

Court of Appeal File No.:

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

## COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP and CALLIDUS CAPITAL  
CORPORATION

Plaintiffs (Appellants)

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC.

C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC,  
FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON  
CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP,  
ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM,  
ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN  
ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN  
BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD  
MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS,  
BRUCE LIVESEY and JOHN DOES #4-10

Defendants (Respondents)

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### NOTICE OF APPEAL

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**THE APPELLANTS APPEAL** to the Court of Appeal from the Order of the Honourable Justice T. McEwen (the "**Motions Judge**") dated December 2, 2021, made at Toronto, Ontario (the "**Order**"), granting the Respondents' anti-SLAPP motions, brought pursuant to s. 137.1 of the *Courts of Justice Act* ("**CJA**") and dismissing the Appellants' claims in the main action herein as against the Respondents.

**THE APPELLANTS ASK** that the Order be set aside and an Order be granted as follows:

1. that the anti-SLAPP motions brought by the Respondents pursuant to section 137.1(3) of the *CJA* be dismissed and that the Appellants' action against the Respondents may continue;
2. that the Appellants be awarded the costs of this appeal and the costs of the proceedings below, or alternatively in the cause; and
3. such further and other relief as this Honourable Court permits.

**THE GROUNDS OF APPEAL** are as follows:

**A. The Appellants' Claim**

4. The Appellants ("**Catalyst**" and "**Callidus**") were publicly accused of fraud, in print and online, to an international audience of over 2.4 million readers of *The Wall Street Journal* (the "**WSJ Fraud Articles**").
5. The harm caused by the public accusations of fraud was immediate and devastating to both Catalyst and Callidus. In addition to the reputational damage they suffered, following the publication of the WSJ Fraud Articles, Callidus' share price dropped 21.4% from the previous day's closing price, leading to significant and lasting adverse effects for Callidus' business. An expert calculated damages of over \$144 million.
6. The publication of the fraud accusations in the WSJ Fraud Articles was the culmination of a conspiracy carried out by a group of "aggrieved borrowers" of

Callidus, a long-time adversary of Catalyst, a group of well-known short-sellers, and the very journalists that published the articles.

7. The aim and effect of the conspiracy was to publically harm Catalyst and Callidus. The conspiracy was not only actionable in itself, but was carried out in breach of Canadian securities law. It included and culminated in a classic "short and distort" scheme, being the tactic of publicizing a negative story about a company to depress the share price and then profiting from a short position taken against the company. This is an illegal tactic of growing concern in Canada that has attracted public, industry and regulatory attention.
8. Catalyst and Callidus commenced this proceeding (the "**Wolfpack Action**")<sup>1</sup> against the Defendants claiming, among other things:
  - (a) a conspiracy amongst the Respondents and other Defendants with the predominant purpose to harm Catalyst and Callidus;
  - (b) an unlawful means conspiracy amongst the Respondents and other Defendants;
  - (c) breaches of section 126.1 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "**Securities Act**") for fraud and market manipulation and section 126.2 of the *Securities Act* for making misleading or untrue statements that affect the market price or value of a security;

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<sup>1</sup> A "Wolfpack" is a term used in the investment industry to describe a group of people who join forces against another company.

- (d) defamation based on the accusations contained in WSJ Fraud Articles;
  - (e) defamation based on statements made by Jeffrey McFarlane to Rob Copeland of *The Wall Street Journal*, who relied on these statements to publish the WSJ Fraud Articles (the “**Copeland Defamation**”);
  - (f) injurious falsehood; and
  - (g) intentional interference with economic relations.
9. A separate defamation action was commenced against Dow Jones and Company (the publisher of *The Wall Street Journal*), the journalists that published the WSJ Fraud Articles, and McFarlane (the “**Dow Jones Defamation Action**”).

## **B. The Appellants**

10. Callidus was a publicly traded company with its shares listed on the Toronto Stock Exchange. It is a lender to companies whose credit risk is too high for traditional lenders.

11. Catalyst manages a number of private equity funds. Certain of the funds are shareholders in Callidus. Investors in the funds include many public institutions including pension funds and academic endowment funds.

## **C. The Respondents**

12. Only some of the Defendants to the Wolfpack Action sought to dismiss the proceeding as against them pursuant to the anti-SLAPP provisions of the *CJA*. Those Defendants were:

- (a) Nathan Anderson, a professional short-seller.
  - (b) Copeland, a journalist at *The Wall Street Journal* who co-authored the WSJ Fraud Articles.
  - (c) West Face Capital Inc. and its CEO, Greg Boland (“**West Face**”), hedge fund operators who had previously engaged in short selling Callidus’ stock.
  - (d) McFarlane, Kevin Baumann, and Darryl Levitt, whose companies had borrowed funds from Callidus and who provided personal guarantees for those loans. Each of the companies defaulted on their loans and, in separate proceedings, enforcement actions were taken against them and their companies by Callidus.
  - (e) Bruce Livesey, a freelance journalist and principal of a research consulting company providing commercial intelligence services.
13. A number of Defendants that Catalyst and Callidus alleged had participated in the conspiracy did not bring anti-SLAPP motions.

