyst Parties, however, the first element of defamation is not satisfied because none of the Four Statements are reasonably capable of bearing defamatory meanings. In addition, the Catalyst Parties argue that West Face has failed to show that it has suffered any damage as a result of these statements.

[497] Rather than conducting a separate analysis in respect of each of the Four Statements, I am of the view that I can conduct a single s. 137.1(4)(a)(i) analysis which considers all Four

Statements together. I say this because a review of the Four Statements reveals that they all essentially allege that Justice Newbould was wrong, showed bias, and ignored key evidence or made erroneous findings of fact and that, as a result, there is still reason to believe that the West Face Parties were engaged in unlawful or unethical business practices. The Four Statements also generally allege that there are facts which give further credence to the Catalyst Parties' suggestion that the West Face Parties were engaged in wrongdoing.

[498] For the reasons that follow, there is a basis in the law and the record, taking into account the early stage of this proceeding, to support a finding that the West Face Counterclaim, as it relates to the Four Statements, has a real prospect of success.

[499] As noted earlier, the question I need to consider at this stage of the analysis is whether there are grounds to believe that the West Face Parties have a "real prospect" of succeeding in satisfying the first element of defamation. As also noted earlier, the first element of defamation requires me to consider whether the expression at issue was defamatory, in the sense that it would tend to lower the plaintiff's reputation in the eyes of a reasonable person: *Grant*, at para. 28.

[500] In my view, there are grounds to believe that there is indeed a "real prospect" that the West Face Parties will be able to satisfy the first element of defamation at trial. As I noted above, each of the statements at issue here essentially accuse the West Face Parties of having been engaged in unethical and unlawful business practices. Despite Justice Newbould's prior ruling against Catalyst, in its statements Catalyst suggests that Justice Newbould was incorrect to reach this conclusion and that he may have been biased against Catalyst. In light of this, Catalyst's Four Statements urge the reader to disregard Justice Newbould's decision.

[501] Such statements are clearly capable of lowering the reputation of the West Face Parties. This is unlike the Defamation Action, where the Dow Jones Defendants merely reported that others had made allegations of wrongdoing against the Catalyst Parties that had yet to be proven. Rather, in this case, Catalyst is essentially saying that Justice Newbould's decision was incorrect and that, as a result, there are still grounds for thinking that the West Face Parties were engaged in improper business practices.

[502] As regards the Catalyst Parties' other argument – that West Face has failed to show that it has suffered any damage as a result of the Four Statements – I find that there are in fact grounds to believe that the West Face Parties have a real prospect of demonstrating harm at trial. Although the West Face Parties do not rely upon expert evidence, Boland has provided extensive affidavit evidence. He deposes that to succeed in the competitive landscape involving private equity investment firms, West Face must enjoy the confidence of existing and potential investors, trust from members of the business community, and the ability to retain and attract top-level investment personnel. He has further deposed, amongst other things, that as a result of the publication of the Catalyst Parties' claims against West Face, which include the Four Statements, investors have shunned West Face on the basis that they cannot invest with West Face while the Catalyst Parties' allegations remain outstanding. Furthermore, Boland states that it has become difficult for West Face to retain top personnel in its business as they are fearful of endangering their professional reputations and jeopardizing their personal security and privacy by becoming involved in West

Face during its feud with the Catalyst Parties and Glassman. Boland's evidence thus suggests that the Catalyst Parties' conduct has caused West Face to incur substantial harm. Boland deposes that West Faces' business has been destroyed.

[503] In any event, and as I have noted, general damages are presumed once the elements of defamation are satisfied: *Pointes*, at para. 71.

Section 137.1(4)(a)(ii): Are there Grounds to Believe that the Catalyst Parties Have no Valid Defences in the West Face Counterclaim?

[504] For the reasons that follow, I find that the West Face Parties have satisfied me that there are grounds to believe that they Catalyst Parties have no valid defences in the West Face Counterclaim.

Defences Concerning the August 2016 Written Statement

[505] With respect to this statement, the Catalyst Parties raise the defences of fair comment, responsible communication, and the failure of the West Face Parties to provide proper notice under the *Libel and Slander Act*.

[506] Beginning with the defence of fair comment, as I noted in both the Defamation and Wolfpack Actions, the defence can be vitiated if the expression in question was made with malice. As I have also noted previously, malice can take a variety of forms, including:

(i) spite, ill-will or the desire to cause harm;

(ii) an indirect or improper motive unconnected with the purpose of the applicable defence;

(iii) any motive that conflicts with the duty that gives rise to the relevant qualified privilege (in cases of qualified privilege); or

(iv) the publication of defamatory statement knowing them to be untrue, or recklessly believing in their truth: see *WIC*, at para. 1; *Bent*, at paras. 121, 136.

