Divisional Court File No. 648/15
Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Parties

MOTION RECORD
(PLAINTIFF'S MOTION TO EXTEND TIME FOR LEAVE TO APPEAL RETURNABLE JANUARY 19, 2016)

January 8, 2016

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(DIVISIONAL COURT)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Parties

NOTICE OF MOTION
(EXTEND TIME FOR LEAVE TO APPEAL
RETURNABLE JANUARY 19, 2016)

The Plaintiff ("Catalyst") will make a motion to a Divisional Court Judge sitting as a Superior Court Justice to be heard on January 19, 2016 at 10:00 a.m. or as soon after that time as the motion can be heard, at 130 Queen Street, Toronto, Ontario, M5G 1E6, from the Order of Justice Glustein dated July 7, 2015.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[ ] in writing under subrule 37.12.1(1) because it is ;

[ ] in writing as an opposed motion under subrule 37.12.1(4);

[X] orally.

THE MOTION IS FOR:

1. Leave to extend the time for filing a notice of motion for leave to appeal in accordance with Rules 62.02 and 61.03.1 of the *Rules of Civil Procedure*;

2. The costs of this motion; and,

3. Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

A. Background to this Action

4. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

5. The Responding Party West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

6. The Responding Party Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014.

7. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

8. On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

9. Shortly thereafter, Catalyst commenced this action and brought an urgent motion for injunctive relief seeking, among other things, preservation of documents and enforcement of the Non-Competition Covenant.

B. The Interim Order

10. On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

11. On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to the Interim Order, pursuant to which, among other things:

(a) The Respondents were ordered to preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against the Respondents; and

(b) Moyse was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image the data stored on the Devices (the "Images"), to be held in trust by his counsel pending the outcome of the motion for interlocutory relief.

C. Moyse's Contempt of the Interim Order

12. Catalyst's motion for interlocutory relief was heard on October 27, 2014. On November 10, 2014, Justice Lederer of the Superior Court of Justice released his decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images.

13. On February 17, 2015, the ISS delivered a its report (the "ISS Report") to counsel for Catalyst and Moyse.

14. The ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

15. Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images. On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

16. On Sunday, July 20, 2014, at 8:09 p.m., Moyse ran the Secure Delete programme on his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer.

17. In addition, Moyse admits that on July 20, 2014, he deleted his Internet browsing history from his personal computer. Moyse's browsing history would have included information related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

18. As a result of Moyse's conduct, it is impossible to know for sure what information, files and/or folders he deleted on July 20, 2014.

19. By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse acted in contempt of Court.

20. The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

21. The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme and deletion of his Internet browsing history on July 20, 2014, was a breach of the Interim Order.

22. It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

23. Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

24. Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine

through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

25. As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

D. Leave to Appeal the Contempt Decision

26. The Contempt Decision conflicts with other decisions in Ontario and elsewhere on a number of issues, including:

(a) the motion judge's application of the principle of ambiguity in court orders;

(b) the motion judge's failure to apply the proper principles for determining credibility of witnesses as part of the fact-finding process, including, among others, failing to determine whether Moyse's evidence was credible in light of the objective and undisputed evidence in the record before the Court; and

(c) the motion judge's determination that he could exercise his discretion to decline to make a finding of contempt based on the undisputed facts before him.

27. It is desirable that leave to appeal be granted so that the Division Court can clarify the interpretation of orders and findings of ambiguity in court orders and clarify the circumstances in which a motion judge is permitted to exercise his or her limited discretion to decline to make a finding of contempt.

28. In addition or in the alternative, there is good reason to doubt the correctness of the motion judge's decision:

(a) The motion judge erred in interpreting the Interim Order to mean that "activities that relate to [the Respondents'] activities since March 27, 2014 was not intended to encompass all of the Respondents' activities, and/or that if this was the intended meaning, then the Interim Order was ambiguous.

(b) The motion judge erred in concluding that there was no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of his Internet searches.

(c) In particular, the motion judge erred in concluding that the Appellant could only speculate that information deleted from Moyse's computer included evidence of Moyse's activities related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

(d) The motion judge erred by failing to apply the proper and established legal test for determining whether the evidence before him proved contempt beyond a reasonable doubt.

(e) The motion judge erred in concluding that, even if Moyse had acted in contempt of the Interim Order, it was appropriate to exercise his discretion to decline to make a finding of contempt. Such discretion is limited to situations where a finding of contempt would impose an injustice in the circumstances of the case, and is not

available in situations where a party's acts in violation of an order make subsequent compliance impossible.

29. The proposed appeal of the contempt motion involves matter of such public importance that leave should be granted.

E. Appeal of the ISS Decision

30. The ISS Decision conflicts with other decisions in Ontario, in particular the decision of Justice Lederer in this same case, in which the Court held that the circumstances warranted an order authorizing an ISS process.

31. It is desireable that leave to appeal the ISS Decision be granted so that the Divisional Court can clarify how the court is to apply the test to authorize an ISS process in circumstances where previous court orders were tainted by a parties' conduct.