**D. Reasons for Decision of the Motions Judge**

14. The Motions Judge found that the Respondents other than Copeland had conspired, with malice, to harm Catalyst and Callidus. They did so by filing whistleblower complaints that accused the Appellants of fraud and other wrongdoings. They then immediately sought to have those untrue statements published, with malicious intent to harm the Appellants, and drive down the price of Callidus’ stock and adversely affect its lending business. The false statements

were published in the WSJ Fraud Articles. Within minutes of publication, the share price of Callidus plummeted. The Motions Judge found that the Appellants suffered harm as a result of these acts.

15. The Motions Judge granted the Respondents' motions and dismissed the Appellants' claim as against them. In doing so he found that:

- (a) the proceeding arises from expressions made by the Respondents;
- (b) there are grounds to believe that the Appellants' claims for conspiracy, breaches of the *Securities Act*, defamation, injurious falsehood, and intentional interference all have substantial merit (i.e. a real prospect of success at trial) against all the Respondents save and except for Copeland;
- (c) there are grounds to believe that no valid defences to these claims have been made out;
- (d) Catalyst and Callidus have suffered harm as a result of these activities; but that
- (e) the public interest in protecting the expressions in issue nonetheless outweighs the public interest in permitting the proceeding to continue and favours the dismissal of the Wolfpack Action as against the Respondents.

(a) *Whether the Proceeding Arises from "an Expression Made by the Person"*

16. Although they did not admit making, participating in, or responsibility for the Copeland Defamation or the WSJ Fraud Articles, the Motions Judge found that

West Face, Levitt, Baumann, and Livesey still satisfied the threshold test that the “proceeding arises from an expression made by [them]” under s. 137.1(3) of the *CJA*.

17. In doing so, the Motions Judge made errors of law, mixed fact and law, and errors of fact in applying the test under s. 137.1(3) of the *CJA* to the expressions that were expressly denied by these Respondents.

18. The Motions Judge further erred in finding that the expressions in issue (culminating in the WSJ Fraud Articles and Copeland Defamation) – which were made in furtherance of a conspiracy, with malice, and in violation of Canadian securities law – satisfied the threshold test under s. 137.1(3) of the *CJA* that such expressions relate to a matter of public interest which warrant a high degree of protection.

(b) *The Proceeding has a Real Prospect of Success at Trial*

19. The Motions Judge held that Catalyst and Callidus met the test under s. 137.1(4)(a)(i) of the *CJA* in demonstrating that they have a real prospect of success at trial against McFarlane, Anderson, Baumann, West Face, Levitt, and Livesey for:

(a) **Predominant Purpose Conspiracy:** they acted in combination with the predominant purpose of harming Catalyst and Callidus.

- (b) **Unlawful Means Conspiracy:** they carried out the unlawful acts (described below) in furtherance of a common design to cause harm to Catalyst and Callidus.
  - (c) **Unlawful manipulation of the capital markets:** the impugned expressions were made in breach of s. 126.1 of the *Securities Act* which prohibits fraud and market manipulation, and s. 126.2 of the *Securities Act* which prohibits misleading or untrue statements reasonably expected to have a significant effect on the price of a security.
  - (d) **Defamation:** their statements in the Copeland Defamation and WSJ Fraud Articles were misleading, untrue, and actuated by express malice against Catalyst and Callidus.
  - (e) **Injurious falsehood:** the accusations against Catalyst and Callidus were false, were made maliciously, and caused special damages to Catalyst and Callidus.
  - (f) **Intentional Interference:** the expressions and conduct in issue were unlawful acts carried out with the specific intention to injure the Appellants' economic relations (i.e. harm was not just a foreseeable consequence of these activities).
20. Notwithstanding his finding that Catalyst and Callidus have a real prospect of success at trial of establishing that McFarlane, Anderson, Baumann, West Face,



Levitt, and Livesey were liable for the unlawful acts alleged, the Motions Judge found that there was no reasonable prospect of such success against Copeland.