[507] In my view, the West Face Parties have demonstrated that there is a real prospect that the Catalyst Parties' Four Statements were actuated with malice. They have thus met their burden under s 137.1(4)(a)(ii) in respect of this defence. I come to this conclusion in light of (1) the Catalyst Parties' extensive history of litigation against the West Face Parties (none of which has been successful) and (2) the Catalyst Parties' initiation of Project Maple Tree, which targeted various adversaries including the West Face Parties. Further, the fact that the Catalyst Parties implemented and continued on with Project Maple Tree, in partial reliance upon the "Vincent Hannah" email when they knew from the outset a pseudonym had been used and shortly thereafter determined that it was not credible, suggests a certain recklessness to the truth and desire to harm the West Face Parties.

[508] In addition, casting the issue of malice aside for the moment, I do not believe that this particular statement is based on true or substantially true facts as required under the defence of fair comment. Although I am not permitted to undertake a deep dive of the evidentiary record, it bears noting that the only "additional evidence" that emerged after Justice Newbould's decision in the Moyse Action was the unreliable Vincent Hannah email. Moreover, there do not appear to be any true or substantially true facts that support the statement's claim that Justice Newbould was biased against the Catalyst Parties. Indeed, Justice Boswell, at para. 354, of his Reasons, explicitly noted that "there [is] nothing in the judgment of Justice Newbould that would suggest he was biased". It is also difficult to understand why the Catalyst Parties did not advance a "judicial bias" argument on appeal if they had "true" or "substantially true" facts to support their allegation.

[509] Turning to the defence of responsible communication, I accept the West Face Parties' submission that the existence of malice also precludes the Catalyst Parties from relying on it. Accordingly, the West Face Parties have satisfied me that there are grounds to believe that the Catalyst Parties have no valid defence of responsible communication as concerns this statement.

[510] In addition, again putting the issue of malice aside, I am also of the view that this defence does not favour the Catalyst Parties by virtue of the fact that there is little to no evidence that Catalyst was reasonably diligent in validating the accuracy of its statement. Rather than amounting to a "responsible communication", it seems to me that this statement is better described as an emotive response to a trial defeat.

[511] Last, insofar as the defence of failure to provide proper notice pursuant to the *Libel and Slander Act* is concerned, I accept the West Face Parties' submissions that the Catalyst Parties cannot rely on this legislation because the West Face Parties assert no claim against the *Financial Post* - the media body responsible for publishing Catalyst's statement. Rather, the West Face Parties sue the Catalyst Parties only.

[512] Moreover, it bears noting that if the Catalyst Parties position on the *Libel and Slander Act* was accepted, it would also apply in the Defamation and Wolfpack Actions, to the benefit of the defendants therein as the Catalyst Parties never sent them notices under the *Libel and Slander Act* with respect to the WSJ Article. This defence is therefore inconsistent with the Catalyst Parties' own position in the anti-SLAPP motions it is defending.

Defences Concerning the October 2016 Press Release

[513] The Catalyst Parties rely on the defence of fair comment in relation to this statement. Once again, this defence is defeated by malice. In my view, my comments with respect to malice in relation to the August 2016 Written Statement are equally applicable here. As a result, I find that the West Face Parties have met their onus under s. 137.1(4)(a)(ii).

[514] As with the August 2016 Written Statement, I also do not believe that this statement was based on true or substantially true facts. This statement, it must be remembered, was made after Justice Newbould had released his reasons in the Moyse Action, essentially vindicating the West Face Parties of any wrongdoing. Notwithstanding this fact, the October 2016 Press Release, amongst other things, accuses West Face of "questionable and potentially unlawful actions

surrounding its acquisition of WIND." While it was of course open for the Catalyst Parties to disagree with Justice Newbould, they would need to point to some additional "true" or "substantially true" facts to rely on the defence of fair comment. Merely relying on the facts that were before Justice Newbould would be insufficient as he had already rejected any suggestion that such facts supported a finding of unlawful conduct on behalf of West Face as regards the WIND transaction. In the motion before me, however, the Catalyst Parties have not pointed to any additional "true" or "substantially true" facts. As a result, their defence of fair comment fails.

Defences Concerning the First Investment Letter

[515] Here, the Catalyst Parties raise the defences of fair comment, qualified privilege, and responsible communication. Given my findings on malice, I find that the West Face Parties have met their burden under s. 137.1(4)(a)(ii). This is because the presence of malice defeats all three of these defences.

