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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST 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

A N D B E T W E E N:

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. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP

Defendants to the Counterclaim

RESPONDING ANTI-SLAPP MOTION RECORD OF WEST FACE CAPITAL INC. AND GREGORY BOLAND (VOLUME 1 OF 2)

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REDACTED

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Defendants to the Counterclaim

AFFIDAVIT OF GREGORY BOLAND
(SWORN MAY 29, 2020)

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(SWORN MAY 29, 2020)

I, Gregory Boland, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Founding Principal, Chief Executive Officer and Chief Investment Officer of West Face Capital Inc. ("**West Face**"). West Face and I are Plaintiffs by Counterclaim in these proceedings. I have personal knowledge of the matters set out in this Affidavit, except where I have relied on information from others, in which case I have identified the source of my information and believe it to be true.

2. I swear this Affidavit in response to the motion brought by certain Defendants by Counterclaim pursuant to section 137.1(3) of the *Courts of Justice Act* (the "**Catalyst Defendants' Partial Anti-SLAPP Motion**"). This Motion purports to extract four elements of the conspiracy pleaded in the Counterclaim from the overall context of that conspiracy, treat them in isolation, and have only our claims pertaining to those particular elements dismissed. The moving parties are The Catalyst Capital Group Inc. ("**Catalyst**"), Callidus Capital Corporation ("**Callidus**"), Newton Glassman ("**Glassman**"), Gabriel De Alba ("**De Alba**"), and James Riley ("**Riley**") (collectively, the "**Catalyst Defendants**").

3. To be clear, the Catalyst Defendants' Partial Anti-SLAPP Motion does not seek to dismiss the entire Counterclaim. Rather, it seeks only to have portions of the Counterclaim dismissed in respect of four discrete publications. In that regard, the Affidavit of James Riley dated December 5, 2019 clarifies as follows:

> 61. This motion pursuant to section 137.1(3) of the *Courts of Justice Act* seeks to have the [Counterclaim] dismissed

> regarding the following publications which are attributable to the Catalyst Defendants by Counterclaim:
>
> (a) a written statement by a Catalyst spokesperson sent by email on August 19, 2016 to *National Post* reporter Emily Jackson for publication;
>
> (b) the October 13, 2016 Press Release by Catalyst;
>
> (c) The First Investor Letter (August 14, 2017);
>
> (d) The March Investor Letter (March 19, 2018).[1]

4. In an effort to avoid redundancy and to reduce the materials that will have to be reviewed by the Motions Judge, in this Affidavit I often refer to and rely on evidence that West Face has previously submitted in support of its own anti-SLAPP motion ("**West Face's Anti-SLAPP Motion**"). That evidence is incorporated by reference, and relied upon by West Face and me in responding to Catalyst's motion. Because I often refer to and rely on the evidence I gave in my Affidavit dated November 8, 2019, which was filed in support of West Face's Anti-SLAPP Motion (my "**First Affidavit**"), it is recommended that my First Affidavit be read before this one.

A. Summary of the Allegations Made by West Face in the Counterclaim

5. As a starting point, a copy of West Face's Counterclaim dated October 1, 2019 (the "**Counterclaim**") is attached to my Affidavit as Exhibit "**A**". A copy of the Catalyst Defendants' Amended Reply and Statement of Defence to Counterclaim dated November 29, 2019 is attached to my Affidavit as Exhibit "**B**". A copy of Black Cube's Statement of Defence dated August 15, 2018 is attached to my Affidavit as Exhibit "**C**". In the Counterclaim, West Face and I allege that the Catalyst Defendants (together with the

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[1] Affidavit of James Riley dated December 5, 2019 ("**Riley Affidavit**"), at para. 61.

other Defendants by Counterclaim) engaged in a systematic, multifaceted and unlawful conspiracy to harm both West Face and me. While the Counterclaim is lengthy and makes a number of detailed allegations, I will attempt to summarize them here.

6. The Counterclaim alleges that the Catalyst Defendants conspired to harm West Face and me in retaliation for West Face's business and litigation successes at the expense of the Catalyst Defendants, including:

(a) West Face's hiring of Brandon Moyse, a former junior analyst at Catalyst, in June 2014;

(b) West Face's participation in the successful acquisition (in September 2014) and subsequent sale (in February 2016) at a substantial profit of Canadian telecommunications company WIND Mobile Inc. ("**WIND**") (a company that Catalyst had also tried, but failed, to acquire);

(c) West Face's profitable short-selling of the shares of Callidus (which was majority-owned at the time by Catalyst) during the period from October 2014 to June 2015; and

(d) the success of West Face in defeating litigation that Catalyst commenced against West Face concerning a number of these matters.

7. The background to the above-noted matters and the various legal proceedings between West Face and the Catalyst Defendants – including the "**Moyse Action**", the "**Veritas Action**", and the "**VimpelCom Action**" – are set out in my First Affidavit. At its heart, however, the conspiracy pleaded in the Counterclaim is consistent with Glassman's

vow in late 2014, to a room full of people, that he would destroy West Face and me. The events pleaded in the Counterclaim, including the four publications that the Catalyst Defendants now attempt to segregate and treat in isolation in their Partial Anti-SLAPP Motion, made good on Glassman's vow.

8. The overt acts committed by the Catalyst Defendants in furtherance of their conspiracy to harm West Face and me may be categorized into two broad (but closely interrelated) categories: (1) the "**Black Cube Campaign**"; and (2) the "**Defamation Campaign**".

9. As alleged in the Counterclaim, the central elements of the **Black Cube Campaign** were:

(a) the Catalyst Defendants retained a now notorious investigative firm centred in Tel Aviv, London and Paris known as Black Cube;[2]

(b) pursuant to this retainer, Black Cube's operatives conducted a series of "stings" against West Face's current and former employees, as well as against Justice Newbould;

(c) the stings were wrongful, vexatious and abusive. They were conducted through the use of false pretences, outright lies and deceit;

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[2] Black Cube is the trade name of the corporate entities (and Counterclaim Defendants) B.C. Strategy Ltd. and B.C. Strategy UK Ltd. Black Cube is a notorious private intelligence agency that operates in "dozens of countries". See Black Cube Statement of Defence, Exhibit "3", at paras. 2-3. The firm is staffed with former members of elite Israeli intelligence units, and for this reason is often described in the media as a "private Mossad".

(d) the stings were unlawful for a number of reasons, including because neither Black Cube nor its operatives were authorized to carry on business in Ontario, nor were they licensed private investigators under Ontario law;

(e) the wrongful purposes and effects of the stings were to:

(i) elicit improperly confidential and privileged information of West Face from West Face's current and former employees, including its former General Counsel;

(ii) undermine and attack the proper administration of justice, as well as the rule of law, by targeting Justice Newbould because he had dismissed all of Catalyst's claims in the Moyse Action. Catalyst then sought to destroy Justice Newbould's reputation by publicizing deliberately misleading excerpts of transcripts of secretly recorded discussions with him;

(iii) generate material that was misused in a misleading and deceptive manner against both West Face and me in the Defamation Campaign (described below);

(iv) cast a cloud of doubt and uncertainty over West Face's successes in litigation against Catalyst relating to WIND. The Catalyst Defendants did so by wrongfully accusing Justice Newbould of actual bias, and then seeking to manufacture evidence demonstrating that Justice Newbould's Decision in the Moyse Action

was infected by, or the result of, anti-Semitism and an associated animus towards Glassman (who is Jewish);

(v) when the Catalyst Defendants' efforts in this regard failed, they then used the sting on Justice Newbould in an effort to obscure and delay the ultimate outcome of the Moyse Action and the VimpelCom Action;

(vi) shroud West Face and me in controversy, contention and scandal, with the intended effect of dissuading investors from dealing with us and ruining our business; and

(vii) otherwise harass and intimidate me, West Face, its employees, Justice Newbould, and other members of the judiciary who might have the misfortune of having to decide matters involving one or more of the Catalyst Defendants.

10. As alleged in the Counterclaim, the **Defamation Campaign** was an insidious, deliberate, systematic, multi-faceted and malicious assault on my reputation and that of West Face. It used half-truths, outright lies, and misleading excerpts of supposed transcripts of stings that occurred during the Black Cube Campaign. It also involved a full frontal assault on the administration of justice in this Province, and on the rule of law. Regrettably, Justice Newbould was treated as collateral damage in this Campaign. The Catalyst Defendants set out to destroy his reputation in their efforts to undermine and attack the validity of his Decision in favour of West Face in the Moyse Action. The ultimate targets of this Campaign, however, were West Face and me.

11. It is impossible to disentangle and treat in isolation particular elements of the Defamation Campaign, as the Catalyst Defendants have attempted to do in their Partial Anti-SLAPP Motion. Rather, the Defamation Campaign was carried out in an integrated manner over an extended period in an effort to maximize the harm to West Face and to me. The Catalyst Defendants publicized false and defamatory narratives using conventional public relations avenues, which are the focus of the Catalyst Defendants' Partial Anti-SLAPP Motion. They commenced and pursued vexatious litigation that further propagated and gave credence to their false narratives. They retained the Counterclaim Defendants Psy Group and Black Cube to manufacture, amplify and expand on the false narratives that they first pushed through conventional channels and litigation, including by establishing or publishing an array of defamatory websites, blogs, and social media postings. They repeatedly accused both West Face and me of engaging in unlawful and unethical conduct, and of gross incompetence. The primary elements of this unlawful Defamation Campaign are described below:

(a) "**WIND Defamation**": The Catalyst Defendants repeatedly and falsely accused West Face of having engaged in improper and unlawful conduct in acquiring its interest in WIND. They also impugned unfairly the success of West Face in the ensuing litigation on this issue by claiming falsely that West Face only prevailed in that litigation because of the alleged bias of Justice Newbould. Several of the false allegations made by the Catalyst Defendants were the product of their efforts to misleadingly quote out of context carefully selected portions of transcripts of surreptitiously recorded stings conducted during the unlawful Black Cube Campaign;

(b) "**Wolfpack Defamation**": The Catalyst Defendants repeatedly and falsely accused West Face and me of participating surreptitiously in an unlawful "Wolfpack" conspiracy to manipulate illegally the share price of Callidus and other companies. These false and defamatory allegations were widely published by or at the instruction of the Catalyst Defendants. This included the misuse of conventional means like the business press and letters to Callidus investors, as well as fabricated and misleading websites, blogs, Tweets and YouTube videos. Information concerning the authorship of these defamatory materials was falsified or deliberately concealed;

(c) "**Performance Defamation**": The Catalyst Defendants falsely impugned the performance and management of West Face's funds, including by falsely alleging that West Face misleads both regulators and its own investors. The Catalyst Defendants amplified these false and defamatory allegations by publishing them online. Their purpose, and the effect of doing so, was to enshroud West Face and me in controversy, scandal and an air of wrongdoing and criminality.

12. All of these false accusations made by or on behalf of the Catalyst Defendants during their Defamation Campaign were widely disseminated, including to actual and potential investors of West Face as well as to members of the business community and the public at large. The four statements that the Catalyst Defendants try to isolate in their Partial Anti-SLAPP Motion can only properly be understood in this context.

B. Catalyst's Post-Judgment "Expressions" Following the Issuance of Justice Newbould's Reasons for Judgment and Costs Endorsement

13. The first two elements of the Counterclaim that the Catalyst Defendants seek to have struck out relate to their publication of two statements in the immediate wake of Justice Newbould's dismissal of the Moyse Action. These are:

(a) Catalyst's **Post-Judgment Comments** of August 19, 2016; and

(b) Catalyst's **October 13, 2016 Press Release**.

14. These statements were the beginning, but by no means the end, of the efforts made by the Catalyst Defendants to undermine and invalidate the success of West Face in the Moyse Action by attacking the conduct and integrity of Justice Newbould. They anticipated, and were later amplified by, the efforts of Black Cube and Psy Group to manufacture and publicize highly prejudicial misinformation about West Face and me, as well as Justice Newbould, and to undermine the validity of the Decision rendered in favour of West Face by Justice Newbould.

(i) Context of Catalyst's Post-Judgment Comments and October 13, 2016 Press Release

15. As alluded to above, on August 18, 2016, Justice Newbould released his Decision dismissing Catalyst's claims and allegations in the Moyse Action in their entirety.[3]

16. The very next day (August 19), in the Post-Judgment Comments, the Catalyst Defendants publicly accused Justice Newbould of actual bias, and asserted that they had

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[3] Justice Newbould's Reasons for Judgment dated August 18, 2016 are attached as Exhibit 16 to my Affidavit dated November 8, 2019.

obtained “additional evidence” that supported Catalyst’s allegations against West Face in the VimpelCom Action. Both of these claims were false and misleading.

17. Catalyst spokesperson Dan Gagnier (“**Gagnier**”) published the Post-Judgment Comments in an emailed statement to Emily Jackson of the *Financial Post* on August 19, 2016. Gagnier’s email stated:

> Spokesperson for Catalyst Capital said:
>
> "**We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbold** [*sic*]. **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 judgement containing clear misstatements of fact.** Among other things, we are particularly concerned that the decision selectively ignores or discounts key testimony as it relates to the critical issue of possible destruction of evidence. We are considering all options regarding an appeal."
>
> "Regardless of this questionable decision, **after the Moyse litigation commenced, additional evidence came out that is supportive of our case against Globalive, West Face, VimpelCom and the other parties**."

18. A copy of Gagnier’s email of August 19, 2016 is attached to my Affidavit as Exhibit “**D**”.

19. The above-noted statements were re-published by the *Financial Post* later that day, in an article by Ms. Jackson titled: “Catalyst Capital Group Inc to appeal after judge dismisses Wind Mobile lawsuit”. A copy of this article is attached to my Affidavit as Exhibit “**E**”.

20. On October 7, 2016, Justice Newbould released his Costs Endorsement in respect of the trial of the Moyse Action. Justice Newbould awarded West Face costs on a substantial indemnity basis in the amount of $1,239,965. Among other reasons for awarding substantial indemnity costs, Justice Newbould held in his Costs Endorsement that the lawsuit had been "driven by Mr. Glassman" because he was:

> not able to accept that he lost his chance to acquire [WIND] by being outsmarted by someone else … He was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.

21. A copy of Justice Newbould's October 7, 2016 Costs Endorsement is attached to my Affidavit as Exhibit "**F**".

22. Justice Newbould's Reasons for Judgment and Costs Endorsement should have been extremely important to West Face and me in our dealings with our investors. The acquisition and subsequent sale of WIND at a substantial profit were important, high profile transactions for West Face. Catalyst's many unfounded allegations of misconduct against West Face in relation to those transactions were widely publicized and extremely harmful to our business and reputation. These Decisions completely vindicated West Face and established that the many allegations of misconduct made by Catalyst against West Face both in the Moyse Action and in the VimpelCom Action were groundless.[4] West Face and I hoped that these Decisions would assuage the concerns of investors about our ethics, conduct, litigation risk, and management of investors' money. The week

[4] The findings made in the Moyse Action were also fatal to Catalyst's claims in the VimpelCom Action for the reasons set out in the Decisions of Justice Hainey and the Ontario Court of Appeal dismissing that Action, copies of which are attached to this Affidavit as Exhibits "38" and "39".

after Justice Newbould issued his Costs Endorsement, on October 13, 2016, West Face issued a press release regarding Justice Newbould's award of costs as well as concerning West Face's launch of a website containing public court materials from Catalyst's multiple lawsuits against it (including the Moyse Action, Veritas Action and VimpelCom Action). West Face's October 13, 2016 press release contained exclusively factual information and direct quotes from Justice Newbould's Costs Endorsement. A copy of this press release is attached to my Affidavit as Exhibit "**G**".

23. In response, however the Catalyst Defendants issued their own **October 13, 2016 Press Release**, a copy of which is attached to my Affidavit as Exhibit "**H**". Whereas West Face had made purely factual statements in its press release, including by quoting directly findings that Justice Newbould had made in rendering his Decisions, the Catalyst Defendants made further unfounded allegations attacking the honour and integrity of West Face. These allegations were substantially the same as the unfounded allegations that Justice Newbould had just rejected in dismissing Catalyst's claims in the Moyse Action, and which His Honour had justified an extraordinary costs award on a substantial indemnity basis. The Catalyst Defendants also seized the opportunity in their October 13, 2016 Press Release to accuse West Face of additional "potentially unlawful actions… regarding Callidus Capital". They did so despite the fact that the Costs Endorsement (and West Face's press release) had nothing to do with Callidus. Catalyst's October 13, 2016 Press Release stated, in relevant part:

> "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.…
>
> "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 trampled 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 that judgment will expose the truth of West Face's actions, character and values**." (Emphasis added)

24. West Face's allegations concerning the Post-Judgment Comments and the October 13, 2016 Press Release are set out in paragraphs 129 to 138 of the Counterclaim. West Face alleges, and I believe, that the Post-Judgment Comments and the October 13, 2016 Press Release:

(a) were harmful, false and defamatory, including because they asserted that:

(i) West Face had engaged in unlawful and unethical conduct in relation to the WIND transaction, including by misusing unlawfully the confidential information of Catalyst;

(ii) West Face's actions, and the character and values of West Face and its principals, were consistent with having engaged in improper and unlawful actions with respect to WIND and Callidus; and

(iii) West Face had only prevailed in the Moyse Action because of the bias of Justice Newbould, who ignored important evidence and misstated the relevant facts in dismissing Catalyst's claims and allegations of misconduct;

(b) were made with malice, including because they repeated allegations that had just been comprehensively rejected by Justice Newbould; and

(c) were widely disseminated by the Catalyst Defendants for the purpose and with the effect of furthering their overarching conspiracy, harming West Face's reputation, and poisoning the relationship between West Face and its current and potential investors.

25. It is particularly ironic that Catalyst claimed in its October 13, 2016 Press Release to "put its faith in the judiciary" when it had already made a highly public and unfounded allegation of actual bias against Justice Newbould, and less than a year later launched an unprecedented assault on his honesty, integrity and conduct through Black Cube's extraordinary sting operation (described below, beginning at paragraph 58).

(ii) The Post-Judgment Comments and October 13, 2016 Press Release Were Not Made in Good Faith

26. On this motion, the Catalyst Defendants have taken the position that the above-noted comments were made in good faith. For example, Riley asserts in paragraph 94 of his Affidavit that the Post-Judgment Comments "set out [the Catalyst Parties'] good faith

belief that [Justice Newbould's Reasons for Decision] demonstrated a possible bias by Justice Newbould".

27. In reality, however, these were disingenuous and entirely false attacks on the honesty and integrity of Justice Newbould. Catalyst never presented any evidence whatsoever to demonstrate that Justice Newbould found in favour of West Face in the Moyse Action because he was biased. As a highly experienced lawyer, I believe Riley knows full well that deciding a case against a party does not "demonstrate a possible bias". Yet that is all Catalyst could ever point to.

28. Catalyst never had any evidence that could support a good faith belief in the allegations made in the Post-Judgment Comments or the October 13, 2016 press Release. Rather, the Catalyst Defendants set out to manufacture "evidence" of these false allegations well after the fact, and used Black Cube and Psy Group to do so. The Post-Judgment Comments and October 13, 2016 Press Release were simply components of their bad faith, multifaceted efforts to shroud West Face and me in controversy, to undermine or invalidate our success in the Moyse Action, and to destroy our reputations with current and potential investors. I believe this is so for a number of reasons, as set out in the following sections.

(iii) Catalyst Never Raised Allegations of Bias Against Justice Newbould During Trial

29. As adverted to above, the first time the Catalyst Defendants accused Justice Newbould of bias was the day after they received his Decision dismissing the Moyse Action. Catalyst had never before suggested that His Honour might be biased against them. Catalyst never moved for Justice Newbould to recuse himself before, during or after

the trial of the Moyse Action. Nor was there any proper basis for such a complaint or application. Indeed, Justice Newbould ruled in Catalyst's favour in respect of the only contested evidentiary issue at trial.[5] The Catalyst Defendants have never complained of any *conduct* engaged in by Justice Newbould. Instead, their complaint of bias arose solely from the substance of his Decision exonerating West Face, and criticizing Catalyst and its principals.

(iv) Catalyst's Appeal Materials Did Not Accuse Justice Newbould of Having Exhibited Bias

30. If the Catalyst Defendants had held a *bona fide* belief that Justice Newbould exhibited actual bias (or even a reasonable apprehension of bias) during the course of the Moyse Action, including at trial, they could and no doubt would have raised such an argument when they filed their written appeal materials in respect of the Moyse Action in 2016 and 2017. They were represented throughout by multiple senior and experienced counsel, including Mr. Di Pucchio, Mr. Greenspan and Mr. Moore.

31. Riley has attached to his Affidavit (as Exhibits "38", "39", "40", and "41") Catalyst's initial Notice of Appeal dated September 13, 2016, its Supplementary Notice of Appeal dated October 21, 2016, its Second Supplementary Notice of Appeal dated February 15, 2017, and its 60-page Appeal Factum dated February 15, 2017. Not one of these documents accused Justice Newbould of bias. Nor did Catalyst or its highly experienced counsel raise these allegations when Catalyst's appeal was argued over two days in late February 2018, more than 18 months after Justice Newbould rendered his Decision in the

[5] West Face had objected to certain areas of cross-examination by Catalyst's counsel as being irrelevant. Justice Newbould did not give effect to this objection.

Moyse Action. Instead, Catalyst's only allegations of bias against Justice Newbould occurred in its public attacks when the Catalyst Defendants sought to undermine and invalidate the success West Face had achieved.[6]

32. Similarly, Catalyst has never presented evidence demonstrating that West Face engaged in "unlawful activity" with respect to either WIND or Callidus. Justice Newbould concluded that there was no such evidence with respect to WIND, and Catalyst has presented no such evidence with respect to Callidus. Indeed, West Face has not been short Callidus since June 2015, and its analysis of Callidus when it took a short position in October 2014 has been proven by subsequent events to have been entirely accurate. Indeed, given the complete collapse of Callidus's share price from a high of over $24 in September 2014 to a going private transaction in November 2019 at $0.75, our analysis concerning the business of Callidus and its prospects was far too favourable (and otherwise completely justified and fair).

33. The only evidence that Catalyst has presented concerning the conduct of West Face is entirely innocuous in nature. It demonstrates what West Face freely admits – that from time to time West Face: (i) conducted due diligence on a third party that was seeking to borrow money, and declined to lend to them, only to have Callidus lend that company money; (ii) exchanged public information with other parties Catalyst or Callidus had sued about the status of the litigation that they and West Face were embroiled in; and (iii) responded to requests from journalists by providing public information about the litigation

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[6] Catalyst did rely on the potential for unspecified "fresh evidence" to obtain an adjournment of the appeal in the Moyse Action scheduled for September 26-27, 2017. Catalyst never presented any fresh evidence, but I believe based on subsequent revelations (as described in this Affidavit) that it likely related to the Black Cube and Psy Group operations against Justice Newbould.

that West Face was embroiled in with Catalyst and Callidus. This is not unlawful activity, and in any event was not connected to any whistleblower complaint or short-selling campaign in 2017 (in which West Face played no role).

(v) Catalyst Never Received "Additional Evidence" Supporting its Claims in the Moyse Action

34. At paragraphs 74-95 of his Affidavit, Riley attempts to justify Catalyst's Post-Judgment Comments by alleging that "additional evidence" emerged after the Moyse Action was commenced (rather than after the trial of that Action had concluded) that supported the Catalyst Defendants' claims in the Moyse and VimpelCom Actions. He then goes on to cite six email strings involving West Face that related to the WIND transaction. That claim is at best a half-truth. The reality is that the Moyse Action was commenced in June 2014, before the WIND transaction even occurred. It is hardly surprising that so-called "additional evidence" concerning the WIND transaction came into existence after the Moyse Action was commenced.

35. Importantly, neither the Post-Judgment Comments nor Riley bothered to disclose that this so-called "additional evidence" emerged well before the trial of the Moyse Action within the litigation process. Nor did they disclose that this very evidence was considered in detail by Justice Newbould during the trial of the Moyse Action. Instead, through the use of a carefully worded half-truth, Catalyst fostered the misleading impression that this supposed "additional evidence" emerged after trial and/or outside the court process, and undermined the validity of Justice Newbould's judgment in favour of West Face.

36. In reality, every single one of the emails identified by Riley in his Affidavit was produced during the discovery process in the Moyse Action and was introduced into

evidence at trial. They were relied upon by Catalyst in examining witnesses as well as during its closing submissions.[7] They were also considered by Justice Newbould in his Decision.[8] Moreover, after the Post-Judgment Comments were made by Catalyst, these emails were referenced in Catalyst's Notice of Appeal.[9] They were then relied upon by Catalyst in its Factum before the Court of Appeal.[10] That appeal was so devoid of merit that it was dismissed from the bench before counsel for West Face were called upon to deliver their responding submissions. Catalyst relied on those very same emails: (i) in its unsuccessful efforts in the VimpelCom Action to defend motions to dismiss that Action brought by the Defendants;[11] (ii) on appeal to the Court of Appeal from the Decision of Justice Hainey dismissing that Action as an abuse of process;[12] and (iii) in the Catalyst Defendants' unsuccessful application for leave to appeal to the Supreme Court of Canada[13] in that matter. Relevant excerpts from Catalyst's Closing Submissions in the Moyse Action, as well as its Factum in the proceeding before Justice Hainey, its Factum before the Court of Appeal, and its Factum in the Supreme Court of Canada in the VimpelCom Action, are attached as Exhibits "**I**" to "**L**" of this Affidavit.

37. Riley's Affidavit discloses none of this critical history and context concerning these supposedly important emails. Rather, in his efforts to defend the Post-Judgment Comments, he omits all of the above information. This is unfortunately consistent with two

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7 Catalyst Trial Closing Submissions, paras. 242-244, 247, 251, Exhibit "**I"**.
8 See Reasons for Judgment dated August 18, 2016, paras. 103-104, 108, 111-112 and 115, Exhibit 37 to Riley Affidavit.
9 Notice of Appeal, paras. 27(q)-(r), Exhibit 38 to Riley Affidavit.
10 Catalyst Factum, paras. 188, 191, Exhibit 41 to Riley Affidavit
11 Catalyst Factum before Hainey J., paras. 55, 59, 62-63, 66-71, Exhibit "**J**".
12 Catalyst Court of Appeal Factum, paras. 20, 28-30, Exhibit "**K**".
13 Catalyst Supreme Court of Canada Leave Factum, Exhibit "**L**".

prior occasions on which Riley has been found by the Courts to be less than forthright under oath.[14]

C. The Catalyst Defendants' Publication of the First Investor Letter dated August 14, 2017 in the Aftermath of the *Wall Street Journal* Article dated August 9, 2017

(i) The First Investor Letter Again Accused West Face of Unlawful Market Manipulation

38. The third portion of the Counterclaim that the Catalyst Defendants seek to have struck out relates to a letter that Catalyst circulated to investors on Monday, August 14, 2017, a copy of which is attached as Exhibit "**N**".[15] West Face refers to this letter in its Counterclaim as the "**First Investor Letter**". Once again, this publication must be viewed in the broader context of the Catalyst Defendants' overall scheme to defame and harm West Face and me.

39. Many of the very same investors that deal with Catalyst also deal with West Face, or were sought after by West Face in our efforts to attract investment capital. Moreover, the investing community is surprisingly small. Investors regularly speak or communicate with each other. As a result, by tarnishing West Face in its communications with its

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[14] During the Plan of Arrangement proceedings for the sale of WIND, Riley swore an affidavit stating that Catalyst had only learned of the manner by which West Face's consortium had acquired WIND as a result of the Plan of Arrangement proceedings. Justice Newbould held that this evidence "was not true". Justice Newbould's decision in this mater is attached as Exhibit "**M**" (see, in particular, paras. 54-61). During the Moyse Action, while under cross-examination on an affidavit, Riley had provided an answer to an undertaking that falsely implied that VimpelCom had never requested a break fee from Catalyst. This was significant because that request for a break fee, rather than anything done by West Face, ultimately caused the negotiations between Catalyst and VimpelCom to fail. In his Decision in the Moyse Action, at paragraph 13, Justice Newbould noted that "prior affidavits of [Riley] were mistaken and speculative in some measure".

investors, Catalyst inflicted enormous harm on our business and reputation, both directly and indirectly, for reasons I explain in more detail at the end of this Affidavit.

40. Catalyst disseminated the First Investor Letter immediately following the *Wall Street Journal's* publication of its article titled: "Canadian Private-Equity Giant Accused by Whistleblowers of Fraud" on August 9, 2017 (the "**Article**"). The Article accurately reported that Callidus was the subject of whistleblower complaints made to, and inquiries by, the Ontario Securities Commission and Toronto Police Services. The Article had nothing to do with and does not mention West Face or me.

41. As admitted by Riley, the First Investor Letter included the following words:

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

42. West Face's allegations concerning the First Investor Letter are set out in paragraphs 139 to 145 of the Counterclaim. In summary, West Face alleges, and I believe, that the First Investor Letter:

(a) was false and defamatory, including because it asserted that:

(i) West Face had engaged in an illegal market manipulation scheme against Callidus; and

(ii) "new facts" helpful to Catalyst's case in the WIND litigation (the Moyse Action and the VimpelCom Action) had been discovered by Catalyst. These statements presented the illusion that Catalyst

had discovered “new facts” that would enable it to prove the truth of its allegations of misconduct against West Face in those cases. This was entirely false, including for the reasons described above at paragraphs 34 to 37; and

(b) was disseminated by the Catalyst Defendants in furtherance of their overarching conspiracy, and for the purpose and with the effect of harming West Face and me, including by further shrouding us in controversy and scandal.

43. Riley asserts in paragraph 35 of his Affidavit that the First Investor Letter was disseminated by Catalyst in furtherance of its fiduciary obligations to keep its investors informed of matters concerning Catalyst’s funds. However, the accusations of misconduct made by Catalyst against West Face in the First Investor Letter were entirely false. As I explain throughout my Affidavit, the Catalyst Defendants had no reasonable basis to believe that they were true. As an investment professional, I know that there is no fiduciary duty to provide false, misleading or questionable information to investors. Quite the opposite is true. The obligation in making disclosures to investors is to provide accurate, reliable and balanced information.

(ii) West Face Was Not Involved in the Publication of the Article or the Alleged Market Manipulation Scheme Surrounding It

44. As set out in detail in the Affidavit I swore in support of West Face’s Anti-SLAPP Motion:

(a) West Face and I were not sources for the Article and did not precipitate the publication of that Article. In fact, we were asked by a *Wall Street Journal* reporter

to corroborate information contained in the Article, but were not able to do so. We had no information about the whistleblower complaints reported in the Article; and

(b) West Face and I did not participate in any alleged "market manipulation" scheme concerning Callidus's shares that was allegedly perpetrated in connection with the publication of the Article on August 9, 2017. In fact, West Face did not hold a short position in Callidus at the time the Article was published, and indeed had not been short Callidus shares for more than two years preceding the publication of the Article.

45. I repeat and rely on paragraphs 123 to 181 of my Affidavit sworn in support of West Face's Anti-SLAPP Motion. The First Investor Letter was just one more step in the Catalyst Defendants' orchestrated, systematic scheme to attack and undermine West Face and me.

(iii) The Catalyst Defendants' Purported Discharge of Their Fiduciary Obligations in Reliance on an Unsubstantiated and Highly Suspicious Pseudonymous Email

46. The very next day, on August 11, 2017, Glassman allegedly received the one and only piece of supposed information that the Catalyst Defendants now purport to rely upon in this motion as the source of their supposed "good faith" belief that West Face was responsible for the alleged short attack surrounding the publication of the Article – namely, a highly suspicious email from someone using the name "Vincent Hanna".

47. The "Vincent Hanna" email stated:

Dear Mr. Glassman.

> This letter is to inform you that you have been targeted by a group of funds in Canada and abroad whose sole goal is to bring down your public vehicle Callidus and you personally. They are acting in concert to short your stock and to spread false rumors in the market place mostly through Bruce Langstaff at canaccord but through any broker who will listen. The wall Street Journal is a prime example of this coordinated effort. The "cabal" does have private investigators following you and most likely have Russians hackers attacking your office emails and servers/cloud. The RCMP and FBI are aware of this "cabal" from a criminal investigation but that doesn't help you in the short term. I am sure you are not surprised but the funds are:
>
> Greg Boland - WestFace Capital.
>
> Roland Keiper - Clearwater Capital.
>
> Sunny Puri/Moez Kassam - Anson Partners.
>
> Shawn Kimmel - K2 Partners
>
> Principals - MMCAP
>
> Marc Cohodes - US Short Seller and his huge global network.
>
> I am disgusted that this acting in concert is going on and happening to you and other participants in the Canadian Capital Markets and I write this letter to inform you of such.
>
> If I were you I would sue the above groups and from that you will garner access to all their trading records and communications between them. From this you will then be fed additional information. This will lead the perpetrators down a rabbit hole they will not escape from. But in the end that is up to you. You now have this information. There will be more to come. Stay tuned.

48. As it concerns West Face and me, the allegations made in this email were unequivocally false. A copy of this email is attached to my Affidavit as Exhibit “**O**”.

49. As far as I am aware, Vincent Hanna is not a real person. Rather, Vincent Hanna is the name of a fictional character played by Al Pacino in the movie “Heat”. I have

attached to my Affidavit as Exhibit "**P**" a copy of IMDb's webpage about the movie "Heat", showing the main cast and characters of the movie (IMDb is a popular website run by Amazon which features movie, TV and celebrity content).

50. Moreover, the email from Vincent Hanna was sent from a "runbox.com" email address, a privately held email hosting service based in Norway. According to the "Why Runbox" page of the runbox.com website:

> The Runbox email servers are located in Norway and subject to strong privacy legislation that protects your data. We enforce a strict Privacy Policy ensuring that your data will not be disclosed to a third party service or to authorities without requesting a court order from Norwegian authorities

51. A copy of this webpage is attached to my Affidavit as Exhibit "**Q**".

52. In other words, the "Vincent Hanna" email, which contains serious but utterly false allegations of misconduct concerning West Face and me, was sent by a fictional character, from an email system designed to conceal the identity of the person who sent it.

53. Riley does not identify in his Affidavit the person who allegedly sent the "Vincent Hanna" email. Nor does he set out any reasonable grounds on which any of the Catalyst Defendants could have believed the contents of the email to be true.

54. I do not believe that any responsible investment manager could or would have placed any reliance on this suspicious and obviously scandalous email without first conducting significant due diligence concerning its provenance and reliability. I certainly do not believe that a responsible investment manager would have relied upon a

suspicious email of this nature to disseminate to hundreds of investors highly damaging allegations concerning a competing investment manager. Indeed, during the many years West Face has been subjected to Catalyst's endless litigation, anonymous individuals have approached me or West Face's counsel purporting to have incriminating information about Catalyst or Glassman. We have never relied on information of that nature, including in communications with our investors, because we have not been able to satisfy ourselves as to its provenance.

55. The Catalyst Defendants have put forward no evidence on this motion, and disclosed no evidence whatsoever in their productions in this litigation, demonstrating that they conducted any form of due diligence to determine the *bona fides* of the "Vincent Hanna" email. Among other things, they have disclosed no further correspondence or contact with the individual who allegedly sent the "Vincent Hanna" email. They appear to have made no efforts whatsoever to verify the identity or reliability of the alleged author of that email.[16] I attach in that regard as Exhibit "**R**" to my Affidavit a letter from West Face's counsel dated January 16, 2020 to counsel for the Catalyst Defendants, regarding numerous deficiencies in their productions. Among many other things, West Face specifically requested the production of all correspondence with "Vincent Hanna", as well as any internal documents or correspondence concerning the "Vincent Hanna" email. I am advised by Mr. Milne-Smith and believe that he received no response to this request.

[16] West Face has obtained one internal Psy Group email which refers to Catalyst believing that "Vincent Hanna" was in fact a Canadian investor named Danny Guy. This email is attached later to this Affidavit as Exhibit "**Y**". Counsel to West Face reached out to Mr. Guy in this regard, and he categorically denied that he was "Vincent Hanna", or indeed that he had any information about this matter. Relevant communications with Mr. Guy are attached to my Affidavit as Exhibits "**S**" and "**T**".

56. To state the obvious, it is entirely conceivable that the “Vincent Hanna” email was sent to Glassman by some shadowy figure at his request, or even sent by Glassman himself, as a “false flag” effort designed to justify the insidious scheme of defamation, harassment and intimidation that the Catalyst Defendants would soon retain Black Cube and Psy Group to carry out.

(iv) Conclusions Regarding the First Investor Letter

57. As stated above, in the First Investor Letter the Catalyst Defendants claimed that they had discovered “new facts helpful to the [WIND litigation]” and that West Face was involved in a “market manipulation” scheme. Their only purported basis for these allegations was a highly suspicious email that:

(a) said nothing whatsoever about WIND;

(b) was ostensibly sent by Al Pacino’s fictional character from the movie “Heat”;

(c) made scandalous and entirely unsubstantiated allegations concerning West Face and me that are, in fact, untrue;

(d) conveniently stated exactly what Glassman wanted to hear after the publication of the Article, which was entirely consistent with the defamation campaign that he ordered Psy Group to perpetrate against West Face and me shortly thereafter (as set out in paragraphs 58 to 83 below);

(e) concealed the true identity of the author; and

(f) did not prompt the Catalyst Defendants to respond, follow up, or apparently send even a single email or other document about it, either internally or externally, at any time prior to publishing the First Investor Letter.

D. The Catalyst Defendants Sought to Manufacture Evidence to Justify Their Defamatory Publications After the Fact

58. Catalyst never presented any evidence to support or justify its highly public and unfortunate accusations of bias against Justice Newbould or of unlawful conduct against West Face and me. It did, however, attempt to manufacture evidence of that nature. West Face has obtained evidence – including contemporaneous emails and sworn Affidavits – confirming that in the weeks leading up to Catalyst's scheduled appeal from the Decision of Justice Newbould in the Moyse Action on September 26 and 27, 2017, the Catalyst Defendants hired two "private Mossads", namely Psy Group and Black Cube.

59. Psy Group was an Israeli private intelligence agency whose motto was "Shape Reality". It became insolvent and ceased operations in 2018, shortly after revelations surfaced that it was under investigation by Special Counsel Robert Mueller for potential involvement in Russian interference in the 2016 U.S. presidential election. Black Cube is an Israeli private intelligence agency that advertises itself as "A select group of veterans from the Israeli elite intelligence units" that specializes in "Creative Intelligence". Copies of marketing materials for Psy Group and Black Cube using these phrases are attached as Exhibits "**U**" and "**V**".

60. The Catalyst Defendants retained Black Cube to carry out a series of "stings" on Justice Newbould and on current and former West Face employees, in an effort to: (i) manufacture evidence to support Catalyst's defamatory publications described above; (ii)

influence the Court of Appeal in the Moyse Action; and (iii) distract investors and members of the business community and public from the Article. Psy Group plotted with the Catalyst Defendants to use the spoils of these stings to discredit and destroy the reputations of Justice Newbould, West Face and me, and to undermine the ability of West Face to uphold the Decision of Justice Newbould in Catalyst's then pending appeal in the Court of Appeal. The documentary evidence upon which I rely in stating my evidence below has been gathered together from various sources, including most importantly Phil Elwood.

REDACTED

63. During the week of Monday, September 4, 2017, Glassman sent emails indicating that he was “travelling” away from Catalyst’s office in Toronto, including to London, England (where one of Black Cube’s three offices is located). Copies of emails demonstrating these facts are attached to my Affidavit as Exhibits “**CC**” and “**DD**”.

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REDACTED beginning on or around September 18, 2017, a series of false and defamatory statements concerning West Face and me were published on the Internet and on social media (the "**Internet Postings**").

73. These Internet Postings built on the earlier theme of Catalyst's Post-Judgment Comments, its October 13, 2016 Press Release, and its First Investor Letter, namely that West Face and I had engaged in serious misconduct, including criminal market manipulation. The Catalyst Defendants appear to have decided that the period immediately preceding the argument of Catalyst's appeal of the Moyse Action on September 26 and 27, 2017 was, to use Glassman's words, the "perfect time", to publicize their allegations of misconduct.

74. The background to the false and defamatory Internet Postings, including copies of the Internet Postings, is set out in the Affidavit of Philip Panet sworn May 21, 2019, which has been filed in support of West Face's Anti-SLAPP Motion. By way of summary:

(a) the Internet Postings were published repeatedly over the Internet, including on websites and by numerous Twitter accounts that provided links to them;

(b) the identities of the true authors of the Internet Postings were concealed, including through the use of false aliases (such as “Samantha Beth”, and even “Judge Frank Newbould”); and

(c) the plain, ordinary and intended meanings of the Internet Postings, as well as their innuendo, were false and defamatory of both West Face and of me.

75. Catalyst was also attempting to plant stories in the mainstream financial press in the period before Catalyst’s appeal was argued in the Moyse Action, through their public relations consultant Dan Gagnier. On September 25, 2017, Catalyst secured from Justice Rouleau an adjournment of its appeal (originally scheduled for September 26-27, 2017) to February 20-21, 2018. Two days later, on September 27, 2017 Glassman wrote to Gagnier demanding action on a Wolfpack story in the *Financial Post* because the Wolfpack allegations were already being published elsewhere on the Internet. When Gagnier replied that he was unaware of any such publications, Glassman told him “Check Huffington Post and check w Emmanuel.” Later that day, Rosen sent Gagnier a list of the various Internet Postings that had been made to that point, including one on the Huffington Post website. Copies of the emails in question are attached as Exhibits “**EE**” and “**FF**”.

76. At virtually the same time that Psy Group was engaged to give credence to allegations made by Catalyst in the Post-Judgment Comments, the October 13, 2016 Press Release and the First Investor Letter, Black Cube carried out a series of “stings”

against Justice Newbould and a number of current and former West Face employees (including Brandon Moyse and West Face's former General Counsel Alex Singh). The sting on Justice Newbould was conducted in an effort to substantiate and give credence to allegations of bias that Catalyst first made against Justice Newbould in the Post-Judgment Comments, immediately after he had issued his Decision in favour of West Face in the Moyse Action.

77. Even before Black Cube's sting on Justice Newbould was implemented on September 18, 2017, the Catalyst Defendants and Psy Group took steps to arrange the publication of the expected results of that sting. They did so in an obvious effort to maximize the harm that the Catalyst Defendants intended to inflict on Justice Newbould's reputation. Their ultimate goal in doing so was to undermine the Decision that Justice Newbould had rendered in favour of West Face in the Moyse Action. In this regard, on September 12, 2017, Emmanuel Rosen of Psy Group contacted a New York-based public relations consultant named Virginia Jamieson to "align with a NY/(or Canadian) journalist". Rosen and Jamieson are both defendants to the Counterclaim. Jamieson was originally from Canada, and Rosen apparently hoped or believed that she would have contacts with Canadian journalists. The next day, on September 13, Black Cube operatives first contacted Justice Newbould by email. On September 15, Jamieson emailed the late Christie Blatchford of the National Post offering a "source" who wanted to speak with her, and who would allegedly show that "Neubolt [sic] allowed destruction of evidence in Catalyst/Westface case." A copy of this email is attached to my Affidavit as Exhibit "**GG**". On September 17, 2017, Jamieson again wrote to Ms. Blatchford to provide a more detailed (but blatantly false) pitch concerning Justice Newbould's Decision in

favour of West Face in the Moyse Action. The falsity of this pitch is explained in the footnotes I have embedded below in the text of Ms. Jamieson' s email:

> The Appellate Bench of Ontario will meet this Wednesday to review the ruling of Judge Frank Newbould in a case tied to the ownership of Wind Mobile. In advance of the appeal, I'd like to connect you with a spokesperson that can prove evidence was destructed in the case and that Newbould's ultimate ruling completely ignored it.[17]
>
> Here is some background:
>
> In 2016, Newbould presided over a case of industrial espionage with billions of dollars hanging in the balance. Catalyst Capital Group had sued West Face Capital and its junior analyst Brandon Moyse. Moyse left Catalyst abruptly, taking with him several hundred confidential documents about Catalyst strategy.[18] Despite a confirmed cascade of confidential documents having been passed by Moyse,[19] Newbould's ultimate ruling ignored Moyse's destruction of evidence.
>
> My source can show you that when Newbould took over the case, Moyse erased his company blackberry and computer, inhibiting the investigation and erasing the possible evidence that he passed along confidential Catalyst briefings about Wind on to West Face.[20]

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17 Justice Newbould's Decision ignored nothing: it addressed thoroughly the evidence that Mr. Moyse had bought "secure delete" software, had deleted his internet browser history, and had wiped his company Blackberry. Ultimately, there was no evidence that Mr. Moyse deleted anything relevant to the litigation, and the direct evidence of Mr. Moyse was directly to the contrary. Reasons for Judgment of Justice Newbould, August 18, 2016, at paras. 132-168.

18 This is false. There was no evidence that Mr. Moyse took with him to West Face or shared with anyone at West Face any confidential information concerning Catalyst's strategy. In fact, all of the evidence was to the contrary.

19 This is false. There was no evidence that Mr. Moyse passed to West Face any documents related to WIND, let alone a "cascade" of confidential documents. All of the evidence was to the contrary. In fact, the only documents Mr. Moyse provided to West Face were four innocuous writing samples about irrelevant companies. Justice Newbould carefully considered those writing samples and concluded correctly that they were a "red herring with little or no substance…" because the samples "had nothing to do with WIND or the confidential Catalyst information alleged to have been obtained and used by West Face". See Reasons for Judgment of Justice Newbould, August 18, 2016, at para. 59.

20 This is also false. Although Mr. Moyse wiped his company Blackberry before returning it to Catalyst (because it contained personal communications and photographs), Catalyst retained copies of all work-related information on its servers. Mr. Moyse did not wipe his personal computer. Rather, he deleted irrelevant information concerning his internet browser history (on his personal computer) that disclosed

> Despite the overwhelming mountain of evidence against West Face, Judge Newbould deemed it meritless in August 2016. Newbould ruled there was no reason to think Moyse had brought confidential information about Wind to West Face.
>
> In addition, Information is brewing about a wolf pack of companies that West Face is involved with as well- we can connect you with the investigators.[21]
>
> Please let me know if you'd like to speak with my source.

78. Jamieson made the same false pitch by virtually identical emails sent on September 17, 2017 to Derek DeCloet of the *Globe and Mail*, as well as to a journalist at *USA Today*. These emails are attached to my Affidavit as Exhibit "**HH**". The words used by Jamieson in her emails to multiple journalists were fed to her by Psy Group.

79. As explained in detail in the footnotes inserted above into the text of Ms. Jamieson's email, the story she peddled to multiple journalists on behalf of the Catalyst Defendants was replete with serious misstatements. In short, however, Jamieson's pitch to Ms. Blatchford, Mr. DeCloet and *USA Today* was two-fold: first, she contended falsely that Justice Newbould had rendered a biased and corrupt judgment in the Moyse Action in favour of West Face (consistent with Catalyst's Post-Judgment Comments); and second, she alleged falsely that West Face was involved in a "wolf pack" of companies that had wrongfully attacked public companies (consistent with the October 13, 2016 Press Release and the First Investor Letter). The day after Jamieson sent this email to

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his use of adult entertainment sites. The event in question occurred in July 2014, long before Justice Newbould had anything to do with the case.

[21] The only reason information of this nature was "brewing" was that Psy Group was cooking it up at the direction of Catalyst.

Ms. Blatchford, Mr. DeCloet, and *USA Today*, Catalyst's plan to manufacture the "evidence" it needed to support the false allegations made in her email was implemented.

80. First, on September 18, 2017, Black Cube stung Justice Newbould. Operatives of Black Cube met with him under the false pretence of wanting advice regarding a fictitious arbitration. Both during a meeting at Justice Newbould's office on the morning of September 18, and again during dinner at Scaramouche later that evening, Black Cube operatives made a series of anti-Semitic statements about the fictitious opposing party, for the obvious purpose of baiting Justice Newbould into agreeing with them or making anti-Semitic comments of his own. Justice Newbould did not do so, however, and instead took issue with these offensive remarks.

82. Although the Catalyst Defendants have taken the position in these proceedings that they had no foreknowledge of the sting against Justice Newbould, it is important to understand that:

(a) Before that sting occurred on September 18, 2017, Catalyst and Glassman specifically instructed Psy Group to damage Justice Newbould's reputation by accusing him of corruption and bias (including racism and anti-Semitism);

(b) This mission was entirely consistent with Catalyst's accusations of bias against Justice Newbould in its Post-Judgment Comments of August 2016;

(c) Catalyst arranged in advance to publicize the results of the sting; and

(d) Immediately after the sting occurred, the Catalyst Defendants took full advantage of that sting by providing materials from the sting to Ms. Blatchford of the *National Post* (through Jamieson). Their purpose in doing so was to induce Ms. Blatchford to publish a highly negative article concerning Justice Newbould in the days immediately preceding the scheduled argument of Catalyst's appeal in the Moyse Action on September 26 and 27, 2017. Catalyst only sought an adjournment of its appeal in the Moyse Action on September 25, 2017 after no such article was, in fact, published.

83. In summary, the Post-Judgment Comments, the October 13, 2016 Press Release and the First Investor Letter were not isolated events or statements. They cannot be assessed independently of the entire factual context in which they were prepared and issued. Rather, as pleaded in the Counterclaim, they formed part of a much larger orchestrated scheme to harm West Face and me by publicizing the same defamatory messages: casting doubt on Justice Newbould's decision in the Moyse Action, and smearing West Face and me as having engaged in improper and unlawful conduct, both in acquiring WIND, and in committing criminal market manipulation with respect to Callidus. As I will explain below, the fourth publication that is the subject of the Catalyst Defendants' Partial Anti-SLAPP Motion was also part of this same orchestrated scheme.

E. The Catalyst Defendants' Publication of the March Investor Letter in Furtherance of Their Campaign of Defamation and Harassment

(i) The Dispute Over the March Investor Letter

84. The final portion of the Counterclaim that the Catalyst Defendants seek to have struck out relates to the publication by Catalyst of its "**March Investor Letter**" on or around March 19, 2018 to hundreds of investors.[22] This publication occurred shortly after the Court of Appeal dismissed from the bench Catalyst's appeal from Justice Newbould's Decision in the Moyse Action on February 21, 2018, (without calling upon counsel for West Face), but before the Court issued its Reasons for doing so on March 22, 2018. Catalyst knew at the time that the March Investor Letter was disseminated that Justice Hainey's Decision in the VimpelCom Action would soon be released. Although the motions to dismiss the VimpelCom Action had been argued before Justice Hainey in August 2017, his Decision had been withheld at Catalyst's request until the Court of Appeal's Reasons in the Moyse Appeal were released. Justice Hainey released his Decision dismissing the VimpelCom Action as an abuse of process on April 18, 2020, roughly one month after the Court of Appeal released its Reasons in the Moyse Action.

85. In the March Investor Letter, Catalyst asserted yet again that it had new "cogent evidence" about the WIND litigation, in the form of so-called "interviews" with two former employees of West Face. Catalyst quoted portions of these "interviews" in an effort to support its entirely false contention that confidential information about Catalyst's bid for WIND had been "improperly leaked" to West Face, and that Catalyst's exclusivity rights

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22 See Riley Affidavit, at paras. 110-120.

had been breached. A copy of the March Investor Letter is attached to my Affidavit as Exhibit "**II**".

86. West Face's allegations concerning the March Investor Letter are set out in paragraphs 195 to 199 of the Counterclaim. In summary, West Face alleges (and I believe) that the March Investor Letter:

(a) was false and defamatory, including because its plain, ordinary and intended meaning was that West Face acquired WIND through unlawful means;

(b) was disseminated by the Catalyst Defendants in furtherance of their overarching conspiracy for the purpose and with the effect of harming West Face and me, including by further shrouding us in controversy and scandal, including with members of the investment community;

(c) deliberately mischaracterized and concealed both the nature, provenance and substance of the so-called "interviews" of West Face's former employees (including by omitting the important fact that the so-called "interviews" of West Face's former employees were, in fact, surreptitious sting operations conducted by operatives of Black Cube using deception, lies and false pretences); and

(d) distorted the substance of the sting "interviews" by using carefully selected excerpts that were designed to mislead readers by conveying false and distorted accounts of information that was actually conveyed by these former employees when they were set up and stung.

87. In response to these allegations, Riley asserts in his Affidavit that the March Investor Letter was merely intended to be a "confidential and privileged update"[23] to Catalyst's investors about the WIND litigation. Riley's evidence is that Catalyst was merely "informing" its investors, so as to keep them "apprised of matters material to [Catalyst's] Funds". I strongly disagree, for the various reasons I describe below.

(ii) The March Investor Letter was Consistent With Catalyst's Broader Conspiracy Against West Face and Me

88. As with the other three publications that Catalyst has put in issue on this motion, the March Investor Letter was not an isolated or discrete publication. Rather, it was part of the carefully orchestrated, multi-year conspiracy by the Catalyst Defendants to falsely accuse West Face of misconduct in acquiring an interest in WIND. Moreover, Catalyst can hardly assert "privilege" over a letter that was disseminated broadly to hundreds of investors, many of which were, and are, adverse to Catalyst because of the way in which their investments have been handled. And Catalyst can have had no reasonable expectation that a letter of this nature that was so widely circulated would, in fact, have been maintained in strict confidence by every one of its recipients.

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[23] Riley Affidavit, at para. 112.

(iii) The Content of the March Investor Leader Was Seriously Misleading

89. The March Investor Letter did not "inform" Catalyst's investors fairly or accurately concerning the supposed "interview" evidence the Catalyst Defendants had obtained as a result of the Black Cube Campaign.

90. As a starting point, the two "interviews" quoted by Catalyst in the March Investor Letter were, in fact, surreptitiously recorded conversations that were arranged deceitfully by operatives of Black Cube during the course of "sting" operations against two former employees of West Face (Peter Brimm and Yu-Jia Zhu) in the Fall of 2017. The March Investor Letter:

(a) failed to disclose that Mr. Brimm and Mr. Zhu were the targets of sting operations run by Black Cube, using outright lies, false aliases and false pretenses;

(b) failed to inform Catalyst's investors that the "interviews" given by Mr. Brimm and Mr. Zhu were not given on an informed basis, or under oath, but were in fact casual conversations that were secretly recorded without their knowledge or consent;

(c) omitted Mr. Brimm and Mr. Zhu's true identities (thereby preventing any reader of the March Investor Letter from simply contacting Mr. Brimm and/or Mr. Zhu to discuss their purported evidence); and

(d) failed to disclose to Catalyst's investors important statements made both by Mr. Brimm and by Mr. Zhu which demonstrated that the claims made by Catalyst about them, and concerning the WIND transaction, were entirely false.

(a) The March Investor Letter Misrepresented Both the Substance and the Significance of Mr. Brimm's "Interview" Evidence

91. The March Investor Letter misrepresented both the substance and the significance of Mr. Brimm's so-called "interview" evidence. Mr. Brimm was the first West Face employee quoted by Catalyst in the March Investor Letter. Catalyst asserted in its March Investor Letter that Mr. Brimm had "repeatedly indicated in his interview that inside information about the WIND negotiations was improperly leaked to West Face".[24]

92. Mr. Brimm was an employee of West Face between October 2011 and April 2015. During the course of his employment at West Face, Mr. Brimm had no involvement whatsoever in West Face's acquisition of WIND. As set out below, Mr. Brimm made this critically important fact clear to the Black Cube operative who met with him. This fact had to have been perfectly clear to Catalyst at the time it decided to quote selectively from Mr. Brimm's "interview" in the March Investor Letter.

93. Mr. Brimm has sworn an Affidavit in this proceeding setting out his recollection of the sting conducted against him by Black Cube. A copy of Mr. Brimm's Affidavit is attached to my Affidavit as Exhibit "**JJ**".[25] Mr. Brimm makes clear in his Affidavit that he met and communicated with operatives of Black Cube on multiple occasions during the period from September to November, 2017. Even though Catalyst publicized the supposed results of its sting on Mr. Brimm in its March Investor Letter, the Catalyst Defendants have asserted privilege over all of the documents in their possession (as well as over all of the documents in the possession of Black Cube) regarding Black Cube's

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24 March Investor Letter, Exhibit "**II**" at para. 11.