32. In addition or in the alternative, there is good reason to doubt the correctness of the ISS Decision. Catalyst respectfully submits that the motion judge erred in dismissing the Appellant's motion to create forensic images of the electronic images belonging to the principals of West Face and for the appointment of an ISS to review those images.

33. Justice Lederer had already determined that it was appropriate to authorize an ISS to review the Images of Moyse's devices prior to the discovery process in this Action.

34. As a result of Moyse's conduct, described above, the ISS's review of Moyse's devices was tainted in a manner unanticipated by Justice Lederer.

35. The creation of forensic images of West Face's devices for review of an ISS prior to the discovery process in this Action is necessary to give effect to the Order of Justice Lederer, from which leave to appeal was unsuccessfully sought by the Respondents.

36. The motion judge erred by failing to consider the need to create the Images of West Face's devices and for an ISS review in order to give effect to the Order of Justice Lederer in this Action.

37. The proposed appeal of the ISS Decision involves matters of such importance that leave should be granted.

F. Extension of Time to Seek Leave to Appeal

38. On July 22, 2015, Catalyst served a Notice of Appeal in which it sought to appeal the Contempt Decision and the ISS Decision to the Court of Appeal for Ontario. Catalyst had good reason to believe that the Contempt Decision was a final decision such that an appeal therefrom could be brought to the Court of Appeal, without leave.

39. Catalyst sought to appeal the ISS Decision in conjunction with its appeal of the Contempt Decision through the application of s. 6.02 of the *Courts of Justice Act*, which it believed applied to the circumstances of its appeal.

40. It was at all times the intention of Catalyst to appeal, or seek leave to appeal, the Contempt Decision and the ISS Decision within the relevant time period for doing so. The failure to seek leave within the relevant time frame for doing so was inadvertent and not deliberate.

41. In November 2015, Catalyst's appeal of the Contempt Decision and the ISS Decision was quashed by the Court of Appeal, without prejudice to Catalyst's right to seek leave to appeal those decisions to the Divisional Court.

42. Moyse and West Face will not be prejudiced by the granting of an extension of the time for serving this notice of motion.

43. The justice of the case requires the extension.

44. Subsection 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

45. Rules 1, 3.02, 37, 61.03, 61.03.1 and 62.02 of the *Rules of Civil Procedure*.

46. Such further and other *grounds* as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The Order of the Honourable Justice Glustein, made on July 7, 2015;

2. The affidavit of Andrew Winton, to be sworn; and

3. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

December 9, 2015

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West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Moving Party

-and-

BRANDON MOYSE et al.
Defendants/Responding Parties

Divisional Court File No.
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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	TUESDAY, THE 7TH
	)	
MR. JUSTICE GLUSTEIN	)	DAY OF JULY, 2015

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff, was heard on July 2, 2015, at the court house, 393 University Avenue, 8th Floor, Toronto, Ontario, M5G 1E6.

ON READING the three motion records filed by the plaintiff, the two motion records filed by the defendant West Face, two motion records filed by the defendant Brandon Moyse, and the joint motion record of the defendants, the facta of the parties, and the joint book of authorities filed by the parties, and on hearing the submissions of the lawyers for the Parties,

1. THIS COURT ORDERS that the Plaintiff's motion for the relief set out in its Amended Notice of Motion dated February 6, 2015, is hereby dismissed.

2. AND THIS COURT FURTHER ORDERS that if the Parties are unable to agree as to costs, each party may make costs submissions of no more than three pages (not including a costs outline), to be delivered by the defendants within 14 days of this order, with the plaintiff to respond within 14 days from receipt of the defendants' submissions. The defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of the plaintiff's costs submissions.

(Signature of Judge)

C. CHUBA
REGISTRAR, SUPERIOR COURT OF JUSTICE
GREFFIER ADJOINT, COUR SUPÉRIEURE DE JUSTICE

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ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 2 6 2015

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

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PROCEEDING COMMENCED AT
TORONTO

ORDER

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AFFIDAVIT OF ANDREW WINTON
(SWORN JANUARY 7, 2016)

I, Andrew Winton, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a Lawyer with the law firm of Lax O'Sullivan Lisus Gottlieb LLP ("LOLG"), the lawyers for the Plaintiff ("Catalyst"), and, as such, have knowledge of the matters contained in this affidavit. To the extent my knowledge is based on information and belief, I identify the source of such information and believe the information to be true.

The Litigation and Prior Motions

2. Catalyst is an independent investment firm that operates in the field of investments in distressed and undervalued Canadian situations for control or influence. In June 2014, Catalyst commenced an action against Brandon Moyse, a former employee ("Moyse"), and West Face

Capital Inc. ("West Face"), a competitor of Catalyst's, in circumstances where Moyse resigned from Catalyst and immediately commenced working at West Face.

3. Attached hereto as Exhibit "A" is a copy of the Amended Amended Statement of Claim in this action. One of the central issues in the action is whether Moyse communicating Catalyst's confidential information and communicated that information to West Face.