[516] Furthermore, because the Catalyst Parties concede that the First Investment Letter's allegation that the West Face Parties were engaged in "interference and market manipulation" was based on the Vincent Hannah email, I find that they cannot rely on the defences of fair comment and responsible communication on this basis as well. As noted, in order to rely on the defence of fair comment, a defendant must show that a person could honestly express the impugned opinion on the basis of proved facts: *WIC*, at para. 28. In order to rely on the defence of responsible communication, a defendant must show that they were diligent in trying to verify the allegation: *Grant*, at para. 126. In this case, however, the Catalyst Parties relied solely on the uncredible Vincent Hannah email in making the above referenced allegations; they had no corroborating evidence. This means that their ability to satisfy these respective elements of the defences of fair comment and responsible communication lacks a real prospect of success. A reasonable person could not honestly believe that the West Face Parties were engaged in "interference and market manipulation" based on this email nor were the Catalyst Parties diligent in trying to verify the allegations contained in the email.

[517] Given the above, it also seems to me that the Catalyst Parties could not have had a some moral, legal, or social duty to publish the above referenced allegation. Indeed, it bears noting that the Vincent Hannah email had nothing to do with the WIND litigation, which is the issue Catalyst Party investors would have been concerned with and which allegedly grounds the Catalyst Parties' "duty". For this reason, I find that the defence of qualified privilege also lacks a real prospect of success

Defences Concerning the Second Investment Letter

[518] Here, the Catalyst Parties raise the defences of fair comment, qualified privilege, responsible communication, and failure to provide notice under the *Libel and Slander Act*.

[519] I have dealt with all of these defences above. Therefore, I am satisfied that there are grounds to believe that these defences lack a real prospect of success.

[520] Further, I note that the Second Investment Letter failed to reference important additional information. In particular, it failed to note that its "interviews" with the two former West Face employees that allegedly provided the Catalyst Parties with new "cogent evidence" relating to the WIND transaction were in the form of surreptitiously recorded "sting" operations. It also failed to note that one of these former employees, Peter Brim, made it clear to Black Cube operatives that he had no role in the WIND deal and that the other employee, Yu-Jia Zhu, informed Black Cube operatives that there was "no truth" to the Catalyst Parties' allegations of misconduct against West Face. In light of this backdrop, there is no basis for finding that the defences of fair comment or responsible communication have a real prospect of success. A reasonable person could not have honestly held the opinion that there was "cogent evidence" suggesting that West Face had acted improper in relation to the WIND transaction based on these "interviews", nor did the Catalyst Parties act responsibly given the nature and status of their alleged sources.

[521] For all of the above reasons, then, the West Face Parties have satisfied me that there are grounds to believe that the Catalyst Parties possess no valid defences to the West Face Counterclaim.

The Public Interest Hurdle

[522] Given my above findings, I do not need to consider s. 137.1(4)(b). In the event that I am wrong, however, I will undertake an analysis under this provision in any event. As noted, in undertaking this analysis, I must undertake three successive steps outlined by the Supreme Court of Canada in *Bent*. Ultimately, the West Face Parties must show, on a balance of probabilities, that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing its Counterclaim to continue outweighs the deleterious effects on expression and public participation: *Pointes*, at para. 82.

The Harm Analysis

[523] I am satisfied that the West Face Parties have suffered harm as a result of the Catalyst Parties' conduct. I rely upon my analysis above in this regard (see paras. 502-503).

[524] In response, the Catalyst Parties submit that West Face's alleged losses and lack of business success were not caused by them but rather by West Face's own corporate mismanagement. They rely on Riley's affidavit evidence in this regard, which suggests that West Face's business failures are a result of its own flawed business strategies.

[525] In my view, however, there is still a basis in the record for concluding that the Catalyst Parties' public accusations against West Face has resulted in it suffering harm. In other words, despite Riley's evidence, and without undertaking a deep dive of the record, I am satisfied that it is still fair to conclude that West Face has suffered harm as a result of the Catalyst Parties' conduct. This will therefore be a relevant consideration in my weighing exercise under s. 137.1(4)(b). I would place the harm in the mid range of the spectrum.

The Public Interest in Protecting the Impugned Expression

[526] Unlike the expressions at issue in the Wolfpack and Defamation Actions, I am of the view that the Four Statements that form the basis of this partial anti-SLAPP motion are not valid and important topics of public debate. These Four Statements primarily relate to the Catalyst Parties' inability to accept the reasoning of Justice Newbould (upheld on appeal) that it had no cause of action against West Face with respect to the WIND transaction. Indeed, it is notable that these Four Statements were published in and around the time that Project Maple Tree and its associated "sting" operations were unfolding. In other words, both Project Maple and these Four Statements were arguably offshoots of the Catalyst Parties' same underlying grievance – namely, its inability to accept defeat in the courts. This being so, I am of the view that the public has little interest in protecting these Four Statements and they fall at the very low end of the spectrum.