25 Peter Brimm's Affidavit was originally attached as Exhibit "G" to Philip Panet's Affidavit in Support of a Motion for Production from Third Parties in this Action, sworn June 4, 2018.

sting operation against Mr. Brimm. The lone exceptions to this claim of privilege are the recordings and transcripts of the so-called “interviews” of Mr. Brimm and Mr. Zhu that Catalyst quoted selectively from in its March Investor Letter (which Riley also attached to his Affidavit).

94. Mr. Brimm’s Affidavit describes how, over the course of this prolonged sting operation, operatives of Black Cube falsely led him to believe that they were interested in having him meet with and give a presentation to a fictitious group of Chinese investors they purported to represent. This is consistent with the transcript of Mr. Brimm’s interview that Riley attached as Exhibit “49” to his Affidavit.

95. As set out in Mr. Brimm’s Affidavit, the specific “interview” quoted from by Catalyst in its March Investor Letter was a casual discussion between Mr. Brimm and a Black Cube operative named Ibrahim Zaitoun that took place on November 1, 2017, at approximately 6:45 am, at a Starbucks located in downtown Toronto. This occurred: (i) more than three years after West Face acquired WIND; (ii) well after all of Catalyst’s allegations against West Face regarding WIND had been publicized repeatedly; and (iii) more than a year after Justice Newbould’s Decision in favour of West Face in the Moyse Action had been rendered.

96. During that discussion on November 1, 2017, the Black Cube operative invited Mr. Brimm to prepare two presentations for the fictitious Chinese investors he purported to represent: the first was to be about the Canadian market; the second was to be about Mr. Brimm’s experience at West Face during the period in which West Face acquired WIND.

97. *The moment the Black Cube operative asked Mr. Brimm to present on the topic of WIND, Mr. Brimm advised that he had not worked on the WIND transaction while employed at West Face*. Instead, he referred the Black Cube operative to Mr. Zhu (who by that time had left West Face and moved to British Columbia). Catalyst edited out and failed to disclose to investors the following crucial context in its March Investor Letter:

> BLACK CUBE OPERATIVE: And the second, hmm, the second thing that I would like you to talk about is your experience with the, hmm, hmm, West Face -- you worked at West Face, right?
>
> PETER BRIMM: West-Face, yeah.
>
> BLACK CUBE OPERATIVE: Your experience there while the purchase of Wind happen -- occurred.
>
> PETER BRIMM: The purchase of what?
>
> BLACK CUBE OPERATIVE: Hmm, Wind I think.
>
> PETER BRIMM: Wind? Okay.
>
> BLACK CUBE OPERATIVE: the cellular company, because it's [a] very big acquisition! Okay?
>
> PETER BRIMM: Yeah.
>
> BLACK CUBE OPERATIVE: So, hmm, we would like you to talk about that, if it's possible of course.
>
> **PETER BRIMM: Hmm, I didn't, <u>I didn't work on that file.</u>**
>
> BLACK CUBE OPERATIVE: Umm-hmm you know
>
> PETER BRIMM:· **--I know some details about it, but <u>I didn't actually work on it</u>, so.**· The gentleman who was responsible for it now lives in BC.
>
> BLACK CUBE OPERATIVE: B.C.?
>
> PETER BRIMM:· You know, British Columbia.
>
> BLACK CUBE OPERATIVE: Oh, British Columbia.

> PETER BRIMM:· Yeah, yeah, exactly, yeah. Hmm, so, he…started his own fund now. But, I'm (pauses – AGENT), let's see. So, the… if we're speaking about Canada, I can talk as short or as long as you want about that, hmm, **the stuff on Wind, I don't have a lot of details 'cause I wasn't on the file.· That would have to be a bit shorter.**

98. Moreover, Mr. Brimm explained in his Affidavit that West Face had strict confidentiality rules surrounding the WIND negotiations while he was at West Face. As a result, he knew nothing about the deal beyond what had been disclosed publicly.

99. When the Black Cube operative asked Mr. Brimm how long he would be able to present to the fictional Chinese investors on the topic of WIND, Mr. Brimm advised that he "might" be able to speak about WIND for a total of a half an hour, because he did not have much information about the matter. When made aware of Mr. Brimm's lack of involvement in the WIND transaction, the Black Cube operative suggested expressly that in presenting to the fictitious Chinese investors, Mr. Brimm could and should rely on "rumours":

> BLACK CUBE OPERATIVE: Okay, and the second one, the Wind story?
>
> PETER BRIMM:· **I mean, I might be able to put together half an hour on that.**
>
> BLACK CUBE OPERATIVE: **That's it?** Ok.
>
> PETER BRIMM:· **Yeah, I don't really have --**
>
> BLACK CUBE OPERATIVE: Okay.
>
> PETER BRIMM:·**-- that much on it -- I don't have the details on it.**
>
> BLACK CUBE OPERATIVE: **You probably will as that – in the business world there's a lot of importance to rumours, to how you saw it happening, you know, not just**

> **the one that did the deal, but – yeah <u>that could be very interesting because it is a very significant deal, even in Chinese eyes</u>.** So that would be nice.

100. It was only after being asked to deliver a presentation to Chinese investors based on rumours that Mr. Brimm speculated about the potential transfer to West Face of confidential information by someone other than Mr. Moyse. His speculation was quoted by the Catalyst Defendants misleadingly and out of context in the March Investor Letter.

101. In short, the March Investor Letter was hardly a fair, accurate or good faith communication by Catalyst to investors of accurate or reliable information from Mr. Brimm. That Letter was yet another bad faith step in the broader conspiracy to defame West Face and me, and was taken with full knowledge by the Catalyst Defendants that the statements of Mr. Brimm:

(a) were made casually based on rumours and speculation, rather than carefully and under oath based on direct knowledge. Furthermore, those statements were made by Mr. Brimm in circumstances where he had no idea that his casual speculation was being recorded or would ever be quoted from or relied upon;

(b) were made more than three years after West Face acquired WIND, in a transaction that Mr. Brimm played no role in and was walled off from; and

(c) were made in circumstances where the Black Cube operative specifically encouraged Mr. Brimm to prepare a lecture on the topic of WIND based on "rumours" on the ostensible basis that doing so would be of interest to fictional Chinese investors that the Black Cube operative purported to represent.

102. If the Catalyst Defendants had provided this important context in describing Mr. Brimm's so-called "interview" in its March Investor Letter, I seriously doubt that any responsible investor would have paid any attention whatsoever to the information Catalyst attributed to Mr. Brimm. That, of course, is precisely why the Catalyst Defendants disclosed no such context in their March Investor Letter.

(b) The March Investor Letter Also Misrepresented Both the Substance and the Significant of Mr. Zhu's "Interview" Evidence

103. The March Investor Letter also misrepresented both the substance and significance of Mr. Zhu's so-called "interview" evidence. Mr. Zhu was the second West Face employee quoted by Catalyst in the March Investor Letter. The March Investor Letter asserted that Mr. Zhu's "interview" indicated that "the West Face consortium's winning bid was made as a result of collusion, including 'teamwork' with WIND's Tony Lacavera during the period when Catalyst was contractually entitled to exclusivity".[26]

104. This statement conveyed two key messages:

(a) First, Catalyst's use of the pejorative word "collusion" suggested that West Face and its co-investors had acted improperly in working with Mr. Lacavera to formulate their successful winning bid for WIND during the term of Catalyst's Exclusivity Agreement with VimpelCom; and

(b) Second, it implied that Mr. Zhu's evidence that the West Face consortium had teamed up with Mr. Lacavera was "new" evidence that had been concealed in

[26] Emphasis added. March Investor Letter, Exhibit "II" at para. 15.

the Moyse Action, and that would enable Catalyst to succeed in the VimpelCom Action.

105. These implications were entirely false, for a number of reasons:

(a) As a starting point, neither Mr. Lacavera nor his company, Globalive Capital Inc. ("**Globalive**"), were parties to Catalyst's Exclusivity Agreement with VimpelCom.[27] Nor was West Face. Until the time that Globalive entered into a Support Agreement with VimpelCom on August 7, 2014 (discussed below), Globalive was not restricted in any way from working with West Face (or with any other potential investor in WIND, for that matter);

(b) There was nothing improper or remarkable about West Face seeking to team up with Globalive in its efforts to acquire VimpelCom's interest in WIND. Globalive already held a controlling voting interest in WIND, and its executives (including Mr. Lacavera) were intimately familiar with WIND's business and operations. Moreover, unlike VimpelCom, Globalive was not interested in exiting entirely from WIND; rather, it wanted to remain involved;

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27 This fact is clear on the face of the Exclusivity Agreement, a copy of which is attached as Exhibit "**KK**", and was appended to the Riley Affidavit as Exhibit 36. However, for this Court's ease of reference, Justice Hainey of the Ontario Superior Court of Justice explicitly made this finding of fact in his Reasons for Decision dated April 18, 2018 dismissing Catalyst's VimpelCom Action, which included a claim by Catalyst that Globalive had breached Catalyst's Exclusivity Agreement with VimpelCom. Justice Hainey struck out this claim for breach of contract as disclosing no reasonable cause of action, because, among other things: (i) Globalive was not a party to the Exclusivity Agreement; and (ii) Catalyst had failed to allege in its Statement of Claim in the VimpelCom Action that Globalive was a party to this Agreement. Justice Hainey's Decision dismissing the VimpelCom Action as an abuse of process was upheld by the Court of Appeal in its Decision dated May 2, 2019. Justice Hainey's Reasons for Decision in the VimpelCom Action are attached as Exhibit "**LL**"; the Court of Appeal's endorsement is attached as Exhibit "**MM**". The Supreme Court dismissed Catalyst's application for leave to appeal on November 14, 2019.

(c) The fact that West Face had "teamed up with Mr. Lacavera" in the period before the Support Agreement was entered into on August 7, 2014 was fully disclosed by West Face during the Moyse Action, and indeed was relied upon by West Face during the trial of that Action. That is so because working with Globalive was one of the factors that assisted West Face in successfully acquiring WIND without obtaining or using in any way confidential information of Catalyst;

(d) Justice Newbould found as fact in the Moyse Action that upon entering into the Support Agreement, Globalive ceased all negotiations with West Face over the sale of WIND until after VimpelCom's proposed transaction with Catalyst had fallen apart:

> However the day the proposal was sent in [*i.e.*, August 7, 2014], Mr. Lacavera of Globalive informed Tennenbaum [*i.e.*, one of West Face's co-investors] that Globalive had earlier that day signed a support agreement with VimpelCom and was therefore unable to continue any discussions or consider any proposals relating to WIND. **As a result, neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014**.[28]

106. In sum, in the March Investor Letter, Catalyst seriously mischaracterized any conclusions that could fairly or properly have been drawn from the small portion of Mr. Zhu's sting "interview" that it quoted from or referred to.

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28 Para. 105 to Justice Newbould's Reasons for Judgment dated August 18, 2016 (attached as Exhibit 16 to my Affidavit dated November 8, 2019).

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107. In addition to misleading investors about the substance and importance of the information conveyed by Mr. Zhu when he was stung by Black Cube, *the Catalyst Defendants also deliberately omitted to inform investors that Mr. Zhu made perfectly clear when he was stung that there was "no truth" to Catalyst's allegations of misconduct against West Face, and that Catalyst lost the WIND opportunity not because of anything West Face had done, but rather because Catalyst had failed to deliver to VimpelCom key deal terms that VimpelCom was looking for in a transaction, namely expediency and certainty of closing*. The Catalyst Defendants also failed to disclose to investors that the Black Cube operative who "interviewed" Mr. Zhu deliberately misled him, including concerning information that had allegedly been conveyed to that operative by Mr. Brimm. The following is an excerpt from the same "interview" transcript that Riley attached as Exhibit "50" to his Affidavit:

> YU JIA ZHU:· And that is how fast that transaction was.
>
> **So Catalyst, as you probably know, sued us afterwards and said, oh, you guys did all sorts of things, that you stole --**
>
> **BLACK CUBE OPERATIVE: Yeah, because Peter [Brimm] told me that there was an employee that then came to work for West Face.**
>
> **YU JIA ZHU:· It was coincidental.·** At the time, West Face was launching a new credit fund, a lending fund, and so they hired a junior analyst to be a part of this credit fund.· He worked for like five days, and then Catalyst sent a letter saying, hey, you can't hire this guy; he has a non-compete and such and such.
>
> So we told him, all right, go home and sit at home for, you know, six months, and then come back kind of thing, and we'll pay your salary.
>
> **He was there for five days and didn't do anything.**

But Catalyst tried to sue West Face and say, you know, this guy gave you secrets which allowed you to bid and win in this auction against us.· It didn't make any sense.· Like we bid less money than you, and it is not like you told us how much money you were bidding and we bid like –

BLACK CUBE OPERATIVE: More.

YU JIA ZHU:· -- 1 million dollars more.

BLACK CUBE OPERATIVE: Yeah.

YU JIA ZHU:· We bid less than you.

BLACK CUBE OPERATIVE: Peter [Brimm] told me that Tony [Lacavera] pulled strings to make sure that none of the lawsuits succeed, personal strings.

YU JIA ZHU:· Yeah, uhm, it wasn't really a matter of pulling strings.· It was more, like I said, the judges in Canada, the court system will look at all -- look at the facts of the case. And we already had a judgment, you must have heard.

There is an appeal now. But the initial judgment was in our favour.· **They said look at the facts of the case. Clearly, you know, West Face won the auction process because they were willing to take risks that Catalyst was not willing to take.· We took a certain amount of risk by entering into this structure**, because it was possible --

BLACK CUBE OPERATIVE: In the conditions.

YU JIA ZHU:· Exactly, yeah, because it was possible that Tony Lacavera, for a period of time he owned a hundred percent of the votes of the company, and it was our risk that he could have screwed us by, you know, not completing the second step transaction where we get 100 percent of the -- or 90 percent of the company.

BLACK CUBE OPERATIVE: He could have kept it and you -

YU JIA ZHU:· Exactly, yeah, so it was not without risks.· **We were willing to take that risk, and therefore, we were rewarded with the asset and eventually the proceeds, you know, the gains from it.**

> **And this was the judge's words.· The judge said this to Catalyst.· He said, you lost not because --**
>
> **BLACK CUBE OPERATIVE: Deal with it.**
>
> **YU JIA ZHU:· Yeah, not because this junior analyst gave some secret to West Face.· It was because you were unwilling to take the risk.**
>
> **BLACK CUBE OPERATIVE: So the rumours that he [*i.e.* Brandon Moyse]·came with the competitor's [*i.e.*, Catalyst's] offer, those are – that is bullshit?**
>
> **YU JIA ZHU:· Yes.· There is no truth to it at all.·** We bid less than --
>
> BLACK CUBE OPERATIVE: Yeah, logically it doesn't make any sense, of course.
>
> **YU JIA ZHU:· It is because the fundamental thing, they [*i.e.*, Catalyst] forgot about the priorities for VimpelCom.· Expediency of close, how fast you can close.**

108. In fact, as the full, unedited transcript of Black Cube's sting of Mr. Brimm makes clear, Mr. Brimm most certainly did not tell Black Cube that Mr. Lacavera had "pulled personal strings" to ensure that "none of Catalyst's lawsuits would succeed". That was an outright lie.

109. In short, the Catalyst Defendants disseminated to investors manifestly misleading extracts from Mr. Zhu's sting, and in doing so seriously mischaracterized both the significance and substance of Mr. Zhu's statements. If the Catalyst Defendants had conveyed to investors a fair and accurate summary of the information conveyed by Mr. Zhu, and disclosed properly the circumstances in which Mr. Zhu was "interviewed", I seriously doubt that any responsible investor would have paid attention to that information.

(iv) The Catalyst Parties' Conduct Concerning the "Evidence" Given by Messrs. Brimm and Zhu is Inconsistent With Their Position

110. Riley's assertion that the March Investor Letter merely "reported" to Catalyst's investors the new supposedly "cogent evidence" that they had allegedly obtained from Messrs, Brimm and Zhu is flatly inconsistent with their conduct concerning that evidence. It is clear to me that the March Investment Letter was intended to unfairly disparage and defame West Face and me, rather than to report fairly and accurately on what Messrs. Brimm and Zhu actually said.

111. First, Messrs. Brimm and Zhu were stung by Black Cube well before Catalyst's appeal in the Moyse Action was argued in the Court of Appeal in February 2018. After they were stung, however, Catalyst did not move to submit information concerning their stings as fresh evidence in the Court of Appeal. Nor did Catalyst seek to rely upon evidence concerning those stings in the proceedings before Justice Hainey in the VimpelCom Action. Catalyst was well aware that their so-called "evidence" concerning Messrs, Brimm and Zhu was neither cogent nor credible, and would not assist Catalyst in its efforts to appeal the Decision of Justice Newbould in the Moyse Action or resist the motion of West Face to stay the VimpelCom Action as an abuse of process.

112. Second, rather than attempt to rely upon this so-called "evidence" in the Moyse Action or in the VimpelCom Action, the Catalyst Defendants and/or their agents sought, instead, to publicize to the media misleading extracts from their sting "interviews" of Messrs. Brimm and Zhu. In doing so, they no doubt sought to maximize the harm to West Face and me, including by further shrouding us in controversy and scandal, and by undermining publicly our success against Catalyst both in acquiring WIND and in the Moyse Action. In that regard, in the Fall of 2017 (during the very timeframe of Project

Maple Tree), West Face and its counsel, as well as Mr. Brimm, were approached by multiple reporters from major media outlets like Reuters, Bloomberg News and the Associated Press, and asked to comment on statements that purportedly had been made by Messrs. Brimm and Zhu during the Black Cube stings. Information concerning those statements had no doubt been conveyed to members of the media by or on behalf of the Catalyst Defendants.

113. Third, Catalyst never used this "interview" evidence in the WIND litigation, or even proposed to do so—instead, it was only ever used by Catalyst outside of Court, in an effort to damage West Face and undermine the legitimacy of its victories. Instead, Catalyst "cherry-picked" misleading excerpts from the transcripts of these stings in their communication to investors in a manner that materially distorted their meaning and significance. That approach is flatly inconsistent with providing material information to investors fairly and on an accurate and reliable basis.

F. Harm Suffered by West Face

114. Unfortunately, the Catalyst Defendants have made good on the threat issued by Glassman in late 2014 to destroy West Face and me. Our business and reputations have been savaged through a series of relentless defamatory attacks and coordinated vexatious litigation. It was only after we were repeatedly sued and victimized by the Catalyst Defendants that West Face and I brought the Counterclaim. We did so out of necessity. By the time our Counterclaim was brought, we were left with no choice but to defend our business and reputations, including against the false and defamatory communications that had been disseminated by the Catalyst Defendants to hundreds of

investors and others as elements of their wide-ranging, systematic and relentless campaign of harassment, retaliation and intimidation described above.

115. As explained more fully below, the harm that has been inflicted on West Face and me by the Catalyst Defendants is serious and potentially irreparable. There are two principal ways in which we have suffered. The first is that West Face has been impaired significantly in managing its existing investments. The second is that the efforts of West Face to raise new funds from investors have been undermined. Both of these impacts are directly attributable to the actions of the Catalyst Defendants that are the subject of the Counterclaim.

116. In his Affidavit, Riley claims that any harms suffered by West Face are because of its own conduct, not the misconduct of the Catalyst Defendants. While it may be difficult to determine with precision exactly what would have happened if the systematic, vicious and relentless campaign of intimidation, harassment and defamation that the Catalyst Defendants have perpetrated over the past six years had never occurred, I can say without any hesitation whatsoever that the conduct engaged in by the Catalyst Defendants has directly and negatively impacted West Face's ability to manage its investments and to raise and invest capital.

(i) The Catalyst Defendants' Conduct Impaired West Face's Ability to Manage the Investments of its Existing Funds

117. In his Affidavit, Riley attacks the performance of West Face's investment funds. His criticisms are neither fair nor warranted. Riley overstates his attack and ignores the context surrounding the performance of West Face's funds, including the manner in which the WIND-related litigation and Catalyst's related publications out of court undermined

West Face's ability to manage investments of its funds in a manner consistent with the investment approach that West Face had previously taken.

118. West Face's traditional investment strategies have included a significant focus on less liquid, more concentrated, and longer-term investments. The primary investment funds managed by West Face are named the "Long Term Opportunities" funds. They have been marketed to investors on the basis of those types of investments. Furthermore, a number of the most successful investments made during my career as an investor have featured these attributes, including investments in Stelco, WIND Mobile, Maple Leaf Foods, Bonanza Creek Energy, Terrastar, Protostar I and UTS Energy.

119. The Long Term Opportunities funds are structured as "hedge funds". West Face's hedge funds provide investors with the opportunity to withdraw a portion of their investment capital quarterly, subject to various restrictions on the size and timing of the withdrawal. These withdrawal rights, particularly in view of the preference in the portfolio towards longer-term, less liquid investments, requires West Face (as a fiduciary for its clients) to manage very carefully the balance between the assets and liabilities of the funds. West Face had done so successfully since the inception of these funds in 2007.

120. In late 2014 Catalyst expanded the size and scope of the Moyse Action to include claims for hundreds of millions of dollars in damages against West Face in relation to the WIND investment. Ultimately, Catalyst claimed over $1 billion in damages as well as the tracing of profits associated with the WIND investment. Catalyst's claims were enormous, and represented an existential threat to the continued existence of West Face. Moreover, the WIND investments were made in the name of (and profits accrued to) investment

funds managed by West Face. Accordingly, the potential liability arising from Catalyst's WIND-related litigation represented a very material exposure for those funds. As a result, and due to the need to carefully balance the assets and liabilities of the investment funds, West Face was forced by the claims asserted by Catalyst to adopt a significantly more conservative investment approach than it had followed historically .

121. In summary, West Face had to position investments of its funds to be able to withstand two threats. First, West Face and its funds faced claims for damages and related relief measured in the hundreds of millions of dollars. Accordingly, West Face determined that it was prudent to hold back and not distribute to investors 50% of the profits that had been realized on the acquisition and subsequent sale of WIND to protect against the risk of Catalyst succeeding in litigation relating to WIND. Second, West Face and its funds faced a significant risk that the false and defamatory allegations made by Catalyst in its tactical litigation and in the Defamation Campaign would induce investors to submit significant withdrawal requests. Put simply, West Face's investment funds risked a potential "run on the bank", which had the potential for significant prejudice to our investors generally. Catalyst had made serious allegations of misconduct against West Face and me in its litigation and in the Defamation Campaign. While we knew that those allegations were entirely false, we also knew that investors were far less familiar with the relevant facts and circumstances than we were, and might well take the disinformation spewed by or on behalf of Catalyst at face value. We also knew that complex commercial litigation is an inherently risky and uncertain process. As a result, we were well aware that the extraordinarily harmful allegations made by the Catalyst Defendants against West Face and me required existing and prospective investors in West Face funds to assess

the risk that, if accepted in court, the allegations could destroy West Face as a registered investment manager and inflict enormous harm on the funds managed by West Face.

122. Contrary to the assertions made by Riley in paragraph 176 of his Affidavit, the problem was not West Face's hedge fund structure, which it had managed successfully throughout the period from 2007 to 2014. The problem was Catalyst's coordinated and spurious litigation and defamation campaign. To address this exposure for the funds, West Face had to reduce the concentration of its funds in less liquid investment opportunities that it had traditionally engaged in even though they carried with them substantially greater potential returns. Instead, West Face was forced to hold high cash balances in the portfolios of its investment funds to ensure that there was sufficient liquidity in its investment positions to satisfy potential liabilities to Catalyst, and to address the potential for elevated investor withdrawals. As a result, West Face could no longer pursue the kinds of longer-term, less liquid investments (like WIND) that had long been a cornerstone of our success. This affected adversely the performance of West Face's funds.

123. In fact, only in late February 2020, after the Supreme Court of Canada had dismissed both of Catalyst's applications for leave to appeal in the Moyse Action and the VimpelCom Action, and Catalyst had not commenced yet another claim, did West Face become comfortable concerning the outcome of the WIND-related litigation. Only then could West Face finally release substantially all of the WIND investment proceeds to its investors.

124. Moreover, Riley exaggerates his accusations of poor performance at paragraphs 166 and 169 of his Affidavit. He does so by cherry-picking benchmarks that compare West Face's returns to those of indices based on the TSX60 or S&P500, which are not representative of the benchmarks applicable to an investment in a hedge fund. Institutional investors have provided the substantial majority of West Face's investment capital. They typically construct investment portfolios across a diversified range of investment strategies, including not only equity funds and credit funds, but also "alternative assets" such as hedge funds and private equity funds to diversify their portfolios beyond public equity markets.

125. For that reason, investors considering an investment in Canadian hedge funds would evaluate West Face primarily in context of West Face's Canadian hedge fund peers, and, to a lesser degree, against other North American hedge funds more broadly, rather than against public equity market indices like the ones referred to by Riley. The most well-known index of Canadian hedge funds is the Scotiabank Canadian Hedge Fund Index. Indeed, in its investor communications, a relevant excerpt of which is attached as Exhibit "**NN**", West Face benchmarks itself against that index. Attached as Exhibit "**OO**" to this Affidavit are two charts comparing the Scotiabank Canadian Hedge Fund Index to the performance of West Face's Long Term Opportunities Fund—one chart for the investment vehicle open to Canadian investors, and the other chart for both onshore U.S. investors and offshore investors. Each of these charts effectively compares West Face's hedge funds to a more relevant benchmark than the public equity market indices referred to by Riley. In this context, West Face performed as well or better than its most comparable benchmark. The charts also include the TSX Composite Index for reference,

although West Face's institutional investors would generally not rely on this index as an appropriate comparator for evaluating the performance of West Face's hedge funds.

126. Furthermore, while a substantial portion of alternative strategies have underperformed relative to the public equity market indices (see the chart in Exhibit "**PP**", which compares various hedge fund indices to the S&P500), very substantial investment capital continues to be deployed in hedge fund strategies (including those employed by West Face), primarily because they offer a source of diversification beyond passive public equity market indices. According to Prequin, a leading alternative asset industry data source, over US$3 trillion was deployed in hedge fund strategies as of Q1 2020. This pattern suggests that investors in alternative strategies are generally not benchmarking against public equity market indices.

127. In summary, Riley's suggestion – that the Catalyst Defendants bear no responsibility for the decline in West Face's investment performance after West Face became the target of relentless attacks and repeated, vexatious litigation at the hands of the Catalyst Defendants – is simply not true. Catalyst's scheme of defamation, intimidation and harassment (including through the dissemination of the publications at issue in the Catalyst Defendants' Partial Anti-SLAPP Motion) constrained dramatically the manner in which West Face could invest.

128. On a final but related note, it should also be noted that defending and responding to the repeated attacks made against West Face and me by the Catalyst Defendants has been enormously burdensome and a huge drain on West Face's resources and attention. We have spent tens of millions of dollars in legal and other professional fees, and devoted

countless hours of personal and professional time, in our efforts to investigate the conduct that the Catalyst Defendants have engaged in but concealed, to defend the seemingly endless litigation commenced by one or more of the Catalyst Defendants, and to mitigate the enormous harm and damage the Catalyst Defendants have caused.

(ii) The Catalyst Defendants' Conduct Impaired West Face's Ability to Raise Additional Investment Capital for its Existing Funds

129. Investment management is founded on the integrity of the investment manager. Investors in our funds cannot know in advance what investments will be made, so they have to rely on the track record, reputation and integrity of the investment manager. Investment management is also a highly competitive business, and investors have numerous investment managers they can choose to invest with. As a result, an investment manager whose reputation and integrity are under attack is at a significant disadvantage in a number of different respects.

130. As noted above, the primary group of investment funds managed by West Face has been the Long Term Opportunities funds. These are organized as hedge funds, which allow investors to redeem their investments on a periodic basis. Over time, the investors in any open-ended investment fund will change, with a natural cycle of investors redeeming after a period of being invested in the fund. In the normal course, hedge fund managers therefore need to continually market themselves and secure investments from new investors to replace investors that have redeemed their investments. However, the campaign of defamation, intimidation and harassment carried out by the Catalyst Defendants against West Face in the period since 2014 undermined significantly the ability of West Face to replace redeeming investors with new investors, and effectively

destroyed the ability of West Face to raise additional capital in aggregate. The lack of new investors ultimately eroded the viability of West Face's hedge funds, and resulted in the demise of West Face's non-Canadian hedge funds. Through their tactical, vexatious and repeated litigation and the continuous dissemination of false and defamatory statements concerning West Face and me, the Catalyst Defendants implemented and engaged in an extensive and extended plot to destroy West Face and me. By inducing elevated redemptions and materially undermining West Face's ability to replace redeeming investors, they created a "death spiral" that destroyed our previously successful business.

131. The conduct of the Catalyst Defendants adversely affected West Face's ability to retain and attract investment capital in a number of ways. Most obviously, the Catalyst Defendants attacked viciously the conduct, integrity and reputation of West Face and me. West Face's victories in court were repeatedly undermined by their relentless campaign of defamation and misinformation—not just about WIND, but also about allegedly unlawful market manipulation related to the "Wolfpack" allegations. Moreover, their allegations in the Defamation Campaign that West Face was engaging in regulatory breaches and illegal activity raised the prospect for existing and potential investors that regulatory or criminal law authorities might bring prosecutions or enforcement proceedings against West Face and its executives, including me. Even the possibility of such prosecutions or proceedings can amount to a death sentence for an investment manager. Unimpeachable integrity and reputation are essential for any investment manager, and a successful prosecution against West Face or its executives for regulatory and/or criminal violations would likely lead to a termination of West Face's registration with securities regulators.

132. Based on my conversations over the years with numerous existing and prospective investors of West Face, I know that Catalyst's allegations, both in its vexatious litigation and in its Defamation Campaign, raised significant concerns. Furthermore, the nature and scope of the claims asserted by Catalyst in the WIND litigation created additional concerns for new investors pertaining to potential exposure associated with litigation claims that preceded any investment that they might make. The lack of closure to the litigation and Catalyst's repetition of its unfounded allegations of misconduct outside the litigation materially impaired West Face's ability to allay the concerns of those investors. The Catalyst Defendants maintained a steady drumbeat of serious but unfounded allegations of misconduct, and in doing so took an enormous toll on our reputation and ability to attract and retain investment capital. As a result, starting in the second half of 2014 — precisely when Catalyst amended its allegations in the Moyse Action to include the WIND acquisition — and continuing to the present, West Face saw a dramatic reduction in subscriptions from new investors.

133. At paragraph 167 of his Affidavit, Riley cites an article in *Absolute Return* in support of an allegation of "lagging performance", suggesting the article was reporting poor investment returns by West Face's funds. However, that article was reporting on declines in assets under management, not return on investment, and described a broad industry-wide trend of decline in assets under management by hedge funds, rather than a trend particular to West Face. Riley's own evidence on this point disproves his argument: West Face was losing investors, rather than losing money on its investments. Moreover, the West Face related data cited in the *Absolute Return* article was incorrect. West Face suffered a decline in assets under management far more severe than was reported in the

article, precisely because of the severe damage inflicted by the Catalyst Defendants, as described above.

134. Riley also argues at paragraph 175 of his Affidavit that West Face's woes were caused by its own decision to suspend redemptions. That criticism is also unfair and unwarranted. In fact, Riley misunderstands the context of that decision and the withdrawal terms associated with the West Face investment funds. The governing documents for the West Face Long Term Opportunities funds (which were available to all investors at the time of investment) provide that withdrawals from each fund are limited to no more than 12.5% of aggregate general portfolio capital in any single quarter, regardless of the level of redemptions received from investors. Those restrictions meant that in the face of existing and anticipated investor withdrawal requests made by investors in the fall of 2017 (which were precipitated by Catalyst's campaign to destroy West Face), investors would be required to wait two full years to be fully paid out on their investments. In light of those redemptions and the inability to source new investment capital to replace those redemptions, West Face concluded that non-Canadian investors would be better served by accelerating the return of their capital in a manner that treated all (redeeming and non-redeeming) investors equally. Accordingly, after West Face suspended redemptions, West Face developed a proposal for investors in West Face's non-Canadian investment funds to return capital more quickly than the two years otherwise provided for under the fund documents. In effect, West Face stopped investors from "pulling" their capital out gradually over two years and instead "pushed" their capital out more rapidly. West Face's proposal was well received by non-Canadian investors and was implemented on approval by over 95% of investors, with no objections. When West Face later made a proposal that

would entirely lift the suspension on redemptions for non-Canadian funds in July 2019, 100% of investors in those funds approved the proposal.

(iii) The Catalyst Defendants' Conduct Impaired West Face's Ability to Raise a New Investment Fund

135. Through its history, West Face has applied a variety of strategies for raising and deploying investment capital. West Face has used structures for collective investment vehicles that were tailored to the available investment opportunities, and to the preferences of investors in those vehicles. Investment opportunities and investor preferences evolve over time and West Face has adapted its offerings to investors accordingly, including with hedge fund structures, private-equity style "draw" funds, co-investment funds and single-asset-category funds. Historically, West Face has employed investment strategies that involved relatively more liquid assets in funds with more open redemption terms, and less liquid assets in funds with more restrictive redemption terms. Where less liquid assets were acquired in its hedge funds, which have relatively open redemption terms, West Face ensured that the overall portfolio liquidity supported those strategies.

136. Over time, West Face had determined that from the varied investment strategies it had been applying, the subset of strategies involving more concentrated, less liquid, transactions had generally outperformed the various other strategies employed by West Face and were also preferred by most investors. Given the redemption issues in the West Face Long Term Opportunities funds, the liquidity structure of those funds, the significant legal exposure created by Catalyst, and the legacy portfolio of investments that had yet to be monetized in the West Face Long Term Opportunities funds, West Face decided to

create a new fund that would focus on that subset of investment strategies and discontinue other strategies.

137. Accordingly, from late 2017 to early 2019, West Face made efforts to raise capital from investors for a new private equity fund (the "**Distressed Fund**"). West Face retained Mercury Capital Advisors to act as a placement agent and to facilitate introductions to institutional investors that invest with private equity asset managers.

138. Throughout 2018 and during the first quarter of 2019, I travelled extensively across Canada and the United States to meet with investors identified by Mercury or through our own efforts, for the purpose of soliciting investments in our proposed Distressed Fund. The proposed investment strategy for that Fund was well received by potential investors. Nevertheless, we were unable to raise sufficient capital to create a new Fund. Based on the reaction that I received in numerous face-to-face meetings, and my experience dealing with alternative asset investors since the inception of the West Face Long Term Opportunities funds, I have no doubt that the Distressed Fund would have been successful but for the Defamation Campaign and the Black Cube Campaign conducted against West Face and me by the Catalyst Defendants.

139. Time after time when I was meeting with potential investors, I was told that they simply could not invest with West Face while Catalyst's allegations (including those made in the four publications at issue in the Catalyst Defendant's Partial Anti-SLAPP Motion) hung over our firm and me.

140. This was not simply a matter of litigation risk, given that we had been entirely successful in litigation with Catalyst on multiple occasions. Rather, Catalyst's very public

allegations of misconduct with respect to WIND, and of market manipulation with respect to Callidus, cast a pall over both West Face and me. As stated above, Investors have a wealth of options to choose in deciding where to invest their money. Many of them manage pension or endowment funds for large unions or universities, and are subject to intense scrutiny. They simply could not be seen investing funds with West Face while it was shrouded in controversy and scandal, and continued to suffer under the pernicious cloud associated with contrived and repeated accusations of serious misconduct that went to the heart of an investment manager's integrity and purpose.

141. Riley alleges at paragraphs 176-178 of his Affidavit that West Face's decision to raise a new distressed asset private equity fund was somehow an admission of a "flawed investment strategy". In reality, it was intended to implement West Face's most successful investment strategies in a fund structure that was insulated from the ongoing Catalyst-related litigation. Riley also claims that a focus on "distressed and undervalued situations" was somehow mimicking Catalyst, but almost every investor looks for undervalued situations, and West Face had been investing in distressed investments — including WIND — since the firm's inception.

142. At paragraph 179 of his Affidavit, Riley claims that West Face failed to raise a new fund because West Face lacked private equity experience. This claim is simply wrong. In fact, West Face had substantial experience both with investments typical of private equity funds, and with fund structures used in private equity.

143. First, the subset of more concentrated investment strategies that West Face (and other funds that I have managed) had historically engaged in (as noted above) include a

number of typical private equity investments (including WIND, Centaur Gaming, Maple Leaf Foods and Stelco). In fact, on several of those transactions our co-investors were private equity funds. Furthermore, the Long Term Opportunities funds were intentionally structured from the beginning in 2007 with the capability to engage in highly illiquid concentrated investments through the use of “side pockets”, which prevented investors from redeeming from those investments. Both the WIND and Centaur Gaming investments were structured as side pocket investments, which were similar to a private equity structure.

144. Second, in addition to the Long Term Opportunities funds, West Face also manages the Alternative Credit Funds, a group of credit funds structured in the same manner as typical private equity funds. Investment capital for the Alternative Credit Funds was committed by investors for a fixed duration, with investment first occurring through a fixed investment period; the investments were then monetized, and capital (along with any profits) was returned to investors during the “harvest” period.

145. Third, West Face has structured and raised capital for special purpose co-investment vehicles that were structured with terms comparable to private equity funds, where the existing West Face investment funds had insufficient capacity for a particular investment.

146. At paragraph 179 of his Affidavit, Riley also attempts to attack the Distressed Fund on the basis that West Face allegedly “cherry-picked” favourable investments and concealed unfavourable ones (and breached applicable SEC rules in doing so). That criticism is also unfair and unwarranted. In fact, West Face’s marketing document

provided detailed disclosure on the construction of the track record for the Distressed Fund and complied with applicable SEC guidance concerning the presentation of West Face's investment record. Furthermore, given the subset of investment strategies that was drawn from West Face's historical record and proposed for the Distressed Fund, the historical track record presented for the Distressed Fund was entirely relevant and appropriate for prospective investors in that Fund. Moreover, regardless of the track record presented in marketing materials associated with the Distressed Fund, interested investors were also provided with access to a data room that included West Face's complete investment track record.

147. The Distressed Fund was intended to raise a target of US$1 billion, with a life span of up to ten years. The management fee was to be 1.00% on unfunded commitments during the investment period and 1.75% on net invested capital. I have little doubt that West Face would have succeeded in raising this Fund in the absence of the serious misconduct of the Catalyst Defendants, as described herein and in my First Affidavit. If West Face had succeeded in raising the Distressed Fund, I believe that West Face reasonably could be expected to have earned approximately US$80 million in management fees over the life of the fund. The fund terms also provided for a carried interest performance incentive of 20% of any profits in excess of an 8% preferred return to investors. West Face's prior track record deploying the same strategies intended for the Distressed Fund demonstrated an annual rate of return of approximately 15%. Applying those returns to the Distressed Fund, West Face reasonably could be expected to have earned approximately US$120 million in carried interest performance incentive. As a result, West Face has lost the opportunity to earn hundreds of millions of dollars in

management fees and performance incentives associated with managing such investments.

148. In addition, if West Face had successfully deployed the first vintage of the Distressed Fund, West Face would have been able to raise successive vintages of the Distressed Fund (much as Catalyst has done with its own funds). The lost opportunities inflicted upon West Face through Catalyst's tactical litigation, the Black Cube Campaign and the Defamation Campaign, include many multiples of the damage inflicted by the sabotaged launch of the Distressed Fund.

149. Furthermore, history has now shown that West Face was prescient in seeking to establish an investment fund focused on distressed investment opportunities, given the current global economic collapse arising from the COVID-19 pandemic. Based on my own experience as a distressed investor over almost 30 years, I have no doubt that if West Face had been successful in putting into place a distressed investment fund in the current economic environment, West Face would have been well positioned to make a number of investments that would yielded substantial returns for investors. Furthermore, had West Face been able to launch the Distressed Fund in 2018, I expected that West Face would have been able to deploy a significant amount of capital and would soon have been marketing a second round of the Distressed Fund.

(iv) Conclusion

150. In order to be successful as an investment manager, West Face requires three factors: (a) confidence from existing and potential investors, (b) trust from members of the investment community, and (c) the ability to retain and attract top level investment

personnel. Catalyst's relentless and invidious campaign against West Face attacked and undermined all three of these factors. If true, Catalyst's allegations of misconduct would have destroyed West Face' reputation and subjected the firm to fatal regulatory risk. No capable investment professional would have wanted to work at West Face if the firm had engaged in the conduct alleged by the Catalyst Defendants.

151. The incessant defamation, harassment, and intimidation of West Face and its employees, including through the Defamation Campaign and the Black Cube Campaign, had a highly negative impact on the morale of our investment professionals and other employees, as well as on our ability to retain them. At Catalyst's instigation, current and former employees were lied to, deceived, flown halfway around the world on false pretenses, and then selectively and misleadingly quoted in communications to the press and to hundreds of members of the investment community. Very few people are willing to put their professional reputations and personal security in danger. As a direct result, we suffered a relentless flood of departures. Eventually these departures, and our corresponding inability to replace people who left, made it impossible to continue carrying on business, let alone raise a new investment fund.

152. All of these highly negative consequences are directly attributable to the very serious and relentless misconduct engaged in by the Catalyst Defendants. They have systematically concealed highly relevant documentation and information concerning the insidious scheme that they and others associated with them have engaged in over a

period of more than five years. I believe that they must now be held to account in a pu

and transparent judicial proceeding. The truth must be revealed for all the world to se

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario this 29th day of May, 2020

Commissioner for Taking Affidavits by Video Conference
(or as may be)
Maura O'Sullivan (LSO 77098R)

GREGORY BOLAND

This is Exhibit “A” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

AMENDED THIS Oct 1, 2019 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☑ RULE/LA RÈGLE 26 02 (A)
☐ THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE
"A. Stanojevic"
REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST 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

A N D B E T W E E N:

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. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP

Defendants to the Counterclaim

FOURTH FRESH AS AMENDED
STATEMENT OF DEFENCE AND COUNTERCLAIM
OF WEST FACE CAPITAL INC. AND GREGORY BOLAND

TO THE DEFENDANT(S) TO THE COUNTERCLAIM

A LEGAL PROCEEDING has been commenced against you by way of a counterclaim in an action in this Court. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS COUNTERCLAIM, you or an Ontario lawyer acting for you must prepare a Defence to Counterclaim in Form 27C prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff by counterclaim's lawyer or, where the Plaintiff by counterclaim does not have a lawyer, serve it on the Plaintiff by counterclaim, and file it, with proof of service, in this Court, WITHIN TWENTY DAYS after this Statement of Defence and counterclaim is served on you.

If you are not already a party to the main action and you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

If you are not already a party to the main action, instead of serving and filing a Defence to Counterclaim, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your defence to counterclaim.

IF YOU FAIL TO DEFEND THIS COUNTERCLAIM, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date December 29, 2017 Issued by "N. BROWN"
*B.
Local Registrar

Address of court office: Superior Court of Justice
393 University Avenue, 10th Floor
Toronto ON M5G 1E6

SECOND FRESH AS AMENDED STATEMENT OF DEFENCE

1. The Defendants West Face Capital Inc. ("**West Face**") and Gregory Boland ("**Boland**") deny all of the allegations in the Fresh as Amended Statement of Claim dated July 18, 2019 (the **"Amended Claim"**) and put the Plaintiffs to the strict proof thereof.

A. OVERVIEW

2. This is yet another abusive and vexatious action that the Plaintiffs, The Catalyst Capital Group Inc. ("**Catalyst**") and Callidus Capital Corporation ("**Callidus**"), have brought in bad faith. They have done so for at least three purposes:

(a) First, to punish, embarrass and harass West Face for its business and litigation successes at the expense of Catalyst and Callidus, by unfairly and maliciously impugning the integrity and conduct of West Face and its principals;

(b) Second, to distract attention from the deteriorating financial performance, overvalued assets, material non-disclosures, and misrepresentations to investors of Catalyst and Callidus, highlighted by the fall in the Callidus share price from a high of $24.01 in August 2014 to below $0.50 before the announcement on August 15, 2019 of a "going private" transaction at $0.75 per share; and

(c) Third, to intimidate West Face, Boland, other capital market participants, regulators, and members of the media, in an effort to dissuade or discourage them from scrutinizing, discussing, criticizing or commenting

publicly on the deteriorating financial performance, overvalued assets, material non-disclosures, and misrepresentations of Catalyst and Callidus.

3. This is the fourth action that Catalyst and/or Callidus have brought against West Face in a four year period. The first, the "**Moyse Action**", was dismissed by Justice Newbould after a full trial in June 2016. Justice Newbould found that Catalyst's claims and allegations against West Face were wholly lacking in merit, and made findings of credibility against all of Catalyst's principals. Justice Newbould also awarded costs of $1.2 million in favour of West Face, on a substantial indemnity basis. Justice Newbould's trial judgment and costs award were upheld by the Court of Appeal in February and March 2018, in the manner described below. The second of the Plaintiffs' actions against West Face, the "**Veritas Action**", has not been advanced by the Plaintiffs in any material respect even though it was commenced years ago, in June 2015.[1] The third, the "**VimpelCom Action**", was commenced on the eve of trial in the Moyse Action and was dismissed by Justice Hainey in April 2018. Justice Hainey determined that Catalyst's claim in the VimpelCom Action was barred as against various Defendants, including West Face, pursuant to the doctrines of *res judicata*, and barred as against all Defendants as an abuse of process. Justice Hainey's decision was unanimously upheld by the Court of Appeal in May 2019.

4. With respect to the Plaintiffs' claims in this proceeding, West Face and Boland have not conspired with any of the other Defendants; they never retained Bruce

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[1] West Face's motion to strike a portion of the claim in the Veritas Action was successful at first instance, but was ultimately dismissed by the Court of Appeal on February 1, 2017. The Plaintiffs have taken no steps to advance the Veritas Action since that time. The parties are only now proceeding to documentary discovery at West Face's insistence.

Livesey or anyone to write about Callidus or Catalyst; they never encouraged any of the Defendants to "short" Callidus's shares; they did not participate in any "whistleblower" complaint to the Ontario Securities Commission (the "**OSC**") or any other regulatory or criminal authority as detailed in the *Wall Street Journal* article of August 9, 2017 that Catalyst alleges was a key element of the alleged conspiracy; and they have, in fact, not been "short" Callidus's shares since April 2015, more than two years prior to the alleged events of August 9, 2017.

5. Catalyst's and Callidus's claims, including in the current proceeding, have not been advanced in good faith, but instead because of West Face's business successes at Catalyst's and Callidus's expense:

(a) West Face hired Brandon Moyse, a junior analyst, away from Catalyst in June 2014 after Moyse grew tired of Catalyst's abusive work environment and flagging deal pipeline;

(b) Investment funds advised by West Face participated successfully in a consortium that acquired Canadian wireless telecommunications company WIND Mobile ("**WIND**") in September 2014 at an enterprise value of $300 million, after Catalyst had failed to acquire WIND during a period of exclusive negotiations with the vendor in July and August 2014. West Face's consortium sold WIND a year and a half later at a $1.6 billion valuation; and

(c) West Face successfully identified Callidus as an overvalued public company in the Fall of 2014, when Callidus's shares were trading between

$20 and $25, and investment funds advised by West Face sold Callidus's shares "short". When Callidus's share price fell in early 2015, funds advised by West Face realized profits from their short positions. Callidus itself has now conceded that its inability to achieve superior value for its shareholders than $0.75 per share was caused not by any misconduct of West Face or Boland, but by: (i) a decline in Callidus's operating and financial performance; (ii) non-performing loans made by Callidus; (iii) negative operating performance of its non-core subsidiaries; (iv) senior personnel issues; and (v) an increasing inability to retain personnel despite retention programs.

6. Catalyst's founder, CEO and Managing Partner, Newton Glassman ("**Glassman**"), reacted petulantly to all of the matters referred to immediately above. He could not tolerate being bested by West Face or Boland. As explained below, Glassman and his partners at Catalyst, including James Riley ("**Riley**") and Gabriel De Alba ("**De Alba**"), therefore decided to retaliate maliciously, including by orchestrating and participating in a systematic and vicious campaign of defamation against West Face and Boland over the Internet, and by shrouding West Face and Boland in contention and controversy through the repeated commencement and pursuit of abusive, bad faith litigation.

7. This action has been brought by Catalyst and Callidus for the purposes of: (i) limiting unduly and improperly expression on matters of public interest; (ii) harassing and oppressing the Defendants; and (iii) assaulting the integrity of West Face, Boland, and the administration of justice in Ontario. It should be dismissed under section 137.1

of the *Courts of Justice Act* (the **"Anti SLAPP Legislation"**), and stayed under section 140 of the *Courts of Justice Act* on the basis that Catalyst and Callidus are vexatious litigants.

8. Contrary to paragraph 58 of the Amended Claim, Catalyst's and Callidus's persistent, vexatious litigation did not motivate the Defendants to participate in the pleaded conspiracy. On the contrary, Catalyst and Callidus had by 2017 succeeded in "chilling" West Face and Boland from discussing Catalyst or Callidus publicly, and from shorting Callidus's stock, in spite of believing at all material times that the Callidus business was built on inaccurate financial disclosure and doomed to fail.

B. The Parties to the Claim

9. Catalyst is a Toronto-based private equity investment firm. Its three principals at all relevant times were Glassman, De Alba, and Riley. De Alba was a Managing Director and Partner of Catalyst. Riley was a Managing Director and Chief Operating Officer of Catalyst.

10. Callidus is a publicly-traded company that lends money to distressed borrowers that are generally unable to access traditional lending sources. Glassman is the Executive Chairman and during the relevant periods was CEO of Callidus. Riley was Callidus's Secretary. Both are also Directors of Callidus.

11. West Face is a Toronto-based investment management firm. It is led by its CEO, Boland.

C. West Face and Boland Did Not Conspire to Harm Callidus or Catalyst

12. Contrary to the allegations throughout the Amended Claim, West Face and Boland did not participate in a conspiracy to cause the stock price of Callidus to drop, or to otherwise injure the Plaintiffs. The Plaintiffs' claims against West Face and Boland have been invented from whole cloth.

13. West Face closed its "short" position in respect of Callidus in April 2015. Contrary to allegations made throughout the Claim, West Face has not been "short" Callidus since that time. Nor did West Face or Boland communicate with any of the other Defendants for the purpose of causing Callidus's stock price to drop. Callidus's stock price has fallen because of Callidus's fundamentally flawed business model and disastrous financial performance, as West Face had correctly predicted in the Fall of 2014.

14. From time to time, West Face communicated with other parties that have also been sued by Catalyst or Callidus for the purpose of learning about: (a) the status of ongoing litigation commenced by Catalyst and Callidus; and (b) the businesses of Catalyst and Callidus. West Face had sold short the shares of Callidus during the period from October 2014 to April 2015, and Callidus had then sued West Face for defamation in June 2015. That litigation put squarely in issue the business model and financial performance of Callidus, and West Face has therefore continued to try to gather information about Callidus. This included:

(a) In 2014 and 2015, when West Face was researching Callidus in connection with selling short its shares, Boland communicated separately

with (i) the Defendant Kevin Baumann; (ii) the Defendant Jeffrey McFarlane; and (iii) Andrew Levy (another guarantor of Callidus' debts who has since settled with Callidus and provided his communications with the other Defendants to Callidus and Catalyst), about their experiences as borrowers from Callidus in order to better understand the business model and operations of Callidus;

(b) Boland has for many years communicated regularly with the Defendant Bruce Langstaff, who had covered West Face as an equity salesperson at Canaccord Capital Corporation for many years before the events giving rise to the litigation between West Face and Catalyst, and was a personal friend of Boland;

(c) Boland has communicated occasionally with Gerard Duhamel since West Face was contacted through an intermediary about potential financing for his company Bluberi Gaming in early 2014 prior to Catalyst commencing any legal proceedings against West Face;

(d) Boland has from time to time communicated with the Defendant Nathan Anderson, who reached out to Boland unsolicited and advised that he was an investment analyst who was researching Catalyst and Callidus. Boland has never met Anderson in person or seen any work he may have produced about Catalyst or Callidus;

(e) Boland has never met or communicated with either Rob Copeland or Craig Boyer.

(f) Before the Plaintiffs commenced this action, Boland had never communicated with Wes Voorheis about Callidus, and had had no communications with Voorheis on any subject since before 2014.

15. West Face and Boland did not conspire to disseminate negative information about Callidus through any "Bay Street rumour mill"; did not take "short" positions in Callidus during the period complained of in this proceeding; and did not participate in any "whistleblower" complaints about Callidus. In fact, Boland never spoke to more than one of the Defendants at any one time. Nor were West Face or Boland sources for the article about those complaints that was published in the *Wall Street Journal* on August 9, 2017 (the "**Article**"). Although West Face was asked about possible "whistleblower" investigations by a *Wall Street Journal* reporter, it had no information to provide. West Face was at all material times aware of the litigious nature of Catalyst and Callidus, and avoided making any potentially defamatory comments in response to perfectly proper and legitimate questions of the reporter.

16. West Face and Boland specifically deny the allegation in paragraph 92 of the Amended Claim that the conduct alleged had "been honed through repetition in other situations". That allegation has also been invented from whole cloth. West Face and Boland have never conspired with any of the other Defendants with respect to Catalyst, Callidus or any other subject matter.

17. Contrary to the allegations in paragraphs 44 and 57 of the Amended Claim, at no time did West Face or Boland offer to fund, or in fact fund, any of the

Guarantors (as defined in the Claim) in their respective defences of claims brought against them by Callidus.

18. Contrary to the allegations in paragraphs 48 and 104(a) of the Amended Claim, West Face and Boland did not, either directly or through external counsel, introduce Levitt or any other Defendants to U.S. counsel for purpose of filing a RICO complaint against Catalyst and Callidus. In March 2016, Levitt had contacted West Face's external counsel Matthew Milne-Smith about potentially retaining him for a claim against Callidus, but ultimately chose to retain different counsel. Subsequently, in November 2016, at Levitt's request Milne-Smith referred him to a U.S. lawyer willing to act on contingency. West Face and Boland had no involvement in any of these interactions.

D. West Face and Boland Did Not Participate in a "Wolfpack Conspiracy"

19. Contrary to the allegations in paragraphs 62 to 63, 83 and 98 to 156 of the Amended Claim, West Face and Boland never retained or conspired with any of Bruce Livesey, Reuters, the *Wall Street Journal* or any other entity to write articles about Catalyst, Callidus or Glassman, or to support Callidus guarantors. Mr. Livesey is a freelance journalist who pursued independently an article concerning Glassman, Catalyst and Callidus. From time to time, Mr. Livesey contacted Boland with questions about Catalyst and Callidus and their litigation against West Face. Boland provided only publicly available information. He was fully entitled to do so.

20. West Face did not cause or precipitate the publication by the *Wall Street Journal* of the Article complained of in the Claim concerning investigations by the OSC

and Toronto Police Services pertaining to alleged financial misconduct by Callidus, and indeed had no knowledge that such investigations were ongoing.

21. West Face and Boland specifically deny that they had any communications with Anson or the Individual Anson Defendants (both as defined in the Claim) about any of the matters alleged in the Amended Claim. West Face and Boland specifically deny the allegations in paragraphs 78 to 80 of the Amended Claim concerning Anson. At no time did West Face or Boland have any communications with Anson about Callidus, Catalyst or Glassman. Boland has never been a "business colleague" or "personal friend" of Kassam, and has in fact never met or even spoken to him. Anson and West Face have never collaborated in any investment.

22. West Face and Boland specifically deny the allegations in paragraph 81 of the Amended Claim regarding the Defendants Clarityspring and Anderson (both as defined in the Claim). At no time did West Face or Boland encourage Clarityspring, or anyone else, to participate in any "short attack" against or involving Callidus. As described above, Catalyst's and Callidus's persistent vexatious litigation had successfully chilled West Face and Boland from any conduct related to shorting Callidus's shares even though West Face and Boland believed at all material times that Callidus's share price was overvalued. Indeed, West Face and Boland were unaware of, and did not participate in, any such alleged attack, and have no knowledge of any trading activity by Clarityspring or any of the other Defendants in respect of Callidus.