21. In dismissing the Appellants' claim against Copeland at this stage of the proceeding, the Motions Judge made errors of law, mixed fact and law, and errors of fact in finding that there is "no evidence suggesting" that Copeland was aware that Anderson had shorted Callidus stock, even though the record contained unequivocal documentary evidence to the contrary, including that:

- (a) prior to publication of the WSJ Fraud Articles, Copeland reviewed a report that was given to him and prepared by Anderson which specifically disclosed that Anderson and others who had contributed to the report held short positions in Callidus and stood to realize gains in the event that the price of the stock decreased;
- (b) Copeland spoke with Anderson on the phone "fairly regularly" (although how frequently and when are not yet fully known at this pre-discovery stage as Anderson and Copeland have not produced phone records for the weeks leading up to the publication of the WSJ Fraud Articles);
- (c) in text messages between Copeland and Anderson, Copeland had provided advance notice to Anderson of when he anticipated the first of the WSJ Fraud Articles was going to be published and told him, "Don't tell the conspiracy of short sellers!"; and

(d) Copeland provided advance notice to Anderson regarding the anticipated timing of the publication of the WSJ Fraud Article (immediately following which Anderson shorted Callidus stock), in breach of News Corporations'*Insider Trading and Confidentiality Policy* and the *Dow Jones Code of Conduct*, both of which prohibit the disclosure of forthcoming news to assist a third party in buying or selling securities.

22. In finding there was no reasonable prospect of success at trial as against Copeland, the Motions Judge made errors of law, mixed fact and law, and errors of fact by, among other things:

- (a) requiring the Appellants, at a preliminary prediscovery stage, to prove their claims of Copeland's participation in the common design with the other Respondents, rather than requiring simply that the Appellants' claims be legally tenable and supported by evidence that is reasonably capable of belief; and
- (b) failing to defer to trial the ultimate assessments of credibility and other questions requiring a deep dive into the evidence regarding Copeland's participation in the conspiracy alleged.

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<sup>2</sup> Dow Jones and Company is a subsidiary of News Corporation.

23. In addition, the Motions Judge erred in finding that there was no reasonable prospect in succeeding in defamation against Copeland, as further particularized in the Appellants' Notice of Appeal in the Dow Jones Defamation Action.

(c) *No Valid Defences*

24. In addition to finding that the Appellants' claims have a real prospect of success, the Motions Judge held that the Appellants met the test under s. 137.1(4)(ii) of the CJA that the Respondents other than Copeland have no valid defences to the Appellants' claims.

25. The Motions Judge found that there were no grounds to believe that these Respondents had valid defences to the claims of predominant purpose conspiracy, unlawful means conspiracy, breaches of the *Securities Act*, injurious falsehood, and intentional interference, because the defences the Respondents raised were merely reiterations of their unsuccessful challenge to the substantial merit of these claims.

26. With respect to the Appellants' defamation claims, the Motions Judge also found that these Respondents could not rely on the justification defence because the expressions in issue were misleading and untrue; nor could they rely on the defences of responsible communication, fair comment, or qualified privilege, because their statements were actuated by malice against Catalyst and Callidus.

27. With respect to Copeland, the Motions Judge erred in finding that there are grounds to believe that Copeland did have valid defences to the defamation claims

against him, as further particularized in the Appellants' Notice of Appeal in the Dow Jones Defamation Action.

(d) *Harm Suffered as a Result of the Expressions*

28. The Appellants filed expert evidence as to the decline in the share price of Callidus and the adverse impact such allegations would have on the lending business of Callidus. The preliminary analysis of the quantum of damages suffered was in excess of \$144 million. The Motions Judge found that the Appellants satisfied the test under s. 137.1(4)(b) of the *CJA* that they had suffered harm as a result of the Moving Parties' conduct and expressions. The Motions Judge acknowledged that Callidus suffered an immediate decline in its share price following the release of the WSJ Fraud Articles, in addition to the reputational harm Catalyst and Callidus suffered as a direct result of the defamation and the other elements of the unlawful conspiracy alleged. The Motions Judge further acknowledged that the full extent of damages would be a matter for trial.

(e) *The Public Interest in Permitting the Proceeding to Continue Outweighs the Public Interest in Protecting the Expressions*

29. Having found that there was a real prospect of success to the proceeding, no valid defences, and that harm was suffered, the Motions Judge nonetheless dismissed the Appellants' case as against all the Respondents.

30. The Motions Judge erred in law by holding that the Appellants cannot establish that the public interest in permitting the Wolfpack Action to proceed outweighs the

public interest in protecting the Respondents' freedom of expression on a balance of probabilities.

31. In conducting the weighing exercise under 137.1(4)(b) of the *CJA*, the Motions Judge erred by relying on extraneous and irrelevant considerations, including evidence unrelated to the expressions and harm in issue in this proceeding and erred in misconstruing the nature and extent of the harm caused by the conduct of the Respondents.
32. In doing so, the Motions Judge made errors of law, mixed fact and law, and errors of fact in holding that the expressions in issue were worthy of protection and in the public interest even though:
  - (a) the expressions in issue breached the *Securities Act* and were designed to manipulate the public markets by creating an artificial price, thereby endangering not only investors in Callidus but the public's faith in the capital market;
  - (b) the expressions were false and malicious, and made with the intention to inflict harm; and
  - (c) expressions made in furtherance of an unlawful conspiracy or that violate the *Securities Act* are illegal acts, which are neither worthy of protection nor in the public interest.