The Weighing of the Public Interest

[527] Based on the foregoing, the public interest weighing exercise favours the West Face Parties. The harm suffered by the West Face Parties as a result of the Catalyst Parties' expressions is sufficiently serious that, again, noting the balance of probabilities standard which applies at this stage, the public interest in permitting the Counterclaim to continue outweighs the public interest in protecting the impugned expression. I come to this conclusion for two main reasons.

[528] First, as noted above, without taking a deep dive of the record, the evidence before me suggests that the Catalyst Parties' expressions have resulted in harm to the West Face Parties. At the same time, as I also noted above, I am of the view that the public has little interest in protecting the Catalyst Parties' expressions. On this basis alone, the weighing exercise is tilted heavily in favour of the West Face Parties.

[529] Second, I repeat and rely upon the comments made in my analysis of the Public Interest Hurdle in both the Defamation and Wolfpack Actions. I am therefore of the view that the Catalyst Parties' Four Statements were arguably made with a punitive or retributory purpose and that the public has little interest in protecting these kinds of expressions. Again, briefly, I rely upon the litigation history between the Catalyst Parties and West Face, Project Maple Tree, and the Catalyst Parties' reliance upon the dubious "Vincent Hannah" communication.

DISPOSITION

[530] For the reasons above, the Moving Defendants' motions are granted. The Defamation Action is dismissed. The Wolfpack Action is dismissed as against the Wolfpack Defendants.

[531] The Catalyst Parties' motion in the West Face Counterclaim is dismissed.

[532] At the hearing of the motions the issue of costs was not addressed. There is a cost regime provided for in s. 137.1(7) and (8) of the *CJA*. If the parties cannot agree on the issue of costs, they can arrange for a case conference before me to discuss further steps.

McEwen, J.

Released: December 2, 2021

Appendix "A"

DOW JONES, A NEWS CORP COMPANY

DJIA ▼ 22048.70 -0.17% S&P 500 ▼ 2474.02 -0.04% Nasdaq ▼ 6362.33 -0.28% U.S. 10 Yr ▲ 4/32 Yield 2.251% Crude Oil ▲ 49.55 0.77%

THE WALL STREET JOURNAL.

MARKETS

Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers

Authorities looking into complaints that Catalyst inflated value of assets, deceived borrowers

A unit of the Toronto Police Service has begun its own inquiries into Catalyst. PHOTO: ZUMAPRESS.COM

By Rob Copeland and Jacquie McNish

Aug. 9, 2017 3:32 p.m. ET

1 TORONTO—At least four individuals have filed whistleblower complaints with Canadian securities regulators alleging fraud at a multibillion-dollar investment firm and its publicly traded lending arm, according to people familiar with the matter and documents reviewed by The Wall Street Journal.

2 Catalyst Capital Group Inc., one of Canada's largest private-equity firms, is accused in the complaints of artificially inflating the value of some of its assets and deceiving borrowers about the terms of loans it made. The complaints have prompted officials at the Ontario Securities Commission, the country's leading securities regulator, to make inquiries and question people familiar with Catalyst, according to the people and documents.

3 A unit of the Toronto Police Service that specializes in financial crimes has separately begun its own inquiries, a department spokeswoman said.

4 The inquiries don't necessarily lead to an investigation.

5 Catalyst is led by Newton "Newt" Glassman, 53 years old, who has described his businesses as the "Goldman Sachs of Canada."

6 His private-equity firm, which oversees 6 billion Canadian dollars ($4.8 billion) for international clients, is one of the country's more aggressive investors, industry executives say. Catalyst mostly invests in high-interest loans to financially distressed firms such as casino game makers or biopharmaceutical companies, and sometimes takes control of the businesses if the loans aren't paid.

7 Company officials wouldn't comment for this article.

8

Fund Raise

Canadian private-equity firm Catalyst Capital has been one of the most frequent fundraisers globally over the past decade.

Fund	Year	Amount raised
Catalyst I	2002	$186 million
Catalyst II	2008	$635 million
Catalyst III	2011	$1 billion
Catalyst IV	2013	$1 billion
Catalyst V	2015	$1.5 billion

Sources: filings, investor documents

THE WALL STREET JOURNAL.

Under a program begun last year, Ontario regulators accept whistleblower submissions from any individual with original information about an alleged violation of securities law. Regulators dismiss many complaints without any inquiries, according to people familiar with the process. Those reports that merit a review are sent to the program's inquiries team, which conducts interviews and other research before deciding whether to open a formal investigation, the people said.