23. West Face and Boland specifically deny the allegation at paragraph 84 of the Amended Claim that they were privy to or even aware of any alleged confidential

information belonging to Callidus. As West Face has described in great detail in its Statement of Defence in the Veritas Action, and in affidavit materials filed in successful response to an injunction motion brought by Catalyst in the Moyse Action, West Face was able to discern the identity of certain Callidus borrowers from entirely public sources.

24. Contrary to paragraph 104(d) of the Amended Claim, Boland did not direct Milne-Smith to provide West Face's internal Callidus research to any Guarantor. West Face and Boland do not know whether or how any Guarantor may have obtained that research, which was publicly filed with the Ontario Superior Court of Justice in the injunction motion described above. To the best of West Face's and Boland's knowledge, Business News Network extracted West Face's research on Callidus from West Face's public court filing and uploaded it to the public website scribd.com shortly after it was publicly filed in March 2015, and it has remained publicly available there ever since.

25. Contrary to paragraph 103 of the Amended Claim, West Face did not give Levy or anyone else copies of its Statement of Defence in the Veritas Action so that it could be provided to the OSC and JSOT. Since October 2016, West Face has maintained a publicly-accessible website at catalystlitigation.com that contains, with few exceptions, all public court filings made by all parties, including Catalyst and Callidus, in the four cases Catalyst and Callidus have brought against West Face. West Face created this website in response to numerous inquiries from current and prospective investors, service providers and industry participants with which West Face interacts. West Face believed that it would be helpful to make all pleadings, court submissions and evidence by both sides available to the public. Because of the chilling effect of

Catalyst's and Callidus's persistent and vexatious litigation, West Face has only excluded from the website certain materials it expected Catalyst and Callidus to perceive as particularly controversial (including West Face's research on Callidus described above), and certain materials that raised individual privacy concerns. However, given that the Ontario court has issued no sealing orders in these matters, even these materials not on West Face's website remain publicly available in the court file.

E. West Face and Boland Did Not Cause any Harm to Callidus or Catalyst

26. Even if any of the allegations made against West Face and Boland in the Amended Claim were true, which is denied, they did not cause any harm to Callidus or its principal shareholder, Catalyst. Rather, the harms pleaded by Callidus and Catalyst were exclusively caused by the mismanagement and failing financial performance of those companies.

27. On August 15, 2019, Callidus announced that it had entered into an arrangement agreement by which Braslyn Ltd. would acquire all of the common shares of Callidus not already held by insiders for consideration of $0.75 per share. This followed almost three years after Callidus had announced in September 2016 that: (i) it would solicit privatization proposals; and (ii) the shares of Callidus had been valued at $18 to $22 per share. Callidus's share price had been over $18 as recently as January 2017, but had fallen to approximately $11 in August 2017 before the *Wall Street Journal* article complained of in the Amended Claim. The slide in share price continued and was below $0.50 at the time the Braslyn transaction was announced.

28. The valuation of Callidus's shares under the arrangement agreement was supported by: (i) a fairness opinion by Morrison Park Advisors Inc. which concluded that the $0.75 per share available to minority shareholders under the arrangement is greater than the value that could be achieved by the minority shareholders under any other feasible alternative currently available to Callidus; and (ii) a valuation by Blair Franklin Capital Partners Inc. which concluded that absent the consideration to be provided to Braslyn pursuant to a shareholders' agreement with Catalyst, the value of Callidus shares was negative.

29. The precipitous decline in Callidus's share price was not caused by anything pleaded in the Amended Claim. Rather, it was caused by a number of factors entirely attributable to Catalyst and Callidus, including the fact that:

(a) the operating and financial performance of Callidus declined significantly;

(b) starting in the third quarter of 2016, ongoing operating losses and negative cash flows from operations resulted from non-performing loans made by Callidus and quarterly increases in its loan loss provisions;

(c) negative operating performance of, and the extent of the capital required by, a number of the non-core subsidiaries of Callidus;

(d) deterioration in the financial condition of Callidus, leading to an inability to obtain additional financing to invest in Callidus's existing business and to pursue new loan origination;

(e) a number of senior personnel issues, including the medical leave of Glassman; the resignation of Callidus's Interim Chief Executive Officer, Patrick Dalton, on March 11, 2019 following his appointment effective November 5, 2018; Callidus's inability to recruit a new Chief Executive Officer with appropriate experience; and in April 2019, the departure of Callidus's Chief Credit Officer, James Rogers;

(f) the internal forecasts in place prior to the preparation of Callidus's 2018 financial statements did not anticipate the extent of the decline in Callidus's operating and financial performance; and

(g) the need for any party interested in acquiring an equity interest in Callidus to negotiate a shareholders agreement with Catalyst was a barrier to certain parties that expressed initial interest in exploring a transaction.

30. None of the foregoing factors were caused by or attributable to West Face, Boland, or any of the other Defendants.

F. This Claim Is an Attempt to Limit Freedom of Expression on Matters of Public Interest

31. The management, conduct and performance of publicly traded companies such as Callidus are matters of significant public interest. Indeed, the management and performance of Catalyst and Callidus have been the subject of widespread media coverage for years, both in the Article and elsewhere. Catalyst and Callidus seek to generate media coverage, including by frequently issuing press releases and other public statements both with respect to their performance and concerning other matters.

The Article relates to the management and performance of Callidus and, indirectly, Catalyst.

32. One of the purposes of this action is to deter the Defendants, the media, participants in the capital markets and the public at large from scrutinizing, criticizing or commenting on the performance and conduct of Callidus and Catalyst. By suing for conspiracy as well as defamation, Callidus and Catalyst have attempted to deter actual or potential critics from even discussing them in private lest they too be accused of participating in an unlawful "wolfpack conspiracy".

33. Catalyst's and Callidus's pattern of engaging in bad faith, vexatious and abusive litigation and other unlawful and offensive conduct aimed at suppressing free speech and criticism is further demonstrated by their conduct in respect of the Defendant Bruce Langstaff. Mr. Langstaff, formerly an equity salesperson at Canaccord Capital Corporation ("**Canaccord**"), investigated the financial performance of Callidus. He was fully entitled to do so. Nevertheless, the Catalyst Defendants retaliated against Langstaff by demanding that Canaccord fire Mr. Langstaff. They did so with a view to sending a clear and unmistakable message to Mr. Langstaff, Canaccord and other participants in the capital markets that none of Catalyst, Callidus, or their principals would tolerate investigations of this nature that might bring to light questionable, or improper conduct, that Catalyst or Callidus had engaged in. Canaccord acceded to the Catalyst Defendants' demand and fired Mr. Langstaff in order to placate Catalyst, Callidus, and their principals.

34. West Face and Boland request that this action be dismissed against them with costs on a full indemnity or solicitor and his own client basis.

SECOND FRESH AS AMENDED COUNTERCLAIM

35. The Plaintiffs by Counterclaim, West Face and Boland, counterclaim against the Defendants by Counterclaim, Catalyst, Callidus, Glassman, De Alba, Riley (collectively, the "**Catalyst Defendants**"), Virginia Jamieson ("**Jamieson**"), Emmanuel Rosen ("**Rosen**"), B.C. Strategy Ltd. and B.C. Strategy UK Ltd. (together with B.C. Strategy Ltd., "**Black Cube**"), Invop Ltd., doing business as Psy Group, ("**Psy Group**"), and John Does #1-10 (all of the Defendants by Counterclaim collectively, the "**Counterclaim Defendants**") for:

(a) A declaration that the Counterclaim Defendants have defamed West Face and Boland;

(b) General damages in the amount of $450 million for West Face and $50 million for Boland, for defamation, conspiracy, breach of confidence, inducing breach of confidence, inducing breach of contract, inducing breach of fiduciary duty, and the tort of unlawful means;

(c) A declaration that Glassman, De Alba, and Riley are personally liable for their unlawful actions carried out by, through or in the name of Catalyst, Callidus, the other Counterclaim Defendants, and/or any other corporation, entity, representative or agent through which he or they participated or engaged in wrongdoing as pleaded in this Counterclaim;

(d) A declaration that the Counterclaim Defendants are jointly and severally liable to West Face and Boland for all loss, harm or damage caused by or as a result of the conspiracy complained of herein;

(e) An Order requiring the Counterclaim Defendants to deliver up to West Face all originals and copies of all recordings, transcripts, notes, memoranda, emails, text messages or other physical or electronic documents in their possession, control or power (including, without limitation, in the possession of their counsel or other agents) that contain, summarize or reflect the contents of stings conducted by operatives of Black Cube or other investigative firms or agencies involving current or former employees of West Face, or Justice Newbould, and requiring them to certify under oath that they have done so;

(f) A declaration under section 140 of the *Courts of Justice Act* that the Catalyst Defendants are vexatious litigants and an Order that: (i) no further proceeding may be instituted by the Catalyst Defendants or any subset of them in any court against West Face or its officers, directors, or employees; and that (ii) proceedings previously instituted by the Catalyst Defendants or any subset of them against West Face or its officers, directors, or employees may not be continued, except by leave of a judge of the Superior Court of Justice;

(g) To the extent necessary, an Order permitting West Face and Boland to seek the declaration and relief referred to immediately above in this proceeding, rather than by way of separate Application;

(h) In the alternative, requiring that any such Application that may be required, be heard and determined at the same time, in the same hearing and by

the same Justice of this Court that presides at the trial of this Counterclaim;

(i) Punitive damages in the amount of $45 million for West Face and $5 million in aggravated and punitive damages for Boland;

(j) Compound pre-judgment and post-judgment interest, in amounts and at rates to be determined by the Court;

(k) In the alternative, pre-judgment and post-judgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, as amended;

(l) The costs of this proceeding on a full indemnity or solicitor and his own client basis; and

(m) Such further and other relief as this Honourable Court may deem just.

A. OVERVIEW

36. This Counterclaim arises out of an insidious, co-ordinated, and systematic campaign of defamation and economic interference that the Counterclaim Defendants have pursued, and continue to pursue, against West Face and Boland in retaliation for at least two series of events that the Catalyst Defendants took umbrage with:

(a) **The WIND Transaction**: In September 2014, investment funds managed by West Face participated in a consortium of investors that successfully acquired Canadian wireless telecommunications company WIND, after Catalyst failed in its attempts to do so. West Face's consortium sold WIND a year and a half later to Shaw Communications for more than five times

what they paid to acquire it. Catalyst responded by suing West Face in the Moyse Action for more than $500 million,[2] and in doing so alleged falsely that West Face had acted improperly and unlawfully by "scooping" the WIND deal from Catalyst through the misuse of confidential information of Catalyst that was purportedly obtained by West Face from a former junior analyst of Catalyst named Brandon Moyse. After a full trial on the merits, Justice Newbould of the Commercial List rejected completely all of Catalyst's claims. Justice Newbould held that West Face did not receive from Moyse any of Catalyst's confidential information concerning WIND. He also held that Catalyst had failed to acquire WIND because of its own intransigence, miscalculations and other failings, and that Catalyst's strategy to acquire WIND could never have succeeded in any event. Justice Newbould made adverse findings of credibility against each of Glassman, De Alba, and Riley, criticized Catalyst for baselessly attacking the integrity of West Face and its principals, including Boland, and awarded West Face substantial indemnity costs in the amount of $1.2 million. Catalyst's appeal from Justice Newbould's trial judgment in the Moyse Action was dismissed on its merits by the Ontario Court of Appeal on February 21, 2018, from the bench, without the need for oral submissions from West Face or Moyse. Catalyst's motion for leave to appeal to the Court of Appeal in respect of the award of substantial indemnity costs made in favour of West Face by Justice Newbould was

[2] The Moyse Action claimed damages of $500 million. The subsequent VimpelCom Action, which also claimed damages for West Face's participation in the acquisition of WIND, claimed $1.3 billion.

dismissed by that Court in written reasons released on March 22, 2018. On March 28, 2019, the Supreme Court of Canada dismissed Catalyst's application for leave to appeal from the decision of the Ontario Court of Appeal, with costs; and

(b) **The Callidus "Short"**: In the Fall of 2014, Callidus's shares were trading at over $20 per share. West Face correctly identified Callidus as an overvalued company, sold Callidus's shares "short", and made a profit in the Spring of 2015 when Callidus's shares fell to under $17 per share (at which time West Face closed out its "short" position). Approximately two-thirds of Callidus's shares were (and continue to be) held by funds managed by Catalyst. As a result, this decline in share price caused by Callidus's weak financial condition was harmful not only to Callidus, but also to Catalyst and its funds. Callidus's share price has continued to fall since that time as a result of Callidus's poor financial performance and the other reasons pled in the Statement of Defence. Callidus's shares currently trade at under $1 per share.

37. The Catalyst Defendants, and in particular Glassman (who was the self-proclaimed "architect" of Catalyst's failed strategy to acquire WIND) refused to accept responsibility for these failures. Instead, Glassman and the other Catalyst Defendants blamed West Face and Boland for the woes suffered by Catalyst and Callidus, and decided to retaliate in an effort to shroud West Face and Boland in contention and controversy. They were well aware, and indeed intended, that doing so would deter investors and other participants in the capital markets from doing business with West

Face and Boland, thereby causing them harm. That is precisely what has happened. The Catalyst Defendants and other Counterclaim Defendants acted with malice, and with contumelious disregard for the rights and interests of West Face and Boland, in orchestrating the campaign of defamation and harassment described below. They sought to inflict as much harm as possible on West Face and Boland by engaging in the conduct at issue in this Counterclaim, including by disseminating their false and defamatory statements concerning West Face and Boland not only to investors in or with Callidus and Catalyst, but also to current and potential investors with West Face and Boland. The Catalyst Defendants and other Counterclaim Defendants conspired together and with one another to defame and interfere with the economic interests of West Face and Boland in order to punish, embarrass, discredit and harm them, and to deter them and others from crossing the Catalyst Defendants.

38. This conspiracy was also intended to divert the attention of investors, and the financial community at large, from the Catalyst Defendants' own failures, as well as from allegations of misconduct and "whistleblower" complaints made against Callidus and other Catalyst Defendants (including Glassman and Riley) by parties unrelated to West Face.

39. The conspiracy was hatched in or about August 2017 in response to a series of setbacks for the Catalyst Defendants. First, Catalyst had lost the Moyse Action at trial, as described above. Catalyst's appeal from Justice Newbould's trial decision in the Moyse Action was scheduled to be heard by the Court of Appeal on September 26 and 27, 2017, and Catalyst and its principals were well aware that Catalyst had no reasonable possibility of success on appeal.

40. Second, in the period from August 16 to 18, 2017, the parties to the VimpelCom Action argued before Justice Hainey motions brought by the Defendants to strike out, stay or dismiss that Action, on the basis that it was precluded by the doctrines of *res judicata* and abuse of process. Catalyst's claims again West Face and other Defendants in the VimpelCom Action overlapped substantially with claims asserted by Catalyst against West Face in the Moyse Action, and concerned the acquisition by West Face and other investors of WIND in September 2014. The motions of the Defendants to stay or dismiss the VimpelCom Action were based, in part, on issues that had been determined and findings of fact that had been made by Justice Newbould at trial in the Moyse Action. At Catalyst's request, Justice Hainey reserved releasing his decision concerning those motions until after the Court of Appeal had heard and decided Catalyst's appeal in the Moyse Action, on the basis that findings made by Justice Newbould at trial in the Moyse Action might be disturbed on appeal. Catalyst and its principals were well aware that if Catalyst's appeal in the Moyse Action failed and key findings made against it by Justice Newbould in the Moyse Action were not interfered with by the Court of Appeal, it had no reasonable prospect of surviving the Defendants' motions to stay or dismiss the VimpelCom Action.

41. In short, as of August 2017, Catalyst's litigation strategies with respect to its claims concerning the WIND transaction were rapidly failing. Catalyst, however, had represented to its investors (including in presentation materials distributed in connection with its Annual Meeting of Limited Partners in the Spring of 2017) that its claims in the Moyse Action and the VimpelCom Action were worth at least $450 million. In late

August 2017, Catalyst faced the likelihood of both of these Actions being stayed or dismissed in the very near future.

42. Third, on August 9, 2017, the *Wall Street Journal* published the Article that forms the basis of Catalyst's Claim in this Action, describing in detail various "whistleblower" complaints that had been made against Callidus and other Catalyst Defendants, including to the OSC.

43. In response to these developments, in or about August 2017, the Catalyst Defendants decided that, having been unable to succeed in business or litigation against West Face, they would seek to punish, embarrass and discredit West Face and Boland as West Face's principal, in an effort to shroud them in contention and controversy. In order to carry out this plan, they conspired together with the other Counterclaim Defendants to harm the reputations and business interests of West Face and Boland, including by discrediting Justice Newbould and undermining the validity of the Decision he had rendered in favour of West Face in the Moyse Action and launching a fourth claim against West Face (the case at bar) without a good faith intention to actually pursue the litigation. The goal in all cases was to embroil West Face and Boland in controversy.

44. West Face and Boland were the ultimate targets of the deplorable attack that the Counterclaim Defendants waged against Justice Newbould, as described hereafter. Among other things, the Catalyst Defendants hoped to be able to use "evidence" concerning Justice Newbould that had been or was about to be obtained improperly, unethically and illegally by the other Counterclaim Defendants to undermine

the position of West Face in Catalyst's appeal to the Court of Appeal in the Moyse Action, as well as West Face's position in the motions pending in the VimpelCom Action. They also intended to use that "evidence" to attack West Face and Boland in their communications with investors, with other participants in the financial markets, and with members of the media, all with the purpose and effect of causing harm to the business and reputations of West Face and Boland. Justice Newbould was an innocent victim in their pernicious scheme.

45. The conspiracy of the Counterclaim Defendants against West Face and Boland fell into two broad categories:

(a) **The Black Cube Campaign**: The Catalyst Defendants retained or caused to be retained Black Cube, a private investigative firm staffed with former Mossad and Israeli Defence Force intelligence operatives, to conduct a series of "stings" against current and former West Face employees, and against Justice Newbould. The purpose and effect of these stings was to elicit by unlawful means confidential and privileged information of West Face, to attack unfairly the honour, integrity and conduct of Justice Newbould, and to discredit and embarrass West Face, Boland, and other enemies of Catalyst, Callidus and their principals, either real or perceived. The stings were carried out by Aharon Almog-Assoulin, Stella Sharon Penn, Dan Lieberman, and other operatives, the identities of which are known to the Counterclaim Defendants. The Catalyst Defendants and other Counterclaim Defendants also conspired to use the fruits of the

Black Cube Campaign for the express and predominant purpose of harming and embarrassing both West Face and Boland; and

(b) **The Defamation Campaign**: The Counterclaim Defendants conspired to defame West Face and Boland in three principal respects:

(i) **The WIND Defamation**: They repeatedly and falsely accused West Face and its principals, including Boland, of acquiring West Face's interest in WIND by unlawful means, including by misusing confidential information of Catalyst obtained improperly by West Face;

(ii) **The Wolfpack Defamation**: They repeatedly and falsely accused West Face and its principals, including Boland, of engaging in improper conduct including by conspiring with others as part of a "wolfpack" of conspirators, to manipulate illegally the share price of Callidus and other companies related to Catalyst; and

(iii) **The Performance Defamation**: They repeatedly defamed, and continue to defame, West Face and its principals, including Boland, by impugning unfairly the performance of West Face's funds and alleging falsely that West Face and its principals, including Boland, have engaged in misconduct, including the improper manipulation of investors and regulators.

46. As part of the Defamation Campaign, the Catalyst Defendants retained or caused to be retained not only Gagnier Communications Inc. ("**Gagnier**"), a conventional public relations firm, but also Psy Group, another private firm staffed by former members of the Israeli intelligence establishment which specialized in altering public perception through "proprietary influence techniques" and "narrative warfare". Psy Group's business motto is (or was) "Shape Reality". Psy Group took on the retainer from the Catalyst Defendants and referred internally to the Defamation Campaign against West Face and Boland as "**Project Maple Tree**". The primary objective of Project Maple Tree was to destroy West Face and Boland by engaging in the

Defamation Campaign targeting West Face and Boland, primarily through the publication of false and defamatory materials on websites, blogs, and through social media platforms (such as Twitter). Psy Group carried out the Defamation Campaign at the direction of the Catalyst Defendants, and using materials unlawfully collected by Black Cube and others.

47. The unlawful conspiracy of the Counterclaim Defendants has been carried out in at least seven ways:

(a) By the Catalyst Defendants and Gagnier (who acted at all times at the direction of the Catalyst Defendants) issuing or disseminating false and defamatory press releases and other statements about West Face and its principals, including Boland, to the public at large;

(b) By the Catalyst Defendants and Gagnier making false and defamatory statements about West Face and its principals, including Boland, to various members of the financial community, including to current and potential investors with West Face, and encouraging parties not to invest in, or to withdraw monies from, funds managed by West Face;

(c) By the Catalyst Defendants and Gagnier making false and defamatory statements about West Face and Boland to the media, including the *Globe and Mail*, *Bloomberg, Reuters,* the *Associated Press* and others regarding the fund performance of West Face and alleged unlawful market manipulation;

(d) By the Catalyst Defendants making false and defamatory statements about West Face and its principals, including Boland, through communications to Catalyst's funds, limited partners, and/or investors. Given that Catalyst and West Face are competitors, all of Catalyst's investors are potential investors in funds managed by West Face;

(e) By the Catalyst Defendants harassing and intimidating, or retaining third parties, (including Yossi Tanuri, Mr. Tanuri's security firm Tamara Global, Black Cube and Psy Group), to harass and intimidate both Boland and West Face, by: (i) attempting to solicit unlawfully confidential and privileged information about West Face and Boland from current and former employees of West Face, in breach of their professional and contractual obligations; and (ii) attempting to attack the honour, integrity and conduct of Justice Newbould because of his Decision against Catalyst in the Moyse Action and with the goal of fabricating supposed "fresh evidence" that could be used against West Face both during Catalyst's appeal to the Court of Appeal from that Decision and in the VimpelCom Action. Meetings and discussions between Black Cube, current and former employees of West Face and Justice Newbould were arranged, orchestrated and conducted through the use of false pretences, deceit and false promises of employment, engagement or investment;

(f) By the Catalyst Defendants, Jamieson, Rosen, Psy Group and Gagnier providing edited or altered transcripts of surreptitiously recorded meetings between operatives of Black Cube and their targets to various journalists,

including at Bloomberg News and the Associated Press, in an attempt to cause the publication of false and defamatory articles concerning West Face and its principals, including Boland; and

(g) By Psy Group, Rosen and Jamieson obtaining and utilizing information gathered or manufactured by Black Cube and others retained or engaged by or on behalf of them to publish and disseminate as broadly as possible a series of vicious, false and defamatory statements about West Face and Boland, including over the Internet, using fictional or misleading usernames (including "Judge Frank Newbould") and by employing various other techniques to conceal who was actually responsible for the dissemination of these statements.

48. All of the foregoing activities were carried out in bad faith, and with the intent of retaliating against and punishing, embarrassing, discrediting and harming West Face and Boland, and not for any valid or proper purpose. The predominant purpose of the Catalyst Defendants and their co-conspirators was to injure West Face and Boland, and they succeeded in achieving their objective. The conspirators also utilized unlawful means in carrying out their agreed-upon campaign of vilification, defamation and harassment, as described below, in circumstances where they were well aware that West Face and Boland would suffer harm as a direct result of their improper conduct. Harm did, in fact, result both to West Face and to Boland as described below.

B. The Parties to the Counterclaim

49. The parties to the Counterclaim include the Plaintiffs by Counterclaim, West Face and Boland, as well as the Catalyst Defendants: Catalyst, Callidus, Glassman, De Alba, and Riley. These parties are described above in the Statement of Defence of West Face and Boland.

50. Glassman, Riley, and De Alba participated personally in the acts of misconduct pleaded and relied upon by West Face and Boland. Their conduct was itself tortious, and went well beyond the scope of any duties that may properly have been owed by them to Catalyst or Callidus. Indeed, these individuals acted throughout in a spiteful, vindictive, and abusive fashion that no responsible public company, or any company charged with the important responsibility of managing and investing the funds of others, could properly have authorized, sanctioned, or tolerated. They are personally liable to West Face and Boland for their misconduct.

51. Glassman, Riley, and De Alba used the names, positions and resources of Catalyst and Callidus in engaging in the misconduct complained of herein. In the circumstances, Catalyst and Callidus are also liable to West Face and Boland for this misconduct.

52. In addition to the Catalyst Defendants, the Counterclaim Defendants include the Defendants described below.

53. Jamieson is an individual residing in Brooklyn, New York. Jamieson is a communications professional with broad experience in public relations, technology and social media. She was engaged indirectly by the Catalyst Defendants, through Rosen,

and conspired with the Counterclaim Defendants to write, publish, and/or cause the publication and dissemination of false and defamatory statements concerning West Face, Boland and Justice Newbould. Her role in the conspiracy referred to herein included a failed attempt to induce Christie Blatchford ("**Blatchford**"), a prominent, highly respected and widely read journalist at the *National Post*, to publish false and defamatory articles about West Face, Boland and Justice Newbould, including both before and after Catalyst's appeal to the Court of Appeal from the Decision of Justice Newbould in the Moyse Action was originally scheduled to be heard on September 26 and 27, 2017. Jamieson also retained or caused to be retained other third parties located around the globe, to write, publish and disseminate false and defamatory statements about West Face, Boland and Justice Newbould, while using false aliases and usernames to keep her real identity and involvement secret.

54. As stated above, Black Cube is an investigative firm comprised of former members of the Israeli Defence Force and the Mossad, Israel's national intelligence agency. Black Cube was engaged indirectly by the Catalyst Defendants through a chain of parties meant to: (a) shroud Black Cube's engagement, operations, and conduct, in the guise of being litigation privileged; and (b) allow the Catalyst Defendants to falsely deny awareness of, or responsibility for, Black Cube's misconduct. Specifically, the Catalyst Defendants retained Brian Greenspan, a prominent criminal defence lawyer, and instructed him to retain Tamara Global as "security consultants". The Catalyst Defendants did this with the intention and understanding that Tanuri and Tamara would in turn retain Black Cube to carry out the Black Cube Campaign through various Black

Cube operatives, including Almog-Assoulin, Penn, Lieberman, and others whose identities are unknown to West Face and Boland.

55. Black Cube was retained to elicit confidential and privileged information of West Face from its current and former employees, business contacts and their family members, as well as to obtain information that could be used to discredit Justice Newbould and his Decision in favour of West Face in the Moyse Action. The ultimate targets of all of the activities undertaken by Black Cube in respect of this matter were West Face and Boland. Black Cube has offices in Tel-Aviv, London and Paris. Black Cube operates through various corporate entities, including B.C. Strategy Ltd., an Israel-based company, with company number 514587591, and B.C. Strategy UK Ltd., an UK-based company. Neither Black Cube entity nor any of Black Cube's individual operatives were licensed private investigators in Ontario during the relevant period in which Black Cube perpetrated the various "sting" operations described below in furtherance of the conspiracy. Black Cube's operatives include the following:

(a) Aharon Almog-Assoulin is a retired security official. Almog-Assoulin was engaged directly or indirectly by the Catalyst Defendants, through Tanuri, Tamara, or Black Cube, to elicit confidential and privileged information of West Face from its current and former employees, business contacts and their family members, as well as to obtain information that could be used to discredit Justice Newbould and his Decision in favour of West Face in the Moyse Action. In particular, Almog-Assoulin met with West Face's former general counsel Alex Singh and intentionally made false representations to him with the purpose and effect of causing Mr. Singh to

rely on those representations to meet with further Black Cube operatives and divulge to them confidential and privileged information, including information belonging to West Face.

(b) Stella Sharon Penn is a retired intelligence operative. Penn was engaged directly or indirectly by the Catalyst Defendants, through Tanuri, Tamara, or Black Cube, to elicit confidential and privileged information of West Face from its current and former employees, business contacts and their family members, as well as to obtain information that could be used to discredit Justice Newbould and his Decision in favour of West Face in the Moyse Action. In particular, Penn met with West Face's former analyst Brandon Moyse and his wife, as well as multiple current and former West Face employees, and intentionally made false representations to them in an effort to cause them to rely on those representations and meet with further Black Cube operatives and divulge to them confidential and privileged information, including information belonging to West Face.

(c) Dan Lieberman was engaged directly or indirectly by the Catalyst Defendants, through Tanuri, Tamara, or Black Cube, to elicit confidential and privileged information of West Face from its current and former employees, business contacts and their family members, as well as to obtain information that could be used to discredit Justice Newbould and his Decision in favour of West Face in the Moyse Action. In particular, Lieberman met with West Face's former analyst Brandon Moyse and his wife, as well as multiple current and former West Face employees, and

intentionally made false representations to them in an effort to cause them to rely on those representations and meet with further Black Cube operatives and divulge to them confidential and privileged information, including information belonging to West Face.

56. Rosen is an individual residing in Israel. His personal identification number in Israel is 56548456. Rosen is a former TV journalist and documentary filmmaker. Like Jamieson, Rosen was engaged by the Catalyst Defendants, through Psy Group, to write, publish and/or cause the publication and dissemination of false and defamatory statements about West Face, Boland and Justice Newbould. He was also directly involved in the failed attempt to induce Blatchford to publish false and defamatory articles about West Face, Boland, and Justice Newbould. Rosen was part of an inner circle of Psy Group operatives directly involved in orchestrating the Defamation Campaign or otherwise engaged on Project Maple Tree.

57. Psy Group is an intelligence services company based in Limassol, Cyprus, with numerous operatives working out of Petah Tikva, in the metropolitan area of Tel Aviv. Psy Group is the operating name of both Invop Ltd., whose company number in Israel is 51-517203-9, and its parent company, IOCO Limited, whose company number in Cyprus is HE336810. Psy Group was retained by or on behalf of the Catalyst Defendants, directly or indirectly, to assist the Catalyst Defendants in orchestrating and implementing their systematic Defamation Campaign against West Face and Boland. Psy Group is currently in insolvency proceedings in Israel. The principals or operatives of Psy Group include but are not limited to the following:

(a) Royi Burstien is an individual who resides in Israel. His personal identification number in Israel is 24561383. He is or was the Chief Executive Officer of Psy Group and was part of an inner circle of Psy Group operatives involved in orchestrating the Defamation Campaign or otherwise engaged on Project Maple Tree.

(b) Judith Helfgott is an individual residing in Israel. Her personal identification number in Israel is 302041793. She is married to Burstien. She is or was an executive of Psy Group and was also part of the inner circle at Psy Group operatives involved in orchestrating the Defamation Campaign or otherwise engaged on Project Maple Tree. She was also directly involved in the failed attempt to induce Blatchford to publish false and defamatory articles about West Face, Boland, and Justice Newbould.

(c) Sharon Kisluk is an individual residing in Israel. Her personal identification number in Israel is 204478382. She was part of the inner circle of Psy Group operatives involved in orchestrating the Defamation Campaign or otherwise engaged on Project Maple Tree. She was also directly involved in the failed attempt to induce Blatchford to publish false and defamatory articles about West Face, Boland, and Justice Newbould.

58. In addition to the foregoing defendants, certain other individuals or corporations were directly involved in the events described in the Counterclaim.

59. Yossi Tanuri is an individual residing in Israel. Tanuri's personal identification number in Israel is 28541431. Tanuri is a former commander of an elite

unit of the Israeli Defence Force and the owner and proprietor of Tamara Global. Tanuri and Tamara Global acted as an intermediary between the Catalyst Defendants and the remaining Counterclaim Defendants. Tamara Global retained Black Cube and Psy Group to assist in and execute the Catalyst Defendants' retaliatory campaigns to harm West Face and Boland. At the Catalyst Defendants' direction, Tanuri and Tamara Global authored a comprehensive and detailed plan to destroy West Face, Boland, and Justice Newbould.

60. Dan Gagnier is an individual residing in New York City. He is the founder of Gagnier Communications, a strategic communications and public relations agency based in New York City. Mr. Gagnier began his career in Toronto, and he and Gagnier Communications are Catalyst's primary conventional public relations representatives. Mr. Gagnier and Gagnier Communications have at all material times been involved in implementing the Catalyst Defendants' systematic campaign of defamation against West Face and Boland. In particular, they provided reporters, news agencies and others with edited, distorted or otherwise falsified recordings and/or transcripts of meetings between operatives of Black Cube and their targets, including current and former employees of West Face as well as Justice Newbould, in an unsuccessful attempt to cause these various news agencies to publish negative false and defamatory articles about West Face, Boland and Justice Newbould. Gagnier also made and continues to make, at the behest of the Catalyst Defendants, false and defamatory statements about Boland and West Face to reporters, news agencies, and others, the particulars of which are within the knowledge of Gagnier.

C. Background to the WIND Defamation: Catalyst's Failure to Acquire WIND

61. To understand why statements and allegations made and published by or on behalf of the Counterclaim Defendants about West Face and Boland relating to WIND are false and defamatory to West Face and Boland, as well as why and how the Counterclaim Defendants acted with malice in making, disseminating or causing to be made or disseminated the statements and allegations in question, it is necessary to understand why and how Catalyst actually failed to acquire WIND. This sequence of events is one of the principal reasons why the Catalyst Defendants initiated, orchestrated and implemented their unlawful conspiracy, as described herein, and acted with malice in doing so.

62. The question of why Catalyst failed to acquire WIND was decided by Justice Newbould in his Reasons for Judgment dated August 18, 2016 in the Moyse Action. All appeals from that decision have now been dismissed.

63. In January 2014, Moyse contacted West Face to seek employment. Moyse had applied for a job at West Face two years earlier, but decided at that time to work at Catalyst. After a series of interviews, in May 2014 West Face extended a job offer to Moyse, who was at that time working at Catalyst as a junior analyst. Moyse accepted West Face's offer of employment, and tendered his resignation to Catalyst.

64. In June 2014, Catalyst commenced the Moyse Action against Moyse and West Face, alleging that Moyse had breached the confidentiality and non-competition provisions in his employment contract with Catalyst. In its initial Statement of Claim,

Catalyst did not specify what confidential information Moyse had allegedly communicated to West Face.

65. In September 2014, a consortium of investors that included West Face acquired WIND after Catalyst failed to do so. Shortly thereafter, in October 2014, Catalyst amended its Claim in the Moyse Action to assert that West Face had acquired WIND by misusing confidential information belonging to Catalyst that West Face had allegedly solicited and obtained from Moyse. Those allegations were demonstrably false.

66. The trial of the Moyse Action was heard by Justice Newbould over seven extended days of hearings in June 2016. Multiple witnesses testified that Moyse did not convey to West Face at any time confidential information of Catalyst concerning WIND. Catalyst failed utterly in its efforts to adduce evidence to the contrary. On August 18, 2016, Justice Newbould released his Reasons for Judgment dismissing Catalyst's claims against West Face and Moyse in their entirety. West Face relies on the doctrines of *res judicata* and abuse of process with respect to the following facts found by Justice Newbould.

67. Due to regulatory restrictions on foreign ownership of Canadian telecommunications companies that existed at the time, Globalive Capital, a Canadian entity, held two-thirds of the voting shares of WIND but only one-third of the total equity. VimpelCom, a Dutch-headquartered but Russian-controlled company, held one-third of the voting shares and two-thirds of the total equity.

68. Over time, VimpelCom had become frustrated by the regulatory hurdles it faced in Canada. This frustration drove its decision to divest its ownership of WIND. VimpelCom's desire to sell its interest in WIND was well-publicized in 2014. VimpelCom made widely known that it was seeking to sell its interests in WIND based on an enterprise value of only $300 million, which was substantially less than the amount VimpelCom had invested in WIND.

69. West Face and Catalyst both carried on discussions and negotiations with VimpelCom and its advisors in the first half of 2014. During this period, VimpelCom made clear to interested bidders that speed and certainty of closing were its highest priorities. Bidders were not competing on price, which was non-negotiable and had been fixed and made widely known by VimpelCom.

70. Ultimately, VimpelCom entered into an exclusivity agreement with Catalyst on July 23, 2014. As a result, VimpelCom was forbidden from negotiating with West Face or any other bidder during the term of the exclusivity agreement. While the term of VimpelCom's exclusivity agreement with Catalyst was extended several times, ultimately it expired on August 18, 2014.

71. During this period of exclusivity, Catalyst came close to concluding an agreement with VimpelCom to acquire WIND, but failed to do so because of its own flawed assessment of WIND's business as well as its intransigent bargaining position.

72. Specifically, Catalyst believed that WIND would not be a viable business without an express guarantee, in the form of a significant "regulatory concession", from the Government of Canada that would have permitted Catalyst to sell or transfer WIND

or its wireless spectrum to one of Canada's incumbent wireless carriers (Rogers, Bell and Telus) after five years. For this reason, and as noted by Justice Newbould in his Reasons for Judgment, "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government".

73. Unfortunately for Catalyst, the Government of Canada's well established regulatory policy was to encourage the growth and development of a fourth national wireless carrier. Indeed, that had been the Government's explicitly stated policy for years, dating back to at least 2008. As a result, WIND was expressly forbidden by the Government from selling its wireless spectrum to an incumbent. Despite Catalyst's repeated efforts throughout the Spring and Summer of 2014, the Government of Canada steadfastly refused to grant regulatory concessions to Catalyst that would have guaranteed Catalyst the ability to sell or transfer WIND or its spectrum to an incumbent after five years. Indeed, the Government was unequivocal that no such concession would be granted to Catalyst.

74. Catalyst hoped that if it was able to complete and execute an agreement to acquire WIND from VimpelCom and Globalive Capital, the Government of Canada would yield to Catalyst's demands rather than risk the negative publicity that might have arisen if Catalyst's efforts to acquire WIND were terminated.

75. VimpelCom, however, was unwilling to permit Catalyst to even speak with the Government concerning potential regulatory concessions in the interim period between entering into an agreement for the sale of WIND and the closing of the sale transaction. VimpelCom was concerned that any such discussions could delay or

jeopardize the grant by the Government of regulatory approval for the transaction, which was required before any transfer of voting control of WIND could be completed. In its negotiations with Catalyst (and West Face) throughout 2014, VimpelCom had emphasized its desire for a "clean exit" from WIND with minimal regulatory risk.

76. VimpelCom therefore negotiated for and obtained an agreed-upon clause in its proposed agreement with Catalyst that expressly precluded Catalyst from discussing the regulatory concession referred to above with the Government of Canada in the interim period between signing and closing. This meant that for Catalyst to carry out its intended strategy of seeking regulatory concessions about the sale of WIND or its spectrum to an incumbent once it signed its proposed agreement with VimpelCom, Catalyst would have had to breach the very agreement it had just signed. This was a fatal flaw that lay at the heart of Catalyst's seriously flawed acquisition strategy, and had nothing to do with West Face.

77. In early August 2014, the chief negotiators for Catalyst and VimpelCom agreed on a draft form of Share Purchase Agreement. However, VimpelCom's Board of Directors had to approve the transaction before it could proceed. VimpelCom's Board was dissatisfied that the proposed form of Share Purchase Agreement offered VimpelCom inadequate protection in respect of amounts VimpelCom anticipated having to spend to fund the operations of WIND in the interim period between signing and closing. Closing could not occur until the necessary regulatory approvals had been obtained.

78. To address this concern, in mid-August 2014, VimpelCom asked Catalyst to agree to pay a break fee of between $5 and $20 million in the event that the Government of Canada did not approve the sale of WIND to Catalyst within two months. The amount of the break fee was intended to represent funding that VimpelCom would have to provide to WIND during the interim period between signing and closing.

79. Catalyst refused to accede to, or even to discuss, VimpelCom's request for a break fee. Believing incorrectly that VimpelCom had no other viable options, on or about August 15, 2014, Catalyst terminated its discussions and negotiations with VimpelCom, let its period of exclusivity expire, and encouraged VimpelCom to consider its alternatives.

80. Catalyst's belief was misplaced. VimpelCom did, in fact, have other options. On August 6, 2014, a consortium that included West Face had submitted an unsolicited offer for WIND to VimpelCom that did not require regulatory concessions, and was structured in such a way as to avoid entirely the need for regulatory approval before VimpelCom's interest in WIND could be conveyed. Unlike Catalyst, the consortium was willing to acquire initially only VimpelCom's interest in WIND, leaving Globalive's voting control in place. The acquisition of VimpelCom's interest in WIND did not constitute a change of control of WIND. Absent a change of control, no regulatory approval was necessary to complete the sale of VimpelCom's interest.

81. While VimpelCom conducted no negotiations with West Face or other members of its consortium during Catalyst's period of exclusivity, once Catalyst's right to exclusivity expired, VimpelCom was permitted to and did in fact engage in

negotiations with members of the consortium. Those negotiations concluded successfully with the consortium's acquisition of VimpelCom's interest in WIND on September 16, 2014.

82. As found by Justice Newbould, the consortium's unsolicited offer of August 6, 2014 did not cause Catalyst's failure to acquire WIND. Rather, Catalyst failed to complete its proposed Agreement with VimpelCom for two reasons. First, because of its intransigence in refusing to agree to, or even to discuss, VimpelCom's request for a modest break fee of only $5 to $20 million. Second, Catalyst could never have successfully completed its proposed acquisition of WIND because it was unable to obtain regulatory concessions from the Government of Canada permitting it to sell WIND or its spectrum to an incumbent after five years, which Catalyst believed to be a necessary pre-condition to the completion of the proposed acquisition.

83. As described below, the WIND Defamation was rooted in: (i) the refusal of the Catalyst Defendants to accept these facts as described above and found by Justice Newbould; and (ii) the insistence of the Catalyst Defendants in relying upon their entirely false claim that West Face had instead "scooped" or stolen WIND by misusing confidential information of Catalyst concerning WIND that was allegedly conveyed to West Face by Moyse.

D. Background to the Callidus Defamation: Callidus Was Overvalued

84. To understand why the various statements and allegations of the Counterclaim Defendants relating to Callidus are false and defamatory to West Face and Boland, as well as why and how the Counterclaim Defendants acted with malice in

making, disseminating, or causing to be made or disseminated the statements and allegations in question, it is necessary to understand what the Catalyst Defendants allege West Face has done. This sequence of events is another principal reason why the Catalyst Defendants initiated, orchestrated and implemented their unlawful conspiracy, as described herein, and acted with malice in doing so.

85. Callidus holds itself out as an alternative business lender. Callidus makes business loans with limited or no financial covenants, purports to secure its loans against the most liquid assets of its borrowers, and claims to charge extraordinary interest rates in the range of 18 to 20%. Callidus can properly be described as a "lender of last resort", as its borrowers would not pay the high interest rates and fees charged by Callidus if more traditional (and less expensive) forms of debt financing were available to them. As a result, Callidus's borrowers are often in, or on the verge of, some form of financial distress or difficulty.

86. Callidus was wholly-owned by funds managed by Catalyst until April 2014, when Callidus conducted an initial public offering ("**IPO**") of a portion of its shares. The IPO resulted in the ownership interest held by Catalyst's funds being reduced from 100% to approximately 66%.

87. Callidus offered a portion of its shares to the public in its IPO at $14 per share. However, almost immediately after its IPO, Callidus's share price began to rise. By mid-August 2014, its shares were trading at over $20 per share—a significant premium to their IPO price and an even greater premium to their book value based on the assets and liabilities reported in Callidus's public disclosure.

88. West Face monitored Callidus's share price in the period since its IPO. By October 2014, West Face believed that the significant premium of Callidus's share price over its book value was unwarranted. It appeared to West Face that the gap between Callidus's book value and the trading price of its shares indicated that the market perceived significant intangible value in Callidus's continuing ability to generate an ever-expanding portfolio of high yield loans that would not default or otherwise suffer from an impairment of their value. West Face believed that this was unsustainable for a number of reasons.[3]

89. Accordingly, in late October 2014, West Face made a reasoned and entirely appropriate investment decision to begin short-selling Callidus's shares. Around the same time, West Face began conducting more detailed research into the underlying business carried on by Callidus. West Face began summarizing this research and analysis in a proprietary, internal working document.

90. West Face's research into Callidus was conducted on its own account, and for its own internal purposes. In conducting its research, West Face used public sources, such as law firm websites; accounting firm websites (particularly of firms acting as the Monitor or Trustee of insolvent Callidus borrowers); the website of the Office of the Superintendent of Bankruptcy in Canada; case dockets of ongoing bankruptcy proceedings; and public registries of security interest registrations maintained by various government agencies in Canada and the United States, and investment research prepared by investment banks.

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[3] West Face's reasons for believing that Callidus's share price was overvalued are set out in detail in West Face's Statement of Defence in the Veritas Action.

91. West Face's research revealed significant issues with a number of the loans Callidus had made to troubled borrowers, and validated West Face's thesis that Callidus's share price was overvalued. Among other things, West Face determined by December 2014 that:

(a) Callidus's loan portfolio was highly concentrated, in that it contained a relatively small number of outstanding loans;

(b) A number of borrowers of these outstanding loans were in restructuring, bankruptcy or other court proceedings, with little obvious means of repaying sums owed to Callidus, and where collateral valuations would be tested;

(c) Callidus's portfolio of outstanding loans also included a number of specific problem loans that had undisclosed indicators of material impairment;

(d) The valuations Callidus had attached to collateral supporting these loans were overstated;

(e) There was unexplained dramatic growth in the gross book value Callidus had reported in respect of several problem loans, suggesting that additional credit had been extended to borrowers to keep loans from defaulting;

(f) Callidus had made loans to borrowers without conducting sufficient due diligence as to the strength of the loan collateral when loans were made;

(g) Contrary to Callidus's assertions that it only made loans against its borrowers' most liquid assets, Callidus had made loans that were secured against illiquid collateral, such as undeveloped resource property; and

(h) Callidus appeared to be unable to expand its loan portfolio to the degree necessary to justify the premium investors had attached to its publicly traded shares without incurring additional loan losses, or charging lower rates of interest.

92. West Face identified these significant concerns despite the fact that, as of November 2014, Callidus had represented publicly that every single one of its loans was current in all interest and principal obligations, that its loans were more than 100% collateralized, and that Callidus had suffered no realized loan losses in spite of lending exclusively to financially troubled borrowers that could not access traditional sources of lending.

93. In sum, West Face had good reason to continue accumulating a "short" position in Callidus throughout the Fall of 2014. West Face ceased accumulating this "short" position in Callidus on December 24, 2014. By that time, Callidus's share price had dropped to approximately $18 per share (which was still well above the book value per share).

94. West Face closed out its "short" position in Callidus in the Spring of 2015, when Callidus's shares were trading at approximately $13 to $17 per share. As set out in West Face's Statement of Defence, West Face has not "shorted" Callidus's shares in the period since, for approximately four years, and had no involvement in any alleged

"short attack" of August 9, 2017, which is complained of in the Claim of Catalyst and Callidus.

95. In June 2015, Catalyst commenced the Veritas Action against West Face. In the Veritas Action, Catalyst and Callidus accused West Face and Veritas Investment Research Corporation ("**Veritas**") of engaging in a conspiracy to defame Catalyst and Callidus so that West Face could profit from a short-selling strategy in Callidus's shares. As described above, West Face did, in fact, short-sell Callidus's shares in the Fall of 2014. However, West Face did so because it determined that Callidus's shares were overvalued at the time. Moreover, West Face did not engage in a conspiracy with Veritas to publish false or defamatory statements about Callidus.

96. Events since the Fall of 2014 have only served to validate the concerns that West Face identified with Callidus when it took its "short" position at that time. For example, Callidus's loans to Xchange Technology, the Arthon Group, Leader Energy, North American Tungsten, Esco Marine, Deepak International, Harvey Industries (now Wabash Industries), Bluberi Gaming Technologies, Groupe Arsenault, Alken Basin Drilling, Gray Aqua, C&C Wood Products, Otto Industries, Fortress Resources, Binder Machinery, Midwest Asphalt Corporation and Horizontal Well Drillers (to name a few), totalling over $950 million in principal, interest and fees owing, have all developed material indicators of significant impairment or have been subject to insolvency proceedings.

97. Xchange Technology is one of the more significant problematic Callidus loans identified by West Face in 2014. Callidus advanced a one year loan of $22 million

to Xchange Technology in October 2012. In February and May 2013, before maturity of the loan, Xchange Technology ran two separate capital raising processes in an attempt to refinance the Callidus loan. Both processes failed. In October 2013, Callidus commenced a successful receivership application appointing Duff & Phelps as receiver and approving a "stalking horse" sales process for the sale of substantially all of Xchange Technology's business and assets. Callidus served as the stalking horse and "credit bid" on Xchange Technology in November 2013. At the time, Callidus was owed approximately $38 million.

98. The credit bid did not close until November 2015 and by December 31, 2015, Callidus's financial statements listed the acquired business as an asset held for sale with a value of $66.8 million. In a decision issued on May 31, 2016, in proceedings between Callidus and the defendant Jeffrey McFarlane, the former President and CEO of Xchange Technology, Justice Newbould held that the basis for the $66.8 million figure in Callidus's financial statements was "not at all clear".

99. Ultimately, in or around the first quarter of 2016, funds managed by Catalyst purchased Xchange Technology from Callidus for $101.3 million, which Callidus indicated was the "total outstanding principal plus accrued and unpaid interest". Callidus primarily used the proceeds it received from funds managed by Catalyst to repay a portion of the balance outstanding to Catalyst from Callidus under a subordinated bridge facility. No funds were recovered from an independent third party. Catalyst now carries Xchange Technology's assets at only 20% of cost.

100. As a result of these and other issues, since 2015, Callidus has incurred significant loan loss provisions, negatively affecting its financial condition. Similarly, Callidus's financial difficulties have inhibited its ability to initiate new loans, leading to a material overall reduction of its loan book. This reduction in the size of Callidus's loan book has reduced the company's book value and put downward pressure on its share price valuation. Finally, by shifting Callidus's balance sheet away from debt positions to equity positions in former borrowers, the risk profile of the company has deteriorated, further undermining its financial condition. In May 2017, Callidus announced that the OSC also had required Callidus to make a material change in the manner in which it presented its financial statements. In March 2019, Callidus published its 2018 Annual Financial Statements, which disclosed negative that shareholder equity at the end of 2018. This meant that under accounting rules, the company's liabilities exceeded the value of its assets.

101. In response to continuing weakness in Callidus's share price, and in an effort to harm short-sellers (which Catalyst and Callidus believed incorrectly included West Face), Callidus has engaged in a prolonged and aggressive campaign to prop up its share price:

(a) First, in March 2016, when Callidus's shares were trading at less than $10 per share, Callidus announced a substantial issuer bid ("**SIB**") for up to $50 million at $14 per share. The purpose and effect of the SIB was to inflate artificially Callidus's share price, because investors knew that they could buy Callidus shares and tender to the SIB for $14. The SIB was

extended several times and the price of that Bid was eventually increased by Callidus to $16.50;

(b) Second, in late September 2016, when Callidus's shares were trading at less than $17 per share, it announced a proposed initiative to take Callidus private. Callidus later indicated a target completion date of June 2017. No such transaction was concluded at that time, however, because after having conducted diligence into the company, no arm's length third party has been willing to pay what Callidus had indicated was the target price of $18 to $22 per share for Callidus's shares;

(c) Third, at approximately the same time as it announced its proposed privatization transaction in October 2016, Callidus increased its monthly dividend; and

(d) Fourth, in January 2017, Callidus commenced a normal course issuer bid ("**NCIB**") for up to 5% of its total issued and outstanding shares. The purpose and effect of the NCIB was to support the Callidus share price.

102. None of these measures had any appreciable long-term, lasting effect on Callidus's share price, because none of them improved Callidus's underlying business or financial performance.

103. As of the date of this amended pleading, Callidus's shares are trading at a price of less than $1 per share. Moreover, in its most recently released annual financial statements (for year-end 2018), Callidus disclosed a net loss of $183.6 million for 2018

and negative shareholder's equity of $5.4 million. Most of the erosion in shareholders' equity was caused by Callidus acquiring its borrowers and writing down the value of loans and of its acquired businesses. In its second quarter 2019 results, it disclosed a net loss of $104.4 million year-to-date, and a net loss of $79.7 million for the second quarter of 2019. As pleaded above in the Statement of Defence, Catalyst has since announced an arrangement agreement by which Braslyn Ltd. would acquire all outstanding minority shares of Callidus at a price of $0.75 per share.

E. The Conspiracy

104. The events relating to WIND and Callidus described above were intolerable to the Catalyst Defendants and led directly to the formation and implementation of the conspiracy referred to herein. The Catalyst Defendants risked a loss of investor confidence and an inability to raise investor funds in the future if it became known that:

(i) Callidus was failing, such that funds administered by Catalyst would not be able to exit their significant investments in Callidus without suffering significant losses;

(ii) Catalyst had failed to acquire WIND because of its own failed strategies, intransigence, and mismanagement of negotiations with the seller of WIND rather than because of conduct engaged in by West Face; and

(iii) there was no proper basis for the enormous valuations Catalyst had placed on its contingent claims relating to WIND in its representations to its investors.

105. The Catalyst Defendants therefore decided in August 2017 to engage in a two-pronged campaign to discredit West Face and Boland. These two prongs were the Black Cube Campaign and the Defamation Campaign, as particularized below. The

Catalyst Defendants enlisted the assistance of the other Counterclaim Defendants in implementing both of these Campaigns, and all of the acts in furtherance of the conspiracy as described herein were done at the behest of, and for the benefit of the Catalyst Defendants. The Catalyst Defendants were at all times aware of and approved of the actions done in furtherance of the conspiracy as described herein. All of the Counterclaim Defendants were active participants in the conspiracy described herein.

F. The Black Cube Campaign

106. In the period from August 2017 through at least December 2017, the Counterclaim Defendants conspired with each other, and with other co-conspirators who are known to the Counterclaim Defendants but presently unknown to West Face, to unlawfully harass, intimidate and deceive persons who are or were employed by or connected to West Face or played important roles in the litigation described above between West Face and Catalyst. The purpose and effect of the Black Cube Campaign was to harm West Face and Boland. The Black Cube Campaign was carried out by the Counterclaim Defendants using a series of deceitful, fraudulent and otherwise unlawful means.

107. Remarkably, one of the targets of the Black Cube Campaign was Justice Newbould, who, as stated above, rendered the trial judgment in favour of West Face in the Moyse Action in August 2016. One of the central goals of the "sting" perpetrated against Justice Newbould was to entrap him into making anti-Semitic comments, thus insinuating that Justice Newbould decided the Moyse Action in the way that he did because he was biased against Glassman, who is Jewish. The Counterclaim Defendants intended to use the results of the sting against Justice Newbould to attack

and discredit him and his Decision in favour of West Face in the Moyse Action, both in Catalyst's appeal to the Court of Appeal for Ontario from the Decision of Justice Newbould dismissing Catalyst's claims against West Face in the Moyse Action and in the VimpelCom Action. The ultimate targets of this orchestrated attack on Justice Newbould were West Face and Boland. While Black Cube's effort to elicit anti-Semitic remarks from Justice Newbould failed, the purpose and effect of this and other elements of the Black Cube Campaign was to delay the hearing of Catalyst's appeal in the Court of Appeal in the Moyse Action, to delay the outcome of the Defendants' motions to strike in the VimpelCom Action, to cast a cloud of doubt and uncertainty over West Face's victory in the Moyse Action, and to shroud West Face and Boland in contention and controversy.

108. West Face only uncovered the Black Cube Campaign as a result of widespread media coverage in the United States and globally concerning Black Cube because of its involvement in two United States matters where Black Cube is alleged to have engaged with individuals under false pretenses.

109. West Face only learned of the conduct of Black Cube complained of in this proceeding in November 2017 when this media coverage resulted in West Face employees, who had been targeted by operatives of Black Cube, recognizing Penn as one of the individuals who had solicited and met with them under what turned out to be false pretences. Widespread media coverage pertaining to the prominent role played by Black Cube in the United States matters led directly to the discovery by West Face and Boland of the Black Cube Campaign against them.