33. Further, the Motions Judge erred in applying erroneous principles and relying irrelevant evidence to the weighing exercise under s. 137.1(4)(b) of the *CJA*, including that:

- (a) There was a potential chilling effect on other whistleblowers to file whistleblower complaints, notwithstanding that the Motions Judge acknowledged that the Appellants advanced no claims based on the filing of the whistleblower complaints but rather, based their claims on the ulterior uses to which those whistleblower complaints were put, as part of an unlawful conspiracy and an illegal short and distort campaign.
- (b) Callidus has previously sued McFarlane, Levitt, Baumann, and other guarantors of Callidus loans in separate and earlier proceedings. In holding that this weighed against allowing the claim to proceed, the Motions Judge erred by failing to recognize that these “other” proceedings were collections actions to recover the debts owed and to enforce the guarantees. The Motions Judge further erred by failing to take into account the fact that in such actions the Respondents had been largely unsuccessful, yet have continued to advance the same allegations against Callidus in this proceeding.
- (c) The Appellants’ lawsuits had resulted in the expenditure of an inordinate amount of court time and legal fees and had put a strain on an already overburdened civil justice system in Ontario, notwithstanding the affirmation by the Supreme Court of Canada in *1704604 Ontario Limited v Pointes*

*Protection Association*, that the ability of a person to vindicate their rights through a lawsuit is a fundamental value in its own right in a democracy. The fact that such an apparently meritorious case requires extensive Court time cannot, in law, be a ground to dismiss the Appellants' action.

34. In conducting the weighing exercise under s. 137.1(4)(b) of the *CJA*, the Motions Judge further erred by failing to consider the public interest in allowing the Appellants' claim to continue, including the public interest in protecting:
- (a) the integrity of the Canadian capital markets from illegal short and distort attacks;
  - (b) shareholders and investors from the harm caused by those who conspire to engage in such conduct; and
  - (c) the fiduciary obligation of companies like Catalyst and Callidus to advance meritorious litigation in the interests of their stakeholders where they are adversely affected by malicious and unlawful conduct.
35. In dismissing the Appellants' claim against all the Respondents, the Motions Judge made errors of law, mixed fact and law, and errors of fact in relying upon out-of-court conduct unrelated to the Respondents' conduct or the expressions in issue. He erred in finding that Catalyst and Callidus were motivated by a punitive or retributory purpose and failed to apprehend that the Appellants had fiduciary obligations to protect their investors and shareholders from the very harm that the Motions Judge found was suffered as a result of the impugned conduct and

expressions. The Motions Judge also erred in law by conducting a restrictive analysis of Catalyst's litigation history, by failing to avert to or consider several cases of public record which demonstrate Catalyst's regard for and success in fulfilling its duties to its investors.

36. The Motions Judge erred in preventing the Appellants from advancing meritorious litigation on the basis of a conclusion, in substance, that they were vexatious litigants. In doing so the Motions Judge erred in law by failing to recognize that, even in cases where a person has been found to be a vexatious litigant, this does not prevent the litigant from accessing the court to assert its rights in a case with apparent merit.
37. The Motions Judge failed to tether his analysis of the public interest to the text of s. 137.1(4)(b) of the *CJA*, which calls for a consideration of (i) the harm suffered or potentially suffered by a plaintiff, (ii) the corresponding public interest in allowing the underlying proceeding to continue, and (iii) the public interest in protecting the underlying expression. Rather the Motions Judge erred in law by considering the "out-of-courtroom-conduct" of the Appellants without regard to the interests protected by s. 137.1(4)(b), in a manner which failed to consider material parts of the record, and which included, without any basis, that Callidus was guilty of misconduct.
38. The Motions Judge further erred in failing to consider the analysis of each Respondent individually as it relates to the interactions with the Appellants and the application of the tethered analysis of s. 137.1(4)(b) of the *CJA*.



39. In doing so, the Motions Judge failed to follow the Supreme Court's ruling in *1704604 Ontario Limited v Pointes Protection Association*, that "the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP".
40. The Motions Judge erred in law by assessing the public interest on the basis that he was dealing with claims that were "technically" meritorious when in fact the record and his own findings indicated that, at this stage, there was significant substantive merit to the claims advanced.
41. Such further grounds as counsel may advise and this Honourable Court may permit.

**THE BASES OF THE APPELLATE COURT'S JURISDICTION ARE:**

1. Section 6(1)(d) and 19(1.0.1) of the *Courts of Justice Act*, R.S.O. 1990 c.43.
2. The order appealed from is a final order.
3. Leave to appeal is not required.

January 14, 2022

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Plaintiffs (Appellants)

and

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Defendants (Respondents)

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**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT TORONTO

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**NOTICE OF APPEAL**

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