9 Some but not all of the filers of the Catalyst whistleblower complaints have worked at companies that borrowed money from Mr. Glassman's firms, and later had their businesses seized, said people familiar with the matter. Some are involved in litigation with Catalyst, the people said. Some of the complaints involve a series of loans to a small technology distributor, while others focus on other investments and the firm's accounting.

10 Each of the complainants may receive up to C$5 million under the OSC whistleblower program if their allegations prove true.

11 Neither Mr. Glassman nor his companies have been accused by authorities of any wrongdoing.

12 Mr. Glassman is also chief executive of Callidus Capital Corp., a so-called alternative lender listed on the Toronto Stock Exchange. Callidus's lending practices are also a subject of the whistleblower complaints, according to the people and documents.

13 Catalyst funds own a majority of Callidus's public shares and some senior executives work concurrently at both firms.

14 Catalyst is ranked among the top fundraisers for investments in distressed debt over the past decade, with more than $4 billion of new money collected, according to researcher Preqin. Catalyst is considering raising another such fund as soon as this fall, said people familiar with the matter.

15 Existing investors include the endowments of Harvard University, McGill University and wealthy clients of Morgan Stanley , according to people familiar with the matter.

16 A trained lawyer, Mr. Glassman founded Catalyst in 2002 after working at private-equity giant Cerberus Capital. He earned a reputation for lending when others wouldn't, such as to companies on the brink of bankruptcy, a strategy that consistently led to double-digit annual returns.

17 Catalyst this spring was awarded "Global Private Equity Turnaround Firm Of The Year" from the Global M&A Network, a trade group, for recent investments in companies like troubled film studio Relativity Media LLC.

18 Well-known in Canadian business circles, Mr. Glassman is protective of his own privacy. He has at times forbidden friends and journalists from taking his photograph.

19 His companies sometimes file multiple lawsuits against borrowers believed to have violated the terms of their loans.

20 One of those borrowers is Jeff McFarlane.

21 Mr. McFarlane is the former chief executive of computer distributor Xchange Technology Group, known as XTG. He said his company began borrowing from Callidus in late 2012 after the lender purchased its $11.6 million loan from a U.S. bank

22 Within a year, Xchange was in insolvency proceedings. Callidus purchased the company for about $34 million, according to court documents.

23 When Callidus went public in 2014, Catalyst, its majority shareholder, agreed to cover future losses on loans including Xchange.

24 In September 2015, Callidus recorded the Xchange investment as an asset for sale at C$66.9 million in a quarterly earnings report.

25 Then in March 2016, Catalyst transferred C$101 million to Callidus for Xchange, "an amount equal to the total outstanding principal plus accrued and unpaid interest," filings show.

26 In December 2016, Catalyst told its investors that the Xchange stake was only worth a fraction of what it had paid that March, triggering losses on two of its funds, according to one of the whistleblower complaints and documents reviewed by the Journal.

27 Mr. McFarlane confirmed he filed one of the whistleblower complaints. His complaint, and one other, alleges that Catalyst funds overpaid Callidus to acquire the Xchange investment, and delayed and underreported potential losses. "I have serious concerns about the integrity of Callidus's accounting around XTG," Mr. McFarlane said.

28 Last month, the Court of Appeal for Ontario found Mr. McFarlane responsible for a personal guarantee on Xchange's debts that was far less than Callidus was seeking in a civil suit.

29 Mr. Glassman's companies have also sued or counter sued government agencies and former employees for damages in relation to alleged business breaches and misconduct.

30 Callidus in February sued a former employee and alleged he was responsible for "artificially inflating" the financial performance of some of its investments, including Xchange. The employee responded in a court filing denying that, and said Callidus made the claim to deflect attention from "multiple complaints and regulatory investigations." Litigation is ongoing.

31 As part of its quarterly earnings, Callidus in May disclosed that its accounting practices were under review from the OSC. Mr. Glassman told analysts at that time that the review was "nothing extraordinary." He added, "If there was a significant issue with the Commission, I'm fairly certain the Commission would force us to disclose it."

32 Callidus shares are down 19% this year.

CITATION: The Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc. et al., 2021 ONSC 7957
COURT FILE NO.: CV-17-587463-00Cl and CV-18-593156-00CL
DATE: 20211202

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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, ADMIRLTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEYVOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10

Defendants

AND BETWEEN:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

– and –

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

Defendants to the Counterclaim

AND BETWEEN:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

– and –

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

Defendants

REASONS FOR DECISION

McEwen, J.

Released: December 2, 2021