110. Black Cube's conduct was undertaken for and on behalf of the Catalyst Defendants as part of the conspiracy described above, and was unethical, improper and unlawful in a number of respects. First, private security and investigative services are legally regulated in Ontario by the Ministry of Community Safety and Correctional Services. In particular, private investigators are subject to the *Private Security and Investigative Services Act, 2005*, S.O. 2005, c. 34 ("***PSISA***") and the regulations made under it. The *PSISA* prohibits carrying on business as a private investigator in Ontario without being licensed under that statute. Neither Black Cube nor any of its individual operatives were licensed private investigators in Ontario during the period in question.

111. Second, Black Cube operatives did, in fact, contact and meet in Toronto – under false pretenses – with a number of West Face's current and former employees, their family members, and others, as well as with Justice Newbould, using lies and systematic deception. Black Cube operatives secretly recorded these meetings, created transcripts of what occurred, and conveyed these transcripts, recordings and related documents and information to the Catalyst Defendants, either directly or indirectly through intermediaries (the "**Black Cube Evidence**"). Heavily edited and distorted versions of those transcripts and recordings were then used by the Counterclaim Defendants to implement their ongoing campaign of harassment and defamation against West Face and Boland, including in false and misleading statements made to members of the media referred to above, as well as to investors of Catalyst and Callidus and to current and potential investors of West Face.

112. Third, Black Cube's conduct included: (i) making deceitful and false offers of employment to several current and former employees of West Face; (ii) making

deceitful and false expressions of interest in making investments with a former employee of West Face; (iii) making deceitful and false statements to Justice Newbould concerning his potential involvement in a non-existent arbitration proceeding; (iv) inviting their targets to meetings, lunches or dinners under false pretenses, and encouraging their targets to drink alcohol liberally; (v) flying certain targets to London, England for further meetings where they were taken to further fraudulent interviews when jet lagged and tired; and (vi) ultimately attempting to entice their targets into disclosing privileged and/or confidential information of West Face or making prejudicial statements that could be used against the targets, West Face or Boland. In the case of current and former employees of West Face, operatives of Black Cube enticed their targets to disclose confidential (and in at least one case privileged) information of West Face in breach of their contractual and/or professional obligations to West Face.

113. The conduct of the Counterclaim Defendants in orchestrating and carrying out the Black Cube Campaign has harmed West Face and Boland in a number of respects. First, it has sown the seeds of distrust and suspicion among West Face and its current and former employees by subjecting them to deceitful and invasive intrusions into their privacy, and the risk of false and harmful media attention and coverage.

114. Second, it has harmed West Face's ability to attract and retain talented employees, knowing that they too may be subjected to deceitful and invasive retaliatory measures like those engaged in by Black Cube for or on behalf of the Catalyst Defendants.

115. Third, it has resulted in the unlawful disclosure of West Face's confidential, and in at least one case privileged, information to operatives of Black Cube and ultimately to the Counterclaim Defendants, including to all of the Catalyst Defendants. The disclosure of West Face's confidential and/or privileged information, in violation of confidentiality obligations in employment agreements and professional obligations, to both a competitor in business and an opponent in multiple lawsuits is inherently harmful.

116. Fourth, the conduct of the Counterclaim Defendants in engaging or taking advantage of and utilizing the Black Cube Evidence to plant false and misleading media coverage concerning West Face and Boland was calculated to shroud West Face and Boland in controversy and scandal, and to tarnish and undermine their reputations and their business by deterring investors and other market participants from doing business with West Face and Boland.

117. Fifth, the conduct of the Counterclaim Defendants in causing, orchestrating, taking advantage of or utilizing Black Cube Evidence concerning its highly improper "sting" against Justice Newbould is particularly egregious, and was intended to prejudice to the greatest extent possible the positions of West Face both publicly, with investors and potential investors, and in defending and responding to Catalyst's appeal in the Court of Appeal for Ontario from the trial decision of Justice Newbould in the Moyse Action and in pursuing its own motion to stay or dismiss Catalyst's claim in the VimpelCom Action.

118. On the instructions of the Catalyst Defendants, operatives of Black Cube met with Justice Newbould twice under false pretences on September 18, 2017, in his office and at dinner. They lied to and deceived Justice Newbould and attempted repeatedly to entrap him into making anti-Semitic comments that could then be used by Catalyst: (i) to attack Justice Newbould's honesty, integrity, conduct and character, including through highly negative and pre-arranged media coverage on the eve of the hearing of the appeal in the Moyse Action; and (ii) as "fresh evidence" in the Court of Appeal for Ontario, to allege that Justice Newbould acted improperly, with actual bias, in deciding the Moyse Action against Catalyst because Glassman is Jewish.

119. Even though operatives of Black Cube failed in their efforts to entrap Justice Newbould into making anti-Semitic comments, they and the Counterclaim Defendants (including specifically Glassman, Riley, Jamieson, Rosen and Psy Group), along with Burstien, Helfgott, Kisluk, and Gagnier persisted in their efforts to plant highly negative media coverage concerning Justice Newbould. Their objective in doing so was to call into question the validity of the judgement West Face had obtained at trial in the Moyse Action, and to further shroud West Face and Boland in controversy and scandal. Efforts to plant stories concerning the sting on Justice Newbould were made by or on behalf of the Catalyst Defendants both in the period immediately preceding the hearing of the appeal in the Moyse Action, which was originally scheduled to be argued on September 26 and 27, 2017, and in the period after the Catalyst Defendants engineered an adjournment of the appeal during an attendance before Justice Rouleau of the Court of Appeal on the afternoon of September 25, 2017.

120. In particular, on Sunday, September 17, 2017 (the day before Black Cube's failed sting operation against Justice Newbould), at the direction of the Catalyst Defendants and Rosen, Jamieson contacted Blatchford, a prominent business journalist at the *National Post*, as set out above, promising an exclusive story concerning Justice Newbould. At the direction of the Catalyst Defendants, Jamieson provided Blatchford with an inaccurate and incomplete summary of the Moyse Action; falsely claimed that in deciding that action, Justice Newbould had ignored the destruction of relevant evidence; and alleged that West Face was involved in a "wolfpack" of companies that was unlawfully conspiring to harm various public market participants. Jamieson also offered to connect Blatchford to a spokesperson from Catalyst.

121. Three days after operatives of Black Cube met with Justice Newbould, at Rosen's direction, Jamieson met with Blatchford using lies and deception, on Thursday, September 21, 2017 at a café in midtown Toronto. At that meeting, Jamieson gave Blatchford a USB flash drive that had been provided to her by Riley. The USB flash drive contained photos, edited audio recordings and edited transcripts of two meetings between Justice Newbould and a Black Cube operative at Justice Newbould's office and at dinner.

122. All of Jamieson's actions described above were orchestrated and directed by the Catalyst Defendants and Rosen, directly or indirectly, as part of the conspiracy. Their purpose in doing so was to induce Blatchford to write and publish a false and defamatory article concerning West Face, Boland and Justice Newbould immediately before the appeal of the Moyse Action was heard on September 26 and 27, 2017.

123. The co-conspirators failed in their efforts to do so, and no article was, in fact, published by Blatchford in respect of this matter in the period before Catalyst's appeal was first scheduled to be argued.

124. On the afternoon of September 25, 2017, Greenspan, who had not previously publicly acted for Catalyst in any of the litigation involving West Face, requested an adjournment of the appeal in the Moyse Action. He appeared before Justice Rouleau in open court and advised that the existing counsel for Catalyst from the Lax O'Sullivan law firm had withdrawn from the appeal because of an irreconcilable conflict that had only very recently arisen with Catalyst, and that he had been retained to pursue a potential motion for leave to adduce fresh evidence in the appeal. Greenspan declined to reveal what the proposed fresh evidence was, or how or when Catalyst had obtained it. The hearing of the appeal was adjourned by Justice Rouleau to February 20 and 21, 2018 over the objections of West Face.

125. Following the adjournment of the appeal, the Counterclaim Defendants' efforts to manufacture stories defaming West Face and Boland continued. This included not only defamation in respect of Justice Newbould and the Moyse trial, but also defamation relating to this action that Catalyst and Callidus would ultimately launch on November 7, 2017. On October 17, 2017, Rosen met Glassman in New York City to update him on Jamieson's efforts to plant "wolfpack" related stories in the media. On October 20, Rosen met Blatchford at the Broadview Hotel in Toronto and falsely alleged that Aboriginal groups, not Catalyst, were behind the attack on Justice Newbould. He then arranged for Blatchford to meet "Jessie from the operational team", who was in fact Helfgott. Helfgott met Blatchford on October 31, 2017 at the Mercatto in the Eaton's

Centre in a further attempt on behalf of the Catalyst Defendants and Psy Group to encourage Blatchford to write an article defamatory of Justice Newbould, West Face and Boland. Both Rosen and Helfgott met with Blatchford in an attempt to persuade her, using lies and deception, to publish false and defamatory articles repeating the WIND Defamation (as described herein) about Justice Newbould, West Face, and Boland.

126. Ultimately, Catalyst made the decision in late November 2017 not to proceed with its proposed motion to adduce fresh evidence in its appeal in the Moyse Action. Catalyst made that choice:

(a) after the failed sting operation against Justice Newbould was disclosed by Blatchford in an article published in the *National Post* on November 24, 2017 titled "The Judge, the Sting, Black Cube and Me"; and

(b) almost immediately after West Face brought a motion before Justice Rouleau for an Order compelling Catalyst to disclose the "fresh evidence" that it and its counsel had in their possession when the adjournment of the hearing of the appeal in the Moyse Action was sought and obtained on September 25.

127. In the period following November 24, 2017, the Catalyst Defendants, Psy Group, Jamieson, Rosen and Gagnier as well as others working with and for the Counterclaim Defendants as part of the conspiracy described herein, persisted in their efforts to plant highly negative media coverage using edited and distorted versions of the Black Cube Evidence that they intended to damage, and knew would be damaging to, West Face and Boland (including by undermining the legitimacy of Justice

Newbould's dismissal of Catalyst's Claim against West Face in the Moyse Action). The efforts of the Counterclaim Defendants, and others on their behalf, were ongoing in this regard until at least as recently as April 2018.

G. The Defamation Campaign

128. The Counterclaim Defendants' campaign of defamation against West Face and Boland was systematic, multifaceted and persistent. It was at all times carried out with malice and in bad faith, for the reasons described above. It included as its principal elements the dissemination by or on behalf of the Counterclaim Defendants of a series of false and defamatory press releases, communications to Catalyst investors and other capital market participants, Internet postings, and communications to members of the media, including the *National Post*, Bloomberg News and the Associated Press. The campaign of defamation was carried out as part of the conspiracy entered into by the Counterclaim Defendants, described herein, to discredit and harm West Face and Boland.

(i) False and Defamatory Press Releases and Statements Following the Issuance of Justice Newbould's Trial Reasons

129. On August 18, 2016, Justice Newbould released his Reasons for Judgment dismissing Catalyst's claims and allegations in the Moyse Action in their entirety. The very next day, Catalyst issued a statement containing the following defamatory words, which were reprinted in the *National Post* and various other publications (the "**Post-Judgment Comments**"):

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

> We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbold *[sic]*. 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 judgement containing clear misstatements of fact.

130. All of the Catalyst Defendants and Gagnier played an active role in preparing, approving and disseminating these Post-Judgment Comments. The plain and obvious meaning of Catalyst's Post-Judgment Comments was that in acquiring WIND, West Face and its principals, including Boland, had engaged in an unlawful conspiracy and breach of contract, and that Catalyst's allegations of breach of confidence made against West Face and its principals in the Moyse Action were, in fact, true, even though they had been dismissed the day before by Justice Newbould.

131. The Post-Judgment Comments were false. No "additional evidence" supporting any of Catalyst's claims and allegations in the new litigation had "come out" since the trial of the Moyse Action had concluded, only two months earlier. Nor was there any proper or good faith basis for Catalyst to assert, as it did, that the only reason its claims against West Face were dismissed by Justice Newbould was that Justice Newbould had misconducted himself and acted with actual bias in presiding at trial in the Moyse Action. Catalyst made these statements in bad faith and with malice for the reasons described above, and for the purpose and with the effect of embarrassing West Face, Boland and Justice Newbould. Catalyst sought to further shroud West Face and Boland in contention and controversy while presenting the illusion to current and potential investors, participants in the capital markets and others, that it could

substantiate the truth of the WIND Defamation, and of the entirely false allegations that Catalyst had made against West Face in the Moyse Action.

132. On October 13, 2016, Catalyst issued a press release concerning West Face and Boland through the Business Wire news service containing the following defamatory statements (the "**October 2016 Press Release**"):

> 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 trampled 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 that judgment will expose the truth of West Face's actions, character and values.

133. All of the Catalyst Defendants and Gagnier played an active role in preparing, approving and disseminating the October 2016 Press Release. The plain and ordinary meaning of the October 2016 Press Release was that:

(a) West Face and its principals, including Boland, trampled unlawfully on Catalyst's rights, and acted unethically and unlawfully in respect of WIND and Callidus; and

(b) West Face's actions, and the character and values of West Face and its principals, including Boland, are consistent with having engaged in questionable and unlawful actions with respect to WIND and Callidus.

134. Each of these meanings is demonstrably false. The October 2016 Press Release was published with malice, as part of a systematic, orchestrated and unlawful campaign of defamation against West Face and Boland for the express purpose of embarrassing and injuring Boland and West Face as well as its officers, employees and directors as well as poisoning the relationship between West Face and its current and potential investors.

135. The purpose and effect of Catalyst's October 2016 Press Release was to disseminate its false and defamatory allegations against West Face and Boland as widely as possible, including among investors, other participants in the capital markets and other members of the business community. The Catalyst Defendants sought to continue to shroud West Face and Boland in contention and controversy, and succeeded in achieving their objective.

136. In addition, in or about the same period from August to October 2016, Glassman and Gagnier repeated the defamatory words contained in the Post-Judgment Comments and the October 2016 Press Release in a variety of conversations and discussions with industry analysts, potential and current investors of both Catalyst and West Face, professional and business contacts of Boland, media representatives, and other market participants, the identities of whom are known to the Catalyst Defendants and not to West Face (the "**Glassman Defamation**"). On these same occasions, by repeating words contained in the Post-Judgment Comments and October 2016 Press Release, Glassman impugned the conduct, business integrity and ethics of Boland and his partners and colleagues at West Face.

137. Among other things, in disseminating the Glassman Defamation, Glassman and Gagnier represented falsely that West Face and its principals, including Boland, had acted improperly, dishonestly and unlawfully in acquiring WIND, including by misusing confidential information of Catalyst that they had obtained from Moyse. Glassman also told investors and others that the trial decision of Justice Newbould contained numerous errors and would be overturned on appeal.

138. The Glassman Defamation was false. As described above, and as found by Justice Newbould following a full trial of the Moyse Action, West Face and its principals acted in an entirely reasonable, proper and lawful manner in participating in the acquisition and subsequent sale of WIND.

(ii) False and Defamatory Allegations to Catalyst Investors

139. On or about August 14, 2017, in a letter disseminated to all of Catalyst's investors, Catalyst made the following false and defamatory statements concerning West Face (the "**First Investor Letter**"):

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

140. Public information sources disclose that Catalyst's investors include the endowments of Harvard University, the University of Michigan, McGill University, the Missouri State Employees' Retirement System, the New Jersey Division of Investments, the Ohio Public Employees' Retirement System, and the Rockefeller Foundation. The identities of additional investors who received the First Investor Letter are known to the

Catalyst Defendants, rather than to West Face or Boland. Moreover, given that West Face and Catalyst compete as managers of investment funds, each of Catalyst's investors who received the First Investor Letter is a potential investor in funds managed by West Face.

141. All of the Catalyst Defendants played an active role in preparing, approving and disseminating the First Investor Letter to Catalyst's investors. The words contained in this First Investor Letter are defamatory in their natural and ordinary meaning. The words were meant and understood to mean that West Face and its principals, including Boland, either directly or through its employees, officers and directors:

(a) engaged in improper conduct intended to manipulate the market price for the shares of Callidus;

(b) engaged in conspiracies with other people or entities intended to manipulate the market price for the shares of Callidus;

(c) made misrepresentations to the public concerning Callidus; and

(d) manipulated improperly other public market participants.

142. Each of these meanings is false and defamatory. The First Investor Letter was published with malice, as part of systematic and unlawful campaign of defamation against West Face and Boland, for the express purpose of embarrassing and injuring Boland and West Face, as well as its other officers, employees and directors.

143. Moreover, the First Investor Letter was false and misleading. As of the date the First Investor Letter was disseminated by Catalyst, no "new facts helpful to [Catalyst's] case" had been discovered. That statement was made to investors by Catalyst for the purpose, and with the effect, of presenting the illusion that Catalyst would finally be able to prove the truth of its allegations and claims against West Face and its principals in the Moyse Action, and to continue to shroud West Face and Boland in contention and controversy. As stated above, however, Catalyst's claims and allegations against West Face and its principals, including Boland, are now, and have always been, demonstrably false.

144. West Face and its principals acted at all times in an entirely appropriate, lawful and responsible manner with respect to both WIND and Callidus. As described above, West Face determined in October 2014 that Callidus's shares were overvalued, and decided to short-sell its stock, based entirely on its analysis of publicly available information. Moreover, as explained in greater detail above, West Face's assessment of Callidus has been borne out by subsequent events. In the period since West Face first determined that Callidus was overvalued in October 2014, when the shares of Callidus were trading at over $20 per share, the share price of Callidus has fallen dramatically, and is currently trading below $1 per share. Moreover, Callidus has experienced significant loan losses, has been required by the OSC to restructure its financial reporting, and has experienced a dramatic reduction in the size of its loan book.

145. The Catalyst Defendants published the First Investor Letter in furtherance of the conspiracy pleaded herein. The false and defamatory allegations of "market manipulation" in the First Investor Letter were specifically intended to tie into entirely

false allegations of the Catalyst Defendants concerning the supposed participation of West Face and Boland in the "wolfpack" behaviour described below, and to distract attention from the *Wall Street Journal*'s August 9, 2017 Article describing "whistleblower" filings made against Catalyst and Callidus.

(iii) False and Defamatory "Internet Postings" of "Wolf Pack" Behaviour

146. On or about September 19, 2017, one week before the scheduled hearing of Catalyst's appeal in the Moyse Action, a series of false and defamatory Internet postings (the "**Internet Postings**") about West Face and Boland began to appear in a variety of locations on the Internet. These Internet Postings were posted under pseudonyms, but were orchestrated, directed and paid for, directly or indirectly, by the Catalyst Defendants, Rosen and Psy Group as part of Project Maple Tree. Indeed, as described above, Jamieson adverted to the "Wolf Pack" defamation in her meeting with Blatchford on September 17, 2017.

147. The first such Internet Posting uncovered by West Face (the "**Boland Post**") was titled "West Face Capital CEO Gregory Boland has made a fortune "shorting" companies, laying off thousands, then sells stocks high". In addition to the false and defamatory title, the Boland Post contained the following false and defamatory words concerning West Face and Boland:

> West Face Capital has used an aggressive strategy to take control of companies. It requires months, sometimes years of patience, before gutting the asset and selling off what is left of it for profit. Gregory Boland has used this tactic to great effect in conjunction with several partners.
>
> Boland typically targets weak companies to take advantage of cheap stock. But where no such stock exists, West Face and partners are now looking to create it. This pack of

aggressive investors have taken to opening a shorts *[sic]* against target companies, before strong-arming boards of directors and restructuring companies. They then sell off assets for profit.

In 2010, West Face surprised the board of Maple Leaf Foods after wresting away a third Ontario Teachers *[sic]* Pension Plan's 36-percent stake. What resulted was a third-year *[sic]* war between Boland and Maple Leaf CEO Michael McCain. Boland will often speak of the board's "independence" to cleanse of it of people *[sic]* who have long-standing business ties. The result is often conveniently removing multiple directors at once, handing West Face greater proportional control.

"Corporate governance, and specifically director independence, became the focal point of Boland's attack, the lever by which he hoped to wrest power away from the McCains and make the company more responsive to the concerns of smaller investors such as—but not limited to—West Face," Listed Magazine wrote in spring 2011. He used similar strong-arming in 2008 to gut the entire board of Air Canada parent, ACE Aviation.

The "independence" arguments makes sense *[sic]* to most people trying to make managerial decision-making more efficient. Yet, it relies on pointing to inevitably strong working relationships between managers and directors as problematic, meaning true independence erodes over time. It makes for a great talking point for new players to weaken experienced directors for their own gain.

These tactics are not strictly illegal, but Boland has not exactly stayed out of the courtroom either. He has been accused of industrial espionage to one-up competitors, specifically regarding the acquisition of Wind Mobile in 2014. Alfred Balm sued Boland during another takeover, claiming the latter reneged on $10 million in stock sales after said stock dipped below the agreed sales price.

At Maple Leaf Foods, West Face and Boland eventually took a backseat in 2014 after years of infighting. Boland doubled his investment, with $300 million, even though the company posted losses in five of the last six quarters before the sale. He also left Maple Leaf with a $1 billion restructuring plan unfinished. Boland retained a spot on the board, but eventually gave that up in 2016.

> The company's stock has risen, but the quest for profitability is still a ways off. The company laid off 400 workers, mainly in Mississagua *[sic]*, in 2015. When Boland departed a year later, they announced 400 more dismissals and the close of a factory in Thamesford, Ontario.
>
> In an environment where distressed companies are easy prey, it seems West Face Capital has figured out a way to squeeze companies for its [*sic*] last few drops of life. Their tactics should be a lesson for anyone who thinks "independent" management and board "restructuring" are more than buzzwords. They are pretexts used by predatory investors.

148. The Boland Post was published repeatedly over the Internet by or at the request of the Counterclaim Defendants, directly or indirectly, including:

(a) On a website found at http://greg-boland.blog/. This website bore the defamatory heading "Greg Boland and West Face Scam", and contained a link to the Boland Post at http://greg-boland.blog/2017/09/19/west-face-strategy-loveem-and-leaveem. The "author" of the Boland Post on this site is listed as "Anonymous", which provided a link to a page at http://greg-boland.blog/author/judgefranknewbould. While there was no additional content at the "author" page, the URL falsely suggests that Justice Newbould was somehow associated with the Boland Post. The purpose of associating Justice Newbould with the Boland Post was to attack his conduct and integrity, as well as to undermine the validity and reliability of his Judgment against Catalyst in the Moyse Action. As explained herein, this was not the only attempt of the Catalyst Defendants to attack Justice Newbould in an effort to harm West Face and Boland;

(b) On a website found at http://u.wn.com, which bears the heading "West Face strategy: love'em and leave'em", and contained a link to the Boland Post at http://article.wn.com/view/2017/09/18/West_Face_strategy_love_em_and_leave_em/; and

(c) By numerous Twitter accounts that provided links to the articles referred to above stating "To read more about corruption in the Canadian Stock Exchange *[sic]* click here", including but not limited to @joshccros, @Hiru3035Hirusha, @PearsallApril, @iamblessed2006, @AngelicaXoXoz, and @tox_icity. These Twitter accounts were established and managed, directly or indirectly, for, by or on behalf of the Counterclaim Defendants.

149. The plain and ordinary meaning of the Boland Post is that:

(a) West Face and Boland are predatory investors who intentionally harm companies and their employees for West Face and Boland's own private profit;

(b) West Face and Boland were engaged in a "scam" and other unethical and improper, corrupt practices;

(c) West Face and Boland conspired with unnamed third parties to make false and misleading statements about public companies in order to artificially manipulate and suppress their stock prices in support of an improper and unlawful short-selling strategy;

(d) West Face and Boland engaged in "industrial espionage" with respect to West Face's participation in the acquisition of WIND in 2014;

(e) West Face and Boland caused Maple Leaf Foods to suffer losses in five of six quarters, caused significant job losses, and failed to successfully complete a billion dollar restructuring; and

(f) West Face and Boland drive companies into bankruptcy for their own private profit.

150. Each of these meanings is false and defamatory. The Boland Post was published by or on behalf of the Counterclaim Defendants with malice, as part of their systemic and unlawful campaign of defamation against West Face and Boland and in furtherance of the conspiracy described herein, for the express purpose of embarrassing and injuring Boland and West Face as well as its officers, employees and directors.

151. The purpose, intent and effect of the Boland Post was to poison the relationship between Boland, West Face, and their current or potential investors, including by continuing to shroud West Face and Boland in controversy and scandal.

152. The Boland Post was (and is) entirely and deliberately false. West Face and Boland have never "gutted" an asset and then sold off "what is left of it for profit". Nor have they engaged in unlawful stock manipulation, either alone or in conjunction with others. West Face and Boland have never "strong-arm[ed]" the Board of any company. Nor did they "sell off" the assets of any company for the private benefit of

West Face or Boland. At all times, West Face and Boland have shared in the profit or loss of companies in which they have invested in the same manner as other investors in comparable securities.

153. The Boland Post states, or in the alternative alleges by innuendo, that West Face's investment in Maple Leaf Foods was detrimental to Maple Leaf Foods. That statement or innuendo is also false. West Face and Boland's involvement with Maple Leaf Foods was entirely positive. When West Face acquired an interest in the company in 2010, its stock price was trading at less than $10 per share. As a result of a restructuring of the business of Maple Leaf carried out with the support of Boland and West Face, by the time West Face ended its involvement with Maple Leaf in 2016, the stock price was well over $25 and the company had returned to profitability.

154. The purpose and effect of the Boland Post was to disparage the reputations of West Face and Boland, and to discourage improperly investors and other market participants from doing business with them.

155. The second defamatory Internet Posting (the "**Wolf Pack Video**") was first posted on YouTube on or about September 19, 2017, and was titled "Judicial and Economical Corruption in Canada". The Wolf Pack Video was published by or on behalf of the Counterclaim Defendants using the online pseudonym "Wolf Pack". The defamatory text displayed on the Wolf Pack Video was as follows:

> BILLION-DOLLAR TORONTO "WOLF PACK" IS TRAPPING COMPANIES INTO STOCK SHORTS
>
> In June 2016, K2 & Associates took a short position in Asanko Mining...

> the miner had 90% downside potential; and soon Muddy Waters LLC took notice.
>
> UPON THE RELEASE OF THE MUDDY WATER *[sic]* RESEARCH, ASANKO'S STOCK BEGAIN *[sic]* TO TANK...
>
> K2 & ASSOC. IS WORKING WITH OTHER COMPANIES TO CREATE DISCOUNT STOCK BUYOUTS
>
> K2 & Assoc., Anson Funds, WestFace Cap., & MMCAP Fund Inc., are working together
>
> They are forming a "Wolf Pack" designed to target companies and bring them down.

156. In addition, the description of the Wolf Pack Video on its YouTube page contained the following defamatory words:

> There is a new beast on the scene in Canada - The Wolfpack. Made up of a group of at least eight nefarious companies and their CEO's *[sic]*, The WolfPack has been operating for several years to take out their competitors using 'short' tactics. By manipulating the stock market these companies guarantee that any business they target will fall into their hands. Spreading lies, committing purgery *[sic]*, even laundering money- The Wolfpack will stop at nothing to accomplish their goals.
>
> With connections across Canada and into the United States, WestFace, Anson Partners, K2 Partners, along with several private investors like Mark Cohedes *[sic]*, and Alex Speers are operating largely undercover to carry our *[sic]* their short schemes. The list of WolfPack Members goes on and their reach is extensive, the Canadian credit market is in the midst of a major crisis.
>
> Our mission is to expose these companies and the men behind them for what they really are and prevent further economic repercussions. There are at least four businesses that we can confirm have been affected by inducement actions carried out by the group, including: Badger Day lighting, EIF, Valeant Pharmaceuticals, and Concordia International. Each companies *[sic]* has had its shares depleted by the Wolf Pack's market manipulation to the point of declaring bankruptcy. The time has come to put an end to

the manipulation and racketeering of these men and reinstate the public's trust in the financial system.

157. The Wolf Pack Video was published repeatedly by or on behalf of the Counterclaim Defendants, directly or indirectly, including:

(a) On YouTube at http://www.youtube.com/watch?v=o0K_L9OFUDc;

(b) On Twitter by numerous Twitter accounts that provided links to the video stated "Judicial and Economical Corruption in Canada", including but not limited to @dfrancis153, @webmaker_bd, @SaraMariohot82, @Arman_Arif44, @SunlightCity, @cool_coolm80, @rdmoot, @CassyxLove, @penslinger81, @happysnappy16, @nadia_neeka, @lordrose61, emlove2015, @WolflyHearted, @brandonn1768, @hasithamalinga2, @majharul521, @Nawamya148, @admschaaf, @rainoforanges, @Emily_Grier001, @ManojAbey, @asansaranga1998, ThusithaDilana, @erangasperera1, @iamblessed2006, and @tox_icity. These Twitter accounts were managed, directly or indirectly, for, by or on behalf of the Counterclaim Defendants; and

(c) To other parties, the identities of whom are known to the Counterclaim Defendants.

158. The plain and ordinary meaning of the Wolf Pack Video is that:

(a) West Face and Boland conspired unlawfully and improperly with other market participants to engage in corrupt conduct intended to harm, and ultimately cause the bankruptcy of, Asanko Mining, Badger Daylighting,

Exchange Income Fund, Valeant Pharmaceuticals, Concordia International and other companies in order to profit from an unethical and illegal short-selling strategy;

(b) West Face and Boland committed perjury, racketeering and money-laundering; and

(c) West Face and Boland have engaged in illegal stock manipulation.

159. Each of these meanings is false and defamatory. The Wolf Pack Video was published by or on behalf of the Counterclaim Defendants with malice, as part of a systematic and unlawful campaign of defamation, and as part of the conspiracy described herein, for the express purpose of embarrassing and injuring West Face and Boland as well as West Face's officers, employees and directors.

160. The statements in the Wolf Pack Video mirror closely the entirely false allegations of misconduct made by Catalyst and Callidus against West Face and Boland in their Claim in this proceeding and are entirely and deliberately false. West Face has never acted in conjunction with any of the other named entities, has never invested in the securities of Asanko Mining or any of the other named companies, has never engaged in corrupt behaviour, and has never worked with other parties "to target companies and bring them down". Those allegations were invented from whole cloth by the Counterclaim Defendants for the purposes of punishing and embarrassing West Face and Boland, attracting the unwarranted attention of law enforcement and securities regulators, and further shrouding them in controversy and scandal.

161. The purpose and effect of the Wolf Pack Video was to disparage the reputations of Boland and West Face, and to discourage improperly investors and other market participants from doing business with West Face and Boland.

162. The third defamatory Internet Posting (the "**Esco Post**") was first posted on or about September 19, 2017 by or on behalf of the Counterclaim Defendants, directly or indirectly, using the pseudonym "julesljones". This post contained the following defamatory words:

> **The Buyout That Wasn't**
>
> **The Truth Behind the Esco Marine Purchase and K2 & Associates**
>
> At the center of a large scale investigation sit several private Hedgefund companies, who through manipulation and insider information are quietly cornering the market. The group, although on the outside appear unconnected *[sic]* are in fact undeniably linked.
>
> Although the entire group is worthy of in depth analysis and probing, the topic of this brief expose is the connection between Anson Funds Corporation, K2 & Assoicates *[sic]*, Westface *[sic]* Capital and Esco Marine Inc.
>
> **Connecting The Dots**
>
> In June 2014, Callidus Capital provided Esco Marine with a loan of just over US $20 million, as part of an agreement of up to US $34 million, to assist in financing its ongoing operations. Falling behind, Esco was forced to cease all operations and filed for bankruptcy protection from creditors on March 7 after their lender, Callidus Capital Corp, owned by Newton Glassman, called in a $31.4 million loan. Struggling to turn their scrap business around, ESCO Marine, Inc. filed for bankruptcy protection, or more accurately, had an involuntary bankruptcy petition filed against it, on March 7, 2015 . When Esco announced to investors that they couldn't pay, thereby declaring they were in default, a suit was filed against them by Callidus Capital.

The claim was filed with assistance from Greg Boland, the CEO of West face *[sic]* Capital. Boland, *[sic]* just happens to be close associate *[sic]* of Shawn Kimel, so close that the two hold office space for their respective companies in the same building in Toronto's financial district. Westface *[sic]* has a significant interest in acquiring control of Esco, the reason being that one of the major shareholders in the company is a well-known rival.

The Big Game

Getting back to the heart of the matter, Westface *[sic]* and Anson acted in cooperation with each other to bring the stock of the Texan Marine company down enough to crash their public tender and force them into selling. This tactic, commonly known as a 'short' isn't technically illegal...unless you are a company working in collusion with another vested interested *[sic]*.

Anson Funds are a collection of privately-held and pooled investment vehicles which dedicate funds primarily to publicly-traded equity and debt securities. Anson likes the risk, they target companies in the midst of financial turmoil and hope to turn a profit off of the investment they make that most banks refuse to give. Their two main offices are in Dallas and Toronto, which works quite well to transfer assets from Esco to Canadian investors. And now here is where it gets confusing...

Anson and West face share common stock and West face *[sic]* and K2 share office space, the proximity of these businesses to each other can't be ignored. Furthermore, Greg Boland (WestFace) and Shawn Kimel (K2&Associates) both make donations to the Princess Margaret Cancer Foundation, making it likely that the pair are if nothing else associated with each other publicly. Barington/Hilco signed off on the acquisition of Esco Marine Inc, and guess who has strong interest invested in Hilco- Shawn Kimel of K2& Associates.

How Hilco Connects

Hilco Redevelopment Partners was one of the parties set to acquire, restart, and operate Esco Marine Inc. Hilco was in agreement with Callidus Capital to turn the business around. The plan was to have Hilco providing the industrial asset monetization and Callidus providing a loan facility. Hilco

> used one of its subsidiaries, HRP Brownsville for operations and as part of the agreement made with Callidus, HRP would receive $35 million USD. Callidus was set to retain and realize on all of Esco Marine Assets.
>
> Upon the acquisition of ESCO by Hilco, a great deal of stock and any potential returns was lost to Callidus and directly sent to K2&Associates, AKA Shawn Kimel. Knowing what we know about the closeness of Kimel and Boland, it seems likely that the two were in contact with one another.
>
> **In Conclusion**
>
> Despite the fact that the story is still developing and a strong conclusion can't be drawn just yet, the evidence speaks for itself. There is cooperation between these groups, cooperation to bring down stock and purchase floundering companies at bottom prices. Their *[sic]* was a concentrated effort to target Esco and hurt the business of Callidus and the parties behind it aren't trying to hide their identities.

163. The Esco Post was published repeatedly by or on behalf of the Counterclaim Defendants, directly or indirectly, including:

(a) On a website found at http://www.buzzfeed.com/julesljones/the-buyout-that-wasn't;

(b) On a website found at http://www.huffingtonpost.com/entry/the-buyout-that-wasnt-the-truth-behind-the-esco-marine_us; and

(c) By numerous Twitter accounts that provided links to the articles above stating "The Truth Behind the Esco Marine Purchase and K2 & Associates", including but not limited to @tox_icity, @AngelicaXoXoz, and @warunad99. These Twitter accounts were managed, directly or indirectly, for, by or on behalf of the Counterclaim Defendants.

164. The plain and ordinary meaning of the Esco Post is that:

(a) West Face and its principals, including Boland, conspired with others to manipulate unlawfully the stock price of Esco Marine ("**Esco**"), thereby forcing Callidus to sell its investment and lose money;

(b) West Face and its principals, including Boland, engaged illegally in insider trading;

(c) West Face and its principals, including Boland, acted unlawfully and improperly in acquiring control of Esco, a failing company; and

(d) West Face and its principals, including Boland, conspired with others to prevent Callidus from turning Esco's fortunes around.

165. Each of these meanings is false and defamatory. The Esco Post was published by the Counterclaim Defendants with malice, as part of a systemic and unlawful campaign of defamation, and as part of the conspiracy described herein, for the express purpose of injuring Boland and West Face as well as the officers, employees and directors of West Face.

166. The Esco Post was (and is) entirely and deliberately false. Esco was at all times a private company to which Callidus extended a $34 million credit facility in June 2014. In March 2015, after Esco defaulted on its obligations under the credit facility, Callidus appointed a receiver over the assets of Esco. Callidus ultimately acquired Esco by bidding its debt in the insolvency proceeding, and then sued Esco's founders on their

personal guarantees. That litigation has since settled on a confidential basis, the terms of which are unknown to West Face.

167. As a private company, it is impossible to "short" the shares of Esco, which are not publicly traded. West Face has never had an investment in Esco, the business of which failed as a result of the actions of Callidus and not because of anything done by West Face.

168. The purpose and effect of the Esco Post was to disparage improperly and unlawfully the reputations of West Face and Boland, to further shroud them in controversy and scandal, and to discourage improperly investors and other market participants from doing business with West Face and Boland.

169. The fourth defamatory Internet Posting (the "**Face the Music Post**") was first posted on or about October 24, 2017 by or on behalf of the Counterclaim Defendants, directly or indirectly. This post contained the following defamatory words:

> **West Face Capital – Time to Face the Music**
>
> West Face Capital (WF) appears to be losing face following a streak of dismal returns. The Toronto-based hedge fund, managed by activist investor Gregory Boland and considered a formidable player in its field with over $2 billion in assets under management, continues to deliver very weak results for its investors. The weakness of WF's financial results, which are low and unsatisfactory by any standard, is magnified even more when accounting for red-hot equity markets and their returns to every asset class. By their own account, WF is underperforming significantly compared to the S&P 500, the S&P/TSX composite, the Event Driven Distressed Hedge Fund Index, the Event Driven Activist Index and basically any other relevant index.
>
> So what exactly is going on at WF? Have Boland and his team simply hit a bump in the road? Or is there a deeper

story at play? It's difficult to tell from a simple analysis of WF's reports since the level of detail (rather, the lack thereof) makes it hard for even financial experts to understand what is hindering their numbers. Suffice to say that in an industry with loose regulation and oversight, to begin with, WF's near total lack of transparency and oversight compared to its peers stands out. It raises serious concerns.

Now consider that lacking transparency with the abovementioned, consistent underperformance. Taken together those concerns constitute alarm bells that cause any self-respecting investor with a bit of logic to take a step back and a very serious look at whether this is the place or people they want managing their money.

Lack of Compliance

WF appears to have lied or misrepresented facts on its Form ADV reports, claiming it qualifies for exemption from registration since it acts solely as an advisor to private funds and has less than $150M in assets under management in the US. In reality, WF did not report assets under management for several US incorporated funds on its FORM ADV, including the West Face Long Term Opportunities (USA) L.P. which reportedly sold $849.46M in securities. Instead, WF reported this fund as a "feeder" to its Cayman Islands-based West Face Long Term Opportunities Global Master L.P., a fund that reports less gross assets.

WF's Form D and Form ADV simply do not match. Based on SEC filings, WF's estimated AUM exceeds $2.4 billion. The reduced reporting requirements WF has enjoyed since 2012 allows the firm to skate SEC scrutiny along with reduced reporting requirements. Similar SEC investigations into similar PE firms and hedge funds during the same period resulted in a significant enforcement action for undisclosed fees and expenses, failure to disclose conflicts of interest, misleading claims, and valuations, unauthorized shifting, allocation of expenses and more.

Finally, WF has been the subject of injunctions from several Canadian provincial authorities. The Alberta Securities Commission has heard four cases against them, the Ontario Securities Commission three. WF insiders have also failed to promptly report on SEDI (Canada's Electronic System for Disclosure by Insiders).

Profit through management fees, no returns

One of the main problems with funds like WF is their short-term gain approach. The appeal of making huge money through its performance fees often causes the fund's managers to take very big and very unnecessary risks.

In a recent interview, Greg Boland openly declared his true nature as a gambler and a thrill seeker, stating that "Being a contrarian and buying at the nadir of investor confidence has always appealed to me psychologically, I don't know why. The result is you often get some bumpy rides at the beginning. If you're trying to catch a falling knife, you can get a few nicks on the way down."

With the fund's performance so weak, well below its high watermark, Boland and his team will need to provide some very strong returns very fast if they want to continue enjoying the sweet, addictive taste of success fees. Combine these two factors together and add the lack of transparency or reporting requirements and you get a surefire recipe for some very risky and problematic deals in WF's near future.

In the meantime, WF's investors should take a very good, in-depth look at their investor and consider how lucky they really feel with the boat sailing through turbulent waters and a thrill-seeking, risk-taking captain at the helm, especially when it comes to OPM (Other People's Money).

170. The Face the Music Post was published repeatedly by or on behalf of the Counterclaim Defendants, directly or indirectly, on the website u.wn.com.

171. The plain and ordinary meaning of the Face the Music Post is that:

(a) West Face and its principals, including Boland, carry on business improperly in secret, and with a "near total lack of transparency";

(b) No "self-respecting investor" would invest funds with West Face or its principals, including Boland;

(c) West Face and its principals, including Boland, have failed to comply with laws and regulations;

(d) West Face and its principals, including Boland, have actively lied and misrepresented facts to regulators and investors;

(e) West Face, under the leadership of Boland, is similar to other private equity firms and hedge funds that have been the subject of enforcement actions for undisclosed fees and expenses, failure to disclose conflicts of interest, misleading claims, and valuations, unauthorized shifting, allocation of expenses and more;

(f) West Face has been the subject of a number of injunctions issued against it by Canadian provincial securities regulators, including the Alberta Securities Commission and the OSC; and

(g) West Face and its principals, including Boland, take extraordinary and unnecessary risks at the expense of West Face's investors.

172. Each of these meanings is false and defamatory. The Face the Music Post was published by the Counterclaim Defendants with malice, as part of an unlawful campaign of defamation, and as part of the conspiracy described herein, for the express purpose of embarrassing and injuring West Face and Boland, as well as the officers, employees and directors of West Face.

173. The Face the Music Post is entirely and deliberately false. At no point has West Face failed to comply with all applicable laws and regulations. It has never lied or

misrepresented facts to regulators. It has also never been the defendant or respondent in an enforcement or injunction proceeding brought against it by any Canadian provincial securities regulator.

174. The purpose and effect of the Face the Music Post was to disparage unfairly and unlawfully the reputation of West Face and Boland, to further shroud them in controversy and scandal, and to discourage improperly investors and other market participants from doing business with West Face and Boland.

175. The fifth defamatory Internet Posting was published for, by or on behalf of the Counterclaim Defendants, directly or indirectly, on or about October 30, 2017 (the "**Wolfpack Corruption Post**"). The Counterclaim Defendants, or others acting for them or on their behalf, created and posted a website, www.wolfpackcorruption.com, that is entirely dedicated to defaming West Face, Boland and other parties. This website was posted in conjunction with a YouTube video and with two Twitter accounts, @WolfPackCorrupt and @WolfPackScam, all of which directed viewers to visit that same website. The Wolfpack Corruption Post and the @WolfPackCorrupt and @WolfPackScam Twitter feeds all used consistent graphics and logos.

176. The Wolfpack Corruption Post contained the following defamatory words:

> **The Wolfpack's Corruption**
>
> *A wolf stalks its pray from the shadows, waiting for the right moment to pounce.*
>
> *When hunting as a pack, their pray is under attack from all sides.*
>
> The Wolfpack chews up its targets and spits them out. Like Little Red Riding Hood without the happy ending, publicly

traded companies are hit hard by an avalanche of false charges. A blizzard of lies collects momentum, snowballing down the mountain on unsuspecting companies who can't compete with the Wolfpack's ability to destroy target company reputations with little insinuation.

With an allusion to a cooked book or a hint to a conflict of interest, the Wolfpack is a shadowy cabal of short sellers that distort company reputations to drive stock prices down. They prey on investor tendency to jump at rumors, creating a cascade of rumor to profit off stocks they decide to short.

This is the story of an unsuspecting company, delivering its products to customers down the long and winding path in the forest that is Bay Street. But the path is not a safe one despite the scenic Canadian wood and tweets of the birds in the trees. Those woods hide predatory speculators and market manipulators.

Those tweets, hit pieces and speculative reports carry rumors that turn investors against your company, marking your fresh red hood not as a respected brand but a target. Not as a worthy investment, but a stock about to nosedive.

Those rumors are simple to spread. The wolves in the forest are the likes of Anson Funds, K2 & Associates, West Face Capital, MM Asset Management and the American short seller Mark Cohodes. The Riding Hoods? A growing list of victims like Nobilis, Home Capital Group, Concordia and Equitable Group are in the trenches against the Wolfpack's financial war machine.

The Wolfpack develops stories about their targets based on minutia of evidence, amplifying mild foibles to twist them into death knells for these companies. Few victims have survived their wrath. Some have defeated negative projections handedly. Others have successfully gone to war in court. The inept judges know their game. The weak courts know their pattern. The hamstrung regulators have seen it, too.

Now you have a chance to catch these wolves in action and save your investments. Learn here how Toronto's Wolfpack shorts and distorts target companies to make quick money.

177. The plain and ordinary meaning of the Wolfpack Corruption Post is that:

(a) West Face and its principals, including Boland, are part of a group of co-conspirators (*i.e.*, a "wolfpack" or "shadowy cabal" of companies) engaged in stock manipulation of public companies;

(b) West Face and its principals, including Boland, have conspired with others to launch a campaign of deception and misinformation (using "an avalanche of false charges", a "blizzard of lies", and "cascade of rumour") to "destroy" improperly and unlawfully the reputations of public companies and manipulate their stock prices; and

(c) Any legal successes enjoyed by West Face or its co-conspirators have been the result of an "inept judge" or "weak courts", as opposed to merit.

178. Each of these meanings is false and defamatory. The Wolfpack Corruption Post was published for, by or on behalf of the Catalyst Defendants with malice, as part of a systematic and unlawful campaign of defamation, and as part of the conspiracy described herein, for the express purpose of injuring Boland and West Face as well as its officers, employees and directors, and attracting the unwarranted attention of law enforcement and securities regulators, and further shrouding them in controversy and scandal.

179. The Wolfpack Corruption Post is deliberately false and defamatory. As set out repeatedly above, West Face and Boland have never conspired with any of the above-noted companies to short-sell any stocks.

180. The purpose and effect of the Wolfpack Corruption Post was to embarrass and disparage the reputations of Boland and West Face, to further shroud West Face and Boland in controversy and scandal, and to discourage improperly investors and companies from doing business with West Face and Boland.

181. Indeed, as touched on above, on the same day that the Counterclaim Defendants published the Wolfpack Corruption Post (October 30, 2017), they also published, or caused to be published, either directly or indirectly, a YouTube video titled "Market Manipulation in Canada". The YouTube video took the form of a short "Breaking News" segment about how the Canadian financial markets had been "rocked by allegations of insider trading, market manipulation, and interference by a well-known group of short-sellers". While the YouTube video did not expressly refer to West Face by name, scrolling across the bottom of the YouTube video were the words: "Visit: wolfpackcorruption.com for more information". The purpose and effect of the YouTube video was to ensure that as many Internet users as possible would visit the Wolfpack Corruption Post to maximize the damage to the reputations of Boland and West Face. The YouTube video was also defamatory of West Face and Boland.

182. In addition, the Counterclaim Defendants republished the Wolfpack Corruption Post by tweeting or causing to be tweeted links to it from the @WolfpackCorruption Twitter feed, which has since had all of its tweets deleted.

183. The sixth false and defamatory Internet Posting (the "**WestFace.net Post**") was posted on or about November 6, 2017 for, by or on behalf of the Counterclaim Defendants, directly or indirectly. This was yet another website created by

the Counterclaim Defendants for the purposes of embarrassing and defaming West Face, Boland and their alleged co-conspirators. This post contained the following defamatory words:

> **A Company Desperate to Maintain a False Image**
>
> In the world of hedge funds and money managers, there are those you can trust to make accurate and timely investments, and those who take what prove to be unnecessary risks with a hope of return that is never met. West Face Capital, a Toronto-based hedge fund, has come under intensive scrutiny as of late for several discrepancies in their reports, which have led financial market experts to raise red flags.
>
> According to the S&P 500, a widely-regarded and entrusted gauge for determining the profitability and reliability of large-cap U.S. equities, West Face Capital is falling short in almost every performance index. Data, which includes backdated reports on five year, three year and one year revenues, highlight the shockingly meager account with which the investors have been presented. As the business operates in both Canadian and American markets, there are also detailed reports available on the TSX index that corroborate West Face's poor returns.
>
> While the hedge fund claims one thing, the visible results as of June 2017 show that the S&P 500 has gone up 19.9% over the last year and West Face's index went up only 2.8%.
>
> This means that by choosing to invest in the S&P or in other top American stocks, you would have yielded 539% more revenue than if you were to invest in West Face. Their credibility is on rocky terrain, as they continue to vehemently deny any trouble in their portfolio. The TSX reports yield a similar conclusion, with an increase of 11% over the past year, 292% better than West Face. An investor who would willingly purchase options through West Face in this market, or consult their money managers in this state, is putting their money in the trust of a company with zero idea of how to read the current market.
>
> **Riddled with Manipulation and Falsified Reports**

What should trouble investors is the lack of transparency in West Face's financial reports and in their communications with their clients. Canadian-based hedge funds tend to enjoy more lax regulation than their American neighbors, and West Face Capital is taking full advantage of this. The company employs no outside auditors. This means that investors are letting the fund manage their capital and compile their reports with virtually no outside scrutiny. It does not take a financial expert to recognize the potential for misconduct in this situation.

In light of this, and with all the accompanying suspicion, it is truly a wonder that West Face Capital, run by CEO Greg Boland, manages to maintain a client base at all. The reason lies in a sophisticated web of manipulation that has lulled investors into a false sense of security. These investors are not dumb –far from it – but West Face Capital has perfected a scheme of manipulating funds and revealing just enough information to keep their clients and business partners in the dark about their actual worth. They consistently report gains when the harsh reality reflects a string of near-crippling losses.

Activist Investing to Suit Their Own Needs

West Face, under the direction of Greg Boland, utilizes an activist investor approach that is not well received. Activist investors focus more on securing their own interests rather than promoting the needs of their clients: Rather than improving the companies they work with, activist investors position their own people within existing company structures in order to push their agenda forward. Several companies in the past few years have issued major complaints against West Face after falling victim to activist techniques. West Face's rearrangement did little to improve their portfolios, and instead shook up existing business structures with no benefit.

It would be remiss not to mention one of the largest issues with West Face Capital; an issue that may confirm claims of misconduct and market manipulation more than any other. A private firm found evidence that West Face Capital has not been reporting assets under management for several US incorporated funds on its Form ADV since 2012. In addition, the most recent Form ADV reports that West Face Capital qualifies "for the exemption from registration" because it acts

> as the sole adviser to private funds and has assets under management of less than $150 million.
>
> **Wise Investors Should Look Elsewhere**
>
> This, however, is a blatant lie. This exemption has permitted West Face to escape SEC examination and allowed for reduced reporting. The form D and Form ADV for West Face do not match, and based on SEC filings, the investment management firm's AUM is estimated to be more than $2.4 billion. Suspicion of non-compliance with SEC regulations is high, and their relation to the OEC is largely thought to be the same. Coupled with the fact that West Face has been late in filing with SEDI over 16 times, this is a factor that cannot be ignored. West Face Capital is desperately trying to maintain their image amidst obvious inequities, and their behavior is deplorable. Any sound-minded individual who hopes to preserve their portfolio's worth would be wise to think twice before putting their money into the hands of this company.

184. The WestFace.net Post was published for, by or on behalf of the Counterclaim Defendants, directly or indirectly, on a newly-created website titled "WestFace.net". This website was registered by or on behalf of the Counterclaim Defendants on October 24, 2017 under the pseudonym "Jordan Brown". On that same day, "Jordan Brown" also registered GregBoland.net, though that website has not yet become active. The clear and malicious intent of the Counterclaim Defendants in posting or causing this defamatory statement to be posted was to ensure that the website would appear prominently in any search results for West Face or Boland.

185. The plain and ordinary meaning of the WestFace.net Post is that:

(a) West Face and its principals, including Boland, have maintained a "false image" and cannot be trusted by investors;

(b) West Face and its principals, including Boland, take unnecessary and imprudent risks with its investors' funds;

(c) West Face and Boland are incompetent in that they have "zero idea of how to read the current market";

(d) West Face and Boland have engaged in a "sophisticated web of manipulation" of West Face's investors;

(e) West Face and Boland have acted unlawfully and improperly, and not in the best interests of West Face's investors;

(f) West Face and its principals, including Boland, have engaged in misconduct and manipulation;

(g) West Face and its principals, including Boland, have "blatantly lied" to regulators, investors and others, and have otherwise failed to comply with regulatory requirements; and

(h) "Sound-minded" and "wise" investors should not invest their funds with West Face or Boland because they cannot be trusted, take unnecessary risks, are incompetent, have engaged in misconduct and the improper manipulation of investors, and have failed repeatedly to comply with applicable laws and regulations.

186. Each of these meanings is false and defamatory. The WestFace.net Post was published for, by or on behalf of the Counterclaim Defendants with malice, as part

of a systematic and unlawful campaign of defamation, and as part of the conspiracy described herein, for the express purpose of embarrassing and injuring Boland and West Face as well as its officers, employees and directors.

187. The WestFace.net Post is deliberately false and defamatory and was calculated to undermine and destroy West Face, Boland and their reputations. It strikes at the very heart of West Face's business by asserting expressly that investors should not invest their funds with West Face. At no point have West Face or its principals "manipulated" its investors. They have never lied or misrepresented facts to regulators.

188. The purpose and effect of the WestFace.net Post was to disparage the reputations of Boland and West Face, to further shroud them in controversy and scandal, and to discourage improperly and unlawfully investors and other participants in the capital market from doing business with West Face and Boland.

189. The Counterclaim Defendants and others working for or with them engaged in a number of techniques to make it extremely difficult for West Face and Boland to determine that they were responsible for and played a role in the creation and dissemination of the Internet Postings referred above. For example:

(a) prepaid credit cards were used to pay for a number of the services and fees involved in posting the Internet Postings to the Internet, thereby concealing the identities of those paying for these services;

(b) this unlawful and systematic campaign of defamation was carried out by or on behalf of the Counterclaim Defendants using a chain of non-party agents and representatives located around the globe, including in Israel,

Montreal, Vancouver, India, and Bangladesh, such that the actual posters of the Internet Postings are out of the jurisdiction and did not know who they were working for or why;

(c) the scheme involved the use of a number of fake identities, usernames and pseudonyms, including the illegal misappropriation and misuse of the identities of actual people, including "Judge Frank Newbould";

(d) services were employed by or on behalf of the Counterclaim Defendants to optimize the dissemination of the Internet Postings in Internet search engines, such as Google, so that the Internet Postings would reach the widest possible audience; and

(e) the scheme involved using multiple layers of intermediary Internet servers, making tracing the IP addresses of those responsible for the Internet Postings difficult to determine. However, ultimately the IP addresses responsible belong directly or indirectly to the Counterclaim Defendants.

190. The Counterclaim Defendants all conspired to carry out the campaign of defamation described above, as they had agreed in or about August 2017. Among other things, they created, orchestrated and caused the dissemination of the various false and defamatory statements referred to above contained in the Internet Postings; drafted the text of the various defamatory Internet Postings; retained unnamed co-conspirators to draft and/or post and promote the various defamatory Internet Postings; and took steps to use false identities such as "Samantha Beth", "Alex Walker", "Jordan Brown" and "Judge Frank Newbould" in order to conceal their involvement. For example:

(a) On or about August 13, 2017, one or more of the Counterclaim Defendants or an unknown person or persons retained by them (falsely using the username "Alex Walker"), posted a message on Freelancer.com (a website that provides its users with an online marketplace through which employers can hire independent contractors – freelancers – to perform work) in which he stated that he was "looking for someone who can help me publish my website on tier 1 magazines in the U.S.". The person or persons posing as "Alex Walker" ultimately awarded this project to Amin Razvi ("**Razvi**"), an individual residing in India. The website in question was outlawbds.com, which is not itself a part of the defamation campaign against West Face and Boland;

(b) On or around September 10, 2017, "Alex Walker" and Razvi began engaging in an instant messaging chat over Skype (a software application that allows its users to communicate in various ways over the Internet, including video and voice calling, screen-sharing, and instant messaging);

(c) On September 18, 2017, "Alex Walker" stated that he had sent Razvi's Skype contact information to a colleague of his, who "Alex Walker" indicated would contact Razvi soon. "Alex Walker" referred to this person as his "boss", and stated that her name was "Samantha Beth". Like "Alex Walker", "Samantha Beth" was in fact one of the Counterclaim Defendants, or acted on their behalf;

(d) On or about September 18, 2017, "Samantha Beth" retained and directed Razvi to publish and disseminate the Boland Post. "Samantha Beth" sent Razvi an email containing the text of the Boland Post. Razvi published the Boland Post on WN.com (as set out above), after being directed and paid to do so by "Samantha Beth";

(e) Similarly, on September 18, 2017, "Samantha Beth" sent Razvi an email containing the text of the Esco Post. Razvi published the Esco Post on the Huffington Post (as set out above), after being directed and paid to do so by "Samantha Beth";

(f) In discussions with Razvi in or around September 18, 2017, "Samantha Beth" made it clear to Razvi that "her" priorities were for Razvi to publish the false and defamatory Internet Postings as quickly as possible, on as many websites as possible, and on websites that had the highest possible profiles. The Counterclaim Defendants played an active role in orchestrating and directing this conduct, and in doing so sought to maximize to the greatest degree possible the harm that the dissemination of these false and defamatory Internet Postings could and would inflict on West Face and Boland. Acting in furtherance of the conspiracy described herein, "Samantha Beth" took all necessary steps to ensure that a number of the false and defamatory Internet Postings were disseminated as broadly as possible on the eve of the originally scheduled hearing in the Court of Appeal for Ontario of Catalyst's appeal in the Moyse Action. As stated above, that appeal was first scheduled to be argued on September

26 and 27, 2017, until Catalyst engineered an adjournment of the appeal on the afternoon of September 25, 2017;

(g) Similarly, as set out above, the Boland Post was also published at http://greg-boland.blog/. The "author" of the Boland Post on this site is listed as "Anonymous", yet provides a link to a page at http://greg-boland.blog/author/judgefranknewbould. This blog was created on September 19, 2017, and while the username of the user that created this blog was "judgefranknewbould", the user's email was "sambeth381@gmail.com", and the user's address was 326 Bay Street, Toronto – a fictitious address that does not exist. In short, it was the Counterclaim Defendants who created this blog post, using the fictitious "Samantha Beth" persona, and they did so in such a way as to deliberately conceal and mislead its readers as to their involvement; and

(h) Finally, on September 18, 2017, the Counterclaim Defendants used the same fictitious "Samantha Beth" persona, from the very same IP address as the user of the "sambeth381@gmail.com" account who had created the Boland Post, to create a second blog site at http://judgefranknewbould.wordpress.com and to purchase the judgefranknewbould.ca domain name. Notably, this was the day after Jamieson first emailed Blatchford with the "exclusive" story offer about Justice Newbould and West Face, and the very day of the failed sting conducted by operatives of Black Cube against Justice Newbould. The Counterclaim Defendants had drafted and intended to publish a false and

defamatory article about Justice Newbould's "corruption" to this blog post, and would have done so had Black Cube's sting operation against Justice Newbould been remotely successful. The proposed title of this unpublished blog post was "A corrupt system or just a bad apple: how Justice Frank Newbould is destroying our faith in the Canadian judicial system". Rosen delivered a draft of the blog post to Jamieson, who unsuccessfuly tried to have it published in a variety of mainstream media outlets, including the Globe and Mail. The ultimate goal of this planned but unlaunched attack on Justice Newbould was to cast a cloud of doubt and uncertainty over West Face's victory in the Moyse Action and to shroud West Face and Boland in contention and controversy.

191. The Counterclaim Defendants conspired in a similar manner to publish the other Internet Postings. Further particulars of their conduct are known to the Counterclaim Defendants rather than to West Face and Boland.

(iv) False and Defamatory Communications with Reporters Regarding Black Cube Operations

192. In furtherance of the conspiracy detailed herein, upon receiving the Black Cube Evidence, the Counterclaim Defendants, including Black Cube, Psy Group, Jamieson, Rosen, Glassman and Riley, either directly or through Gagnier, provided reporters, news agencies (including the *National Post*, Bloomberg News and the Associated Press), as well as others, with edited, distorted or otherwise falsified recordings and/or transcripts of meetings between operatives of Black Cube and their targets, including current and former employees of West Face as well as Justice

Newbould (the "**Misleading Transcripts**"). The Counterclaim Defendants and Gagnier disseminated the Misleading Transcripts to members of the media repeatedly during at least the period from September to December 2017, in an unsuccessful attempt to cause these various news agencies to publish negative false and defamatory articles about West Face, Boland and Justice Newbould. Among other things, the Counterclaim Defendants provided transcripts to members of the media that had been edited or altered to provide the false impression that:

(a) West Face and its principals, including Boland, had unlawfully received from Moyse confidential information belonging to Catalyst about WIND, and had used that information to their advantage;

(b) West Face and its principals, including Boland, had concealed unlawfully the identity of West Face's investors; and

(c) West Face and its principals, including Boland, had obtained unlawfully and misused confidential information regarding a wireless spectrum auction held in February 2015.

193. Moreover, from August 2016 (following release of the Moyse Trial Reasons) to the present, at the direction of the Catalyst Defendants, Gagnier has consistently made false and defamatory statements alleging that:

(a) West Face was on the verge of financial collapse;

(b) West Face had acquired WIND by unlawful means; and

(c) West Face was engaged in an unlawful short-selling conspiracy with a "wolfpack" of co-conspirators against Callidus and other public companies.

194. All of these accusations were false and defamatory of West Face and Boland, and were published to the *National Post*, Bloomberg News and the Associated Press with malice, for the purpose of embarrassing and injuring West Face and Boland.

(v) Further False and Defamatory Communications to Catalyst Investors

195. In furtherance of the conspiracy detailed herein, upon receiving the Black Cube Evidence, the Catalyst Defendants prepared a further letter to Catalyst investors that included portions of the Misleading Transcripts (the "**March Investor Letter**"). The March Investor Letter was disseminated by the Catalyst Defendants to Catalyst investors on or about March 19, 2018. Each of Catalyst's investors who received the March Investor Letter is a current or potential investor in funds managed by West Face. Moreover, the Catalyst Defendants were well aware when they disseminated the March Investor Letter to numerous investors that the natural, ordinary and probable consequence of doing so was that one or more of those investors would likely further disseminate the March Investor Letter to others, including to members of the media. That is precisely what happened.

196. The Catalyst Defendants disseminated the March Investor Letter to Catalyst investors for the purpose and with the effect of harming West Face and Boland and further shrouding them in controversy and scandal. Among other things, the March Investor Letter deliberately mischaracterized and concealed the involvement and deceitful conduct of operatives of Black Cube in allegedly "interviewing" former

employees of West Face. Moreover, the March Investment Letter contained extracts from heavily edited and distorted transcripts of secretly recorded meetings involving operatives of Black Cube and those former employees. Those meetings were arranged and conducted by operatives of Black Cube for, on behalf of or at the direction of the Catalyst Defendants under false pretences through the use of lies and deception. None of this was disclosed by the Catalyst Defendants in the March Investor Letter. It stated, among other things, the following:

> The interviews [*sic*; the "interviews" were in fact secretly recorded transcripts of Black Cube stings] 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 had received inside information about the WIND negotiations as a result of which West Face was able to buy WIND by making a different bid with fewer conditions than Catalyst. Consequently, this employee stated that **"I** didn't work on the deal because I thought it was polluted."

197. The March Investor Letter was defamatory. The plain and ordinary meaning of the March Investor Letter was that West Face and its principals, including Boland, had only been able to participate successfully in the acquisition of WIND by using dishonourable and unlawful means, including by using "inside information" about Catalyst's negotiations with VimpelCom.

198. The March Investor Letter was false. As described above, West Face used no inside information of Catalyst in acquiring WIND. Rather, Catalyst failed in its bid to acquire WIND because of its poor choices, flawed negotiating strategy, intransigence, and unreasonable, unrealistic and unachievable demands made by Catalyst of the Government of Canada concerning significant regulatory concessions.

The quotation from a former West Face employee in the March Investor Letter was distorted and taken out of context, and did not pertain to the improper use by West Face of confidential information of Catalyst's, which never occurred.

199. As the Catalyst Defendants anticipated and intended, the March Investor Letter was provided by one or more of its investors to members of the mainstream media. On April 17, 2018, the Globe and Mail published an article titled "In Investor Letter, Catalyst Claims It Can Still Win Wind Mobile Suit", which repeated publicly the salient contents of the March Investor Letter. The publication of that article further shrouded Boland and West Face in contention and controversy, as Catalyst hoped and intended would occur.

H. Conspiracy

200. As pleaded above, the Counterclaim Defendants have engaged in both predominant purpose and unlawful means conspiracy in their efforts to inflict harm upon Boland and West Face.

201. The Counterclaim Defendants entered into an agreement in or about August 2017 to act in concert, by agreement, and with the common design to:

(a) punish, embarrass, discredit and harm West Face and Boland by disseminating false and defamatory statements about them that attacked their honesty, integrity, business ethics and conduct. The statements in question are referred to above, and include the Post-Judgment Comments, the October 2016 Press Release, the Glassman Defamation,

the First Investor Letter, the Internet Postings, the Misleading Transcripts and the March Investor Letter; and

(b) carry out the Black Cube Campaign.

202. These various activities were all part of a co-ordinated strategy engaged in by the Counterclaim Defendants in furtherance of their conspiracy. They sought throughout to maximize the harm they inflicted on West Face and Boland, and used improper, unethical and unlawful conduct engaged in by operatives of Black Cube to do so. All of the Counterclaim Defendants were aware of and agreed to the overall strategy, and they all played an active role in implementing that strategy. Specifically:

(a) The Catalyst Defendants were the original architects of the plan to destroy the businesses, careers, and reputations of West Face and Boland. Their objectives in doing so were to: (i) punish, humiliate and discredit West Face and Boland, including by shrouding them in controversy and scandal, with a view to deterring investors from entrusting them with their funds or resources; (ii) deflect attention from their own significant failings, including in respect of their failure to complete Catalyst's intended acquisition of WIND; and (iii) blame others, including West Face, Boland, and Justice Newbould, for their catastrophic losses in the business world and litigation;

(b) The Catalyst Defendants enlisted the aid of and worked together with the other Counterclaim Defendants to punish, discredit and harm West Face and Boland, as described herein;

(c) Rosen, Black Cube, Psy Group, Tanuri, Tamara and Gagnier all actively collaborated with the Catalyst Defendants to develop, orchestrate and implement the specific plan to conduct the Black Cube Campaign and the Defamation Campaign;

(d) The Counterclaim Defendants, Burstein, Helfgott, and Kisluk all participated actively in the Black Cube Campaign and the subsequent attempts of the Counterclaim Defendants to exploit, utilize and publicize the fruits of that Campaign;

(e) The Counterclaim Defendants, directly or indirectly, published the Post-Judgment Comments, the October 2016 Press Release, the Glassman Defamation, the First Investor Letter, the Internet Postings, the Misleading Transcripts and the March Investor Letter, and acted with malice in doing so;

(f) The Catalyst Defendants, Rosen, Black Cube, Psy Group, Tanuri, Tamara, and Gagnier retained persons known to the Counterclaim Defendants but unknown to West Face and Boland to write and disseminate the Internet Postings; and

(g) The Catalyst Defendants, Rosen, Black Cube, Psy Group, and Gagnier provided the Misleading Transcripts to journalists and to others, as described above.

203. The conduct of the Counterclaim Defendants was directed at and intended to punish, discredit and harm West Face and Boland. As described above, the purpose and effect of the Counterclaim Defendants' activities was to damage the reputations of West Face and Boland, to undermine and destroy the business of West Face, and otherwise cause harm to West Face and Boland in retaliation for West Face's recent success at Catalyst's expense as described above.

204. The Counterclaim Defendants knew that harm was likely to result to West Face and Boland from their conduct, and such harm has in fact occurred. By deceiving market participants and investors into believing that West Face and Boland are dishonest, untrustworthy, incompetent and unethical, the Counterclaim Defendants deliberately tarnished and harmed their reputations in the financial and investing communities. This, in turn, has made it more difficult for West Face to raise and retain invested capital, attract and retain employees, and to make investments in other companies. Black Cube's activities also caused harm to West Face and Boland as described above.

I. Unlawful Means Tort

205. The Counterclaim Defendants carried out their conspiracy through unlawful means, including their systematic and orchestrated campaign of defamation, their use of unlicensed private investigators, deceit, unlawful means tort, inducing breach of contract and confidence, invasions of privacy and inducing breach of fiduciary duty.

206. As pleaded above, the Counterclaim Defendants' campaign of defamation had the purpose and effect of deceiving third-party market participants and investors into believing that West Face and Boland are dishonest, untrustworthy, incompetent and unethical. The Counterclaim Defendants made or caused to be made the false and defamatory statements described above with malice, while knowing that they were utterly false.

207. The Black Cube Campaign, carried out by, for or at the direction of the Counterclaim Defendants, also constitutes actionable wrongs against the targets of those activities, the full identities of whom are known to the Counterclaim Defendants. Among other things:

(a) Almog-Assoulin, Penn, Lieberman, and/or other operatives of Black Cube intentionally and fraudulently induced a number of the targets of the Counterclaim Defendants, including Justice Newbould, West Face's former general counsel Alex Singh, and a number of other current and former employees of West Face, to invest time and money, and even (in some cases) to fly to London, England, in pursuit of employment, professional engagements or investment opportunities that never existed. Operatives of Black Cube intentionally made false representations to the targets with the purpose and effect of causing them to rely on those representations to meet with Black Cube operatives and divulge to them confidential and privileged information, including information belonging to West Face;

(b) Almog-Assoulin, Penn, Lieberman, and/or other operatives of Black Cube induced current and former employees of West Face to breach duties of confidence owed to West Face pursuant to employment contracts and at law by offering them lucrative employment or investment opportunities provided the targets would disclose confidential information belonging to West Face;

(c) Almog-Assoulin, Penn, Lieberman, and/or other operatives of Black Cube induced West Face's former General Counsel Alex Singh to breach his fiduciary duties owed to West Face by falsely offering to him a potentially lucrative employment opportunity provided that he would disclose privileged communications that Mr. Singh participated in with his client (West Face) concerning the hiring and employment of Brandon Moyse. They did so by lying repeatedly to and deceiving Mr. Singh, flying him to London, England and then "interviewing" him at a high-end restaurant in London while he was jet lagged, consuming alcohol and being surreptitiously recorded; and

(d) Almog-Assoulin, Penn, Lieberman, and/or other operatives of Black Cube attempted repeatedly to induce or entice Justice Newbould into making anti-Semitic remarks during meetings at his office and at a restaurant in Toronto for the express purpose of enabling the Catalyst Defendants to utilize surreptitious and illicit recordings of Justice Newbould in multiple ways, including: (i) as "fresh evidence" in the Ontario Court of Appeal, in their efforts to rob West Face of the judgment it had obtained fairly at trial

in the Moyse Action; (ii) in resisting motions to stay, dismiss or strike Catalyst's Claim that had been brought by West Face and other Defendants in the VimpelCom Action; and (iii) in false and defamatory statements that the Catalyst Defendants and other Counterclaim Defendants intended to disseminate and publish, including over the Internet, in their efforts to discredit, embarrass and punish Justice Newbould and cast doubt upon the legitimacy of the judgment West Face had obtained at trial in the Moyse Action. In doing so, the Counterclaim Defendants hoped and intended to further shroud West Face and Boland in controversy and scandal.

208. This conduct constituted the tort of deceit against the targets of Black Cube's campaign, and caused damage to West Face and Boland as described herein.

J. Inducing Breach of Confidence and Fiduciary Duty

209. As described above, one aspect of the conspiracy engaged in by the Counterclaim Defendants was the Black Cube Campaign against Alex Singh.

210. The Counterclaim Defendants, including specifically Black Cube, were aware that as the former General Counsel of West Face, Mr. Singh owed West Face duties of confidence and fiduciary duties. Notwithstanding that awareness, the Counterclaim Defendants knowingly conspired to have Almog-Assoulin intentionally elicit from Mr. Singh, and to surreptitiously record, privileged and confidential information (including information concerning legal advice conveyed by Mr. Singh to West Face) pertaining to the hiring and employment of Moyse.

211. After having obtained privileged and confidential information from Mr. Singh, including concerning his legal advice to West Face pertaining to the hiring and employment of Moyse, and with knowledge of the nature of that information, operatives of Black Cube promptly shared it with the Catalyst Defendants. The Catalyst Defendants received and utilized the contents of Mr. Singh's privileged and confidential communication with full knowledge of its privileged and confidential nature, thereby participating in the breach of confidence and breach of fiduciary duty committed thereby.

K. Damages

212. West Face and Boland have suffered significant damages as a result of the conduct of the Counterclaim Defendants pleaded above, including the Black Cube Campaign, the WIND Defamation, the Wolfpack Defamation and the Performance Defamation. Among other things, the negative publicity surrounding the Black Cube Campaign and the various Defamations has:

(a) associated West Face with unsavoury events and allegations in the eyes of current and potential investors;

(b) created the impression that anyone associated with West Face could potentially be the subject of "sting" operations or defamation, thereby deterring individuals from investing or associating with West Face;

(c) scared away potential employees who could have helped grow and develop West Face's business, as a result of the risk that all West Face

employees are potential targets of "sting" activities by sophisticated international intelligence operatives like Black Cube;

(d) resulted in West Face employees resigning in order to remove themselves from the controversy associated with West Face and Boland;

(e) caused West Face investors to redeem their investments and withdraw the proceeds in question from West Face's investment funds, thereby reducing the management fees that West Face can earn;

(f) deterred potential investors from investing with West Face, thereby further reducing the management fees that West Face can earn;

(g) forced West Face to delay distributing all of the legitimate proceeds from the sale of WIND to investors in West Face managed investment funds; and

(h) forced West Face to incur hundreds of thousands of dollars in expenses associated with the retention of legal, investigative and technical advisors in order to determine who played a role in and is responsible for the conduct pleaded above.

213. Boland has also suffered severe reputational harm as a result of the Black Cube Campaign and campaign of defamation described in more detail above. His conduct, ethics and character have been severely and repeatedly impugned, which has harmed his ability to raise capital for business ventures at West Face and elsewhere and has otherwise limited his ability to pursue his professional activities. Moreover,

Boland is personally registered with various securities regulators across Canada and subject to the jurisdiction of U.S. regulators, and the conduct of the Counterclaim Defendants has improperly endangered his standing and reputation with those regulators.

214. In the extraordinary circumstances of this case, very substantial awards of aggravated and punitive damages are appropriate, having regard to the high-handed, willful, wanton, reckless, contemptuous and contumelious conduct of the Counterclaim Defendants. Their conduct, and the conduct of others acting for them or on their behalf, has been truly deplorable and should shock the conscience of the Court. The sting on Justice Newbould described above, and the efforts of the Catalyst Defendants to take full advantage of that sting, amount to a full frontal assault on the administration of justice.

L. The Catalyst Defendants Are Vexatious Litigants

215. The Catalyst Defendants should be declared vexatious litigants under section 140 of the *Courts of Justice Act*. Boland and West Face repeat and rely upon the Fresh as Amended Statement of Defence and on all of the allegations in this Fresh as Amended Counterclaim relating to the sting operation against Justice Newbould. Catalyst and Callidus, under the direction of Glassman, De Alba, and Riley, have commenced multiple, repetitive, vexatious and abusive proceedings against West Face and now Boland. These proceedings are manifestly without merit and have been brought for improper and collateral purposes, including to embarrass and harass West Face and Boland. Once commenced, the Catalyst Defendants have either allowed these meritless claims to lay dormant or have actively engaged in abusive litigation

tactics to stall or delay the proper and final determination of their purported claims. Finally, the Catalyst Defendants' attempted "sting" on Justice Newbould constitutes an outright and highly improper attack on the proper administration of justice.

216. Remarkably, before the Supreme Court of Canada dismissed Catalyst's application for leave to appeal, Catalyst had stated publicly that it was considering bringing a motion under Rule 59.06 to amend, set aside or vary Justice Newbould's Judgment in the Moyse Action, despite already having lost its appeal of that Judgment in the Court of Appeal, and despite having abandoned its threatened motion for leave to introduce fresh evidence on that appeal. The Catalyst Defendants will continue to engage in vexatious and abusive litigation unless and until they are restrained from doing so by this Honourable Court.

M. Service Outside Ontario

217. The Counterclaim Defendants may, without a court order, be served outside of Ontario pursuant to Rules 17.02(g) and (q), because the Counterclaim against the Counterclaim Defendants consists of claims in respect of a tort or torts committed in Ontario, and because the claims made in the Counterclaim are properly the subject matter of a counterclaim under the *Rules*.

218. West Face proposes that this action be tried at Toronto.

~~September 30, 2019~~ AB.
December 29, 2017

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Lawyers for the Defendants/Plaintiffs by Counterclaim, West Face Capital Inc. and Gregory Boland

TO: SERVICE LIST

THE CATALYST CAPITAL GROUP INC. et al
Plaintiff

-and-

West Face Capital Inc. et al.
Defendants

Commercial Court File No. CV-17- CV-17-587463-00CL
Court File No. CV-17-586096

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT
TORONTO

FOURTH FRESH AS AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM OF WEST FACE CAPITAL INC. AND GREGORY BOLAND

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Lawyers for the Defendants/Plaintiffs by Counterclaim,
West Face Capital Inc. and Gregory Boland

This is Exhibit “B” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

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

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COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

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

Defendants

A N D B E T W E E N:

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 ROSE, B.C. STRATEGY LTD. d/b/a BLACK CUBE, B.C. STRATEGY UK LTD. d/b/a BLACK CUBE, and PSY GROUP INC.

Defendants by Counterclaim

<u>AMENDED</u> REPLY AND DEFENCE TO COUNTERCLAIM OF WEST FACE CAPITAL INC. AND GREGORY BOLAND

1. The defendants to the counterclaim, The Catalyst Capital Group Inc. ("**Catalyst**"), Callidus Capital Corporation ("**Callidus**"), Newton Glassman ("**Glassman**"), Gabriel De Alba ("**De Alba**") and James Riley ("**Riley**") (collectively, the "**Catalyst Defendants**"), deny all of the allegations contained in the Fourth Fresh as Amended Statement of Defence and Counterclaim (the "**Counterclaim**") of West Face Capital Inc. ("**West Face"**) and Gregory Boland ("**Boland**") dated October 1, 2019, save and except those allegations expressly admitted herein.

Overview

2. West Face and Boland have advanced this Counterclaim as a tactical move in response to the Statement of Claim (the "**Claim**") with the intent of avoiding and obfuscating the issues raised in the Claim. The Claim addresses serious allegations of market distortion and the use of short-selling to wreak havoc on the capital markets in particular in relation to Callidus.

3. The Counterclaim is nothing more than a smokescreen: it is an improper attempt by West Face and Boland to distract the market from West Face's poor fund management and deteriorating financial performance, to divert attention from the merits of Catalyst's and Callidus's claim, to shield West Face's and Boland's improper conduct from scrutiny by the courts, and to unduly limit the Catalyst Defendants from expressing themselves on matters of public interest.

4. The Catalyst Defendants have neither defamed nor conspired to defame West Face or Boland, nor have they participated in any systematic "Campaign" to harm West Face and Boland, as alleged. Indeed, most of the statements complained of

by West Face and Boland were neither made nor published by the Catalyst Defendants.

5. The Catalyst Defendants plead and rely upon the defences of fair comment, qualified privilege, public interest responsible communication, and as regards to certain statements complained about, the defence of justification.

6. West Face and Boland have not suffered any harm or damages as a result of any alleged wrongful conduct on the part of the Catalyst Defendants. Any loss of investments or investor confidence, any inability to attract investors or raise investment funds, or any failure to retain or hire employees that West Face and Boland complain of in the Counterclaim, are directly attributable to West Face's own past and continued underperforming Fund investments, as well as West Face's poor investment decisions, lack of due diligence and incompetent management. Indeed, West Face's performance has been abysmal for the better part of 5 years, and has resulted in an exodus of investors from its funds. This has nothing to do with the Catalyst Defendants, but rather West Face's own poor management and ineptitude.

7. The Catalyst Defendants are not vexatious litigants, as alleged. This allegation is also entirely tactical. West Face and Boland seek to avoid a determination of the merits of the allegations in the Claim that they have participated in an improper and unlawful short-selling campaign.

8. There is simply no foundation for the damages and other relief sought by West Face and Boland. The Counterclaim should be dismissed with substantial indemnity costs to the Catalyst Defendants.

The Catalyst Defendants

9. Catalyst is a Canadian private equity firm that specializes in investments in distressed and undervalued situations (i.e., investments in companies that are under-managed, under-valued or poorly capitalized). Catalyst has statutory and common law obligations to keep its investors and the public informed of matters concerning the management, conduct and performance of Catalyst, its affiliates and investment funds, and of any other matter material to the company.

10. Callidus is a publicly traded asset-based lender that operates in the growth and recovery market in Canada and the U.S. Callidus provides capital to meet the financing requirements of companies that cannot access traditional lending sources. Callidus has statutory and common law obligations to keep its investors and the public informed of matters concerning the management, conduct and performance of Callidus and of any other matter material to the company.

11. Glassman is the Managing Partner of Catalyst, and the Executive Chairman and a Director of Callidus. Riley is a Managing Director and the COO of Catalyst, and the Secretary and a Director of Callidus. De Alba is a Managing Director and Partner of Catalyst and has no role at Callidus.

12. As officers and/or directors of Catalyst and/or Callidus, Glassman, Riley and De Alba have statutory and regulatory obligations to keep Catalyst's and Callidus's

investors and the public, as the case may be, informed of matters concerning the management, conduct and performance of Catalyst, Callidus, their affiliates and investment funds, and of any other matter material to the operation of the companies.

13. At all material times, Glassman, Riley and De Alba were solely acting in their capacity as officers and/or directors of Catalyst and/or Callidus. Glassman, Riley and De Alba deny that they are personally liable for any alleged defamation, conspiracy, breach of confidence or any of the other alleged acts complained of by West Face and Boland.

West Face and Its Poor Financial Performance

14. West Face is an investment management firm that manages a number of hedge funds and investment portfolios in Canada, the United States and the Cayman Islands. These include:

(a) **The West Face Long Term Opportunities Fund (the "Long Term Opportunity Fund")** - closed to new investors in 2007 with a cap of $700 million, this group of funds consists of the West Face Long Term Opportunities Limited Partnership (the "**Canadian Fund**"), the West Face Long Term Opportunities (USA) Limited Partnership (the "**US Fund**") and the West Face Long Term Opportunities Master Fund L.P. (the "**Cayman Master Fund**"). The Canadian Fund, the US Fund and the Cayman Master Fund together invest in the West Face Long Term Opportunities Global Master Fund L.P. The West Face Long Term Opportunities Fund Ltd. (the

"**Cayman Fund**") invests in the Cayman Master Fund. West Face is the investment advisor to each of the Canadian Fund, the US Fund and the Cayman Master Fund; and

(b) **The West Face Alternative Credit Fund (the "Alternative Credit Fund") –** closed to new investors in September 2014 with a cap of $600 million, this group of funds consists of the West Face Credit Opportunities Master I L.P. which is managed by the WFCOF Cayman Inc., the West Face Alternative Credit Master L.P., which is managed by West Face ACF Cayman GP Inc. and WF ACF KI I L.P., which is managed by the WF ACF KY I GP Inc. The focus of the West Face Alternative Credit Fund is on high risk investments in second-lien debt, unsecured debt, mezzanine financing, acquisition financing and bridge loans,

(collectively, the "**West Face Funds**").

15. The founding principal of West Face is Boland, who serves as CEO and Co-Chief Investment Officer. The other principals of West Face are Peter Fraser, Anthony Griffin and Thomas Dea. West Face's investment strategies are directed by its four principals. Unlike other hedge fund firms, West Face has refused to subscribe or conform to reporting requirements of independent data and market research firms, such as Preqin, upon which institutional investors rely to perform due diligence and keep track of hedge fund managers and hedge fund performance.

16. A significant part of West Face's investment strategy is to take short positions in companies and try to take advantage of sharp declines in a company's stock price.

West Face has taken short positions in companies such as Home Trust Company, SunOpta Inc., Hain Celestial Group, Inc., Air Methods Corporation and Callidus.

17. Since 2011, the West Face Funds have consistently suffered from poor financial performance. For example, the Long Term Opportunity Fund has, for more than 5 years, repeatedly underperformed relative to other indices, including the S&P/TSX Composite Total Return Index and the S&P 500. The Long Term Opportunity Fund consistently failed to achieve double digit returns and in some years incurred negative returns.

18. As of June 30, 2017, prior to the alleged publication of the "Internet Postings" complained of, the cumulative returns earned in the Long Term Opportunity Fund were significantly below the cumulative returns of the S&P/TSX Composite Total Return Index and the S&P 500. As shown below, the three-year cumulative return on the Long Term Opportunity Fund as of June 30, 2017 was -2.5%. In contrast, the three-year cumulative return for the S&P/TSX Composite Total Return Index and the S&P 500 for the same period were 9.5% and 31.7%, respectively. From the perspective of a five-year cumulative return, the Long Term Opportunity Fund's performance lagged even further behind the comparative indices:

	West Face Long Term Opportunity Fund	**S&P/TSX Composite Total Return Index**	**S&P 500**
1-Year Cumulative	2.8%	11.0%	17.9%
3-Year Cumulative	-2.5%	9.5%	31.7%
5-Year Cumulative	16.9%	52.1%	97.9%

19. The Long Term Opportunity Fund has consistently underperformed for many reasons, including:

    (a) negative investment returns from high investment exposure in oil and gas companies like PHI Inc. and Gran Tierra Energy Inc., following the collapse of the oil and gas market in 2014-2015;

    (b) “unexpected outcomes” in West Face’s investments in Entravision Communications Corporation and Air Methods Corporation;

    (c) investing in a company that was charged criminally for bribery and corruption;

    (d) investments that failed to meet West Face’s forecast;

    (e) failed short positions; and

    (f) over-attribution of illiquid investments.

20. For example, in a public SEC 13F Filing, West Face disclosed that it suffered a negative US$204.1 million return over a three-year period ending February 20, 2018 (equating to a -47.5% aggregate annual return and a -18% internal rate of return) in the following investments: PHI Inc., Entravision Communications Corp., Gran Tierra Energy Inc., Hudson Technologies Inc., SunOpta Inc. and Suncoke Energy Inc.

21. West Face’s poor investment performance meant that it never achieved the high water mark or preferred return on its funds.

22. As a consequence of West Face's poor performance as a fund manager, its investors lost confidence in the firm and elected to redeploy their investment elsewhere. Thus, the total value of assets under West Face's management ("**AUM**") suffered a precipitous decline.

23. West Face's AUM declined from a high of approximately $2.8 billion to approximately $1.7 billion by March 2016. By September 2017, well before the publication of the alleged defamatory statements, West Face's AUM had further declined to only approximately $1 billion as its investors rushed to redeem their investments.

24. West Face was subject to significant redemptions from its investors well before the publication of any of the alleged defamatory statements. Contrary to West Face's and Boland's allegations, any loss of investments or investor confidence, or any inability to attract investors or raise investment funds, were a result of West Face's poor financial performance and management. The Catalyst Defendants deny that West Face has suffered any loss or damages as a result any the actions by the Catalyst Defendants.

25. The Catalyst Defendants further deny that West Face has encountered any difficulty in retaining or recruiting employees as a result of the actions of the Catalyst Defendants. If West Face has suffered such difficulties, then it is a result of employees who became seriously disillusioned with West Face's financial struggles, extensive fund redemptions and future prospects and sought opportunity for advancement and growth elsewhere. Simply put, any inability to

retain or recruit employees is due to West Face's dismal performance and rapidly declining AUM, and not attributable to the Catalyst Defendants.

26. Moreover, the reputational damage suffered by West Face due to its exceedingly poor performance was further compounded when it announced:

(a) in September 2017, the decision to suspend withdrawals and redemptions in the Long Term Opportunity Fund (known in the business as "gating"). As a result of this extreme decision, investors in the Long Term Opportunity Fund were prohibited from withdrawing any of their investment from the Long Term Opportunity Fund. This decision, made out of necessity given the accelerated pace of redemption requests, created strong negative sentiment amongst West Face's investors and the marketplace, and damaged West Face's business prospects; and

(b) in December 2017, the decision to discontinue offering both the US Fund and the Cayman Fund. As a result, investors in the US Fund and the Cayman Fund only received a return of capital on a pro rata basis upon redemption and not on an expected "first come-first out" basis. In effect, West Face could not meet investors' demands for redemption and decided to wind up the US Fund and the Cayman Fund.

27. Indeed, in December 2017, West Face acknowledged that its investment strategies were ill-suited to a hedge fund structure. West Face conceded that, over the last several years, the quarterly liquidity requirements for its hedge funds and the lack of available capital to allocate to private investments, have restricted West

Face's ability to successfully participate in higher value opportunities, thereby resulting in losses.

28. West Face's losses and lack of "business success" have nothing to do with the Catalyst Defendants. They are solely attributable to West Face's own mismanagement and ineptitude, which led its hedge funds to fail.

29. West Face, itself, conceded this mismanagement. In 2018, West Face abandoned its flawed investment strategy that had failed its investors and attempted to create a new private equity fund, the "West Face Distressed Fund". Unlike West Face's other funds, the primary focus of the "West Face Distressed Fund" was intended to be on investments in distressed and undervalued situations - the same investment focus as Catalyst.

30. West Face sought to raise $1 billion for its new fund, notwithstanding that it had no prior performance record of managing and creating value from a private equity fund focussed on distressed and undervalued investments. The size of the raise was excessive for a first time private equity fund by a manager with no private equity track record.

31. In an attempt to raise the new fund, West Face held "road show" sales presentations to potential investors. These sales pitches presented a "cherry-picked" list of specific investments that showed positive returns, while ignoring many of West Face's investments that yielded negative or poor returns. This approach is not consistent with SEC rules.

32. Given the poor financial performance of the West Face Funds, the lack of any prior record of private equity fund performance of distressed and undervalued investments, West Face's history of gating and prohibiting its investors from withdrawing their investments, West Face's refusal to report to independent data and market research firms, and the selective and improper investment illustrations used to attempt to raise $1 billion from potential investors, West Face failed to raise the West Face Distressed Fund as would be expected. West Face's failure to raise new funds had nothing to do with the Catalyst Defendants.

33. Consequently, any loss that West Face and Boland have allegedly suffered or any lack of success on the part of West Face and Boland to attract investors for the new proposed private equity fund were entirely attributable to their own decisions and actions in marketing the proposed fund, and West Face's growing reputation as a poor fund manager.

The West Face Court Actions

34. West Face and Boland improperly seek to have the Catalyst Defendants declared vexatious litigants in order to shield their own actions and wrongful conduct from scrutiny of the court. There is no basis for this extraordinary relief. The court actions that West Face and Boland complain of in the Counterclaim are neither abusive nor vexatious, as alleged.

(i) The Moyse Action

35. On June 25, 2014, an action was commenced against West Face and Brandon Moyse, a former employee of Catalyst who resigned to join West Face. The action

was commenced in order to enforce Moyse's non-competition obligation pursuant to his Employment Agreement with Catalyst (the "**Moyse Action**").

36. Before his resignation, Moyse was on Catalyst's internal "telecom" deal team working on Catalyst's acquisition of Wind Mobile Inc. ("**Wind**").

37. Wind is a Canadian telecommunications provider that was formerly owned by VimpelCom Ltd. ("**VimpelCom**") and Globalive Capital Inc. ("**Globalive**").

38. In late 2013, Catalyst and VimpelCom had entered into negotiations for the sale of VimpelCom's interest in Wind. In the spring of 2014, Catalyst and VimpelCom entered into a confidentiality agreement to keep confidential the negotiations regarding Catalyst's potential purchase of VimpelCom's interest in Wind (the "**Confidentiality Agreement**"). In July 2014, Catalyst and VimpelCom also entered into an Exclusivity Agreement pursuant to which VimpelCom, its affiliates, and its advisor, UBS Securities Canada Inc. ("**UBS**"), were prohibited from soliciting or encouraging any offers, or participating in any negotiation or discussions with any other party regarding the sale of Wind (the "**Exclusivity Agreement**").

39. At that time, West Face was not considered by VimpelCom to be a serious player in the negotiations for Wind. VimpelCom had rejected earlier offers by West Face for the acquisition of Wind.

40. By May 6, 2014, Catalyst and VimpelCom had agreed to a $300 million purchase price for Wind and were working to complete a formal Share Purchase Agreement.

41. On May 24, 2014, Moyse resigned from Catalyst effective June 22, 2014 to join West Face.

42. The Moyse Action was therefore commenced on June 25, 2014 to enforce the non-competition clause in Moyse's Employment Agreement.

43. As described further below, Moyse was subsequently enjoined, pursuant to an order of Justice Lederer of the Ontario Superior Court of Justice, from using, misusing or disclosing any and all confidential and/or proprietary information of Catalyst, and from engaging in activities competitive to Catalyst in order to be in compliance with the non-competition clause. Justice Lederer also ordered that Moyse's personal computer and other electronic devices be forensically imaged and reviewed by an independent supervising solicitor.

44. By August 3, 2014, a Share Purchase Agreement between Catalyst and VimpelCom was "substantially completed" for the sale of Wind to Catalyst.

45. On August 11, 2014, VimpelCom and Catalyst informed Industry Canada that the deal "was done".

46. On August 15, 2014, VimpelCom demanded a $5 - $20 million break fee from Catalyst, which had been previously requested and abandoned by VimpelCom early in the negotiations. This demand for a break fee, made 10 days after VimpelCom told Catalyst that the Share Purchase Agreement was "substantially settled" and 4 days after Catalyst and VimpelCom informed Industry Canada that the deal was "done", was rejected.

47. On September 15, 2014, it was announced that a consortium that included West Face (the "**Consortium**"), entered into an agreement with VimpelCom to purchase Wind for the same price as Catalyst had negotiated.

48. On October 9, 2014, Catalyst amended its statement of claim against Moyse and West Face, alleging that West Face used confidential information it received from Moyse to successfully pursue the acquisition of Wind.

49. The Moyse Action was tried on June 6-13, 2016 before Justice Newbould. The action was dismissed and costs were awarded against Catalyst. The decision and costs award were appealed and upheld by the Court of Appeal.

50. Although it was unsuccessful, the Moyse Action was neither abusive nor vexatious.

51. Before commencing the Moyse Action, Catalyst wrote to West Face and Moyse about the implications of the departure of Moyse and his acceptance of employment with West Face.

52. In response, West Face and Moyse took the position that the non-competition and non-solicitation clauses of Moyse's Employment Agreement were both unenforceable. West Face and Boland offered an "ineffectual assurance" that Moyse had no intention of revealing any information which could reasonably be considered confidential or proprietary in nature. Their response proposed that either Catalyst simply accept their assurance or go to court. As West Face and Moyse "volunteered nothing", Catalyst commenced an action and sought an injunction.

53. The injunction, as further particularized below, was granted by Justice Lederer of the Ontario Superior Court of Justice. During the course of the injunction proceeding, it was discovered that despite their assurances, Moyse had indeed provided West Face with Catalyst memos marked “Confidential” and “For Internal Discussion Purposes Only” (“**Catalyst Confidential Memos**”). It was learned that Moyse provided Catalyst Confidential Memos to Thomas Dea of West Face who then circulated them to the other partners and a Vice-President at West Face. West Face and Moyse said nothing about the sharing of Catalyst Confidential Memos when they gave their assurances to Catalyst that that they had no intention of revealing or improperly using any information that was confidential to Catalyst. West Face and Moyse waited until Catalyst discovered that the Catalyst Confidential Memos had been delivered, before acknowledging that the transmission took place. As Justice Lederer found, West Face and Moyse provided an “ineffectual assurance”. In the face of the ineffectual assurance that West Face and Moyse did not have or would not improperly use Catalyst confidential information, it was reasonable and not vexatious of Catalyst to pursue the Moyse Action.

54. On November 14, 2014, Justice Lederer issued an order enjoining Moyse from using, misusing or disclosing any and all confidential and/or proprietary information of Catalyst. To ensure that Moyse did not communicate confidential information to West Face, the court also enjoined Moyse from engaging in activities competitive to Catalyst, in compliance with the non-competition clause.

55. Justice Lederer held that there was a strong *prima facie* case that Moyse had breached the confidentiality clause of his Employment Agreement. The Court found that Moyse took and delivered to West Face confidential information which could demonstrate strategies Catalyst used in a competitive business. West Face understood the Catalyst Confidential Memos received were confidential. Notwithstanding its confidential nature, West Face distributed the Catalyst Confidential Memos to each of its partners and a Vice-President.

56. Moreover, Justice Lederer ordered an Independent Supervising Solicitor ("**ISS**") to review the forensic images of Moyse's personal electronic devices to identify if any material confidential to Catalyst remained in Moyse's possession. The order was necessary as it was discovered during the course of the injunction proceeding that Moyse had deleted emails evidencing the transmission of Catalyst Confidential Memos to West Face. Moyse opposed the order and asserted that he should be left to review and determine what must be produced. Justice Lederer rejected Moyse's assertion.

57. It was later discovered by the ISS, that on the very day that the court had ordered Moyse's personal devices to be forensically imaged, Moyse downloaded military-grade deletion software to his personal computer and deleted material from his computer the night before his computer was turned over for imaging.

58. Contrary to West Face's and Boland's allegations, the Moyse Action was neither abusive nor vexatious. Indeed, the Court of Appeal for Ontario noted that Moyse's

decision to delete material from his computer was a "serious breach of the court order".

(ii) The VimpelCom Action

59. On May 31, 2016, a week before the trial of the Moyse Action, a claim was commenced against VimpelCom, its advisor UBS, and members of the Consortium, including West Face, for inducing breach of contract, conspiracy and breach of confidence relating to the Consortium's acquisition of Wind (the "**VimpelCom Action**").

60. Contrary to West Face's and Boland's allegations, West Face did not act in an entirely appropriate manner with respect to the acquisition of Wind. Catalyst discovered, long after the commencement of the Moyse Action, that during the period of confidentiality and exclusivity with Catalyst:

(a) confidential information was obtained by members of the Consortium about the dates of Catalyst's exclusivity rights and the status of Catalyst's negotiations and dealings with VimpelCom and its Board;

(b) the Consortium had discussed and negotiated the purchase of Wind with VimpelCom and its advisors;

(c) VimpelCom's advisor, UBS, participated in and encouraged the Consortium's competing proposals; and

(d) the timing and content of the Consortium's competing bid were designed for the specific purpose of providing VimpelCom with an alternative option to

Catalyst's offer at the same time as VimpelCom was scheduled to consider the agreement with Catalyst.

61. For example:

(a) on or about July 18, 2014, West Face and the Tennenbaum Group requested, and later obtained, VimpelCom's consent to share information and work together to develop a proposal for the acquisition of Wind;

(b) on July 21, Tennenbaum Group's principal, Michael Leitner ("**Leitner**"), wrote to West Face's principal, Boland, stating that he "heard [C]atalyst is seeking exclusivity this week";

(c) on July 22, Leitner told Boland that "I spoke to Felix [Saratovsky of VimpelCom]…Catalyst may have this in exclusivity by the end of the week";

(d) on July 23, Leitner and Boland were advised that "[Jonathan] Herbst [of UBS] called me to say that the company has entered into exclusivity at the reserve price - $150 million";

(e) by August 1, West Face, Tennenbaum Group and other members of the Consortium reconciled their financial models. The Consortium received comments "over the phone" from VimpelCom about the Consortium's Share Purchase Agreement and received some "feedback on price levels";

(f) on August 1, the Consortium was advised when the Share Purchase Agreement with Catalyst was going to be submitted to the VimpelCom board; and

(g) on August 6-7, the Consortium, with the benefit of inside information, deliberately delivered its own "superior" proposal to pre-empt VimpelCom's approval of Catalyst's Share Purchase Agreement. At that time, the Consortium was also provided with additional confidential information about the internal processes and timetable of VimpelCom, including a revised board schedule. The Consortium was told by UBS "not to burn their file".

62. Contrary to West Face's and Boland's allegations, VimpelCom's board was not genuinely dissatisfied with the offer from Catalyst. Rather, with information it improperly obtained in breach of the Confidentiality Agreement and the Exclusivity Agreement, West Face and the other members of the Consortium made a proposal they believed to be "superior" to Catalyst's. Shortly thereafter, the Consortium's proposal was deliberately provided during the period of the Exclusivity Agreement so that the VimpelCom board had, as stated by Leitner, "2 birds in hand" when it came to approve the Share Purchase Agreement with Catalyst. Providing the proposal before the VimpelCom board approved Catalyst's Share Purchase Agreement was the Consortium's "only play".

63. To the knowledge of West Face and Boland:

(a) Catalyst was not aware at the time of any of the communications and the sharing of information that occurred amongst VimpelCom, Globalive, UBS and members of the Consortium;

(b) the communications and the sharing of information that occurred among VimpelCom, Globalive, UBS and the Consortium were in violation of the

Confidentiality Agreement and the Exclusivity Agreement that Catalyst and VimpelCom had entered into; and

(c) the conduct of the Consortium, VimpelCom, Globalive and UBS was intended to frustrate and impair Catalyst's contractual rights and to provide West Face and the other members of the Consortium with an improper advantage, and in fact their conduct let to these effects.

64. Upon discovering these new facts, Catalyst commenced the VimpelCom Action against VimpelCom, Globalive, UBS and members of the Consortium. The breach of and interference with Catalyst's Confidentiality Agreement and Exclusivity Agreement by VimpelCom, Globalive, UBS, and members of the Consortium were not known to Catalyst at the time the Moyse Action was commenced. At issue in the VimpelCom Action are the breaches of contract and confidence alleged against VimpelCom, Globalive and UBS, contrary to Catalyst's Confidentiality and Exclusivity Agreement, and the misuse of confidential information by the Consortium to conspire and induce VimpelCom to breach its agreements with Catalyst.

65. The claim against VimpelCom, UBS and members of the Consortium is neither abusive nor vexatious.

66. Indeed, Catalyst's belief that confidential information about the Wind negotiations and transactions was improperly obtained by the Consortium in breach of Catalyst's confidentiality and exclusivity rights has subsequently been confirmed by former West Face employees.

67. According to a former West Face employee with extensive experience as a portfolio manager, inside information about the Wind negotiations was obtained by members of the Consortium. As a result, the Consortium was able to purchase Wind by making a different bid with fewer conditions than Catalyst. This employee stated that he thought the deal was "polluted" and that the Consortium had benefited from inside information about Catalyst's confidential bid:

Former WF employee	But one of them in particular was – they were like 'we can't provide you with that'. And somehow that news made its way into our shop. And so they [**the West Face consortium]** made a bid with no conditions—
Interviewer	That's crazy—
Former WF employee	--and the board took it.
Interviewer	--this is why – it's crazy, isn't it? I mean –
Former WF employee	It is, unless someone on the Wind board told you what the right answer was, but said they couldn't put it on paper.
Interviewer	So they had inside information from Wind or from Catalyst? Or from both, you think?
Former WF employee	They had information about Catalyst's bid, and they had information about why Wind wasn't taking it. And so they gave a bid that was lower but a little bit different that the board would accept.

68. Further, this same former West Face employee stated that Catalyst was correct in believing that West Face had indeed received confidential information about the Wind transaction that it was not supposed to have:

Interviewer	Who has the right answer?
Former WF employee	Catalyst. It's – I believe they're correct that West Face had information they weren't supposed to.

Interviewer	Ah, okay.
Former WF employee	It just didn't come to West Face's hands the way--
Interviewer	So what's the right path? Where did it go, I mean it's --
Former WF employee	The board.
Interviewer	A board member? Of Wind, you think a board member of Wind gave them the--
Former WF employee	Yeah."

69. A second former West Face employee with extensive investment industry experience stated that the Consortium's winning bid was made as a result of collusion:

Former WF employee	[**Catalyst**] actually had a bid that was higher than ours. They bid something, something over 300 million, I don't know what. Our belief that it was higher than ours. Umm, so they kind of forgot about, they kind of forgot about, umm… If you remember what, umm, VimpelCom told UBS, the three key--.
Interviewer	Conditions.
Former WF employee	Umm, yeah. Umm, items they were looking for in the bidding process was, umm, expediency of close, whoever can close the fastest; certainty of close; and number three was price. But price wasn't the most important factor. So, we put our bid in, and we said, "See, no conditions to close, we can close--." And the big thing was regulatory, because you need a regulatory approval to take ownership of the asset, and they had to put in a, a regulatory approval.
Interviewer	And you had that approval?
Former WF employee	We didn't, but what we did differently from Catalyst Capital is we went to Tony Lacavera and we said, "Tony, umm, technically speaking, you already control this asset. You own 51% of the votes, so why don't we team up with you, we'll give you the money, and then you pay VimpelCom?"
Interviewer	Is that, isn't that conflict of interest?

Former WF employee	No, no. There's no conflict of interest.
Interviewer	He was selling to himself?
Former WF employee	He, well, he--. He only owned 5% of the business, remember? But he owned 51% of the votes.
Interviewer	Yeah.
Former WF employee	So we said to him, "Why don't we give you 285 million dollars, and then you use that to pay VimpelCom 285 million--."
Interviewer	To buy their--.
Former WF employee	"-to buy out their shares."
Interviewer	-95%?
Former WF employee	Correct. And then, at some point later, we will restructure the company such that we own 90% and you own 10%. So, we teamed up with Tony Lacavera, and he was first, was willing to do that because he would essentially be gifted a certain percentage of the company for free."

70. To date, no court has made any determination as to whether the actions of VimpelCom, UBS, Globalive or members of the Consortium had breached any of Catalyst's confidentiality and exclusivity rights. Contrary to West Face's and Boland's allegations, these issues were not determined by Justice Newbould in the Moyse Action. VimpelCom and other defendants in that action were not parties to nor subject to any documentary or oral discovery in the Moyse Action. No court has heard from VimpelCom or UBS regarding the circumstances surrounding the sale of VimpelCom's shares of Wind. No explanation has been given by VimpelCom about why it made its demand for a break fee after having already settled the terms of a Share Purchase Agreement with Catalyst and announcing that a deal with Catalyst was done. There has been no explanation by UBS for the numerous conversations it had with the Consortium throughout the period of

Catalyst's Exclusivity Agreement. The propriety of VimpelCom's, UBS's and Globalive's conduct that led to the Consortium's bid has yet to be adjudicated upon.

71. Given the foregoing, there is no basis whatsoever to have the Catalyst Defendants declared as vexatious litigants.

(iii) The Veritas Action – 2014 Short-Selling Attack

72. On June 18, 2015, an action against Veritas Investment Research Corporation ("**Veritas**") and West Face was commenced for defamation, conspiracy and intentional interference with economic relations relating to a short-selling scheme orchestrated against Catalyst and Callidus (the "**Veritas Action**").

73. The short-selling scheme involved the publication and dissemination of reports by West Face and Veritas that contained false and defamatory statements impugning the financial viability and conduct of both Catalyst and Callidus. The scheme was designed to deceive market participants into believing that Callidus was a poor investment, and thus to drive the price of Callidus stock downward.

74. At a meeting between West Face and Veritas representatives in December 2014, Boland disclosed details of an unfavourable report that West Face had prepared regarding Callidus (the "**West Face Report**"). Boland "arranged" for the report to be shared with Veritas so that Veritas would produce a second unfavourable report on Callidus (the **"Veritas Report**"), creating the false impression that West Face and Veritas had independently and separately issued negative reports. This had the effect of deceiving the market place into believing that a negative consensus

was building against Callidus, and driving the price of Callidus stock downward which, in turn, bolstered West Face's admitted short-selling campaign.

75. Catalyst and Callidus claim that the Veritas Report and West Face Report contained false and defamatory statements impugning the financial viability and conduct of both Callidus and Catalyst designed to cause shareholders to sell Callidus stock. The Veritas Action is not abusive or vexatious, as alleged.

76. Indeed, West Face had previously sought to strike Catalyst's and Callidus's claim in its entirety on the basis that it disclosed no reasonable cause of action. West Face's motion to strike, however, was dismissed by the Ontario Superior Court of Justice.

77. On appeal, the Court of Appeal of Ontario confirmed that Catalyst and Callidus have "made out a *prima facie* cause of action in defamation against both West Face and Veritas" and are "proceeding in good faith".

78. There is no basis for this second attempt by West Face to prematurely halt the Veritas Action and have the Catalyst Defendants declared as vexatious litigants.

(iv) The Conspiracy Action – 2017 Short-Selling Attack

79. This action by Catalyst and Callidus against West Face, Greg Boland, Anson Group Canada and others, relates to a subsequent short-selling attack that began on August 9, 2017 when the Wall Street Journal published an article regarding false whistleblower complaints filed with the OSC against Callidus and Catalyst.

80. The Catalyst Defendants repeat and rely on their assertions contained in the Statement of Claim.

81. The Counterclaim is an attempt by West Face and Boland to avoid a court adjudication on West Face's and Boland's conduct in this case and to conceal its behaviour in communicating with the whistleblowers and short-selling Callidus stock. The within action is neither abusive nor vexatious, as alleged.

The Litigation and Investigations

82. Following the short-selling attack in August 2017, Catalyst, through its counsel, retained Tamara Global Holdings Ltd. ("**Tamara Global**") to provide personal and corporate security and to provide litigation support in respect of ongoing and contemplated litigation.

83. Tamara Global was authorized to retain subcontractors and additional consultants pursuant to its retainer.

84. Tamara Global retained B.C Strategy UK Ltd. ("**B.C. Strategy**") for the purpose of litigation, including litigation between Catalyst and West Face. B.C. Strategy was to execute its retainer in accordance with its best professional judgment.

85. The Catalyst Defendants deny that it engaged B.C. Strategy for any improper purpose, as alleged. The Catalyst Defendants did not direct or have any involvement in the alleged activities described by West Face in the Counterclaim. The Catalyst Defendants did not conspire with B.C. Strategy or with any of the other defendants to engage in any unlawful activity.

86. B.C. Strategy was to conduct itself at all times in a lawful manner. Insofar as the Catalyst Defendants are aware, all interviews and meetings were conducted and all information was gathered by B.C. Strategy, lawfully.

87. The interviews and meetings were conducted for the purpose of litigation between Catalyst and West Face. The interviews and meetings and any information that exists therefrom are therefore privileged, unless that privilege is expressly waived.

88. The Catalyst Defendants did not induce West Face employees to breach any duties of confidence or fiduciary duties, as alleged. Specifically, none of the information obtained by B.C. Strategy, including any purported information from Alex Singh related to the hiring and employment of Moyse, is privileged. If any information was privileged then any such privilege has been waived by West Face. This occurred when Alex Singh delivered an affidavit in the Moyse Action and was cross-examined thereon in relation to Moyse's hiring, including advice and direction he gave to Moyse and West Face about these and other related matters. Singh's affidavit and cross-examination transcript and additional evidence in relation to these matters were filed and relied upon by West Face at the trial of the Moyse Action.

89. In any event, West Face and Boland have suffered no damages whatsoever as a result of the employee interviews. No actionable wrong has been committed against West Face or Boland.

90. With respect to B.C. Strategy's meeting with Mr. Newbould, the Catalyst Defendants had no prior knowledge of the meeting with Mr. Newbould. The

Catalyst Defendants were only informed of the meeting with Mr. Newbould after the meeting had occurred.

91. The Moyse Appeal was to commence on September 25, 2018. Upon learning of the meeting with Mr. Newbould, a brief adjournment of the appeal was sought to consider a possible motion to introduce fresh evidence.

92. Upon further consideration of B.C. Strategy's meeting with Mr. Newbould and its implications, Catalyst abandoned any motion to introduce fresh evidence on the appeal.

93. Catalyst also sought to strike the allegations regarding Mr. Newbould from the Counterclaim. West Face and Boland, however, opposed Catalyst's request to strike. They did so, in part, to deflect attention away from their own improper activities and the merits of Catalyst's and Callidus's claim against them.

94. West Face and Boland have also engaged with the media to keep this litigation in the public eye, including matters surrounding Mr. Newbould.

95. West Face and Boland have not suffered any damages as a result of the meeting with Mr. Newbould, nor does it constitute any actionable wrong against them.

The Alleged Defamation Campaign

96. Contrary to West Face's and Boland's allegations, the Catalyst Defendants did not make any defamatory statements to the media or the financial community, nor did they issue any false and defamatory press releases, investor communications or internet postings regarding West Face or Boland. Further, the Catalyst Defendants

did not authorize B.C. Strategy, PSY Group Inc., Emmanuel Rosen, Virginia Jamieson, or any other party to make or post any defamatory statements, through aliases or otherwise, concerning West Face or Boland, as alleged.

97. The Catalyst Defendants did not on their own (or in concert with the other defendants by counterclaim) engage in any of the activities described as the alleged “Defamation Campaign”.

98. The Catalyst Defendants state that the words complained of by West Face and Boland in the Counterclaim are incapable of bearing any of the meanings pleaded, do not bear the meanings pleaded, and are not defamatory. Further, the Catalyst Defendants plead and rely upon the fair comment defence, the qualified privilege defence, the public interest responsible communication defence, and with respect to certain statements set out below, the defence of justification.

99. The Catalyst Defendants acted in good faith and deny all allegations that they acted maliciously towards West Face and Boland.

100. The statements complained of by West Face and Boland are expressions relating to matters of public interest. The Counterclaim is merely an attempt by West Face and Boland to chill off the Catalyst Defendants from expressing themselves on matters that are of public interest.

101. Further particulars of the Catalyst Defendants’ defence regarding the statements complained about in Catalyst’s press releases, Catalyst’s investor letters, and the internet postings are pleaded below.

(i) Catalyst Press Releases

102. West Face and Boland complain of two press releases issued on August 18, 2016 (the "**August 18 Press Release**") and October 13, 2016 (the "**October 13 Press Release**") (collectively, the "**Press Releases**"). The Press Releases were issued following the release of Justice Newbould's decision in the Moyse Action and his decision on costs.

103. The outcome of the Moyse Action and the costs decision are information material to the company.

104. Pursuant to its statutory and common law obligations, Catalyst had a duty to disclose such material information to the public. The statements in the Press Releases that West Face and Boland complain about were not made with malice or with the intent to injure West Face or Boland. Rather, the statements that West Face and Boland complain about were made by Catalyst in the course of discharging its duty to keep the public informed of material information concerning the company and are protected by the defence of qualified privilege.

105. The statements made in the Press Releases that West Face and Boland complain about are also protected by public interest responsible communication defence.

106. The statements made in the Press Releases that are opinion constitute fair comment, made in good faith and without malice, on matters of public interest.

107. In addition, with respect to the August 18 Press Release, the statement complained about that "Additional evidence has come out since the Moyse

litigation that supports the new case that alleges conspiracy and breach of contract" is true. Since the commencement of the Moyse Action, additional evidence was discovered that members of the Consortium, including West Face, were kept apprised of Catalyst's negotiations for Wind, and had discussed and negotiated the purchase of Wind during the period of Catalyst's Confidentiality and Exclusivity Agreement with VimpelCom. The truth about the Consortium's above-noted conduct is unassailable.

108. With respect to the statements complained about in the October 13 Press Release, the actions of West Face and Moyse in receiving and circulating Catalyst documents marked "Confidential"; the deletion of data and information from Moyse's personal devices following a court order intended to preserve such information, and West Face's and Moyse's failure to be forthcoming about their conduct, are fairly characterized as "unethical".

109. The Catalyst Defendants deny that the Press Releases caused West Face or Boland any damages whatsoever as a result of their publication. Further, the Catalyst Defendants by Counterclaim were never served with a Notice of Libel pursuant to section 5 of the *Libel and Slander Act* with respect ot the National Post/Financial Post article published on August 19, 2016 (referred to in paragraph 129 of the Fourth Fresh as Amended Statement of Defence and Counterclaim of the Plaintiffs by Counterclaim).

(ii) Catalyst Investor Letters

110. West Face and Boland complain of statements made in letters sent by Catalyst to its investors on August 14, 2017 (the "**August 14 Investor Letter**") and March 19, 2018 (the "**March 19 Investor Letter**") (collectively, the "**Investor Letters**").

111. Specifically, the statements complained about in the August 14 Investor Letter addressed the short-selling attack against Callidus. It had been the subject of a short-selling attack that had a significant and material impact on its share price. Catalyst received information that Callidus and Glassman were targeted by a group, including Boland of West Face, acting in concert to short-sell Callidus stock and spread false rumours in the marketplace.

112. Pursuant to its obligations, Catalyst is required to inform its investors of material information concerning the short-selling attack. The statements contained in the August 14 Investor Letter were not made with malice with the intent to injure West Face or Boland. Rather, these statements were made in the course of discharging Catalyst's duty to keep its investors informed of material information concerning the company and are protected by the defence of qualified privilege.

113. The statements made in the August 14 Investor Letter that West Face and Boland complain about are also protected by the public interest responsible communication defence.

114. The statements made in the August 14 Investor Letter that are opinion constitute fair comment, made in good faith and without malice, on matters of public interest.

115. The matters addressed in the March 19 Investor Letter concern both the Moyse Action and the VimpelCom Action, and the information discovered from former West Face employees that are material to those Actions.

116. The March 19 Investor Letter accurately set outs the information obtained from West Face former employees, including information that:

(a) inside information about the Wind negotiations was improperly communicated to members of the Consortium during the period of Catalyst's exclusivity and confidentiality;

(b) West Face had indeed received confidential information about the Wind transaction that it was not entitled to have; and

(c) the deal with the Consortium was "polluted" and that the Consortium had benefited from inside information about Catalyst's confidential bid.

117. The statements contained in the March 19 Investor Letter that West Face and Boland complain about are protected by the defence of qualified privilege.

118. The statements contained in the March 19 Investor Letter that West Face and Boland complain about are also protected by the public interest responsible communication defence.

119. The statements made in the March 19 Investor Letter that are opinion constitute fair comment, made in good faith and without malice, on matters of public interest.

120. The Catalyst Defendants deny that the Investor Letters caused West Face or Boland any damages whatsoever as a result of their publication. Further, the Catalyst Defendants by Counterclaim were never served with a Notice of Libel pursuant to section 5 of the *Libel and Slander Act* with respect to the Globe and Mail article published on April 17, 2018 (referred to in paragraphs 195 and 199 of the Fourth Fresh as Amended Statement of Defence and Counterclaim of the Plaintiffs by Counterclaim).

(iii) "Internet Postings"

121. The Catalyst Defendants deny that they authored, created, published, directed or instructed any party to draft, create or publish the internet postings complained about by West Face and Boland.

122. The Catalyst Defendants did not create or use, or direct any party to create or use false identities or aliases to post statements that were false or otherwise, as alleged. The Catalyst Defendants have no knowledge of the authors of the internet postings complained of by West Face and Boland.

123. Specifically:

(a) **Boland Post:** the Catalyst Defendants did not author or direct any party to author the alleged post that West Face and Boland have defined in the Counterclaim as the "Boland Post", nor did they create or direct any party to create any of the websites and Twitter accounts through which the post was allegedly posted. Until being notified by West Face's counsel, the Catalyst Defendants had no knowledge of the alleged websites and Twitter

accounts. Indeed, these websites and Twitter accounts are largely unknown to the public with little to no visitors or followers. The post and the alleged websites and Twitter accounts are largely unknown. Contrary to West Face's and Boland's allegations, the post was not widely read or disseminated. Moreover, most, if not all, of the information contained in the post is derived from past publications from recognized news media for which West Face and Boland made no complaint;

(b) **Wolfpack Video:** the Catalyst Defendants did not create or direct any party to create the video that West Face and Boland have labelled in the Counterclaim as the "Wolf Pack Video", nor did they create or direct any party to create Twitter accounts through which the video was allegedly posted. The Catalyst Defendants had no knowledge of the video or the Twitter accounts through which the video was allegedly posted until it was brought to their attention by West Face's counsel. The video and the alleged Twitter accounts are largely unknown. There is no evidence that the video was widely disseminated or viewed so as to attract any negative attention to West Face or Boland;

(c) **Esco Post:** the Catalyst Defendants did not author or direct any party to author the post that West Face and Boland have defined in the Counterclaim as the "Esco Post", nor did they create or direct any party to create any of the alleged websites and Twitter accounts through which the post was allegedly posted. The Catalyst Defendants did not direct or indirectly use the pseudonym "julesljones", as alleged. Until the post was

brought to their attention by West Face's counsel, the Catalyst Defendants had no knowledge of the post. Indeed, the post contains statements regarding Callidus that are inaccurate. The alleged post and Twitter account are not widely known to the public. The post was not broadly disseminated or read so as to attract any negative attention to West Face and Boland;

(d) **Face the Music Post:** the Catalyst Defendants did not author or direct any party to author the post that West Face and Boland have defined in the Counterclaim as the "Face the Music Post", nor post directly or indirectly on the website that the post was allegedly posted. The Catalyst Defendants had no knowledge of the alleged post or the website upon which the post was posted, until it was brought to their attention by West Face's counsel. The post and the website are widely unknown to the public. The alleged post and Twitter account are not widely known to the public. The post was not broadly disseminated or read so as to attract any negative attention to West Face and Boland;

(e) **Wolfpack Corruption Post:** the Catalyst Defendants did not author or publish, nor direct any party author or publish the post that West Face and Boland have defined in the Counterclaim as the "Wolfpack Corruption Post". Further, they did not create nor cause anyone to create the website upon which the post was allegedly posted. Moreover, they did not create nor direct any party to create the Twitter accounts through which the post was allegedly posted. Until the post was brought to their attention, the Catalyst Defendants had no knowledge of the alleged post or the website and the

Twitter accounts through which the post was allegedly posted. The alleged post and website are not widely known to the public. The post was not broadly read or disseminated so as to attract any negative attention to West Face and Boland; and

(f) **Westface.net Post:** the Catalyst Defendants did not publish, create, make directly or indirectly the statements complained of in the post that West Face and Boland have defined in the Counterclaim as the "Westface.net Post". Further, they did not use any pseudonym nor cause any pseudonym to be registered, as alleged. Moreover, they did not create or register the website, as alleged. The alleged post and website are not widely known to the public. The post was not broadly disseminated or viewed so as to attract any negative attention to West Face and Boland.

124. Contrary to West Face and Boland's allegations, the Catalyst Defendants did not conspire to harm West Face or Boland by disseminating false or defamatory statements through any "Defamation Campaign". The Catalyst Defendants did not engage in any unlawful or wrongful activity, as alleged.

125. In any event, West Face and Boland have not suffered any loss or damages as a result of the publication, circulation or posting of the Press Releases, Investor Letters and Internet Postings. Well before the publication of any of the defamatory statements complained of, West Face suffered a precipitous decline in its AUM as a result of its poor financial performance and mismanagement. For the better part of 5 years, West Face consistently underperformed relative to other indices, often

incurring negative or minimal returns. The loss and damages alleged to have been suffered by West Face and Boland are a result of West Face's and Boland's own failed investment decisions and mismanagement, and not as a result of any actions of the Catalyst Defendants.

Conclusion

126. There is no merit to the Counterclaim and it ought to be dismissed. The Counterclaim is a bald attempt by West Face and Boland to distract the market from West Face's poor fund management and deteriorating financial performance, to divert attention from the merits of Catalyst's and Callidus's claim, to shield West Face's and Boland's improper conduct from scrutiny by the courts, and to chill off the Catalyst Defendants from expressing themselves on matters of public interest.

127. West Face and Boland have not suffered any damages whatsoever as a result of any conduct by the Catalyst Defendants.

128. In any event, the damages claimed are excessive and too remote to be recoverable at law. West Face and Boland have failed to mitigate their damages.

129. The Catalyst Defendants did not act in a reckless, high-handed, malicious, oppressive or reprehensible manner that would warrant an award of aggravated or punitive damages.

130. The Catalyst Defendants therefore request that the Counterclaim be dismissed with costs on a substantial indemnity basis.

~~September 25, 2018~~
November 29, 2019

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TO: **SERVICE LIST**

THE CATALYST CAPITAL GROUP INC. et al
Plaintiffs

-and-

WEST FACE CAPITAL INC. et al.
Defendants

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

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TORONTO

REPLY AND DEFENCE TO COUNTERCLAIM

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This is Exhibit “C” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Court File No. CV-17-587463-00CL
Court File No. CV-17-586096

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B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC., FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST 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 and JOHN DOES #1-10

Defendants

A N D B E T W E E N:

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. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. d/b/a PSY GROUP ~~INC.~~

Defendants to the Counterclaim

STATEMENT OF DEFENCE TO COUNTERCLAIM

1. The Defendants to the Counterclaim, B.C. Strategy Ltd. d/b/a Black Cube and B.C. Strategy UK Ltd. d/b/a BLACK CUBE, deny all of the allegations contained in the Counterclaim.

The Black Cube Entities

2. B.C. Strategy Ltd. is an Israeli company that provides intelligence, litigation support, and similar services to its clients. B.C. Strategy U.K. Ltd. is a separate company that also provides the same services to its clients. The two B.C. Strategy companies occasionally provide services to one another's clients through subcontract arrangements.

3. The two B.C. Strategy companies operate under the trade name (and will be referred to herein as) "Black Cube", which is a registered trademark in approximately 50 jurisdictions including Canada. Black Cube operates in dozens of countries, has dozens of employees, and is engaged by, among others, top-tier law firms around the world to provide litigation support and similar services.

The Catalyst/ West Face Litigation

4. The Catalyst Capital Group Inc. ("Catalyst") and Callidus Capital Corporation ("Callidus") are and have for several years been involved in a series of lawsuits against West Face Capital Inc. ("West Face"). The various proceedings have expanded to involve directors, officers, and principals of the corporations, as well as related or affiliated corporations, and third parties.

5. The proceedings all involve different groups of parties and different specific claims, but they are all related proceedings in that the principal litigants are Catalyst and Callidus on one side, and West Face on the other, and because there are some key factual issues that are common to several proceedings.

Black Cube Retainer

6. Black Cube was retained on or about September 11, 2017 for the purpose of supporting Catalyst and Callidus in their litigation against West Face, and related proceedings. The terms of and communications about Black Cube's retainer are protected by litigation privilege, upon which the Black Cube defendants rely.

Black Cube's Involvement

7. Black Cube's engagement, operations and communications with respect to the Catalyst/ West Face dispute were at all times undertaken for the sole purpose of providing litigation support, and are therefore privileged. Black Cube does not by this pleading waive any aspect of the litigation privilege or any other applicable privilege that applies to its work, files, conduct, work product, and the like.

8. Black Cube acknowledges and it is a matter of public record that its agents or employees met with various individuals in an attempt to obtain information that may be helpful to Catalyst and Callidus in their litigation with West Face. There is no legal prohibition against, or unlawful purpose behind, Black Cube's conduct in doing so.

9. Black Cube denies that any conspiracy as alleged in the Counterclaim (or otherwise) exists between the defendants by Counterclaim.

10. Black Cube did not participate in making or approving any statement alleged in the Counterclaim to be defamatory.

11. Black Cube denies committing any unlawful act or intentional tort. Black Cube did not owe any legal duty to West Face or the persons with whom Black Cube met.

No Damages

12. The Black Cube defendants in any event plead that the plaintiffs by counterclaim suffered no damages whatsoever as a result of the conduct complained of in the Counterclaim.

13. Black Cube's conduct does not meet the test for the imposition of punitive damages. There was no independent actionable wrong. While the individuals Black Cube met with are unique, the act of conducting the investigations undertaken by Black Cube in order to obtain information for use in litigation is not. Black Cube cannot be punished with an award of punitive damages simply because the persons with whom it met had previously held any particular status or position in Ontario.

14. The Defendant to the Counterclaim, B.C. Strategy Ltd. d/b/a Black Cube, B.C. Strategy UK Ltd. d/b/a BLACK CUBE, asks that the Counterclaim be dismissed, with costs.

August 15, 2018

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Defendant to the Counterclaim

AND TO: **PSY GROUP INC.**
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Petah Tikva 49000

Defendant to the Counterclaim

THE CATALYST CAPITAL GROUP INC. et al. Plaintiffs	-and-	M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA et al. Defendants
GREGORY BOLAND et al. Plaintiffs by Counterclaim	-and-	THE CATALYST CAPITAL GROUP INC. et al. Defendants to the Counterclaim

Court File No. CV-17-587463-00CL/Court File No. CV-17-586096

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STATEMENT OF DEFENCE TO COUNTERCLAIM

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Lawyers for the Defendants to the Counterclaim,
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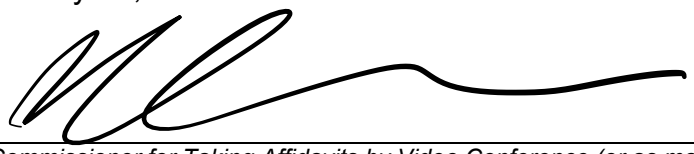
This is Exhibit “D” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.



Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

To: Jackson, Emily (National Post)[ejackson@postmedia.com]
From: Dan Gagnier
Sent: Fri 8/19/2016 5:14:59 PM (UTC)
Subject: Re: Ontario court judgment against Catalyst

Spokesperson for Catalyst Capital said:

"We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbold. 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 judgement containing clear misstatements of fact. Among other things, we are particularly concerned that the decision selectively ignores or discounts key testimony as it relates to the critical issue of possible destruction of evidence. We are considering all options regarding an appeal."

"Regardless of this questionable decision, after the Moyse litigation commenced, additional evidence came out that is supportive of our case against Globalive, West Face, VimpelCom and the other parties."

From: Jackson, Emily (National Post) <ejackson@postmedia.com>
Sent: Friday, August 19, 2016 9:43 AM
To: Dan Gagnier
Subject: Ontario court judgment against Catalyst

Hi Dan,

Hope you're summer is going well. I'm working on a story today about the Ontario judge ruling against Catalyst in the initial lawsuit against its former employee Moyse. I'm wondering – what sort of implications does this have for the more recent lawsuit claiming $750 million? Will Catalyst move forward with that lawsuit?

Please let me know. Much appreciated.

Emily

Emily Jackson
Financial Post | Telecom Reporter
Office | 416.383.2420
Cell | 416.402.6765
ejackson@postmedia.com
@theemilyjackson

From: Dan Gagnier <dg@gagnierfc.com>
Date: Monday, June 13, 2016 at 10:47 AM
To: User Template <ejackson@postmedia.com>
Subject: Re: thanks for the chat.

Hi Emily - haven't heard anything yet, but will be checking in with them today and will let you know.

Best,

From: Jackson, Emily (National Post) <ejackson@postmedia.com>
Sent: Monday, June 13, 2016 10:46 AM
To: Dan Gagnier
Subject: Re: thanks for the chat.

Hi Dan,
Wondering if there are any updates on this… Please let me know.
Thanks,
Emily

Emily Jackson
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Office | 416.383.2420
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@theemilyjackson

From: Dan Gagnier <dg@gagnierfc.com>
Date: Wednesday, June 1, 2016 at 3:40 PM
To: User Template <ejackson@postmedia.com>
Subject: Re: thanks for the chat.

Thanks Emily. All the best,

Dan

From: Jackson, Emily (National Post) <ejackson@postmedia.com>
Sent: Wednesday, June 1, 2016 3:28 PM
To: Dan Gagnier
Subject: thanks for the chat.

Speak to you next week.

Emily Jackson
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This is Exhibit “E” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

FINANCIAL POST

August 19, 2016

Catalyst Capital Group Inc to appeal after judge dismisses Wind Mobile lawsuit

By Emily Jackson

The appeal continues Capital's extensive legal battle for a share of the wireless startup now owned by Shaw Communications Inc.

TORONTO - Private equity firm Catalyst Capital Group Inc. will appeal an Ontario court ruling that tossed out its claim for a chunk of Wind Mobile, continuing its extensive legal battle for a share of the wireless startup now owned by Shaw Communications Inc.

The Ontario Superior Court of Justice dismissed in its entirety Catalyst's lawsuit that alleged rival Bay Street firm West Face Capital Inc. used confidential information from a former Catalyst employee to buy a stake in Wind Mobile, a deal both firms were chasing in 2014.

West Face and a consortium of buyers ultimately bought Wind from Amsterdam-based telecom Vimpelcom that fall, less than a month after Catalyst's exclusive negotiations failed. Catalyst argued West Face couldn't have landed the deal without confidential information from analyst Brandon Moyse, who was working on Catalyst's telecom file before he quit in May 2014 and joined West Face in June. It asked the court to order[1] West Face to hold its ownership of Wind in a trust for Catalyst.

But Justice Frank Newbould ruled this week that Moyse did not provide any information to West Face that enabled it to offer a better deal than Catalyst.

The judge believed Moyse's assertion that he never discussed Wind with his new employer, which assigned him to other files before he was placed on leave after three and a half weeks in light of Catalyst's non-compete clause.

Moyse did email West Face confidential memos unrelated to Wind during the hiring process, but the judge ruled it was an error and did not indicate he revealed details about Wind. The junior analyst also wiped his BlackBerry before returning it to Catalyst and deleted his browser history before turning his computer over to lawyers, but the judge said his intent was simply to get rid of personal information.

The judge went on to chastise Catalyst owner Newton Glassman, stating he had "considerable difficulty" accepting his evidence as reliable.

"He was aggressive, argumentative, refused to make concessions that should have been made and contradicted his own statements made contemporaneously in emails," Newbould wrote.

On the other hand, he praised the West Face witnesses as "straightforward" and "impressive." He stated they "did not engage in overstatement."

After Catalyst filed its initial lawsuit against West Face, Shaw bought Wind Mobile for $1.6 billion in late 2015. In June 2016, Catalyst sued West Face and the consortium of buyers[2] including Globalive for $750 million, the amount it estimates it would have made if it had owned Wind at the time of the sale.

Catalyst will continue to pursue the second lawsuit as it appeals this decision, a spokesperson said Friday. Additional evidence has come out since the Moyse litigation that supports the new case that alleges conspiracy and breach of contract, the spokesperson said.

"We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbold. 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 judgement containing clear misstatements of fact," Catalyst said in a written statement.

"Among other things, we are particularly concerned that the decision selectively ignores or discounts key testimony as it relates to the critical issue of possible destruction of evidence."

West Face is "grateful for the vindication" the judge provided, according to a news release that highlighted the judge's conclusions about the witnesses.

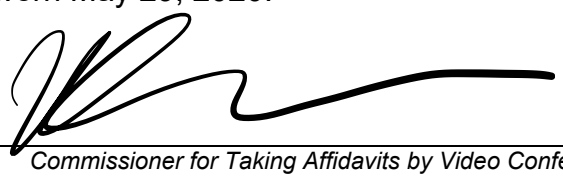
"The reasons for the complete dismissal of the case make clear that the lawsuit launched by Catalyst was without merit. We are confident that Catalyst's other lawsuits against West Face and various other parties face similar obstacles," CEO Greg Boland said in a statement.

References

1. business.financialpost.com/news/fp-street/wind-mobile-ownership-under-threat-as-bay-street-hiring-tiff-spirals-into-legal-brawl
2. business.financialpost.com/fp-tech-desk/catalyst-capital-sues-former-wind-mobile-owners-for-750m-over-alleged-conspiracy-breach-of-contract

National Post

This is Exhibit “F” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.



Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 6285
COURT FILE NO.: CV-16-11272-00CL
DATE: 20161007

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

BETWEEN: THE CATALYST CAPITAL GROUP INC

Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC

Defendants

BEFORE: Newbould J.

COUNSEL: *Rocco DiPucchio, Andrew Winton and Bradley Vermeersch*, for the plaintiffs

Robert A. Centa, Kris Borg-Olivier and Denise M. Cooney, for the defendant Brandon Moyse

Kent E. Thomson, Matthew Mile-Smith and Andrew Carlson, for the defendant West Face Capital Inc.

COST ENDORSEMENT

[1] I have now received cost submissions from the parties following the dismissal of this action.

West Face costs

[2] West Face claims costs on a substantial indemnity basis. The normal rule is that costs are to be paid on a partial indemnity basis. However, conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial or complete indemnity basis. See *Young v. Young*, [1993] 4 S.C.R. 3. The conduct giving rise to such an award can be conduct either in a circumstances giving rise to the cause of action or in the proceedings themselves. See Orkin, *The Law of Costs*, 2nd ed. at para. 219 and *Ford Motor Company of Canada v. Ontario Municipal Employees Retirement Fund* (2006), 17 B.L.R. (4th) 169 (Ont. C.A.).

[3] Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of a party can give rise to costs on a substantial indemnity scale. See *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 per Blair J. (as he then was). In *Re Bisyk (No. 2)* (1980), 32 O.R. (2d) 281; aff'd [1981] O.J. No. 1319 (C.A.), Robins J. (as he then was), held that unproven allegations of undue influence in the preparation of a will were allegations of improper conduct seriously prejudicial to the character or reputation of a party deserving of costs on a solicitor and client basis. Both of these cases were referred with acceptance in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.) at para. 47.

[4] In *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856, it was alleged that the defendant formed a competing business in breach of his fiduciary duties to the plaintiff and his non-competition agreement, hired a former employee of the plaintiff in breach of non-competition and non-solicitation clauses in her employment agreement, appropriated the plaintiff's confidential information, knowingly participated in the former employee's breach of fiduciary duties to the plaintiff, interfered with economic relations and unlawfully conspired with the former employee to the plaintiff's detriment. Hoy J. (as she then was) viewed the allegations as harmful to the defendant's integrity and awarded costs on a substantial indemnity basis. She said:

> **21** The allegations in this case go beyond breach of employment contract. Allegations of appropriation of confidential information and knowingly

> participating in breach of a fiduciary duty appear to me to be seriously prejudicial to, and to impugn the integrity of, a young professional developing a career in the "trusted intelligence services" field and, in the absence of a release which effectively puts an end to the allegations, to, in appropriate cases, justify costs on a substantial indemnity scale in the event of a discontinuance.

[5] In this case, the claim against West Face was pleaded as follows:

> 34.6 West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyse, to obtain an unfair advantage over Catalyst in its negotiations with Wind. But for the transmission of confidential information concerning Wind from Moyse to West Face, West Face would not have successfully negotiated a purchase of Wind.

[6] On the face of it, this is an accusation of soliciting and misusing confident information. To solicit it indicates an intention to obtain confidential information. In the industry in which both West Face and Catalyst participated, personal integrity is extremely important. The accusation that West Face knowingly solicited confidential information from an employee of Catalyst and used it against Catalyst was an allegation of wrongdoing that attacked the integrity of West Face and its executives.

[7] In this case, Catalyst was aware before it amended its statement of claim to make this claim that West Face had set up a confidentiality wall before Mr. Moyse began working for West Face. It was also aware that Mr. Griffin of West Face had sworn two affidavits denying that West Face had obtained any confidential information about Catalyst from Mr. Moyse or had used such information in its dealings to acquire an interest in Wind. It was also aware of affidavits from Messrs. Leitner and Burt, principals of two of the partners of West Face in the bid for Wind, denying that they had received any information from West Face about Catalyst's dealings regarding Wind. Catalyst had also received extensive production of all of West Face's productions. Catalyst openly admitted at the opening of trial that it had no "direct" evidence that Mr. Moyse communicated confidential Catalyst information about Wind to West Face.

[8] This was not a case in which it was acknowledged by West Face that it had obtained Catalyst information from Mr. Moyse and the issue was whether it constituted confidential

information or was used by West Face. Rather it was a straight contest as to whether West Face had obtained confidential Catalyst information about Wind and had used it. Catalyst was aware aware that in order to prove its allegations it had to establish that West Face witnesses were lying. There was no way around that. In its closing argument it alleged "subterfuge and secrecy" as being as essential part of the asserted tort.

[9] Thus the allegations not only impugned the integrity of Mr. Griffin and other persons at West Face by asserting a solicitation and misuse of confidential Catalyst information but also attacked their honesty in their asserting that no confidential information regarding Catalyst was obtained from Mr. Moyse or used by West Face.

[10] This law suit was driven by Mr. Glassman. He was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else. He set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire Wind. He was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.[1]

[11] In these circumstances I am of the view that West Face is entitled to costs on a substantial indemnity basis.

[12] Regarding the amount of the costs claimed by West Face on a substantial indemnity basis, Catalyst raises no argument on the quantum. West Face claims substantial indemnity costs totalling $1,239,970.41, including fees of $1,053,238.29, disbursements and HST.

[13] West Face in its bill of costs claimed $843,246.50 on a partial indemnity basis, including fees of $702,155.18, disbursements and HST. Catalyst accepts that that claim on a partial indemnity basis is reasonable. Under rule 1.03 the definition of substantial indemnity cost means

[1] I in no way impugn the integrity of Catalyst's lawyers who conducted the case in an entirely professional manner.

1.5 times partial indemnity costs. 1.5 times $702,155.18, the amount of fees claimed by West Face on a partial indemnity basis and accepted by Catalyst as reasonable, comes to $1,053,232.77, which is within $5 dollars of the amount claimed by West Face for substantial indemnity fees.

[14] Thus I fix the substantial indemnity costs to be paid by Catalyst to West Face at $1,239,965.

Brandon Moyse

[15] Mr. Moyse also claims costs on a substantial indemnity basis. In many ways he is entitled to costs on that scale for the same reasons that West Face is entitled to substantial indemnity costs. His reputation and integrity were attacked. Had the allegation stuck that he disclosed confidential Catalyst information to West Face, it would have had a very detrimental effect on his career prospects at a very early stage of his career. As it was, the allegations alone caused Mr. Moyse great difficulty. As a result of the litigation, Mr. Moyse was off work from July 16, 2014 until December 2015, and had significant difficulties securing a new job.

[16] Mr. Moyse made some mistakes at the outset of this sorry saga. He destroyed evidence of his web browsing history out of a concern that it would show he had accessed adult entertainment websites and become part of the public record. He wiped his blackberry to remove personal information. He always asserted that they were honest mistakes and that he never passed on to West Face any confidential Catalyst information regarding its Wind initiative or destroyed any evidence of any such activities. Mr. Moyse was a young man at that time who had a very close relationship with his girlfriend who is now his fiancée.

[17] Mr. Glassman caused Catalyst to assert a full scale attack on this young man. No thought was given to all of the denials by Mr. Moyse as well as by the West Face witnesses that there had not been any confidential Catalyst information regarding Wind given to West Face by Mr. Moyse. Catalyst claimed general damages against Mr. Moyse. What those would be were not particularized, which in a case involving a claim by Catalyst against West Face in excess of $500 million, would leave Mr. Moyse in a perilous state. It was only in its closing submissions on a

question from the bench that Catalyst counsel said that damages equivalent to an award covering its costs of the case would be appropriate. That amount in this expensive litigation would be something that Mr. Moyse would in all likelihood be unable to pay.[2]

[18] However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

[19] Mr. Moyse claims partial indemnity costs of $339,500.18, made up of fees to the end of trial of $282,330.50, disbursements of $20,466.71 and HST. Catalyst argues that the fees claimed are excessive. It has filed a bill of costs of its own costs on a partial indemnity basis with fees to the end of trial being $455,381 plus HST. The arguments of Catalyst essentially come down to an assertion that the spoliation case against Mr. Moyse was a separate claim that did not require all of the time spent. I do not accept that argument. Mr. Moyse had to be represented throughout the case, including discoveries and cross-examinations of West Face witnesses and at trial. The spoliation case against him was not divorced from the evidence led against West Face and he was exposed to a very large judgment that could have been affected by an award against West Face.

[20] The fees claimed by counsel for Mr. Moyse are approximately 61% of the fees claimed in the Catalyst bill of costs. The fees claimed by counsel for Mr. Moyse are 40% of the fees claimed by counsel for West Face on a partial indemnity basis. It is evident that the work done by counsel for Mr. Moyse was substantially less than the work done for Catalyst and West Face.

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[2] One might wonder why the action against Mr. Moyse was continued after his leave of absence from West Face. He was in no position to pay any substantial award of damages. If Catalyst was hoping that in order to get out of the impending financial disaster, Mr. Moyse would "turn state's evidence" and say that he had disclosed confidential Catalyst information regarding its Wind initiative to West Face, it did not work. The fact that West Face has paid Mr. Moyse's legal fees may have had something to do with that, although West Face has not indemnified Mr. Moyse against any damage award. Mr. Moyse continued his denial of making any such disclosure and I accepted his evidence.

[21] It is not the court's function when fixing costs to second guess successful counsel of the amount of time spent unless the time spent was obviously too much. See *Fiorillo v. Krispy Kreme Doughnuts Inc.* [2009] O.J. No. 3223 and the authorities cited in it. I am in no position to say that the time spent was obviously too much.

[22] There are three areas specified by Catalyst in its critique of the bill of costs of Mr. Moyse:

(a) Mr. Moyse claimed 15 hours for Commercial List attendances. It is said there were six attendances since January 2016 and that none lasted more than one hour. This ignores preparation time. It is said no costs were sought, awarded or reserved for those attendances. That is irrelevant. Attendances at 9:30 am conferences are the norm in the Commercial List and they save a lot of time and expense, as acknowledged by Catalyst in its costs submissions that costs were reduced because disputes between the parties were resolved at those appointments without fully briefed motions. Counsel are entitled to their costs of those attendances as they are steps in the proceeding.

(b) Mr. Moyse claimed 151.4 hours for oral discoveries. It is said that the only discovery that Mr. Moyse conducted was of Catalyst's witness for thirty minutes and that he only gave six undertakings during his one day of discovery. It is said that it is not possible for one day of defending a witness and preparing for a 30 minute oral discovery to take 140 hours of preparation. This ignores the fact that counsel for Mr. Moyse had 7800 productions to consider, including 3400 documents produced by Catalyst between late March and May, 2016 and also attended, quite properly, the other discoveries. To have ignored those would have been foolhardy.

(c) Catalyst complains that counsel for Mr. Moyse claimed 218.3 hours for direct and cross-examination preparation yet he only called two witnesses during trial and only cross-examined four witnesses. It should be pointed out that 70 hours were spent by a law clerk for preparing briefs of documents for witnesses and 5 hours

> were for a student. It is said counsel for Mr. Moyse need not have spent so much preparation time. I cannot say that the time spent was obviously too much. Second-guessing successful counsel in a complex case such as this, particularly the spoliation case, is a difficult thing to do on the basis of simply looking at the hours.

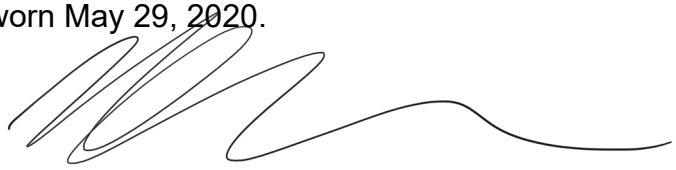
[23] In this case, with the personal attack made on Mr. Moyse by Catalyst that affected Mr. Moyse's livelihood, Catalyst had to know that Mr. Moyse had no alternative but to take every possible step he could to defend himself.

[24] Taking into account the factors in rule 57.01 and discussed in *Andersen v St. Jude Medical Inc.*, [2006] O.J. No. 508 (Div. Ct.), I fix the partial indemnity costs to be paid to Mr. Moyse by Catalyst at the amount claimed of $339,500.18.

Newbould J.

Date: October 7, 2016

This is Exhibit “G” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.



Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Court awards over $1.5 million in costs against Catalyst Capital in lawsuit with West Face and Brandon Moyse; West Face launches catalystlitigation.com website

TORONTO, Oct. 13, 2016 /CNW/ - West Face Capital Inc. announced today that Justice Newbould of the Superior Court of Justice in Ontario has awarded costs of $1.2 million to West Face, on a substantial indemnity basis, and $340,000 to Brandon Moyse on a partial indemnity basis, to be paid by The Catalyst Capital Group Inc. in connection with Court File No. CV-16-11272-00CL.

In August of this year, Justice Newbould dismissed in its entirety the lawsuit brought by Catalyst against West Face Capital and Mr. Moyse, related to West Face's successful acquisition of WIND Mobile Corp. in 2014. Justice Newbould's cost endorsement noted that the lawsuit was driven by Catalyst CEO Newton Glassman, who "was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else." Justice Newbould also found that Mr. Glassman "was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed."

New Website

West Face also announces the launch of a new website at www.catalystlitigation.com. Due to the large volume of documents, and in response to numerous inquiries from current and prospective investors, service providers and industry participants that we interact with, West Face has assembled the public court materials from the various lawsuits launched by Catalyst against West Face in the archive hosted on this website, including materials filed in court by each of Catalyst and West Face.

West Face believes that the Catalyst and Callidus claims in each of these proceedings are without merit and is vigorously defending each of these proceedings.

About West Face Capital Inc.

West Face Capital Inc. is one of Canada's leading alternative investment managers combining control-through-distressed, high-yield, negotiated finance, proactive equity, and private equity activities. West Face's capabilities are underpinned by a seasoned multi-disciplinary investment team, proprietary origination channels, deep sector expertise, and the ability to address investment targets in domestic and international markets.

SOURCE West Face Capital Inc.

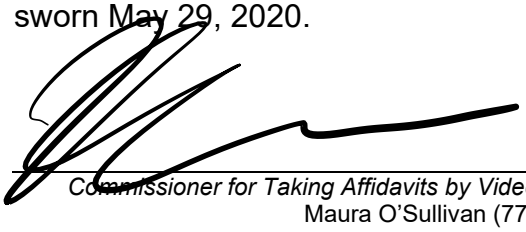
For further information: Philip Panet, General Counsel & Secretary, West Face Capital Inc., 2 Bloor Street East, Suite 3000, Toronto, Ontario, M4W 1A8, Tel: (647) 724-8900

RELATED LINKS

http://www.catalystlitigation.com

www.westfacecapital.com

This is Exhibit “H” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.



Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Catalyst Capital Group Comments on West Face Statements

October 13, 2016 09:36 PM Eastern Daylight Time

TORONTO--(BUSINESS WIRE)--The Catalyst Capital Group Inc. ("Catalyst"), Canada's second-largest independent private equity firm, today commented on recent statements by West Face Capital Inc. regarding ongoing litigation related to its acquisition of WIND Mobile Corp and the short attack at Callidus Capital Corporation:

"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 the 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 trampled or counterparties act unethically. Because ultimately, it is our LPs and investors that are impacted.

"It should be highly concerning to numerous stakeholders that West Face has determined to litigate through the public at large, in full knowledge of an upcoming jury trial regarding the WIND acquisition, and the fact that the Brandon Moyse/West Face decision is being appealed. The appeal is on the basis of a denial of procedural fairness, errors of law in determining the spoliation claim and errors of fact and mixed fact and law in determining the claims for spoliation and the misuse of Catalyst's confidential information. The award by Justice Newbould on a substantial indemnity basis ignores finding by Justice Lederer, among other things, and is a continuation of the basis for our appeal.

"Catalyst has put its faith in the judiciary and expect that our claims and appeals will be heard fairly and that judgment will expose the truth of West Face's actions, character and values."

Note to Editors: Detailed summary regarding Catalyst Capital's notice of appeal from the trial decision of Justice Frank Newbould of the Ontario Superior Court of Justice - Commercial List dated August 18, 2016 in Court File No. CV-14-507120.

Errors of Fact and Procedural Unfairness:

- In his review of the evidence and determination of disputed facts relating to Catalyst's claim that Brandon Moyse and West Face Capital Inc. misused its confidential information, the trial judge made several palpable and overriding errors of fact. Catalyst is aware of over 30 errors of fact as demonstrated by the stark difference between the trial judge's ruling as compared to the actual record. The mishandling or willful ignorance of these facts directly influenced the determination that West Face and Moyse were not liable for misuse of confidential information.
- Catalyst also believes that the trial judge applied an inconsistent standard in his

evaluation of the witnesses. For example, Catalyst highlights that there were numerous and glaring inconsistencies by defendants' oral evidence that directly contradicted contemporaneous documentary evidence.

- For example:
  - The trial judge erred in finding that West Face "took seriously" the issue of confidentiality when the documentary and oral evidence demonstrates that in March and April 2014, Tom Dea knowingly and repeatedly distributed Catalyst's confidential information to his partners and reviewed that information to determine if it was "helpful" to West Face; and
  - The trial judge erred in finding that Wind was the only telecom investment West Face was working on in spring 2014 when West Face's witnesses admitted and documentary evidence demonstrated it was also considering an investment in Mobilicity.
- While the opposite standard was applied to the Plaintiffs. For example, Newton Glassman's, Catalyst's Managing Partner, unique experience with the only similar case to be litigated in North America and his legal background were summarily dismissed, when the undisputed fact is that Mr. Glassman was significantly involved in the successful outcome of the similar case before the U.S. Supreme Court, and also graduated from law school.
- Catalyst believes that this inconsistent standard led to procedural unfairness and on this basis alone a new trial is required.

Error of Law in Determining the Spoliation Issue

- It is undisputed that Moyse consented to an order that required him to preserve the contents of his personal computer and that Moyse then employed a military-grade document deletion software the night before his personal computer was scheduled to be forensically imaged.
- Catalyst believes that the motion judge erred in law in relation to his findings on the issue of spoliation of evidence by [Brandon] Moyse. The trial judge erred in law by ignoring the historical evidentiary standard requiring defendants to prove that they had not destroyed the evidence in question, which Moyse and West Face failed to do, but rather put the task on Catalyst to produce a particular piece of evidence that is by definition impossible to prove - and by Moyse's own admission was destroyed. This was a precedent setting error of law.
- The consequences for this issue go beyond the dispute between these parties – the trial judge created a new, improper and impossible standard to meet that rewards defendants for destroying evidence and will make it easier in future cases for defendants to destroy relevant evidence with impunity.

About Catalyst:

The Catalyst Capital Group Inc., a private equity investment firm with more than $6 billion in assets under management founded in 2002, is a leader in operationally focused turnaround investing. The firm's mandate is to manufacture risk

adjusted returns, in keeping with its philosophy of "we buy what we can build." Catalyst's Guiding Principles of investment excellence through operational involvement, superior analytics, attention to detail, intellectual curiosity, team and reputation are key to the firm's success. The Catalyst team collectively possesses more than 110 years of extensive experience in restructuring, credit markets and merchant and investment banking in Canada, the United States, Latin America and Europe.

Contacts

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This is Exhibit “I” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Court File No. CV-16-11272-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

PLAINTIFF'S CLOSING SUBMISSIONS

June 14, 2016

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Lawyers for the Defendant, Brandon Moyse

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
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17. THE CONSORTIUM SUCCESSFULLY BUYS WIND

A. WEST FACE JOINS THE CONSORTIUM, FINDS OUT CATALYST IS IN EXCLUSIVITY

242. By July 21, 2014, West Face's negotiations with the confidential strategic partner had ended. West Face sought instead to join forces with Tennenbaum, LG Capital and Oak Hill to form a consortium that would bid on Wind. On that date, Michael Leitner, the managing partner of Tennenbaum, and Boland exchanged emails about Catalyst seeking exclusivity from VimpelCom.[175]

243. On July 22, 2014, Leitner informed Griffin, Fraser and Boland that Catalyst "may have this in exclusivity by the end of the week".[176]

244. On July 23, 2014, Jonathan Friesel of Oak Hill Capital, an entity that dropped out of the consortium at the last minute, informed Boland that he was informed by UBS that VimpelCom had entered into exclusivity at the "reserve price" and was tied up for 5-7 days. Boland forwarded this email to his partners Griffin, Fraser and Dea.[177]

245. Griffin's evidence that he "assumed," but did not "know," that VimpelCom had entered into exclusivity with Catalyst is an exercise in metaphysical sophistry. Griffin's refusal to acknowledge that he "knew" Catalyst was in exclusivity is akin to Moyse's refusal to admit that he "knew" Catalyst was interested in pursuing a Wind deal in March 2014 – it is not based on documents, but based on an unrealistic philosophical inquiry into what it means to "know" anything.

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[175] WFC0069995 – Emails between Leitner and Boland dated July 21, 2014 **(CPM Tab 174)**.
[176] WFC0059172 – Emails between Leitner, Griffin and Boland dated July 22, 2014 **(CPM Tab 175)**.
[177] WFC0048724 – Emails dated July 23, 2014 **(CPM Tab 176)**.

246. The more credible finding is that by July 23, 2014, West Face knew, for certain, that Catalyst was in exclusivity with VimpelCom at the reserve price.

B. THE CONSORTIUM PLANS TO BLOCK CATALYST'S OFFER

247. As of July 30, 2014, the Consortium's plan contemplated a purchase of both Wind and Mobilicity.[178] That plan was abandoned when the Consortium learned on Friday, August 1, 2014, that VimpelCom's board of directors was going to consider a Catalyst SPA. On that date, Leitner wrote to the other Consortium members:

> I just heard that VimpelCom is taking the Catalyst SPA to the board this weekend. There has been no retrade as of yet, but parties are bracing for it. Suggest we get on a call to discuss. Have some feedback on price levels as well.[179]

248. The Consortium was determined not to give up on Wind just yet. Using the only option available to them, namely, putting in an offer that Catalyst could not match, the Consortium elected to waive the regulatory approval condition.

249. West Face knew, from Moyse, that a proposal that waived regulatory approval would give it an advantage over Catalyst, because Catalyst could not, and would not, waive regulatory approval. By waiving this condition, West Face and the Consortium knew that their offer would be considered superior to Catalysts.

250. For this reason, even though they were bidding against a party that had been in exclusivity for over a week at the reserve price, the Consortium constructed a "superior" proposal that did not increase the price offered for VimpelCom's interest in Wind. This is completely illogical bidding

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[178] Griffin Trial Cross, June 9, 2016, p. 1055, l. 8 – p. 1056, l. 4 **(CPM Tab 177)**. See also WFC0070195 – emails dated July 30, 2014 re. Mobilicity Term Sheet **(CPM Tab 178)**.
[179] WFC0047832 – Emails dated August 1, 2014 between Leitner and others **(CPM Tab 179)**.

behaviour in a supposedly "blind" auction, unless one infers that the Consortium had knowledge of Catalyst's negotiating positions.

C. THE CONSORTIUM SUBMITS A "SUPERIOR PROPOSAL"

251. On August 7, 2014, the Consortium sent VimpelCom a proposal that it labelled a "superior" proposal to purchase Wind (the "August Proposal"). The August Proposal entailed an offer to purchase VimpelCom's debt and equity interests in Wind, without conditions, for total consideration of $285 million. In so doing, the Consortium would effectively step into VimpelCom's shoes as the majority financial shareholder and minority voting shareholder, with no guarantee that it would receive regulatory approval to re-structure the voting interests in Wind at a late date.

252. Notably, all of the witnesses at the trial pointed to a non-witness (Lawrence Guffey) as the individual who allegedly came up with this proposed deal structure in August. Catalyst was therefore unable to cross-examine at trial and test the credibility of this alleged fact. There is no documentation that has been produced that supports the story that this deal structure was proposed or developed by Guffey.

253. In fact, among the three Consortium members who participated in the August Proposal, two of the principals of the Consortium members did not testify: Guffy and Boland. West Face also did not call Fraser to testify, even though he was deeply involved in the August Proposal as well. Catalyst submits that to the extent any evidence regarding these individuals' roles in this action is ambiguous, the Court can draw an adverse inference from West Face's failure to call Boland and Fraser to testify at trial and to subject themselves to cross-examination.

254. The evidence from representatives of the three Consortium members who did testify – Griffin, Hamish Burt on behalf of LG Capital, and Leitner – gave evidence that they did not view the waiving of regulatory approval to entail a significant risk.

255. This evidence does not accord with common sense, the obligations an investment fund owes to its investors or with the regulatory history leading up to August 2014. As the events of 2012-2014 demonstrated, regulatory approval of a change of control of spectrum licenses was not a rubber stamp and approval could not be presumed.

256. Notably, West Face engaged with Industry Canada once, in May 2014, before it was a member of the consortium. There is no documentary evidence in the record that sets out what steps, if any, LG Capital and Tennenbaum took to assure themselves that Industry Canada would approve the Consortium's application to re-structure Wind's voting control.

257. However, there is evidence that Tennenbaum viewed litigation as a mitigating strategy. Leitner's evidence at trial was that through ownership of shareholder loans, if the Consortium did not get shareholder approval, Wind would go into a CCAA proceeding, auction the business and the Consortium would receive its capital back.[180]

258. **This was the same litigation strategy that Catalyst had presented to Industry Canada in March and May 2014 in the PowerPoint presentations prepared by Moyse.**

259. Leitner's evidence demonstrates that while the Consortium members claimed not to have known about Catalyst's regulatory strategy, their approach to their deal matched exactly what

[180] Leitner Trial Cross, June 9, 2016, p. 904, ll. 1-23 **(CPM Tab 180)**.

Catalyst believed a third party – not Catalyst, which could not sue the government – could adopt to pressure the government to grant it regulatory approval.

D. THE CONSORTIUM FINALIZES TRANSACTION FOR WIND

260. Shortly after Catalyst's exclusivity with VimpelCom expired, VimpelCom entered into exclusivity with the now-expanded Consortium.

261. While it was in exclusivity with VimpelCom, West Face's attitude towards regulatory concessions changed, and merged with Catalysts.

262. On August 26, 2014, Boland wrote to Leitner, Guffy and Fraser to update them on a discussion he had with Lacavera. According to Boland, Lacavera was concerned about a regulatory approval ("Phase One") issue:

> 6. Phase one issue – this might be a problem:
>
> a. Given that we control the application he is concerned that we may over reach (**by asking for roaming, spectrum transfer to incumbent etc**) and could thwart the "sailing through" application.[181]

263. All of sudden, out of nowhere, the Consortium appears to have been discussing spectrum transfer to an incumbent.

264. Griffin was asked repeatedly during his cross-examination if spectrum transfer to an incumbent formed any part of West Face's investment thesis. He was adamant it did not:

> Was there ever any thinking at all about selling Wind to an incumbent as part of your investment thesis?

[181] WFC0042949 – Emails among the Consortium members, August 2014. The Boland email is on page 2-3 **(CPM Tab 181)**.

This is Exhibit “J” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

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50. Despite the supposed confidentiality of the negotiations between VimpelCom and Catalyst's, the Consortium was clearly aware of the content of those negotiations. On July 21, 2014, Tennenbaum's principal, Michael Leitner, wrote to West Face's principal, Greg Boland, stating that he "heard [C]atalyst is seeking exclusivity this week".[30] Boland replied that West Face "asked for that a couple times and [it] didn't work".[31]

51. On July 22, 2014, Tennenbaum informed West Face that Catalyst "may have this in exclusivity by the end of the week."[32] This information should not have been known by any parties other than Catalyst, VimpelCom and UBS.

(vii) Catalyst and VimpelCom Agree to Negotiate Exclusively

52. As it turned out, Tennenbaum's information was correct. On July 23, 2014, believing that they were close to a deal, Catalyst and VimpelCom entered into an agreement pursuant to which VimpelCom could only negotiate with Catalyst (the "Exclusivity Agreement"):

> (a) VimpelCom and Catalyst shall and shall cause their respective Affiliates to deal exclusively with each other in connection with the Transaction and VimpelCom shall use its reasonable efforts to ensure that GWMC and its subsidiaries deal exclusively with Catalyst and its respective Affiliates in connection with the Transaction;
>
> (b) VimpelCom shall not, shall ensure that its Affiliates will not, and shall use its reasonable efforts to ensure that GWMC and its subsidiaries do not, directly or indirectly, **through any of its or their respective Representatives,** solicit or encourage offers from, participate in any negotiations or discussions with, enter into any agreements with, or furnish any information to, any person regarding any alternative transaction to the Transaction (including

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[30] WFC0069995 – Emails between Leitner and Boland dated July 21, 2014 **(Suppl. Resp. MR of Catalyst at Tab A2, pg. 11)**.
[31] WFC0069995 – Emails between Leitner and Boland dated July 21, 2014 **(Suppl. Resp. MR of Catalyst at Tab A2, pg. 11)**.
[32] WFC0059172 – Emails between Leitner, Griffin and Boland dated July 22, 2014 **(Suppl. Resp. MR of Catalyst at Tab A3, pgs. 12-14)**.

> but not limited to an acquisition, merger, arrangement, amalgamation, other business combination, joint venture or equity or other financing) involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets (an "Alternative Transaction"); and
>
> (c) VimpelCom shall, shall cause its Affiliates and its and their respective Representatives to and shall use its reasonable efforts to ensure that GWMC and its subsidiaries, (A) discontinue or cause to be discontinued any existing activity of the nature described in Section 2(a), including but not limited to precluding access to any due diligence data room (except for access provided to Catalyst and its Representatives) and (B) enforce and not release any third party from, or otherwise waive, any standstill covenants or obligations owed by any such third party to VimpelCom and/or its Affiliates and/or GWMC or its subsidiaries under any confidentiality agreement entered into with respect to a potential Transaction involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets. [Emphasis added.][33]

53. The Exclusivity Agreement prevented VimpelCom *and* its agents and advisors (including UBS) from negotiating or having discussions with any other party, or providing any other party with information regarding a Wind transaction, during its term. In addition, the Exclusivity Agreement made the existence and the terms of the Exclusivity Agreement itself confidential.[34]

54. The initial term of the Exclusivity Agreement ran from July 23 to July 29, 2014.[35]

(viii) The Consortium Learns of the Exclusivity Agreement and Price

55. On July 23, 2014, Jonathan Friesel of Oak Hill, an entity that had earlier dropped out of the Consortium, informed Boland (of West Face) that he was informed by UBS that VimpelCom had entered into exclusivity at the "reserve price" (meaning the $300 million enterprise value set

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[33] Exclusivity Agreement (**Third AMR of UBS at Tab 2C, pgs. 47-55; MR of GA at Tab 6, pgs. 87-91**).
[34] Exclusivity Agreement (**Third AMR of UBS at Tab 2C, pgs. 47-55; MR of GA at Tab 6, pgs. 87-91**).
[35] Exclusivity Agreement (**Third AMR of UBS at Tab 2C, pgs. 47-55; MR of GA at Tab 6, pgs. 87-91**).

by VimpelCom at the outset of the auction process) and was tied up for 5-7 days. Boland forwarded this email to his partners Griffin, Fraser and Dea.[36]

(ix) Catalyst and VimpelCom Extend Exclusivity Agreement

56. By July 30, it appeared that VimpelCom and Catalyst were very close to a deal and they agreed to extend the Exclusivity Agreement to August 5, 2014.[37]

57. On August 1, VimpelCom confirmed to Catalyst that the share purchase agreement was "substantially completed" subject to settling details in the schedules[38].

58. At the same time, VimpelCom informed Catalyst that it planned to finalize a support agreement with Globalive and Tony Lacavera.[39] The purpose of the support agreement was to engage Globalive and ensure that it would support a transaction with Catalyst.

59. Incredibly, the Consortium learned, **on the very same day**, that the Catalyst share purchase agreement was settled and would be going to VimpelCom's board of directors. Leitner wrote to the other Consortium members:

> I just heard that VimpelCom is taking the Catalyst SPA [share purchase agreement] to the board this weekend. There has been no retrade as of yet, but parties are bracing for it. Suggest we get on a call to discuss. Have some feedback on price levels as well.[40]

60. This communication demonstrates the depth of knowledge that Leitner and the other Consortium participants had into Catalyst's supposedly confidential negotiations with VimpelCom. Not only did they know when the share purchase agreement was going to

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[36] WFC0048724 – Emails dated July 23, 2014 **(Suppl. Resp. MR of Catalyst at Tab A4, pgs. 15-16)**.
[37] de Alba May 27, 2016 Affidavit at ¶140 **(MR of WF at Vol. 15, Tab 47, pgs. 5947)**.
[38] de Alba May 27, 2016 Affidavit at ¶143 **(MR of WF at Vol. 15, Tab 47, pgs. 5947-5948)**.
[39] de Alba May 27, 2016 Affidavit at ¶ 143 **(MR of WF at Vol. 15, Tab 47, pgs. 5947-5948)**.
[40] WFC0047832 – Emails dated August 1, 2014 between Leitner and others **(Suppl. Resp. MR of Catalyst at Tab A5, pgs. 17-19)**.

VimpelCom's board of directors, they were also aware of the terms of the share purchase agreement. Leitner's communication also indicates that the Consortium had not given up on Wind, despite the Exclusivity Agreement, and was tailoring a proposal for VimpelCom.

(x) Catalyst Confirms that the Share Purchase Agreement is Substantially Settled

61. By August 3, 2014, Catalyst and VimpelCom agreed that the deal was "substantially settled", subject to approval from VimpelCom's directors.[41] This agreement automatically extended the Exclusivity Agreement an additional five business days.[42]

(xi) The Consortium Submits a "Superior" Proposal

62. Late in the evening of August 6, 2014[43], Leitner, on behalf of the Consortium, sent VimpelCom and UBS what he labelled as a "Superior Proposal to purchase WIND Canada" (the "Proposal").

63. The Consortium carefully tailored their Proposal to appear as a better alternative to the Catalyst share purchase agreement that the Consortium knew VimpelCom's board of directors was considering at the time. The language in the Proposal contrasts its terms with a phantom offer (which the Consortium knew was Catalyst's offer):

(a) "Our proposal will be superior to any other offer as our proposal will <u>not</u> require regulatory approval…"

(b) "Our transaction will not be a change of control of [Wind], and as a result requires no engagement with the regulatory authorities"

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[41] de Alba May 27, 2016 Affidavit at ¶133-145 **(MR of WF at Vol. 15, Tab 47, pgs. 5945-5948)**.
[42] de Alba May 27, 2016 Affidavit at ¶ 144-145 **MR of WF at Vol. 15, Tab 47, pg. 5948)**.
[43] Because of what appear to be time zone differences between affiants, it may have been delivered on August 7.

(c) "[O]ur proposal will be economically superior to any other proposal…"[44]

64. Notably, even though the Proposal was described by Leitner as a "superior" proposal, it did not offer VimpelCom a higher price for Wind than the "reserve" price that had been set by VimpelCom. All of the so-called "superior" terms concerned non-monetary issues. The Consortium knew that its Proposal was "superior" to Catalyst's bid because it had improperly received confidential information concerning the terms of Catalyst's deal.

(xii) VimpelCom and Catalyst Agree to Extend the Exclusivity Agreement

65. On August 8, VimpelCom and Catalyst extended the Exclusivity Agreement to August 18.[45]

66. On August 10, 2014, Leitner discussed the Proposal with UBS and provided details of further equity commitments to bolster the Proposal.[46] Leitner bragged to the Consortium of his discussion with UBS:

> I took the liberty of mentioning to UBS that this last leg of the commitments may come this evening.[47]

67. It is evident that behind Catalyst and VimpelCom's negotiations, at the very least, UBS was keeping open negotiations with the Consortium and, for their part, the Consortium was continuing to feed information to VimpelCom to induce it to consider its Proposal despite clear knowledge and understanding that VimpelCom was in exclusivity with Catalyst.

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[44] WFC0051622 – Emails between Peter Fraser ("Fraser"), Griffin, Tom Dea and others **(Suppl. Resp. MR of Catalyst at Tab A6, pgs. 20-22)**; Leitner June 1, 2016 Affidavit **(MR of WF at Vol. 15, Tab 51, pgs. 6034-6047)**.
[45] de Alba May 27, 2016 Affidavit at ¶ 151 **MR of WF at Vol. 15, Tab 47, pg. 5949)**.
[46] WFC0051186 – Emails with Leitner, Greg Boland ("Boland") and Jordan Swartz **(Suppl. Resp. MR of Catalyst at Tab A7, pgs. 23-26)**.
[47] WFC0051186 – Emails with Leitner, Greg Boland ("Boland") and Jordan Swartz **(Suppl. Resp. MR of Catalyst at Tab A7, pgs. 23-26)**.

(xiii) VimpelCom and Catalyst Inform the Regulator that a Deal is Done

68. On August 11, VimpelCom and Catalyst held a joint call with Industry Canada to tell the regulator that a Wind deal "was done".[48]

69. Despite this representation, an internal West Face email from a West Face partner, Peter Fraser, to his other partners, Griffin and Boland, indicates that UBS was telling the Consortium that there was uncertainty about a deal:

> Herbst [of UBS] said he can't really talk but wasn't too encouraging. I said you could meet Felix [of VimpelCom] in Amsterdam if he wanted.[49]

(xiv) UBS Tells the Consortium Not to "Burn the File"

70. On August 14, 2014, Leitner emailed the Consortium members to tell them that UBS had provided him with insight into the process:

> The [VimpelCom] board met last Thursday and Friday – ostensibly to approve the 'bird in hand'. It's now been almost one full week and no announcement. I spoke to UBS yesterday asking what the latest update is. Their words: "don't burn the file yet".[50]

71. Boland of West Face suggested in reply that the Consortium should continue to press VimpelCom:

> I think it would be easy and painless to put in a letter enforcing willingness to provide equity financing. If the Catalyst deal gets wobbly the more heft we have in our syndicate the better. Is there any reason we can't do this asap to at leaf (sic) maximize our optionality?[51]

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[48] de Alba May 27, 2016 Affidavit at ¶ 156 **(MR of WF at Vol. 15, Tab 47, pg. 5950)**.
[49] WFC0051878- Emails with Fraser, Griffin and Boland **(Suppl. Resp. MR of Catalyst at Tab A8, pg. 27)**.
[50] WFC0051186 **(Suppl. Resp. MR of Catalyst at Tab A7, pgs. 23-26)**.
[51] WFC0051186 **(Suppl. Resp. MR of Catalyst at Tab A7, pgs. 23-26)**.

(xv) VimpelCom Suddenly Demands a Break Fee

72. On August 15, VimpelCom returned to Catalyst with two new, substantial demands: it insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and it asked for a $5-20 million break fee if the deal did not close.[52] Both proposed terms came after VimpelCom told Catalyst that the SPA was substantially settled and after the parties told Industry Canada that the deal was done.

73. The exclusivity period between Catalyst and VimpelCom terminated on August 18 without a signed SPA[53] in the face of VimpelCom's demands to reduce the closing period and for a break fee.

74. By August 21, VimpelCom agreed with the Consortium that it would not enter into another exclusivity agreement with any party (besides the Consortium) until August 25, 2014. On August 27, VimpelCom and the Consortium entered into exclusivity. On September 16, 2014, the Consortium concluded a deal with VimpelCom to purchase Wind for $300 million.[54]

75. The trial of this Action will examine the reasons why VimpelCom retraded the deal and, *inter alia*, requested the break fee from Catalyst *after* it previously agreed that the share purchase agreement was substantially settled, and the connection of the request for the break fee to the Consortium's Proposal.

76. The Action against the Defendants includes the following main allegations:

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[52] de Alba May 27, 2016 Affidavit at ¶ 157-159 **(MR of WF at Vol. 15, Tab 47, pgs. 5950-5951)**.
[53] de Alba May 27, 2016 Affidavit at ¶ 157 and 160 **(MR of WF at Vol. 15, Tab 47, pgs. 5950-5951)**.
[54] Griffin June 4, 2016 Affidavit at ¶ 124-126 **(MR of WF at Vol. 15, Tab 48, pgs. 6000-6001)**.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM

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Lawyers for the Plaintiff

This is Exhibit “K” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Court of Appeal File No: C-65431
Superior Court File No. CV-16-11595-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

- and -

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants
(Respondents)

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July 24, 2018

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PART I - JUDGMENT UNDER APPEAL

1. The plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), appeals from the judgment of The Honourable Mr. Justice Hainey ("**Justice Hainey**" or the "**Motions Judge**") dated April 18, 2018 (the "**Judgment**"),[1]

(a) dismissing Catalyst's action herein (the "**Current Action**") against all of the defendants on the grounds of issue estoppel, cause of action estoppel and/or abuse of process based on a prior action involving a former employee (the "**Moyse Action**);

(b) striking Catalyst's breach of contract claims against the defendants, Globalive Capital Inc. ("**Globalive**") and UBS Securities Canada Inc. ("**UBS**"), without leave to amend.[2]

2. The Motions Judge erred in his application of the preclusive doctrines of issue estoppel, cause of action estoppel and abuse of process. In doing so, he dismissed the Current Action against all the defendants in circumstances where the causes of action are different from the Moyse Action and the fundamental issues relating to those causes of action have yet to be adjudicated on the merits.

3. The Motions Judge further erred by finding that it was plain and obvious that Catalyst's breach of contract claims against UBS or Globalive could not succeed or, in the alternative, by failing to grant Catalyst leave to amend its statement of claim on the basis that the record bore viable claims that could be pleaded to rectify any deficiency in the pleading.

4. Catalyst requests that its appeal be granted. If required, Catalyst further requests leave to amend its statement of claim to address any perceived deficiency.

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[1] Judgment of Justice Hainey dated April 18, 2018, Appellant's Appeal Book and Compendium ("**ABC**"), Tab 2; Reasons for Decision in *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471 ("**Reasons on the Motion Below**"), ABC Tab 3

[2] In this appeal, the plaintiff has not appealed the costs of the Motion below as the issue of costs has yet to be determined by the Motions Judge. It is anticipated that any appeal of a costs order will be addressed at the hearing of the appeal.

> "Each Party agrees that …such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement." [emphasis added]

15. It was recognized and acknowledged that should the Confidentiality Agreement be breached, that it would cause irreparable damage to the non-breaching party.[12]

16. On May 6, 2014, Catalyst and VimpelCom agreed to a purchase price for Wind of $300 million.[13] Catalyst and Vimpelcom worked to complete a share purchase agreement.[14] As described in paragraphs 22-23 below, Catalyst and VimpelCom also entered into the Exclusivity Agreement, pursuant to which VimpelCom and UBS were prohibited from directly or indirectly soliciting or encouraging any offers, participating in any negotiations or discussions with any other party regarding any alternative transaction, or from furnishing any information to any other party in respect of the Wind transaction.[15] It was acknowledged that a breach of this Agreement would entitle the non-breaching party to equitable relief, without proof of special damages.[16]

(ii) The Consortium

17. Prior to the Exclusivity Agreement, VimpelCom had negotiated the sale of Wind with other entities including Tennenbaum and West Face.[17]

18. West Face submitted four proposals to VimpelCom between April 23 and June 22, 2014.[18] Each of the proposals contained a different deal structure, but all involved VimpelCom

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[12] Confidentiality Agreement, para. 11, ABC Tab 17 p 43. See also Confidentiality Agreement, para. 3.4, ABC Tab 17 p 41
[13] Reasons on the Motion Below, para. 16, ABC Tab 3 p. 29
[14] Reasons on the Motion Below, para. 16, ABC Tab 3 p. 29
[15] Exclusivity Agreement, para. 2(b), ABC Tab 21 p 344
[16] Exclusivity Agreement, para. 6(c), ABC Tab 21 p 346
[17] Reasons on the Motion Below, para. 17, ABC Tab 3 p. 29

remaining a minority equity holder in Wind or tying consideration to a future event.[19] VimpelCom rejected the proposals.

19. By the end of June 2014, West Face was not a serious player in the negotiations for Wind.[20] On July 21, West Face joined forces with Tennenbaum and the other Consortium members. As of late July, VimpelCom did not consider the Consortium or its members to be credible bidders for Wind.[21]

20. Despite the terms of the Agreements and the supposed confidentiality of the negotiations between VimpelCom and Catalyst, the Consortium was aware of the content of those negotiations and was kept apprised of their status by VimpelCom, UBS and Globalive.[22] For example, on July 21, 2014, Tennenbaum's principal, Michael Leitner, wrote to West Face's principal, Greg Boland, stating that he "heard [C]atalyst is seeking exclusivity this week". [23] On July 22, Leitner told Boland that "I spoke to Felix [Saratovsky of VimpelCom]…Catalyst may have this in exclusivity by the end of the week".[24] On July 23, Leitner and Boland were advised that "[Jonathan] Herbst [of UBS] called me to say that the company has entered into exclusivity at the reserve price - $150 million".[25]

21. Information regarding Catalyst's exclusivity and reserve price should not have been

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[18] Affidavit of Anthony Griffin, sworn June 4, 2016 ("**Griffin June 4, 2016 Affidavit**"), paras. 36, 38-39, and 54, ABC Tab 28
[19] Griffin June 4, 2016 Affidavit, paras. 36, 38-29, and 54, ABC Tab 28
[20] Griffin June 4, 2016 Affidavit, paras. 124, ABC Tab 28
[21] Examination in Chief of Michael Leitner at the Trial of the Moyse Action on June 9, 2016, p.895:18-p.896:12, ABC 31
[22] Further allegations are made in paras. 51-122 of the Amended Amended Statement of Claim in the Current Action, ABC Tab 6, regarding the disclosure of confidential information by VimpelCom, UBS, Globalive and Anthony Lacaverra (CEO of Wind and principal of Globalive):
[23] Emails between Michael Leitner and Greg Boland dated July 21, 2014, ABC Tab 18. See also, Email between Michael Leitner, Greg Boland and others dated July 21-22, 2014, ABC Tab 19
[24] Email between Michael Leitner, Greg Boland and others dated July 21-22, 2014, ABC Tab 19
[25] Emails between Jonathan Friesel, Michael Leitner, Greg Boland and others dated July 23, 2014, ABC Tab 20

disclosed to members of the Consortium by VimpelCom and UBS. The full extent of the information disclosed by Vimpelcom or UBS is currently unknown. Neither VimpelCom, UBS nor any of the key participants (e.g. Anthony Lacavera, the CEO of Wind and the principal of Globalive) have been examined for discovery on this issue.

(iii) VimpelCom and Catalyst Agree to Negotiate Exclusively

22. On July 23, 2014, VimpelCom and Catalyst entered into the Exclusivity Agreement whereby VimpelCom and its representatives would only negotiate exclusively with Catalyst until July 30.[26]

23. The Exclusivity Agreement specifically prohibited VimpelCom, UBS and Wind from directly or indirectly soliciting or encouraging any offers from, negotiating or discussing any alternative transaction with, or furnishing any information to any other party in respect of a transaction with Wind.[27] The terms of the Exclusivity Agreement itself were to be kept confidential.[28] It was recognized and acknowledged that, should the Exclusivity Agreement be breached, that it would cause irreparable damage and Catalyst would be entitled to "the remedy of injunction or …other equitable relief", without proof of special damages.[29]

24. By July 30, 2014, VimpelCom and Catalyst were close to finalizing the SPA.[30] They agreed to extend the Exclusivity Agreement to August 5.[31] By August 3, VimpelCom confirmed that, other than the schedules, the SPA was "substantially completed" and only approval from

[26] Reasons on the Motion Below, para. 19, ABC Tab 3 p. 30
[27] Exclusivity Agreement, para. 2(b), ABC Tab 21 p. 344
[28] Exclusivity Agreement, para. 4, ABC Tab 21 p. 345
[29] Exclusivity Agreement, para. 6(c), ABC Tab 21 p. 346
[30] Reasons on the Motion Below, para. 20, ABC Tab 3 p. 30
[31] Reasons on the Motion Below, para. 20, ABC Tab 3 p. 30

VimpelCom's Board of Directors was needed.[32] By August 7, the parties had signed off on the terms of the schedules, and a 300 plus page SPA was ready to be signed, subject only to formal approval by VimpelCom's Board.[33]

25. As to the regulatory conditions, because the SPA involved a change of control at Wind, the SPA agreed to by Vimpelcom and Catalyst was conditional on government approval.[34] However, since the change of control was to a Canadian entity Catalyst, this condition was not considered a serious risk. Indeed, Vimpelcom "received positive feedback from the government" about Catalyst's acquisition of Wind and agreed that the government would consider "Catalyst to be a preferred solution to the present situation". [35]

26. Aside from these standard conditions, Catalyst had sought concessions from the government to be able to sell its shares to a wireless incumbent (e.g. Rogers) if it could not operate Wind profitably.[36] This however was not a condition of the SPA and was not a predicate for closing the Wind transaction.[37] The agreed upon SPA explicitly stated that "before closing Catalyst could not discuss with any Governmental Authority the sale or transfer of Business, or any of its assets, …to an Incumbent".[38] Instead, the SPA "did permit Catalyst after closing to pursue regulatory concessions from Industry Canada *that WIND had been seeking*".[39]

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[32] Email from Felix Saratovsky to Gabriel De Alba dated August 1, 2014, ABC Tab 23
[33] Affidavit of Gabriel De Alba, sworn May 27, 2016, para. 149, ABC Tab 27
[34] Share Purchase Agreement, para. 7.3, ABC Tab 23 p. 363
[35] Email from Felix Saratovsky to Jon Levin dated August 15, 2014 ABC Tab 26
[36] It was the intention of Catalyst to build a telecom business to compete with Rogers, Bell and Telus and it would do so by combining Wind with Mobilicity. However a concession was sought to sell the business to an incumbent in the event Catalyst was not successful.
[37] Share Purchase Agreement, ABC Tab 23. See also Cross-Examination of Gabriel De Alba at the Trial of the Moyse Action, June 7, 2016, pp. 278:1-281:1, ABC Tab 29 and Cross-Examination of Newton Glassman at the Trial of the Moyse Action, June 7, 2016, p.390:1-19 and pp.504:19-507:19, ABC Tab 29
[38] Reasons on the Moyse Action, para. 131 footnote 14, ABC Tab 4 p. 96-97
[39] Reasons on the Moyse Action, para. 131 footnote 14, ABC Tab 4 p. 96-97

27. On August 8, 2014, the Exclusivity Agreement was extended to August 18.[40] On August 11, Vimpelcom and Catalyst held a joint conference call with Industry Canada to advise that their deal "was done".[41]

(iv) The Consortium Submits a "Superior Proposal"

28. It is alleged in the Current Action that the defendants either breached or induced the breach of the Agreements. For example, the Consortium knew by August 1, when the SPA with Catalyst was going to be submitted to the Vimpelcom Board.[42] The Consortium also received comments "over the phone" from VimpelCom about the Consortium's SPA.[43] The Consortium also received some "feedback on price levels as well".[44] How and why the Consortium knew when the SPA would be before the VimpelCom Board and what the reference to "price levels" meant, came up incidentally in the Moyse Action. As Justice Newbould remarked, information about when the SPA was going to the board for approval "likely came ... from an advisor to Tennenbaum who may have obtained it from UBS".[45] What the "price levels" was in reference to remained unclear to Justice Newbould.[46] What is clear is that the information regarding the Catalyst SPA was supposed to be confidential and any dealings between VimpelCom and the Consortium was prohibited under the Agreements.

29. To pre-empt VimpelCom's approval of the SPA, the Consortium sent VimpelCom, its senior executives and UBS, a "superior proposal" on August 7 which stated:[47]

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[40] Reasons on the Motion Below, para. 23, ABC Tab 3 p. 30
[41] Reasons on the Motion Below, para. 24, ABC Tab 3 p. 30
[42] Emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, ABC Tab 22
[43] Emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, ABC Tab 22
[44] Emails between Peter Fraser, Michael Leitner and others dated August 1, 2014, ABC Tab 22
[45] Reasons on the Moyse Action, para. 111, ABC Tab 4 p. 91
[46] Reasons on the Moyse Action, para. 111, ABC Tab 4 p. 91
[47] Reasons on the Motion Below, para. 21, ABC Tab 3 p. 30

(a) "Our proposal will be superior to any other offer as our proposal will not require regulatory approval…"

(b) "Our transaction will not be a change of control of [Wind], and as a result requires no engagement with the regulatory authorities."

(c) "[O]ur proposal will be economically superior to any other proposal…"

30. The Consortium's proposal was deliberately provided during the period of the Exclusivity Agreement so that – as described by Leitner of Tennenbaum – the Vimpelcom Board had "2 birds in hand" when it came to approve the Catalyst SPA.[48] Providing the proposal before the Board approved the Catalyst SPA was, in the words of Leitner, the Consortium's "only play".[49] This was exactly what was prohibited under the Agreements. Of course, the entirety of the reasons for and the extent of the breaches of the Agreements are not fully known as none of the key participants have been subject to discovery.

(v) VimpelCom Suddenly Demands a Break Fee

31. On August 15, 2015, after having received the Consortium's bid, VimpelCom renewed two prior demands of Catalyst that had been rejected by Catalyst and abandoned by Vimpelcom early on in the negotiations: (1) it insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and (2) it demanded a $5-20 million break fee if such regulatory approval was not received within the two months.[50] Concurrent with these demands, UBS told the Consortium "don't burn the file yet".[51]

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[48] Emails between Michael Leitner, Peter Fraser, Anthony Griffin, Dea dated August 6/7, 2014, ABC Tab 24
[49] Emails between Michael Leitner, Peter Fraser, Anthony Griffin, Dea dated August 6/7, 2014, ABC Tab 24
[50] Reasons on the Motion Below, para. 25, ABC Tab 3 p. 30. See also Emails between Leitner, Boland and others from August 9-15, 2014, ABC Tab 25
[51] Emails between Michael Leitner, Greg Boland and others dated August 9-15, ABC Tab 25

Court of Appeal File No.: 65431
Super Court File No.: CV-16-11595-00CL

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Appellant

- and -

VIMPELCOM LTD. et. al.
Defendants/Respondents

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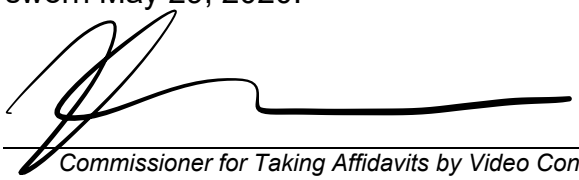
This is Exhibit “L” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.



Commissioner for Taking Affidavits by Video Conference (or as may be)
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SCC File No: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Applicant
(Appellant)

- and -

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., and WEST FACE CAPITAL INC.

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The proposed appeal addresses the consequences which can emerge when doctrines of efficiency are used to drive claimants from the "judgment seat". In this case, the Applicant proceeded with an earlier action against only one of the eleven defendants in the within action. Relying on the principles of efficiency in *Hryniak*, the trial of the first action was expedited to deal with narrowly focussed issues in a 6-day hearing. Concurrently, all rights in respect of the claims in the within action were preserved by Court order. Yet, the doctrines of abuse of process and estoppel were applied by the courts below to dismiss this second action. The courts below held that this second action ought to have been heard with the original action, notwithstanding that the original action had been expedited and only involved one of the eleven defendants in the second action.

2. This case provides an opportunity to consider the balance between this Court's recent call in *Hryniak* for proportional litigation, and the traditional doctrines of estoppel and abuse of process. Where multiple claims and litigants exist (as often happens), these traditional doctrines of estoppel and abuse of process need to be tempered to avoid undermining the principles of proportionality and ensure there is the fair adjudication of disputes.

3. In addition, this case raises the long unresolved issue of whether proof of detriment is required to succeed in a claim for breach of confidence. The law in Canada is conflicting and unclear on this issue and has been the subject of confusion and commentary by the courts and legal scholars.

4. These issues of public importance arise out of two separate actions: the current action between the Applicant Catalyst Capital Group Inc. ("**Catalyst**") and the Respondent group of companies for breach of contract, breach of confidence, inducing breach of contract and conspiracy, in respect of a large corporate transaction (the "**VimpelCom Action**"), and an earlier, narrower action by Catalyst against a departing employee, Brandon Moyse ("**Moyse**"), for breach of his employment agreement (the "**Moyse Action**"). Both actions relate in part to the acquisition of a telecom company called WIND Mobile Corp. ("**WIND**"). However, the causes

of action in the two actions are distinct, as are all but one of the defendants against whom the separate causes of action are advanced.

5. VimpelCom Ltd. ("**VimpelCom**") and Globalive Capital Inc. ("**Globalive**"), assisted by UBS Securities Canada Inc. ("**UBS**"), sought to sell their shareholdings in WIND. Catalyst sought to acquire WIND. Catalyst and VimpelCom entered into an Exclusivity Agreement and a Confidentiality Agreement that prohibited VimpelCom and its advisor and agent, UBS, from negotiating or discussing any alternative transaction with any other party and that required VimpelCom to keep the content of its negotiations with Catalyst confidential. Both VimpelCom and Catalyst recognized and agreed that should either agreements be breached, it would cause irreparable harm entitling Catalyst to equitable relief without proof of special damages.

6. In breach of these Agreements, VimpelCom, Globalive and UBS entered into negotiations with a group of U.S. Investors (the "**Consortium**") who delivered what they described as a "superior proposal" at the very same time as Catalyst's deal was before the VimpelCom Board for approval. Catalyst failed to acquire WIND and commenced an action seeking damages and equitable remedies for breach of confidence and breach of contract against VimpelCom, UBS and Globalive for engaging with members of the Consortium during the period of exclusivity with Catalyst and transmitting confidential information obtained during negotiations with Catalyst. The action also claimed damages for inducing breach of contract, misuse of confidential information and conspiracy against members of the Consortium.

7. By contrast, the Moyse Action involved claims against a former employee of Catalyst, Moyse. It was alleged that Moyse breached his obligation of confidentiality under his employment agreement by misappropriating and passing confidential information belonging to Catalyst to its competitor and Moyse's new employer, West Face (the "**Moyse Information**"). The Moyse Information was alleged to have been used by West Face in the Consortium's successful bid for WIND.

8. Relying on the principles of proportionality, the trial of the Moyse Action was ordered by Justice Newbould to take place over six days on a very expedited schedule. Justice Newbould

also specifically ordered that Catalyst's rights to assert any potential claim against members of the Consortium relating to their acquisition of WIND were to be preserved.

9. In his decision in the Moyse Action, Justice Newbould held that Moyse had not passed confidential information about Catalyst's strategies and attempts to acquire WIND to West Face and thus West Face could not have misused any such information. This finding was enough to dispose of the Moyse Action. Catalyst does not take issue with that finding.

10. However, in the within VimpelCom Action, the Motions Judge relied on the preclusive doctrines of estoppel and abuse of process to dismiss the VimpelCom Action and held that the claims against the eleven defendants in the VimpelCom Action should have been advanced within the Moyse Action. The Court of Appeal, in upholding the dismissal of the VimpelCom Action, also held that Catalyst "could have" and "should have" brought the claims in the VimpelCom Action in the Moyse Action. The Court of Appeal also held that Catalyst suffered no detriment and, as such, was not entitled to any equitable remedies.

11. The Court of Appeal gave no consideration to the fact that Justice Newbould had ordered that the Moyse Action proceeded on a focussed and expedited basis and the impact that this had on the VimpelCom Action, before upholding the dismissal of the VimpelCom Action.

12. This Court, in *Hryniak v. Mauldin*,[1] pronounced a culture shift in litigation and called on judges and counsel to recognize proportionality as an important principle in the adjudication of disputes. The decision to dismiss the VimpelCom Action on the basis of estoppel and abuse of process doctrines sets a dangerous precedent, warranting review and intervention by this Court, as it will force plaintiffs to combine all possible claims against all possible defendants into a single proceeding even when it may not be efficient or proportionate to do so. This decision is also inconsistent with the frequently cited principles set out by the House of Lords in *Ashmore* that "it is part of [a judge's] duty to identify crucial issues and to see they are tried as expeditiously and inexpensively as possible. …When a judge alive to the possible consequences decides that a particular course should be followed in the conduct of the trial in the interests of

[1] *Hryniak v. Mauldin*, [2014] 1 SCR 87 [*Hryniak*] at para 32.

justice, his decision should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong" [2]

13. The decision also adds to the confusion that exists in the law in Canada of whether a plaintiff must establish "detriment" – in the nature of loss or damages - to succeed in a claim for breach of confidence. The decision conflicts with other jurisprudence in Canada. It is also at odds with the leading jurisprudence in the United Kingdom on this issue. It is of importance to the orderly development of commercial law in Canada that this Court clarify whether detriment is a required element for torts such as breach of confidence and inducing breach of contract.

B. STATEMENT OF FACTS

(i) The VimpelCom Action

14. WIND was a telecommunications provider. Until September 16, 2014, it was owned by VimpelCom and Globalive when they, with the assistance of UBS, sold their interest in WIND to the Consortium.

15. A month prior to that however, Catalyst had substantially completed a deal with VimpelCom to purchase WIND.[3] By August 7, 2014, Catalyst and VimpelCom had a 300-plus page Share Purchase Agreement ("**SPA**") ready to be signed whereby VimpelCom was to sell WIND to Catalyst for $300 million, subject only to formal approval by VimpelCom's Board.[4] Indeed, VimpelCom and Catalyst held a joint conference call with Industry Canada to advise that their deal was "done".[5]

16. To govern and facilitate their negotiations, Catalyst and VimpelCom had executed a Confidentiality Agreement[6] and an Exclusivity Agreement[7] (collectively, the "**Agreements**").

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[2] *Ashmore v. Corp of Lloyd's*, [1992] 2 All ER 486 (H.L.) [*Ashmore*] at 488 and 492
[3] *The Catalyst Group Inc. v VimpelCom Ltd.*, 2019 ONCA 354 [*Reasons of the ONCA Below*] at para 6.
[4] *The Catalyst Capital Group Inc. v VimpelCom Ltd.*, 2018 ONSC 2471 [*Reasons on the Motion Below*] at para 20.
[5] *Reasons on the Motion Below* at para 24.
[6] Confidentiality Agreement dated March 21, 2014, by and between VimpelCom Ltd., Global Telecom Holding S.A.E., and The Catalyst Capital Group Inc. [*Confidentiality Agreement*].

The intent was to ensure that their discussions were kept confidential and that they be able to exclusively negotiate the purchase of WIND without interference from competing bids.

17. The Confidentiality Agreement specifically provided that the content of the negotiations between Catalyst and VimpelCom, as well as any terms or conditions relating to the purchase of WIND by Catalyst, were confidential and were not to be disclosed to any third party. VimpelCom and Catalyst expressly recognized and agreed that, should the Confidentiality Agreement be breached, this would cause irreparable harm to the non-breaching party. [8]

18. The Exclusivity Agreement specifically provided that VimpelCom, UBS and WIND were to deal exclusively with Catalyst and prohibited them from soliciting or encouraging any offers from, negotiating or discussing any alternative transaction with, or furnishing any information to any other party in respect of a transaction with WIND. The parties expressly recognized and agreed that, should the Exclusivity Agreement be breached, it would cause irreparable harm entitling Catalyst to "the remedy of injunction or …other equitable relief", "without proof of special damages".[9]

19. In the VimpelCom Action, Catalyst alleges that VimpelCom and its agents breached the Agreements and that members of the Consortium induced the breach of these Agreements. It is further alleged that VimpelCom and UBS dealt with members of the Consortium during the period of exclusivity with Catalyst, and that the Consortium was improperly informed of the status and content of the ongoing negotiations with Catalyst.

20. In particular, the Consortium knew when the SPA between Catalyst and VimpelCom was going to be submitted to the VimpelCom Board. The Consortium also received comments from VimpelCom about the Consortium's own proposed share purchase agreement including feedback on price levels during the exclusivity period. This was specifically prohibited under the Agreements.

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[7] Exclusivity Agreement dated July 23, 2014, among The Catalyst Capital Group Inc. and VimpelCom Ltd. [*Exclusivity Agreement*].
[8] *Confidentiality Agreement* at para 11.
[9] *Exclusivity Agreement* at para 6(c).

21. To frustrate the Agreements and interfere with Catalyst's attempts to buy WIND, the Consortium, knowing of the state of Catalyst and VimpelCom's negotiations, sent what the Consortium described as a "superior proposal" to VimpelCom on August 7, just when the Catalyst SPA was before the VimpelCom Board for approval.[10]

22. On August 15, 2014, after having received the Consortium's bid, VimpelCom sought to "retrade" the deal that had been negotiated for months by demanding that Catalyst pay a break fee of between $5 and $20 million if regulatory approval from the government of Catalyst's purchase of WIND was not received within two months.[11]

23. This demand for a break fee was made *after* VimpelCom told Catalyst that the SPA was substantially settled[12] and just days after the parties told Industry Canada that the deal was "done".[13] VimpelCom knew that the deal with Catalyst would inevitably "break" because there was no way government approval could be obtained in less than two months.[14] This new demand by VimpelCom was intended to ensure that VimpelCom could take advantage of the Consortium's "superior proposal".

24. Catalyst did not accede to the break fee demand. On August 25, 2014, VimpelCom and the Consortium entered into their own exclusivity agreement.[15] On September 16, the Consortium and VimpelCom concluded a deal to purchase WIND.[16]

25. The issue of whether VimpelCom or its advisor, UBS, breached the Exclusivity Agreement or the Confidentiality Agreement, why VimpelCom made a demand for a break fee and whether any of the members of the Consortium induced VimpelCom to make its demand for a break fee to avoid signing the SPA, were to be adjudicated in the VimpelCom Action.

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[10] *Reasons on the Motion Below* at para 21.
[11] *Reasons on the Motion Below* at para 25.
[12] *Reasons on the Motion Below* at para 20.
[13] *Reasons on the Motion Below* at para 24.
[14] *Reasons on the Motion Below* at para 25.
[15] *Reasons on the Motion Below* at para 27.
[16] *Reasons on the Motion Below* at para 27.

26. The Court of Appeal, in upholding the Motions Judge's dismissal of the VimpelCom Action on the basis of estoppel and abuse of process, recognized that the VimpelCom Action raised distinct causes of action.[17] It concluded, however, that Catalyst "could have" and "should have" advanced its claims for breach of the Agreements, breach of confidence and inducing breach of contract, within the context of a focussed and expedited 6-day trial of the Moyse Action (more fully described below). The decision in the Moyse Action has now been used to estop Catalyst from pursuing its claim against VimpelCom and members of the Consortium.

(ii) The Moyse Action

27. During Catalyst's negotiations with VimpelCom, an action was commenced by Catalyst on June 25, 2014, against Moyse and West Face (one member of the Consortium). Moyse was a Catalyst employee working on Catalyst's acquisition of WIND, until he resigned from Catalyst on May 24, 2014 to join West Face effective June 22, less than two months before the Consortium submitted its successful bid for WIND. [18]

28. A claim was commenced to enforce Moyse's non-competition obligations pursuant to his employment agreement with Catalyst, and was later amended to include a claim for a constructive trust over West Face's shares of WIND that were acquired by West Face and the other members of the Consortium. The central issue in the Moyse Action was the alleged misuse of "confidential information [that] came from…Moyse" while he was an employee of Catalyst and was allegedly provided to West Face, his new employer (the "**Moyse Information**").[19]

29. On November 10, 2014, an interim order enjoining Moyse from using, misusing or disclosing any and all confidential and/or proprietary information of Catalyst was issued.[20] The Court held that there was a strong *prima facie* case that Moyse had breached the confidentiality

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[17] *Reasons of the ONCA Below* at para 57.
[18] *Reasons on the Motion Below* at para 30.
[19] *The Catalyst Capital Group Inc. v Moyse*, 2018 ONCA 283 [*Reasons of the Court of Appeal in the Moyse Action*] at para 2; *Catalyst Capital Group Inc. v Moyse*, 2016 ONSC 5271 [*Reasons of the Superior Court in the Moyse Action*] at para 14.
[20] *The Catalyst Capital Group Inc. v Moyse*, 2014 ONSC 6442 [*Moyse Injunction Order*] at para 83.

clause of his Employment Agreement.[21] The Court found that Moyse took and delivered to West Face information which could demonstrate strategies Catalyst used in a competitive business.[22]

(iii) The Plan of Arrangement and the 6-day Expedited Moyse Trial

30. On December 23, 2015, while various interlocutory motions and appeals in the Moyse Action were proceeding through the courts, Mid-Bowline Group Corp., the entity through which the Consortium acquired the shares of WIND, brought an application for court approval of a plan of arrangement to sell its interest in WIND to Shaw Communications for $1.6 billion. Without any prior notice to Catalyst, the Consortium brought an application to obtain clear title to the shares of WIND and to obtain a release in favour of West Face of Catalyst's constructive trust claim in the Moyse Action.

31. Catalyst objected to the plan of arrangement. Catalyst also put the Consortium on notice that it intended to pursue a claim for inducing breach of contract in relation to its bid to acquire WIND during the period of exclusivity between Catalyst and VimpelCom.

32. Justice Newbould held in his reasons dated January 26, 2016, that the Moyse Action must be decided quickly, and in doing so, relied on the principle of proportionality pronounced in *Hryniak*.[23]

33. He also held that the trial of the Moyse Action was <u>not</u> to consider any claims for inducing breach of contract against members of the Consortium in relation to their acquisition of WIND.[24] Justice Newbould found that Catalyst could have started the new claim in March 2015 when new facts were disclosed and found it "troubling" for Catalyst to "lie in the weeds" to assert new claims to stop the plan of arrangement.[25] However, Catalyst had no notice of the plan of arrangement until December 23, 2015. Similarly, Catalyst never had (nor has it had) full

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[21] *Moyse Injunction Order* at para 71.
[22] *Moyse Injunction Order* at para 71.
[23] *Re: Mid-Bowline Group Corp*, 2016 ONSC 669 [*Mid-Bowline*] at para 48.
[24] *Mid-Bowline* at para 61.
[25] *Mid-Bowline* at para 59.

production of documents regarding the potential breaches of the Agreements, and the few documents which it did have, came into its possession well after March 15, 2015.

34. The formal Order of Justice Newbould issued on February 3, 2016, provided that, among other things, any potential claim by Catalyst against members of the Consortium relating to their acquisition of their interests in WIND from VimpelCom were preserved.[26]

35. To accommodate counsel schedules, Justice Newbould also formally set the trial date in the Moyse Action for May 18, 2016 for six days.[27] Five days before the commencement of the Moyse trial, the claim against VimpelCom and the Consortium that had been carved out by the February 3 Order was issued.

(iv) The Decision in the Moyse Action

36. The central issue in the Moyse Action was the alleged misuse of confidential information received by Moyse while he was employed at Catalyst.[28] The specific information alleged to have been passed by Moyse to West Face included Catalyst's internal research reports, internal presentations and internal discussions.

37. Following the 6-day trial, Justice Newbould dismissed the Moyse Action. He found that Moyse did not pass confidential information about Catalyst's dealings with or strategy regarding WIND to West Face and thus West Face could not have used such information.[29]

38. Notwithstanding that he concluded there was no breach of confidence by Moyse, Justice Newbould also proceeded to make a number of other findings and observations:

(a) "There is no evidence that the bid of the consortium of August 7, 2014 was even looked at by the Board of VimpelCom during the period of exclusivity with Catalyst or that it

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[26] Order of Justice Newbould Approving Mid-Bowline Plan of Arrangement, dated February 3, 2016 [*Plan of Arrangement Order*] at para 4.5.

[27] Endorsement of Justice Newbould dated February 3, 2016. The Trial ultimately commenced on June 6, 2016.

[28] *Reasons of the Court of Appeal in the Moyse Action* at para 2; *Reasons of the Superior Court in the Moyse Action* at para 14.

[29] *Reasons of the Superior Court in the Moyse Action* at paras. 117 and 125

played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst".[30]

However, the comment that there was "no evidence" about these matters reflects the fact that VimpelCom was not a party to the Moyse Action, no one from the VimpelCom Board ever testified in the Moyse Action, and VimpelCom never produced its documents nor was it discovered on this issue, which is central to the VimpelCom Action but not the Moyse Action;

(b) "It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom".[31]

Justice Newbould made this remark without deciding why VimpelCom made its demand for a break fee well after the parties had agreed upon the terms of the Catalyst SPA and announced to Industry Canada that the deal was "done". Whether VimpelCom was induced to demand a break fee is central to the VimpelCom Action, but not to the Moyse Action;

(c) "…there was no chance that Catalyst could have successfully concluded a deal with VimpelCom."[32]

Again, Justice Newbould left unanswered the question of whether Catalyst's inability to conclude a deal was a result of the breaches of the Agreements and the conduct of the Consortium as pleaded in the VimpelCom Action.

39. On appeal of the Moyse Action, the Court of Appeal upheld Justice Newbould's decision and held that "Mr. Moyse had not provided any confidential information to West Face".[33] In so doing, the Court of Appeal focussed on the central issue in the Moyse Action: the claim of misuse of Catalyst confidential information allegedly passed by Moyse to West Face. As the Court of Appeal put it [emphasis added]:[34]

"To succeed on the misuse of confidential information claim, Catalyst had to prove that:

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[30] *Reasons of the Superior Court in the Moyse Action* at para 127.
[31] *Reasons of the Superior Court in the Moyse Action* at para 130.
[32] *Reasons of the Superior Court in the Moyse Action* at para 131.
[33] *Reasons of the Court of Appeal in the Moyse Action* at para 16.
[34] *Reasons of the Court of Appeal in the Moyse Action* at paras 2, 4, 8, 14 and 16.

- Mr. Moyse gave confidential information concerning Catalyst's bid to purchase WIND to West Face;
- West Face used that confidential information when pursuing its bid for WIND; and
- The misuse of that confidential information caused detriment to Catalyst."

40. There was no adjudication of the issues related to VimpelCom's breach of the Exclusivity Agreement or the Consortium's inducing that breach. These simply were not issues in the Moyse Action.

(v) Dismissal of the VimpelCom Action

41. The central issues raised in the VimpelCom Action were whether VimpelCom breached the terms of the Agreements, whether VimpelCom and/or UBS engaged in negotiations with the Consortium during the period of exclusivity with Catalyst, whether confidential information shared with VimpelCom, Globalive and UBS (not Moyse) was disclosed to the Consortium, whether members of the Consortium induced or conspired to induce VimpelCom to breach its Agreements with Catalyst or whether the imposition of a break fee would have occurred but for that inducement, and, if so, what are the appropriate remedies.[35] The VimpelCom Action addresses *different* causes of action from the Moyse Action arising out of *different* legal relationships, *different* conduct, and *different* confidential information, against substantially *different* parties. No allegations were made against Moyse in the VimpelCom Action.

42. In dismissing the VimpelCom Action, the Motions Judge did not decide whether VimpelCom or UBS breached the Exclusivity Agreement or the Confidentiality Agreement; whether confidential information was passed by VimpelCom or UBS to the Consortium and used to induce VimpelCom to accept the Consortium's bid; or what equitable remedies would be available against VimpelCom, UBS and the other defendants for such wrongful conduct. The merits of these allegations are central to the VimpelCom Action and have not been decided by any Court.

43. To date, no Court has heard from VimpelCom or UBS regarding the circumstances surrounding the sale of WIND. No documentary or oral discovery of VimpelCom or UBS has

[35] Amended Amended Amended Statement of Claim of The Catalyst Capital Group Inc. in the VimpelCom Action, at paras 26-30, 43-45, 55-59, 63-76, 95-98, 103-122, and 125-127.

taken place. No explanation has been given by VimpelCom about why it demanded a break fee if regulatory approval could not be obtained within two months, after having already settled the terms of the SPA and announcing that a deal with Catalyst was "done". There has been no explanation by UBS of the numerous conversations it had with the Consortium members throughout the period of Catalyst's Exclusivity Agreement. VimpelCom's, UBS's and Globalive's sharing of information that led to the Consortium's bid has yet to be adjudicated upon.

44. The Court of Appeal dismissed Catalyst's appeal of the Motions Judge's dismissal of the VimpelCom Action. In its reasons, from which Catalyst now seeks leave to appeal to this Court, the Court of Appeal held that:

(a) Catalyst **"**could have" and "should have" brought forward the claims made in the VimpelCom Action in the Moyse Action.[36] The Court made this finding even though Catalyst's rights to pursue a separate claim against VimpelCom and the other members of the Consortium were specifically preserved.[37] The Court of Appeal did not consider or weigh the fact that Newbould J. ordered an expedited 6-day trial in the Moyse Action to commence within four months' time and that to add the VimpelCom Action and have ten new parties defend, discovered and tried on distinct theories of liability, would have undermined the expediency and proportionality of the proceeding (indeed, VimpelCom, an entity based in the Netherlands, was entitled to and insisted on at least 60 days to deliver a defence); and

(b) Catalyst could not succeed in its claim in the VimpelCom Action for breach of confidence, inducing breach of contract and conspiracy, because Catalyst could not suffer any detriment as Catalyst could not have concluded a deal with VimpelCom to acquire WIND.[38] In dismissing the appeal, the Court of Appeal stated that Catalyst did not plead any of the alternative equitable remedies, such as an accounting, even though Catalyst did plead such equitable remedies when it

[36] *Reasons of the ONCA Below* at para 20.
[37] *Plan of Arrangement Order* at para 4.5.
[38] *Reasons of the ONCA Below* at para 45.

specifically pleaded a tracing of the monies.[39] The Court of Appeal also held that detriment was a necessary element for a breach of confidence, inducing breach of contract and conspiracy claims. The Court of Appeal stated that the "**jurisprudence is clear**" that a claimant must prove detriment to establish liability for breach of confidence, inducing breach of contract and conspiracy[40], even though there is conflicting jurisprudence that has also clearly stated that detriment is not a required element to seek equitable remedies for these torts.

PART II – THE QUESTIONS IN ISSUE

45. The proposed appeal raises the following issues of public importance warranting consideration by this Court:

(a) While recognizing a culture shift in *Hryniak*, how should courts and parties balance the interests of proportionality while also protecting a party's right to pursue claims, particularly in cases involving multiple parties with different and separate causes of action?; and

(b) Is proof of detriment a necessary element for a party to obtain equitable remedies for the tort of breach of confidence?

PART III – STATEMENT OF ARGUMENT

A. THE BALANCE BETWEEN PROPORTIONALITY AND RES JUDICATA

46. It is a long-standing tenet of our judicial system that every person with an arguable claim should be entitled to a fair and just adjudication by the court. As this Court held in *Hunt v. Carey*,[41] only in the clearest of cases should a claimant be driven from the judgment seat.

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[39] Amended Amended Amended Statement of Claim in the VimpelCom Action, paras 134-137, in which a tracing of the proceeds was specifically pleaded.
[40] *Reasons of the ONCA Below* at para 41.
[41] *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980.

47. In *Hryniak v. Mauldin*, this Court pronounced a culture shift. *Hryniak* recognized proportionality "as an important legal principle"[42] and the principle has since been described as the "touchstone"[43] of modern civil justice and the "benchmark"[44] for access to civil justice.

48. To give effect to this culture shift, this Court called upon judges to make changes to case management and to make "reasonable efforts to control and manage the conduct of trials".[45] As Ontario's Chief Justice remarked, deference must be shown to the case management efforts of the courts and courts must be mindful of the impact of their decisions in giving effect to the culture shift to proportionality.[46]

49. The pursuit of proportionality ought not to come at the expense of a party's right to pursue and have valid claims adjudicated by the court. If such rights can be at risk of being extinguished in the pursuit of the goal of proportionality, then clear guidelines are required by this Court setting out the circumstances in which such rights can or cannot be in jeopardy.

50. In this case, in the interests of proportionality, a 6-day trial of the Moyse Action was set, commencing in four-months' time. Nonetheless, the Motions Judge and the Court of Appeal in this action concluded that it was an abuse of process to commence a second action and that the claims in the VimpelCom Action against ten additional parties, involving distinct and separate causes of action, "should have" and "could have" been advanced by Catalyst within the context of the expedited Moyse Action. These rulings were made notwithstanding an order by Justice Newbould that the rights of Catalyst vis-à-vis VimpelCom and others were expressly preserved.

51. Justice Newbould, in exercising his case management powers and relying on the principle of proportionality, ordered a very speedy trial in the Moyse Action and preserved Catalyst's rights to pursue claims in respect of other parties. However, the Court of Appeal held that

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[42] *Heritage Electric Ltd. et al v Sterling O & G International Corporation et al.*, 2017 MBCA 85 at para 21.
[43] *Klippenstein v Manitoba Ombudsman*, 2015 MBCA 15 at para 32, leave to appeal refused [2015] SCCA No. 135
[44] *Burns Bog Conservation Society v Canada (Attorney General)*, 2014 FCA 170 at para 42.
[45] *R v Jordan*, 2016 SCC 27 at para 139.
[46] Remarks of Chief Justice George Strathy at the Opening Courts of Ontario, 2016 (online: http://www.ontariocourts.ca/coa/en/ps/).

Catalyst "could have" and "should have" added ten additional parties in the VimpelCom Action to the Moyse Action. To do so would have taken an expedited case and made it a model of complexity, undermining (and not enhancing) the principle of proportionality.

52. In the pursuit of proportionality in the Moyse Action, Catalyst is now estopped from pursuing its claims against VimpelCom, UBS and members of the Consortium in the VimpelCom Action. In doing so, there was no consideration given by the Court of Appeal to the fact that advancing these claims in the Moyse Action was neither expedient nor proportionate.

53. The Court of Appeal's decision undermines the desired culture shift in cases involving multiple parties with multiple causes of action. By this decision, parties will be compelled, out of fear that their rights could be extinguished on the basis of the doctrines of estoppel and abuse of process, to bring all possible claims against all possible parties in a single action, even though it may be neither expedient nor proportionate to do so.

54. The Ontario Court of Appeal has recognized, in the context of motor vehicle accidents, that it is not necessarily an abuse of process to bring multiple lawsuits where there are overlapping facts. Due to the factual and legal complexities of motor vehicle cases, multiple lawsuits are often brought arising out of the same occurrence, without the risk that such lawsuits will be dismissed on the bases of issues estoppel, cause action estoppel or abuse of process. Striking multiple lawsuits in the context of motor vehicle cases, particularly where different causes of action are advanced against different defendants, fails to balance the interests of justice and may be *disproportionate* to the efficiency that it seeks to achieve.[47] These decisions stand in stark contrast to the within appeal.

55. No Canadian jurisprudence in the commercial context has considered whether the principle of proportionality are best served by bringing separate proceedings against multiple defendants involving different causes of action, and under what circumstances it is an abuse of process for failing to proceed with such a case in a single proceeding.

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[47] See, e.g., *Abarca v Vargas*, 2015 ONCA 4 at paras 24, 28 and 35; *Hoffman v Avis Budget Group Inc.*, 2015 ONSC 7740 at para 13; see also Sinai, Y., "The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel" (2011) 56:3 McGill LJ 673.

56. By contrast, consistent with the *Ashmore* principles, the English courts have recognized that there is a real public interest in not encouraging a single action against a wide range of defendants with discrete claims:

(a) In *Johnson v Gore Wood,*[48] the House of Lords adopted "a broad, merits-based" approach to the question of whether a claim is an abuse of process and refused to strike out the claimant's personal claim against the defendants, where he had already brought a claim against them arising out of the same circumstances on behalf of his company.

(b) In *Dexter Ltd v Vlieland-Boddy,*[49] the English Court of Appeal held that in large commercial disputes, it by no means follows that either the public interest in efficiency and economy in litigation or the interests of the parties... are best served by one action against them all".

(c) In *Aldi Stores Ltd. v WSP London Ltd*.,[50] the English Court of Appeal held that "there is a real public interest in allowing parties a measure of freedom to cho[o]se whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants… That freedom can and should be restricted by appropriate case management."

(d) In *Otkitrie v Threadneedle,*[51] the Court refused to strike out the claims against the defendants in the second action as an abuse of process. The Court stated that such a case management breach is not by itself sufficient to constitute an abuse of process.

57. With the recent culture shift having been pronounced in *Hryniak,* the time is ripe for this Court to provide direction on how to balance the principle of proportionality, the doctrines of estoppel and abuse of process, and the rights of parties to have their claims fairly and justly adjudicated.

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[48] *Johnson v Gore Wood,* [2000] UKHL 65 at 31.
[49] *Dexter Ltd v Vlieland-Boddy,* [2003] EWCA Civ 14 at paras 51-53.
[50] *Aldi Stores Ltd. v WSP London Ltd.*, [2007] EWCA Civ 1260 at paras 17 and 25.
[51] *Otkitrie v Threadneedle*, [2015] EWHC 2329 at paras 26-28.

B. IS DETRIMENT A NECESSARY ELEMENT FOR EQUITABLE REMEDIES?

58. In upholding the dismissal of the VimpelCom Action, the Court of Appeal stated that "the jurisprudence is clear that a claimant must prove detriment to establish liability for breach of confidence…"[52] There is, however, conflicting jurisprudence that clearly states that detriment is not a required element to obtain equitable remedies for breach of confidence.

59. In *Cadbury Schweppes v FBI Foods*,[53] this Court considered the cause of action of breach of confidence. Cadbury Schweppes had not suffered financial loss due to the breach of confidence. Cadbury Schweppes was, however, awarded damages at trial "in the interest of fairness".[54] This Court, quoting from the House of Lords in *Attorney-General v Guardian Newspapers Ltd. (No. 2)*, stated that in some circumstances the disclosure itself might be sufficient, without more, to constitute detriment.[55]

60. This Court also noted that while La Forest J. in *Lac Minerals* had considered detriment to be an essential element of a breach of confidence action, it was clear that La Forest J. had regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information.[56]

61. Commentators have described the law on whether detriment is a necessary element of breach of confidence as "confusing". Paul Perell (as he then was) noted that "detriment" is not necessarily required to establish a compensable claim for breach of confidence. The wrongful gains of the breaching party may be sufficient:

> [T]he element of detriment means that the confider must suffer a wrong or injury from the misconduct of the confidant, which injuries would include not only the confider's compensable losses but also the confidant's wrongful gains connected to the misconduct.[57]

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[52] *Reasons of the ONCA Below* at para 41, citing its decision in *Lysko v Braley*, [2006] OJ No 1137 (CA) at paras 17-19.
[53] *Cadbury Schweppes v FBI Foods*, [1999] 1 SCR 142 [*Cadbury Schweppes*].
[54] *Cadbury Schweppes* at para 53
[55] *Cadbury Schweppes* at para 53, quoting from *Attorney General v Guardian Newspaper Ltd. (No. 2)*, [1990] AC 109 (UKHL) [*Spycatcher*].
[56] *Cadbury Schweppes* at para 53.
[57] Paul Perell, "Breach of Confidence to the Rescue", (2002) 25:2 ADVOC Q. 199 at 205.

62. In other contexts, this Court has acknowledged that damages may be determined by the extent of the defendant's gain rather than the plaintiff's detriment:

> Considerations other than the extent of the plaintiff's actual loss shape the way the compensation principle is applied and there are well-established exceptions to it. For example, the rule that contract damages compensate only the plaintiff's actual loss is not the only rule that applies to assessing contract damages. As a leading English case put it, "Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiff is measured by a different yardstick": *Attorney General v. Blake*, [2001] 1 A.C. 268 (H.L.), at p. 278. In some cases, for example, an award of damages in contract may be based on the advantage gained by the defendant as a result of the breach rather than the loss suffered by the plaintiff: see, e.g., *Bank of America Canada v. Mutual Trust Co*., 2002 SCC 43 (CanLII), [2002] 2 S.C.R. 601, at para. 25. The rule that damages are measured by the plaintiff's actual loss, while the general rule, does not cover all cases.[58]

63. Canadian courts have been and continue to be inconsistent in the application of the legal requirements for breach of confidence:

(a) In *Stonetile (Canada) Ltd. v Castcon Ltd.*,[59] the Alberta Court of Queen's Bench held, in a case of breach of confidence, that the the misuse of confidential information did not directly cause damage to the plaintiff. The Court found however that it provided a "springboard" effect, which drove the court to look for a remedy that ensures the possessor of the information does not get an unfair start in the field of competition;[60]

(b) In *Pat's Off-Road Transport v Campbell*,[61] the defendant had used confidential information to replicate his employer's truck-mounted hot oil heaters. The plaintiff had not suffered any detriment. Nevertheless, the Alberta Court of Queen's Bench held that this should not allow the defendants to escape from any

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[58] *Waterman v IBM Canada Ltd*., 2013 SCC 70 at para 36.
[59] *Stonetile (Canada) Ltd. v Castcon Ltd*., 2010 ABQB 392 [*Stonetile*]
[60] *Stonetile* at paras 58 and 63.
[61] *Pat's Off-Road Transport v Campbell*, 2010 ABQB 443 [*Pat's Off Road*].

award of damages.[62] The Court formulated the third element of the cause of action: "Was there unauthorized use of the information?"[63]

(c) In *Minera Aquiline Argentina SA v IMA Exploration Inc.*,[64] the plaintiff suffered a detriment as a result of the defendant's unlawful use of confidential information. Given that the plaintiff suffered a detriment, the British Columbia Court of Appeal did not find it necessary to analyze the question of whether detriment is a necessary element of an action founded in breach of confidence, but noted that the law with respect to this question "does not appear to be entirely settled;"[65]

(d) In *Seaway Marine Services Ltd. v Weiwaikum General Partner Ltd.*,[66] the defendants argued that proof of detriment is an essential element of the breach of confidence and that the plaintiff's failure to prove detriment was fatal to its case. The Court disagreed, finding that "the proposition that detriment is an essential element of the cause of action is not entirely free of doubt."[67]

64. By contrast, the law that plaintiffs in breach of confidence actions may be entitled to a remedy even if they have not suffered a financial detriment is well established in England:

(a) *Terrapin Ltd. v Builders' Supply Co*.[68]: Using confidential information to gain a commercial advantage or "springboard" allowing the competing product to come to market sooner can cause "detriment" to the party disclosing the information.

(b) *Seager v. Copydex Ltd*. [69]: "He who has received information in confidence shall not take unfair advantage of it." Even if misused innocently, information disclosed in confidence or inadvertently, if it gives the defendant a "springboard" or an advantage, is actionable.

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[62] *Pat's Off-Road* at para 85.
[63] *Pat's Off-Road* at para 64.
[64] *Minera Aquiline Argentina SA v IMA Exploration Inc*., 2007 BCCA 319 [*Minera*].
[65] *Minera* at para 85.
[66] *Seaway Marine Services Ltd. v Weiwaikum General Partner Ltd*., 2014 BCSC 2102 [*Seaway*].
[67] *Seaway* at para 94, citing *Cadbury Schweppes* at paras 52-54.
[68] *Terrapin Ltd. v Builders' Supply Co.*, [1967] RPC 375 (Ch.D.) at 376, 389, 391, and 392.
[69] *Seager v Copydex Ltd*., [1967] 1 WLR 923(ChD, CA) [*Seager*] at 368, 371 and 374.

(c) *Attorney General v. Guardian Newspaper Ltd. (No. 2)*[70]: A party should not be allowed to benefit from his own wrong and may be accountable for any profit made out of that party's breach of duty.

(d) *Experience Hendrix*[71]: There is no reason to bar, in appropriate circumstances, an order for payment of a reasonable sum having regard to any benefit made by the infringement, even though the appellant cannot prove any financial loss.

(e) *Attorney General v. Blake*[72]: An accounting for profits can be awarded as remedy where damages are not sufficient.

65. It is of importance to the orderly development of commercial law in Canada that this Court clarify whether detriment is a required element for torts such as breach of confidence, particularly in a case such as this, where the parties specifically agreed in writing that a breach would entitle the innocent party to equitable relief, without proof of special damages.

66. The Court of Appeal in this case has restricted or limited the available remedies a party is entitled for such claims where courts are, as this Court stated, supposed to have "considerable flexibility in fashioning a remedy"[73] and in doing so, has perpetuated the state of confusion that Perell observed in the law almost twenty years ago.

PART IV – SUBMISSIONS CONCERNING COSTS

67. The Applicant requests its costs of the application for leave to appeal.

PART V - ORDER SOUGHT

68. The Applicant requests an Order granting it leave to appeal the decision of the Court of Appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of August, 2019.

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[70] *Spycatcher* at 255-256 and 262.
[71] *Experience Hendrix LLC v PPX Enterprises Inc*., [2003] EWCA Civ 323 at para 35.
[72] *Attorney General v Blake*, [2001] 1 A.C. 268 (HL) at 285.
[73] *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at 615 and 671.

"*John Callaghan*"

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"*Matthew Karabus*"

Matthew Karabus

"*David Moore*"

David Moore

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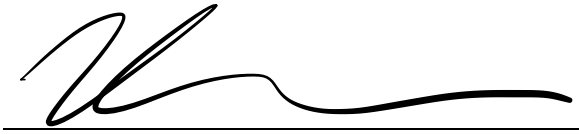
Statutes, Regulations, Legislation:

Nil.

This is Exhibit “M” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.



Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

CITATION: Re: Mid-Bowline Group Corp, 2016 ONSC 669
COURT FILE NO.: CV-15-11238-00CL
DATE: 20160126

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

BEFORE: Newbould J.

COUNSEL: *Kent E. Thomson and Matthew Milne-Smith*, for the Applicant

Rocco DiPucchio and Lauren P.S. Epstein, for The Catalyst Capital Group Inc.

Michael Schafler and Ara Basmadjian, for Shaw Communications Inc.

Robert A. Centa, for Brandon Moyse

HEARD: January 25, 2016

REASONS FOR JUDGMENT

[1] This is an application by Mid-Bowline Group Corp. pursuant to section 182 of the Ontario *Business Corporations Act* for approval of a proposed plan of arrangement. The arrangement contemplates that a subsidiary of Shaw Communications Inc. will acquire all of the

outstanding shares of Mid-Bowline, the owner of WIND Mobile Corp., for approximately $1.6 billion.

[2] WIND is a private Ontario company. It is Canada's fourth largest wireless carrier, currently serving approximately 940,000 subscribers in British Columbia, Alberta and Ontario. WIND was formed in 2008. The majority of its voting shares were held by Globalive Capital Inc. ("Globalive Capital"), while the majority of its total equity was held by Orascom Telecom Holdings S.A.E. ("Orascom"). In 2011, Orascom's majority equity stake in the company was acquired indirectly by VimpelCom Ltd. ("VimpelCom").

[3] Mid-Bowline is an Ontario private, closely-held company that indirectly owns 100 percent of WIND. The shareholders of Mid-Bowline include, among others, funds managed by West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners, LLC (Tennenbaum"), Globalive Capital and 64NM Holdings, LP (together the "Investors").

[4] The plan is opposed by The Catalyst Capital Group Inc. by reason of its claim that one of the shareholders of Mid-Bowline, West Face, acquired confidential information belonging to Catalyst that was used by West Face in its acquisition of an interest in WIND through Mid-Bowline. Catalyst claims a constructive trust over the Mid-Bowline shares owned by West Face. The terms of the plan of arrangement would release any constructive trust claim that Catalyst has over the shares of Mid-Bowline owned by West Face that are being sold to Shaw.

[5] The plan of arrangement, as amended, provides that Shaw shall acquire the shares of Mid-Bowline free of any claim against those shares, including the shares of West Face, but that Catalyst shall continue to have the right to claim against West Face the profits earned by West Face from the sale to Shaw. That is, the claim by Catalyst for a constructive trust over the shares of Mid-Bowline owned by West Face is released in order to permit Shaw to acquire the shares of Mid-Bowline free of any claim against those shares but the right of Catalyst to pursue its claims for the profit earned by West Face on those shares survives.

[6] The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the

Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.

[7] So far as the requirements of section 182 of the OBCA are concerned, I am satisfied that the statutory procedures in section 182 have been met and that the application has been put forward in good faith. Trying to deal with the Catalyst claim in the manner proposed by Mid-Bowline in the circumstances of this case was not, as claimed by Catalyst, an exercise of bad faith. It was put forward in an open and transparent manner and designed to protect any legitimate right that Catalyst may have.

[8] The third requirement of section 182 is that the arrangement is fair and reasonable. Catalyst says that it is not and that this Court has no authority under section 182 to exterminate the substantive or procedural rights of third parties.

The Catalyst claim and its background

[9] In 2013, VimpelCom decided to divest its interest in WIND, and a number of interested potential buyers came forward. Ultimately, in September 2014, the Investors, acting through Mid-Bowline, acquired VimpelCom's debt and equity interest in WIND. The ownership structure of WIND was subsequently reorganized so that WIND became an indirect, wholly-owned subsidiary of Mid-Bowline.

[10] Catalyst was a bidder for WIND and from July 23 to August 18, 2014 VimpelCom conducted exclusive negotiations with Catalyst for Catalyst to buy WIND. No agreement was reached.

[11] The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23,

2014 and ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not recruited or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

[12] At the time of Mr. Moyse's hiring, West Face had already been pursuing an acquisition or financing of WIND for over six months, since November 2013. It was well-known throughout the industry that VimpelCom wanted to sell its interest in WIND because of the well-publicized regulatory challenges it had faced as a foreign owner. West Face conducted due diligence and made a series of offers to VimpelCom before Mr. Moyse was ever hired.

[13] Upon learning of Mr. Moyse's move to West Face, Catalyst immediately advised West Face of its position that Mr. Moyse was prohibited from working for West Face as a result of a non-competition clause in his employment agreement. Catalyst also advised West Face that Mr. Moyse had received access to confidential information regarding a "telecom file" during his employment with Catalyst. This was the first time, after it had already hired Mr. Moyse, that West Face learned that Catalyst had been pursuing what West Face assumed to be the WIND opportunity.

[14] The evidence of Mr. Griffin of West Face, which has not been denied in any way, is that upon learning of Catalyst's objections to Mr. Moyse's hiring, West Face took the position that Mr. Moyse's non-competition covenant was unenforceable, and denied receiving any confidential information from Mr. Moyse. Out of an abundance of caution, given Catalyst's express concerns about the "telecom file", West Face nonetheless established strict firewalls around West Face's own work on WIND. Mr. Moyse was denied access to computer files relating to that project, and all members of the WIND team at West Face were explicitly instructed not to speak to Mr. Moyse about that transaction.

[15] Two days after Mr. Moyse's departure from West Face on July 18, 2014, the strategic partner with whom West Face had been working on a potential acquisition of WIND for the previous month backed out. The WIND deal that West Face had been pursuing while Mr. Moyse had worked there became a dead end.

[16] The further evidence of Mr. Griffin, which has also not been denied, is that one week after Mr. Moyse left West Face, on July 23, 2014, VimpelCom informed West Face that it had entered into exclusive negotiations with another bidder, which West Face presumed to be Catalyst (and which Catalyst ultimately confirmed in this litigation). Nonetheless, West Face decided to join with a group of investors in the event that VimpelCom's preferred bidder was unable to reach an agreement during the period of exclusivity. This group ("New Investors") included Tennenbaum and 64NM who had themselves been pursuing the investment independently for a number of months.

[17] The further evidence of Mr. Griffin, which has also not been denied, is that on August 6, 2014, uncertain as to when the exclusivity period would end, the New Investors, which did not include Globalive Capital, submitted an unsolicited offer for WIND. A more formal proposal followed the next day, August 7. The proposal left Globalive Capital's voting majority voting interest in WIND undisturbed. On August 7 however, Globalive Capital agreed to a support agreement with VimpelCom, which obliged Globalive Capital to support VimpelCom in its exclusive negotiations with Catalyst.

[18] The further evidence of Mr. Griffin, which has also not been denied, is that upon the expiry of exclusivity, the New Investors revived their efforts with VimpelCom and, subject to VimpelCom's approval, with Globalive Capital. Ultimately a a definitive purchase agreement was signed by all parties and the purchase of WIND closed on September 16, 2014 pursuant to which Mid-Bowline became the owner of WIND.

[19] On June 25, 2014 Catalyst commenced an action against Brandon Moyse and West Face. It claimed injunctive relief, including preventing Mr. Moyse from disclosing confidential information. An interlocutory motion by Catalyst regarding Mr. Moyse was heard on October 27, 2014 by Mr. Justice Lederer who on November 10 granted an interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left Catalyst's employment).

[20] On December 16, 2014, Catalyst delivered an Amended Amended Statement of Claim in which it alleged that Mr. Moyse while employed by Catalyst was a member of the team studying the WIND opportunity and privy to Catalyst confidential information concerning that opportunity. It alleged that West Face obtained that confidential information to obtain an unfair advantage over Catalyst in its negotiations with VimpelCom regarding WIND and that but for the transmission of the confidential information West Face would not have successfully negotiated a purchase of WIND. Catalyst claimed a constructive trust over West Face's interest in WIND and an accounting of all profits earned by West Face as a result of its misuse of confidential information obtained from Mr. Moyse.

Catalyst claims a need for a trial

[21] Catalyst claims that it requires the full panoply of a trial process in its action against West Face, saying that the action it started in June, 2014 is at an early stage and that there has been no discovery or production of documents. It says that on this application its rights are being decided without any witnesses. This ignores the history of the action and what has occurred to date.

[22] So far as the plan of arrangement application is concerned, a four day hearing was established on January 4, 2016 for four days beginning January 25, 2016. Catalyst had the draft material of Mid-Bowline in December and was served with the motion record on January 8, 2016 that included the affidavit of Mr. Griffin as well from the other investors in Mid-Bowline, being representatives of Globalive Capital, Tennenbaum and 64NM. Four days was scheduled for evidence and it was anticipated that the deponents of the affidavits at least would be examined and cross-examined. However, no evidence was filed by Catalyst to contradict the Mid-Bowline evidence, and no request was made by Catalyst to cross-examine any Mid-Bowline witness. As a result, the reporter was cancelled and the matter proceeded by oral argument on the material filed.

[23] I adjourned the hearing on Monday January 5 until 2 pm to give Mr. DiPuccio a chance to get instructions from Catalyst. Later in the morning Mr. DiPuccio delivered an affidavit of James Riley of Catalyst sworn that morning. It contained a statement that Mr. Riley understood from Mr. DiPuccio that the Plan hearing would not be decided on its merits as originally

scheduled pending a discussion on the terms on which the Plan might be amended so that West Face's proceeds from the sale to Shaw could be held in escrow pending an expedited trial of Catalyst's claim.

[24] This statement was allegedly based on discussions held earlier in January in chambers in which the parties discussed trying to agree on a term that would allow the plan of arrangement to be approved on some terms that would protect Catalyst's rights. At that discussion counsel for Mid-Bowline made clear that it would not agree to hold the funds for West Face in escrow for reasons he explained. It was left that the parties would try to negotiate some other protection for Catalyst. However it was never discussed that the hearing scheduled for four days starting January 25th would be put off or that the plan approval application would not be heard on its merits at that time. The failure of Catalyst to file any evidence in opposition to the plan of arrangement was a decision of its own choosing. Its decision not to cross-examine on any of the affidavits filed by Mid-Bowline was also of its choosing.

[25] There is a history of full document production by West Face in the claim against it by Catalyst and of cross-examination on affidavits. There has also been delay caused by Catalyst sitting on its hands.

[26] On July 16, 2014 a consent order of Justice Firestone ordered Mr. Moyse to turn his computer over to his counsel for the taking of a forensic image of the data kept by him on his computer, to be conducted by a professional firm. On November 10, 2014 Justice Lederer ordered that the forensic images that had been created were to be reviewed by an independent supervising solicitor ("ISS"). The ISS subsequently released a draft report on February 1 and its final report on February 17. As set out therein, the ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face. It did, however, find evidence suggesting that Mr. Moyse had deleted his browser history.

[27] On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face for an order prohibiting West Face from playing any role in the management of WIND and an order requiring West Face to provide electronic images of all of its computers to the ISS for review. One of the stated purposes of Catalyst's motion for the imaging order was to determine

"whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information". Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyse for contempt of the earlier interim consent order of Justice Firestone.

[28] Catalyst's motion was heard by Justice Glustein on July 2, 2015. Although West Face delivered its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials, Catalyst did not deliver its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

[29] Justice Glustein rendered his decision five days after argument, on July 7, 2015, and dismissed Catalyst's motion in its entirety. With respect to the request that West Face provide electronic images of all of its computers to the ISS for review, Justice Glustein held that there was no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations. Justice Glustein noted that West Face had offered to turn over its own confidential information created, accessed or modified by Mr. Moyse to the ISS, but Catalyst has not accepted this offer. Regarding the productions of West Face, Justice Glustein stated:

> **56** Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

[30] There was filed on the motion before Justice Glustein five affidavits of Mr. Riley of Catalyst, affidavits of Mr. Moyse, two affidavits of Mr. Griffin of West Face, an affidavit of Mr. Dea of West Face, an affidavit of Mr. Burt-Gerrans who was the computer expert who imaged the West Face computer records and an affidavit of Mr. El Shanawany who was the corporate

planning and control officer of WIND. There were also voluminous transcripts of the cross-examination of all of these persons.

[31] After receiving Justice Glustein's decision on July 7, 2015, Catalyst appealed the decision to the Court of Appeal, even though Justice Glustein's decision was interlocutory. Within two days of receiving the notice of appeal, on July 24, 2015 counsel to West Face immediately notified Catalyst's counsel that it was not entitled to appeal directly to the Court of Appeal. Catalyst ignored this advice, following which West Face served a notice of motion to quash Catalyst's appeal on August 5, and an amended notice of motion, factum and book of authorities on September 11, 2015. Catalyst never responded to this motion, but instead on November 5, 2015, consented to an order quashing the appeal. Catalyst then waited until December 10, 2015 to deliver a notice of motion to extend the time for it to seek leave to appeal to the Divisional Court.

[32] Catalyst's motion to extend the time to appeal to the Divisional Court and the appeal were heard together by Justice Swinton on January 21, 2016 and dismissed the following day. Justice Swinton was critical of Catalyst for appealing the decision of Justice Glustein to the Court of Appeal as the law was clear that interlocutory orders are appealable to the Divisional Court and Catalyst was represented by experienced litigation counsel. She also held that Catalyst had not given a reasonable explanation for the lengthy delay given the state of the law with respect to appeals to the Court of Appeal and the facts of this case. As to the merits of an appeal, Justice Swinton held there were none.

[33] I can only conclude that Catalyst has purposely delayed its claim against West Face for tactical reasons. As long as a claim for an order of a constructive trust against the shares of Mid-Bowline held by West Face is outstanding, Catalyst knows that West Face cannot realistically sell those shares. Catalyst had to understand that WIND might well be sold, taken the Canadian market for spectrum and the fact that Mid-Bowline is owned by financial interests and is not an operator in the wireless business. Catalyst has been deeply involved in that market, not only with its failed negotiations to acquire WIND from VimpelCom but also with its large financial position in Mobilicity, another regional wireless carrier that had filed for CCAA protection.

Fair and reasonable test

[34] In *BCE v. 1976 Debentureholders,* [2008] 3 S.C.R. 560 the Supreme Court of Canada held that determining whether a plan of arrangement is fair and reasonable involves two inquiries:

(a) whether the arrangement has a valid business purpose; and

(b) whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way.

[35] The valid-purpose inquiry is invariably fact-specific and the nature and extent of the evidence needed to satisfy this requirement will depend on the circumstances. See *BCE* at para. 146. The inquiry requires only the demonstration of a prospect of clearly identified benefits to the corporation that have a reasonable prospect of being realized if the proposed arrangement is implemented. See *Magna International Inc. (Re)* (2010), 75 B.L.R. (4th) 163 at para. 50 (Div Ct).

[36] The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company. See *BCE* at para. 126. This is precisely the situation here.

[37] The benefit to Mid-Bowline and its shareholders is obvious. The sale to Shaw is at a tremendous price and if the sale does not close, there is no guarantee that another transaction would come along with a price of $1.6 billion. The purpose in being able to sell the interest of West Face in Mid-Bowline free of any constructive trust claim of Catalyst is required for the sale to occur.

[38] Regarding the second part of the fair and reasonable test, whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way, it was stated in BCE:

> **147** The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
>
> **148** An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:
>
> > [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[39] I do not agree with Catalyst that there is no jurisdiction under section 192 to compromise rights of Catalyst. Section 192 is a flexible provision that has been broadly interpreted. In *BCE* it was stated:

> **124** In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.
>
> **125** This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76....

[40] In undertaking the fair and reasonableness inquiry, the interests of shareholders and other stakeholders is to be considered. See *BCE* at para. 115.

[41] In this case, the claim of Catalyst is that it is entitled to a constructive trust over the shares of Mid-Bowline owned by West Face. It is not an equity owner at the moment, but would be if a constructive trust were ordered in its favour. It is a stakeholder in West Face's interest in

Mid-Bowline to that extent. To say that a Court is powerless to make any order compromising the rights of Catalyst would be to give Catalyst a veto over the plan of arrangement merely by reason of its claim.

[42] The voluminous evidence filed by the parties on the previous motion before Justice Glustein and now on this application (which is largely the same as previously filed before Justice Glustein) has disclosed no confidential information of Catalyst regarding WIND provided by Mr. Moyse to West Face. It is clear that West Face has produced all of its relevant documents. The case of Catalyst at this stage looks weak.

[43] The provision added to the plan of arrangement to protect the right of Catalyst to damages is as follows:

> From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish the right of The Catalyst Capital Group Inc. to continue to assert its claims against West Face Capital Inc. in Ontario Superior Court of Justice Court File No.: CV-14-507120 (provided that the potential liability of West Face Capital Inc. is limited to the net profit of West Face Capital Inc. in respect of this Arrangement), with the exception of any constructive trust or equivalent remedy which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5. (Underlining added).

[44] Apart from releasing its constructive trust claim, Catalyst has a concern that this provision would prevent it from tracing money paid to West Face in the event it were entitled to a judgment against West Face. It also is concerned that the words "net profit" are unclear because what is meant by "net" is unclear. I would direct that the provision be amended to make clear that the provision does not prevent Catalyst from proceeding with a tracing claim of the

money received by West Face from the sale of its share interest in Mid-Bowline. I would also direct that the word "net" be removed.

[45] On the state of the record before me, and taking into account the interests of all concerned, including Catalyst, I am of the view that the plan of arrangement is fair and reasonable.

What should be done?

[46] Although Catalyst has not produced any evidence on this application, a decision of its own making, I would give Catalyst one last chance to call evidence, so long as it is done quickly. Shaw hopes to close the transaction on March 1, 2016 but this may be unlikely. The outside date for the closing of the transaction is July 1, 2016.

[47] Contrary to the argument of Catalyst, it does not have a right to a lengthy process leading to a trial. This is particularly the case when Catalyst has purposely delayed pursuing its claim against West Face and taken clearly inappropriate proceedings to appeal the interlocutory decision of Justice Glustein. Apart from that appeal process, it did nothing to further the action.

[48] The Supreme Court of Canada has made it clear that a cultural shift in the civil process is required. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 Karakatsanis J. stated:

> **2** Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> **27** There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense

> and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> **28** This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[49] The reality in this case is that the issue needs to be decided quickly for all concerned. The wireless industry in Canada is in a state of flux and whether Shaw is or is not entitled to acquire WIND is important to that industry. This issue raised by Catalyst must be decided quickly. In light of all that has gone on in the past year and a half in its case against West Face and Mr. Moyse, that can be accomplished while protecting the rights of the parties.

[50] Taking into account appeal periods, a further hearing involving this application and the claim of Catalyst against West Face and Mr. Moyse should proceed quickly, and I set four days from February 22 to 26, 2016, with further steps in the interim as follows:

(i) The issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline. Whether this includes the issue as to whether Catalyst has any claim for misuse of Catalyst confidential information is up to Mid-Bowline. Counsel are to attempt to agree on the language of the issue to be tried, failing which it shall be settled at a 9:30 a.m. appointment with me on February 1, 2016.

(ii) The pleadings to date will be used.

(iii) The affidavits to date in the Catalyst action against West Face and Mr. Moyse and in this application may be used at the hearing.

(iv) Any party may conduct further cross-examinations on the deponents of affidavits on matters not yet covered in the cross-examinations to date.

(v) Catalyst may cross-examine Messrs. Lockie, Burt and Leitner on their affidavits filed in this matter.

(vi) Mr. Moyse as a party has a right to participate.

(vii) Any further issues regarding the hearing are to be dealt with promptly at a 9:30 a.m. appointment with me.

Claim for inducing breach of contract

[51] On Monday, in his affidavit sworn that morning, Mr. Riley made a statement indicating Catalyst intends to seek as relief in the action an order tracing all of the proceeds of the sale, relief that would involve amendments to the existing claim and that would "at first" glance be precluded by the proposed plan. His statement was that "In lieu of a claim for a constructive trust and an order holding the West Face proceeds of the Transaction in escrow, Catalyst intends to seek as relief in the Action an order tracing all of the proceeds of sale".

[52] During argument, it became clear that the basis for this intended claim would be a claim for inducing breach of contract made against the parties that participated in the unsolicited bid to VimpelCom to acquire its interest in WIND during the period that Catalyst and VimpelCom were having exclusive discussions. Those parties apart from West Face were Tennenbaum and 64NM. This intended claim for tracing would be to trace all of the proceeds paid to all shareholder of Mid-Bowline and not just those paid to West Face. It would obviously require the addition of the other shareholders of Mid-Bowline.

[53] Mr. Riley stated in his affidavit that the information giving rise to this new claim came from "information learned for the first time through the materials filed on this application". What information he was referring to was not stated. In argument it was stated that what he learned was that others were involved besides West Face in the unsolicited bid. However, it is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking interlocutory relief against West Face.

[54] On his cross-examination on May 13, 2015 Mr. Riley, the chief operating officer of Catalyst, discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. He would not agree that VimpelCom had not breached its exclusivity clause and said further:

> However, when a contract is breached, as I recall, there's two—you can—under the theory of Lumley and Guy, and I'm not trying to play lawyer, you can go after one of the two parties, the party breaching or the party inducing a breach.

[55] Mr. Riley is a very experienced lawyer. He was aware of the case of *Lumley v. Guy*, (1853) 118 ER 749, a case in England in which an opera singer was induced by Covent Garden to leave another theatre at which the singer had an agreement to perform. It was in that case that the modern action for inducing breach of contract was established.

[56] Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that[1].

[57] The reason I believe why this was said was that late last week Mid-Bowline delivered its amended plan to permit Catalyst to continue with its damage claim against West Face but removing the right to continue with its constructive trust claim against West Face. Such a claim would not allow the proposed plan of arrangement to proceed and would give Catalyst leverage in any negotiations with Mid-Bowline.

[58] In his letter of January 6, 2016 written with prejudice, Mr. DiPuccio asserted that Catalyst was not interested in holding up a sale of the shares of WIND to Shaw. I have some

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[1] I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

doubts about that statement. The terms put in the letter to West Face were terms that Catalyst had to know would not be agreeable to West Face, and indeed Catalyst was told that shortly after the letter was sent. The proposed action now is also intended to interfere with the sale to Shaw. The vendors are all financial concerns with fund investors and to hold up the proceeds of the sale or to require their tracing in the hands of their fund investors that would be claimed in the claim against them for inducing a breach of contract is something that Catalyst has to know would not be agreeable to them.

[59] This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, which was not true, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner.

[60] The evidence on the record is that VimpelCom told the parties who made the unsolicited bid that it could not deal with it while under an exclusivity arrangement with Catalyst and it did not do so. The proposed claim of Catalyst looks weak on the strength of the record before me and Catalyst has done nothing to adduce evidence to support the intended claim.

[61] In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.

Newbould J.

Date: January 26, 2016

This is Exhibit “N” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Dear Catalyst Fund Limited Partnership V (the "Fund" or "Fund V") Investor:

Catalyst continues to be excited about the existing Canadian distressed opportunity set and believes all of the work undertaken on behalf of its LPs will be rewarded handsomely.

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

We are very concerned about materials from the Funds (Quarterly Letters and Annual General Meeting presentations) appearing in social media / other public media sources and becoming manipulated against the interests of the LPs. This is now more relevant as we are trying to monetize the investments in the earlier Funds. Therefore, we are reminding LPs to remember their confidentiality obligations as part of the LP Agreements (please refer to the confidentiality provision on the following page).

Please feel free to contact the undersigned with any questions you may have, and thank you, once again, for your continued support. We remain committed to the Guiding Principles attached hereto as our commitment to you, our investors.

Newton Glassman

The following is the 2Q 2017 Quarterly Letter.

The materials included in this document are prepared for Catalyst's Limited Partners only and are subject to confidentiality as per the Limited Partnership Agreement.

By opening / reading this document, or by otherwise receiving this document, you understand, acknowledge, and agree to be bound by the confidentiality provision of the Limited Partnership Agreement. You also represent that the confidentiality provision has, and will continue to be, respected by you and your institution.

Confidentiality Provision

The following confidentiality provision is from Article 17 of the Limited Partnership Agreement dated as of February 4, 2015. The capitalized terms contained in the confidentiality provision have meanings set forth in the limited partnership agreement.

17.1(f) Confidential Information. The General Partner and the Manager hereby agree and each Limited Partner hereby agrees that neither it nor any of its representatives or Affiliates shall at any time disclose any Confidential Information to any Person nor use the same for any purpose other than the purposes of the Partnership or its investment therein, nor disclose or use for any purpose other than those of the Partnership, the private affairs of the Partnership or its investment therein or any other information relating to the business, operations or affairs of the Partnership which it may acquire hereunder or pursuant to this Agreement or any other agreement entered into pursuant to or in contemplation of this Agreement; provided that such restriction shall not apply to (i) information that is or becomes generally available to the public other than as a result of any disclosure made by a Person in violation of this Section, (ii) information already in a party's possession without restriction on disclosure, (iii) information that comes into a party's possession from a third party without restriction on disclosure, other than in violation of any agreement of which the recipient party is aware, or (iv) information that is required to be disclosed by law or by any court, governmental or regulatory authority or securities exchange, provided that the disclosing party shall use all reasonable efforts to notify the other parties of such requirement as soon as it becomes known to such disclosing party and shall provide such reasonable cooperation as may be requested by the General Partner to assist the General Partner in seeking an appropriate protective order to avoid such disclosure. Notwithstanding the foregoing, a Limited Partner that is a "fund-of-funds" may disclose Confidential Information regarding the Partnership and any.

Below, please find an updated table regarding outstanding Fund commitments.

Fund V [1] *($ in Millions)*	**3Q 2017**	**4Q 2017**	**Post-2017**	**Total**
Callidus Loan Participations	75.0	75.0	142.4	**292.4**

[1] Fund V term is 10 years ending on March 27, 2025. Two additional one-year extensions are available. Investment period ends March 27, 2020.
[2] Capital call facility draws repaid within 120 days.
[3] Expenses through end of Fund life.
[4] Management fees through investment period.

Callidus Capital Corporation ("Callidus")
Prepared by: Newton Glassman

New Developments this Quarter

CALLIDUS IS NOW A REPORTING ISSUER (I.E. A PUBLIC COMPANY, LISTED ON THE TSX, TICKER SYMBOL "CBL") AND CATALYST MUST BE CAREFUL NOT TO DISSEMINATE NON-PUBLIC PRICE SENSITIVE INFORMATION. THIS WOULD INCLUDE THE SIZE AND COMPOSITION OF THE LOAN PORTFOLIO AND THE STATE OF THE LOAN PIPELINE. THEREFORE, SUCH NON-PUBLIC MATERIAL INFORMATION WILL ONLY BE PROVIDED IN QUARTERLY LETTERS SIMULTANEOUS WITH OR AFTER SUCH INFORMATION HAS BEEN PUBLICLY DISCLOSED.

Catalyst substantially completed the capital markets process for Callidus in Q2/2014:

- Completed the initial public offering ("IPO") of 18,000,000 common shares of Callidus ("Common Shares") for aggregate gross proceeds of C$252MM on April 23, 2014
- Closed the issuance of an additional 2,700,000 Common Shares pursuant to the over-allotment option granted to the underwriters for aggregate gross proceeds of C$37.8MM on May 8, 2014
- Closed a $200MM senior secured revolving credit facility with Deutsche Bank AG, New York Branch ("DBNY") on April 10, 2014
- Catalyst received approximately C$234MM as a result of the IPO, and subsequently made a distribution in Q2/2014
- Exchanged the interest in the loan portfolio and servicer for shares of the new public company resulting in improved liquidity while accelerating potential for further appreciation
- Fund IV continued to participate in 18% (C$50MM) of the loan portfolio as it existed at IPO (with such loans being replaced from time to time). In December 2014, Callidus purchased the participation interest for 2,335,357 common shares at the December 3rd, 2014 closing price plus $821K in cash as a post-closing adjustment for foreign exchange

Second Quarter 2017 Highlights

- Growth in loan portfolio resumed with the addition of new C$30 million facility in the quarter
- Total revenue of C$26.9 million decreased 15% (C$4.7 million) from first-quarter 2017 and 31% (C$11.9 million) from second-quarter 2016, primarily due to consolidation of Bluberi Gaming Technologies Inc. ("Bluberi") in first-quarter 2017 and Otto Industries North America Inc. ("Otto") in second-quarter 2017
- Net loss of C$25.8 million for second-quarter 2017 (including the C$28 million non-cash impact of a present value calculation update associated with the future disposition of collateral) compared to net loss of C$3.5 million in the prior quarter and net income of C$37.5 million in the prior-year period
- Loss of C$0.51 per share (diluted) for second-quarter 2017 compared to loss of C$0.07 per share (diluted) in the prior quarter and earnings of C$0.73 per share (diluted) for second-quarter 2016
- As at August 9, 2017, Callidus had purchased 1,259,730 Common Shares pursuant to the NCIB at a weighted average price of C$15.33 per common share

Business Update (As at August 8, 2017)

Privatization Process

- Callidus is continuing the process of soliciting proposals intended to lead to the privatization of Callidus. The complexity and diversity of the structures that have been proposed, has unfortunately resulted in the process taking longer than originally expected
- As part of the formal privatization process, and as an alternative to proposals received, Callidus has retained the services of a placement agent and advisory firm with experienced personnel dedicated to raising capital for alternative investments, including "private debt funds"
- The potential pursuit of a private debt fund as a competitor in the privatization process is specifically being explored because it may result in greater value to Callidus' public shareholders than the proposals otherwise available to Callidus
- Should it be determined that the "private debt fund" is the preferred privatization alternative, Catalyst Capital Group Inc. ("CCGI") has advised that funds it manages would most likely participate and would do so on the same economic terms as the public shareholders
- As is typical of any process prior to final and definitive agreement, there can be no certainty that a transaction will be concluded or as to what price may be offered or accepted. CCGI, which manages funds that own approximately 68% of the issued and outstanding shares of Callidus, remains committed to completing a transaction on terms consistent with the previously published valuation range of C$18 to C$22 per share

Loan Portfolio

- As a result of ongoing, continuous process changes and improvements, Callidus revised its measure of growth prospects, referred to as its pipeline of potential borrowers, to include what was internally categorized as lower probability in order to present what Management believes is a more accurate measure of opportunities being pursued and a better reflection of the size of the addressable market. Callidus included this category as there have been instances of migration of opportunities within the pipeline from lower to higher probability categories
- This pipeline, measured on a gross basis is currently approximately C$2.3 billion, with a US$255 million signed-back term sheet. If presented on a basis consistent with past reporting parameters, the pipeline measure at June 30, 2017 was C$1,150 million, and currently stands at C$810 million. Callidus has observed an increase in the prospects and deal pipeline, an encouraging sign given the goal to re-start growth. As noted previously, Callidus closed and funded a new loan during the quarter. Callidus continues to maintain a cautious approach in reviewing potential prospects as it has observed a rising number of deals being signed by competitors as credit dollars continue to pour back into the market
- During the quarter, Callidus closed and funded a new loan representing approximately C$30 million (US$22.8 million) of facilities. As previously disclosed, Callidus has a term sheet of approximately C$330 million (US$255 million) signed back by a prospective borrower which is included in the estimated pipeline number and is the subject of ongoing due diligence. If due diligence is satisfactory, the term sheet is expected to convert into new loan facilities near the end of the third quarter. As previously disclosed, Callidus undertakes extensive due diligence before closing on a loan transaction and has historically closed on between 60% and 80% of signed back term sheets. There can be no assurance that the results of the due diligence will be satisfactory to Callidus
- Net loans receivable decreased from the year end primarily due to the recognition of businesses acquired as a result of the acquisition of Bluberi in first-quarter 2017 (valued at approximately C$127 million) and Otto in second-quarter 2017 (valued at approximately C$92 million)

Yield Enhancements and Provision for Loan Losses

- At June 30, 2017, the total recognized yield enhancements taken into income over the last two quarters totaled approximately C$5.8 million (or C$0.12 per share)
- Provision for loan losses of C$35.0 million was recorded in the statement of income for the current quarter. The majority (approximately C$28 million or 80%) of this provision related to the present value impact associated with the disposition of collateral that is expected to be fully realized over a longer period of time
- During the current quarter, Callidus recognized a recovery of C$6.9 million under the Catalyst guarantee due to the recognition of specific loan loss provisions in the quarter. During the current year-to-date period, Callidus recognized a recovery of C$8.5 million under the Catalyst guarantee due to the recognition of specific loan loss provisions in the first six months of 2017

Normal Course Issuer Bid

- In January 2017, Callidus commenced a normal course issuer bid (the "NCIB") with respect to the common shares (see news release dated January 25, 2017)
- As at August 9, 2017, Callidus had purchased 1,259,730 Common Shares pursuant to the NCIB at a weighted average price of C$15.33 per common share
- Callidus intends to continue purchases under the NCIB as long as the common shares of Callidus continue to trade at a discount to Callidus' view of fair value

Changes to Credit Facilities and Liquidity

- Callidus' primary sources of short-term liquidity are cash and cash equivalents and undrawn credit facilities. Assuming a participation rate for Catalyst Fund V of 75% and continued usual increases in our senior debt facilities, total liquidity as at June 30, 2017 would be able to support approximately C$300 million of new loans
- The revolving credit facility was terminated on July 17, 2017 as there was C$nil outstanding at the end of the revolving period and beginning of the amortization period. As loan growth is restarted, discussions with potential lenders about a warehouse facility continue, with the objective of finding a replacement, flexible warehouse facility given Callidus' actively managed loan portfolio. Management believes it will be successful in obtaining an appropriate warehouse facility. Callidus has two facilities maturing in the next three months. Management believes that these facilities will either be extended or replaced

Callidus Response to False Allegations Published by the Wall Street Journal

- On August 9, 2017, Callidus issued a statement regarding false allegations by supposedly "independent" individuals abusing the OSC whistleblower process. The allegations about Callidus and its majority shareholder, The Catalyst Capital Group Inc., were irresponsibly published by the Wall Street Journal even after a comprehensive briefing held with Wall Street Journal reporters on August 8, 2017. For example, as part of that meeting it was made clear that the treatment of the Catalyst guarantee for Callidus loans made to Xchange Technology Group was in accordance with all applicable accounting requirements. As well, full disclosure was contained in both Catalyst's financial reports to its limited partners and through Callidus' public disclosures on an ongoing basis. The accounting treatment and disclosure were entirely appropriate and there is no basis for allegations to the contrary, facts the Wall Street Journal chose to ignore
- These allegations presented are primarily based on anonymous sources and are believed to have been initiated by individuals against whom Callidus has current litigation relating to the

enforcement of guaranties. Those individuals have already had the opportunity to present their allegations in court without success. That is because the allegations are false

- Callidus knows of no legitimate basis for any whistleblower complaint. In fact, It is extraordinary that the media has been given copies of confidential whistleblower reports that neither Callidus nor Catalyst has ever seen. Callidus believes that those individuals, having failed in court, are filing deliberately misleading whistleblower reports with the Ontario Securities Commission so that they can then leak them to the press in the hope that the press will publish the allegations. As a result, the media and public markets are misled and the legitimate OSC 'whistleblower' process is exploited for personal advantage, and to do damage to the market value of Callidus, and to the reputation, operations and investments of its majority shareholder, Catalyst
- Any abuse of the 'whistleblower' process is a very serious matter that has significant consequences. For that reason, Callidus believes that it is the actions of those individuals that warrants investigation

Changes to the Management Team

- Callidus remains committed to the goal of doubling the loan portfolio over the next two to three years. In support of that goal, Callidus has added an additional senior Underwriter and Originator to the Management team
- Geoffrey Zbikowski has joined Callidus as Vice President, Head of Originations - Western Region. Geoffrey was previously a Managing Director with White Oak Global Advisors, LLC's Origination team. He is currently based in California and will primarily cover the US market. Geoffrey began his career in the Financial Restructuring Group at CIBC World Markets
- Michael Pisani has joined Callidus as Vice President, Portfolio/Underwriting. Michael has broad experience across lending platforms and industries including asset-based, cash flow, franchise, manufacturing, transportation, aircraft, debtor-in-possession and real estate. He most recently served as Senior Vice President and Workout Leader for Wells Fargo Equipment Finance. Prior to that he was Vice President, Corporate Finance at GE Capital, and Assistant Vice President for CIT Business Credit Canada

Financial Highlights (for 3 Months Ended June 30, 2017)

- As at June 30, 2017, gross loans receivable before derecognition was C$1,028 million, a decrease of C$286 million or 22% from December 31, 2016. The decrease was primarily due to the repayment of 6 loans totaling C$377 million partially offset by the funding of existing loans and the origination of a new loan in June 2017
- At June 30, 2017, there were 19 loans and the average loan amount funded was approximately C$54 million. This compares with 24 loans and an average loan amount funded of C$55 million at December 31, 2016. Net loans receivable decreased from year-end due to these repayments as well as the recognition of businesses acquired as a result of the acquisition of Bluberi Gaming Technologies Inc. in the first quarter of 2017 and Otto Industries North America Inc. in the second quarter of 2017, as these loans were removed from loans receivable and the companies were consolidated in the financial statements
- Gross yield for the quarter was 11.2%, a decrease of 8.8% from the same quarter last year due primarily to lower interest rates charged on certain loans and lower additional fees in the current quarter
- For the current year-to-date period, a total of C$7.0 million of additional fees have been recognized in interest and fees and other in the statement of comprehensive income related to yield enhancements

- Provision for loan losses of C$35.0 million was recorded in the statement of income for the current quarter. The majority (approximately C$28 million or 80%) of this provision related to the present value impact associated with the disposition of collateral that is expected to be fully realized over a longer period of time. Under IFRS, Callidus is required to: (i) account for the present value impact immediately as part of a loan loss provision and (ii) account for the accretion of this amount in future periods through the statement of comprehensive income as interest revenue, meaning a C$28 million reduction in current period income which is expected to be fully recovered in future periods
- During the current quarter, Callidus recognized a recovery of C$6.9 million under the Catalyst guarantee due to the recognition of specific loan loss provisions in the quarter
- For the current quarter, the average loan portfolio outstanding was C$1,030 million, a decrease of C$117 million or 10% from the same quarter last year
- The leverage ratio decreased from 40.4% at December 31, 2016 to 37.1% at June 30, 2017
- For the current quarter, Callidus recorded a net loss of C$25.8 million primarily as a result of a higher provision for loan losses
- Fund has participation interest in three of Callidus' loans, representing C$9.8MM as of June 30, 2017

Guiding Principles

Principle 1: Excellence.
Catalyst is a firm dedicated to the pursuit of excellence, adhering to the very highest standards of integrity. As a result, Catalyst embraces the fact that excellence is an ongoing and evolving process, and defined from our investors' perspective only. We at Catalyst are committed to continually preserving, pursuing and building upon this dedication to excellence, which by our definition includes the pursuit of the highest standards of integrity, in all that we do. On behalf of our investors, Catalyst's culture of excellence is both our mandate and our mission.

Principle 2: Superior Analytics. Our ability to deliver exceptional, insightful and unique analytics is our foremost competitive advantage. It is what unquestionably sets us apart and what will unquestionably be the "catalyst" for our lasting success. We don't pretend to be the smartest; we strive to be the hardest working and most thorough analytical team. We will approach every assignment with vigor and absolute resoluteness. We will mentor and coach each other to ensure we continuously hone, invest in, and master our analytical excellence.

Principle 3: The Details. The crux of our work is in the details. We dig deep into the minutiae to reveal what others have missed. It is this search in the details that allows us to discover true value and find the very best answers. We will never settle for the status quo because of our commitment to excellence and because we know that hidden within the details is, by definition, reduced risk and/or improved returns for our investors.

Principle 4: Intellectual Curiosity. We recognize that it takes constant intellectual curiosity to fully explore the possibilities. We will therefore go to extraordinary lengths to explore issues and situations to their logical end maintaining an environment where such exploration is encouraged and supported. We will always ask questions, even when we feel certain that we know the answers. Regardless of role within the organization, we are all expected to passionately and meaningfully debate all of the issues we encounter. We will do this respectfully, keeping in mind that it is not personal; it is driven by our commitment to the fact that the investors' best interests are always our #1 concern. After all, it is intellectual curiosity that will ensure we identify and uncover all the angles and subtleties of a situation, and enable our continued collective and personal development.

Principle 5: Team. We are only truly empowered as a team. As individuals we cannot possibly anticipate all of the nuances of a situation. Our combined intellect/insight exceeds the sum of our parts, and our ability to work collectively, leveraging all insights, experiences and abilities, is the key to our continued success. While individual creativity and independent thinking are always encouraged, we will only reap the most remarkable results when we capitalize on the intellectual collective of our different perspectives. As a member of the Catalyst team we will hold each other accountable for imparting our knowledge to each other and acknowledge that for our continued success and the protection of our investors' best interests, our individual expertise must be shared.

Principle 6: Reputation. Our reputation is at the heart of our business. The quality of our people, the work we do, and our dedication to excellence and integrity are paramount to our reputation. We will hold ourselves up to the highest levels of integrity and ethical standards, and instill pride in the Catalyst name. We will lead by example, treating our team members, our investors and all of our stakeholders with the utmost respect. Our reputation for excellence is and will continue to be our greatest asset.

This is Exhibit “O” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Message

From: Vincent Hanna [vincent_h@runbox.com]
Sent: 8/11/2017 4:55:15 PM
To: nglassman [nglassman@catcapital.com]
Subject: Attacks on Callidus

Dear Mr. Glassman.

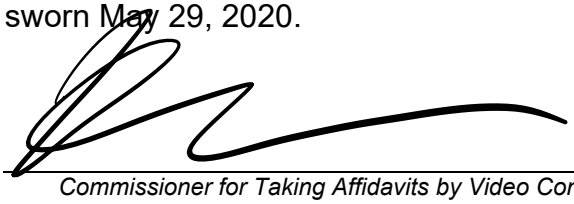
This letter is to inform you that you have been targeted by a group of funds in Canada and abroad whose sole goal is to bring down your public vehicle Callidus and you personally. They are acting in concert to short your stock and to spread false rumors in the market place mostly through Bruce Langstaff at Canaccord but through any broker who will listen. The Wall Street Journal is a prime example of this coordinated effort. The "cabal" does have private investigators following you and most likely have Russians hackers attacking your office emails and servers/cloud. The RCMP and FBI are aware of this "cabal" from a criminal investigation but that doesn't help you in the short term. I am sure you are not surprised but the funds are:

Greg Boland - WestFace Capital.
Roland Keiper - Clearwater Capital.
Sunny Puri/Moez Kassam - Anson Partners.
Shawn Kimmel - K2 Partners
Principals - MMCAP
Marc Cohodes - US Short Seller and his huge global network.

I am disgusted that this acting in concert is going on and happening to you and other participants in the Canadian Capital Markets and I write this letter to inform you of such.

If I were you I would sue the above groups and from that you will garner access to all their trading records and communications between them. From this you will then be fed additional information. This will lead the perpetrators down a rabbit hole they will not escape from. But in the end that is up to you. You now have this information. There will be more to come. Stay tuned.

This is Exhibit “P” referred to in the Affidavit of Gregory Boland sworn May 29, 2020.

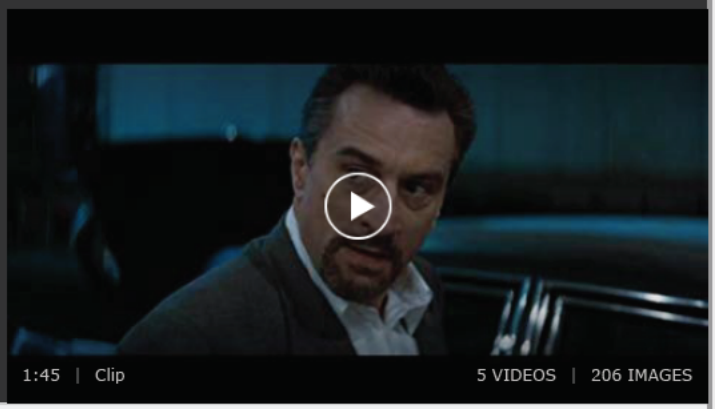


Commissioner for Taking Affidavits by Video Conference (or as may be)
Maura O’Sullivan (77098R)

Heat (1995)

R | 2h 50min | Crime, Drama, Thriller | 15 December 1995 (USA)

8.2/10 544,240 Rate This



A group of professional bank robbers start to feel the heat from police when they unknowingly leave a clue at their latest heist.

Director: Michael Mann
Writer: Michael Mann
Stars: Al Pacino, Robert De Niro, Val Kilmer | See full cast & crew »

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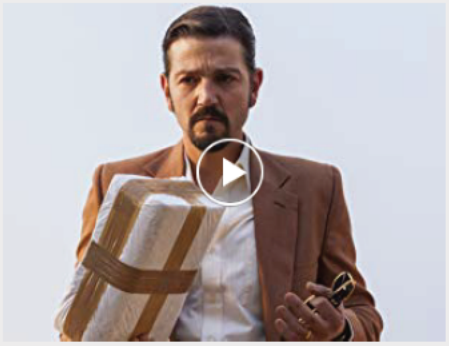
How Diego Luna Kept Things Real in "Narcos: Mexico"



The charismatic actor brings memories of Mexico and a nose for authenticity to his performance as Félix Gallardo.

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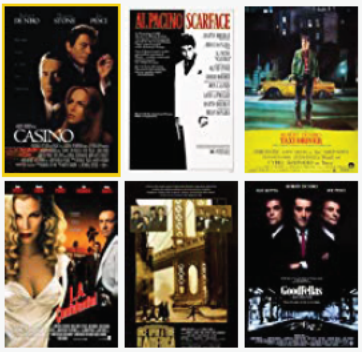

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R Crime | Drama

8.2/10

A tale of greed, deceit, money, power, and murder occur between two best friends: a mafia enforcer and a casino executive, compete against each other over a gambling empire, and over a fast living and fast loving socialite.

Director: Martin Scorsese
Stars: Robert De Niro, Sharon Stone...

Cast

Edit

Cast overview, first billed only:

Al Pacino	...	Lt. Vincent Hanna
Robert De Niro	...	Neil McCauley
Val Kilmer	...	Chris Shiherlis
Jon Voight	...	Nate
Tom Sizemore	...	Michael Cheritto
Diane Venora	...	Justine
Amy Brenneman	...	Eady
Ashley Judd	...	Charlene Shiherlis
Mykelti Williamson	...	Sergeant Drucker
Wes Studi	...	Casals
Ted Levine	...	Bosko
Dennis Haysbert	...	Donald Breedan
William Fichtner	...	Roger Van Zant
Natalie Portman	...	Lauren Gustafson
Tom Noonan	...	Kelso

See full cast »

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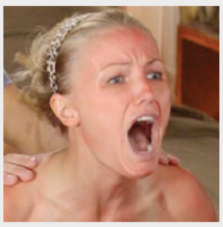

The Worst Movie Remakes of All Time

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Storyline

Edit

Hunters and their prey--Neil and his professional criminal crew hunt to score big money targets (banks, vaults, armored cars) and are, in turn, hunted by Lt. Vincent Hanna and his team of cops in the Robbery/Homicide police division. A botched job puts Hanna onto their trail while they regroup and try to put together one last big 'retirement' score. Neil and Vincent are similar in many ways, including their troubled personal lives. At a crucial moment in his life, Neil disobeys the dictum taught to him long ago by his criminal mentor--'Never have anything in your life that you can't walk out on in thirty seconds flat, if you spot the heat coming around the corner'--as he falls in love. Thus the stage is set for the suspenseful ending....
Written by Tad Dibbern <DIBBERN_D@a1 mscf upenn edu>

Plot Summary | Plot Synopsis

Plot Keywords: gun battle | honor | organized crime | bank | armored car robbery | See All (203) »

Taglines: A Los Angeles Crime Saga See more »

Genres: Crime | Drama | Thriller

Motion Picture Rating (MPAA)
Rated R for violence and language | See all certifications »
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Details

Edit

Official Sites: Official Facebook | Official site
Country: USA
Language: English | Spanish
Release Date: 15 December 1995 (USA) See more »
Also Known As: Heat See more »
Filming Locations: Venice Boulevard at Georgia Street, Los Angeles, California, USA See more »

Box Office

Edit

Budget: $60,000,000 (estimated)
Opening Weekend USA: $8,445,656, 17 December 1995
Gross USA: $67,436,818
Cumulative Worldwide Gross: $187,436,818
See more on IMDbPro »

Company Credits

Production Co: Warner Bros., Regency Enterprises, Forward Pass See more »
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Technical Specs

Runtime: 170 min
Sound Mix: Dolby Digital | SDDS
Color: Color (Technicolor)
Aspect Ratio: 2.35 : 1
See full technical specs »

Did You Know?

Edit

Trivia
Al Pacino revealed in Argentina when he performed An Evening With Al Pacino at the Teatro Colón, that when they had to rehearse the last scene, Robert De Niro told him: "No words". He still thinks that that was the right call. See more »

Goofs
When Vincent in Air 18 contacts JJ in Air 40 wanting to know the whereabouts of Neil, JJ says Neil is "on the 105 heading east towards the 110 interchange." After Vincent gets into the car

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a list of 34 t tles
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created 11 May 2018

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Title: **Heat** (1995)
IMDb 8.2/10

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Police Procedural Movies

Best Movie Starring Robert De Niro

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on the Vermont on-ramp, they pass-through signs above the freeway clearly indicate they are traveling west on Highway 105, not east. See more »

Quotes
[first lines]
Construction Clerk: Check, charge, or cash?
See more »

Alternate Versions
The television version aired by NBC on January 3, 1999 was disowned by director Michael Mann and credited to "Alan Smithee" because, though Mann offered to reinstate 17 minutes of deleted footage in the film to make it fit a four-hour time slot, NBC decided to excise over 40 minutes of footage from the theatrical release in order to make it fit a three-hour slot (including commercials). See more »

Connections
Featured in Avenged (2013) See more »

Soundtracks
Top O' The Morning To Ya
Written by Erik Schrody (as Eric Schrod), Leor Dimant (as Leon Demant) and Willie Dixon
Performed by House of Pain
Courtesy of Tommy Boy Records
See more »

Frequently Asked Questions

Q: Why would Neil be so concerned about Chris' domestic problems? Why does he confront Charlene in the hotel?

Q: Were Pacino and De Niro ever in the same scene together?

Q: If Breedan was monitoring the police scanner in the getaway car why didn't he pick up on Vincent organising the roadblock via walkie talkie?

See more »

User Reviews

★★★★★★★★★★ **One Of The Best Crime Films Ever**
15 February 2006 | by ccthemovieman-1 – See all my reviews

I really believe this is one the great crime movies of all time. It has some drawbacks that wouldn't make me recommend this for family viewing - tons of f- words by Al Pacino and a few bloody scenes, but as far as a fascinating crime story: wow!

This movie made modern-day history because it was the first time two of the great actors of this generation - Pacino and Robert De Niro - finally acted together in the same film. Those two didn't disappoint, either. They were great to watch and one of the huge highlights of the film, to me, was when they faced each other in a simple conversation over a cup of coffee. That conversation has always fascinated me, no matter how many times I've heard it. It was such a "landmark" scene that It's even the subject of a short documentary on the special-edition DVD.

As with the conversation scene, the shootout segment in the streets of Los Angeles still astounds me no matter how many times I see it. The other action scenes are intense and memorable, too, and the cast in here is deep. This isn't just Pacino and De Niro. It's Val Kilmer, Ashley Judd, Jon Voight, Diana Venora, Natlie Portman, Tom Sizemore, Amy Brenamann, Wes Studi, Ted Levine, Mykelti Williamson, on and on.

Put that fabulous cast under Michael Mann, one of the best directors in business, add a great soundtrack and interesting camera-work and you have a great film. At three hours long, it never bores one and at same time, doesn't overdo the action, either. I read one critic criticize this film because of the time taken to examine the personal lives of the main characters, but you can't have three hours of nothing but action. The only scene I felt went on a bit too long was the ending chase at the airport, but that's nitpicking considering the film as a whole.

This is just one of those movies where a great cast and director live up to their billing.

178 of 227 people found this review helpful. Was this review helpful to you? Yes No | Report this

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WEST FACE CAPITAL INC. et al. Plaintiffs by Counterclaim	-and-	THE CATALYST CAPITAL GROUP INC. et al. Defendants to the Counterclaim		

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

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