4. Shortly after the action was commenced, Catalyst brought a motion seeking, among other things, to create forensic images of Moyse's electronic devices and to appoint an Independent Supervising Solicitor ("ISS") to review the images of those devices to determine if there was documentary evidence on those devices that Moyse had taken Catalyst's confidential information and/or whether any confidential information was communicated to West Face. Attached hereto as Exhibit "B" is a copy of Catalyst's notice of motion dated June 26, 2014.

5. On July 16, 2014, Moyse and West Face consented to an interim order that provided for, among other things, the preservation of the defendants' records that relate to Catalyst, to their activities since March 27, 2014 and/or to any of the matters raised in the action, and for the creation of forensic images of Moyse's electronic devices. Attached hereto as Exhibit "C" is a copy of the interim order of Justice Firestone dated July 16, 2014.

6. Forensic images of Moyse's electronic devices (the "Images") were created on July 21, 2014.

7. The motion to appoint an ISS was heard and granted by Justice Lederer in the fall of 2014. Attached hereto as Exhibit "D" is a copy of Justice Lederer's Reasons for Judgment dated November 10, 2014. In his reasons, Justice Lederer wrote:

> Finally, counsel for Catalyst submitted that an independent supervising solicitor should be identified and required to review the forensic images that have been created and held in trust by counsel for Brandon Moyse to identify what, if any, material these images may contain that are confidential to Catalyst. What is personal to Brandon Moyse would be returned to him. Counsel for Brandon Moyse opposed this request. It would be an extraordinary order. It is the view of counsel for Brandon Moyse that material that is confidential to Catalyst will have to be produced. It should be left to Brandon Moyse to review and determine what must be produced. The difficulty with this is that it is another assurance where those made in the past were not sustained.
>
> 4. The forensic images that were created in compliance with the order of Mr. Justice Firestone shall be reviewed by an independent supervising solicitor identified, pursuant to a protocol to be jointly agreed to by counsel for the parties, or, failing such agreement, by way of further direction of the court.
>
> 5. The review of the forensic images by the independent supervising solicitor shall be completed before any examinations-for-discovery are conducted in this action.

8. Attached hereto as Exhibit "E" is a copy of the order of Justice Lederer dated November 10, 2014.

The Motion before Justice Glustein

9. The ISS appointed pursuant to Justice Lederer's order delivered its final report in February 2015. Attached hereto as Exhibit "F" is a copy of the ISS's report dated February 17, 2015.

10. The ISS report revealed that, immediately prior to the making of the Images on July 21, 2014, Moyse downloaded and apparently launched military-grade deletion software that is capable of deleting documents from a computer so that they cannot be recovered through forensic analysis. The ISS was unable to determine if Moyse actually ran the deletion software, but noted that a system folder created the night before the Images were created suggested that the software had been launched prior to the creation of the Images.

11. Catalyst had seen an earlier draft of the ISS's report that included the information concerning Moyse's conduct. Immediately upon learning of Moyse's conduct, Catalyst brought a motion seeking, among other things, to have Moyse held in contempt of court for breaching the Order of Justice Firestone dated July 16, 2014, the creation of forensic images of devices belonging to West Face, and the appointment of an ISS to review those images (the "Contempt and ISS Motion"). Attached hereto as Exhibit "G" is a copy of Catalyst's Amended Notice of Motion dated February 6, 2015.

12. The Contempt and ISS Motion also sought an interlocutory injunction to restrict West Face's control over its shares in Wind.

13. The parties filed voluminous records of evidence in the Contempt and ISS Motion. Catalyst's evidence included affidavit evidence from a forensic IT investigator who concluded that Moyse most likely used the deletion software to delete files before the Images were created. Attached hereto as Exhibits "H", "I", "J" and "K" are copies of the affidavits, without exhibits, of Jim Riley and Martin Musters that Catalyst filed in support of the Contempt and ISS Motion.

14. Moyse and West Face also filed extensive evidence in response to Catalyst's motion, and cross-examinations of the parties' affiants took place in May 2015.

15. The Contempt and ISS Motion was heard by Justice Glustein on July 2, 2015. On July 7, 2015, Justice Glustein dismissed all three elements of the motion: the contempt issue, the ISS issue and the interlocutory injunction. Attached hereto as Exhibit "L" is a copy of Justice Glustein's endorsement dated July 7, 2015.

Catalyst Attempts to Appeal the Dismissal of the Contempt and ISS Motion

16. Without intending to waive privilege, I can inform the Court that immediately following receipt of Justice Glustein's decision, Catalyst instructed LOLG to appeal Justice Glustein's dismissal of the contempt and ISS portions of the motion.

17. Catalyst served its notice of appeal on the defendants on July 22, 2015. Attached hereto as Exhibit "M" is a copy of the notice of appeal dated July 22, 2015. The appeal was made to the Ontario Court of Appeal on the basis that the appeal of the dismissal of the contempt motion was an appeal from a final order of a judge of the Superior Court and that the appeal of the ISS motion could be joined to the appeal of the contempt motion pursuant to s. 6(2) of the *Courts of Justice Act*.

18. By letter dated July 24, 2015, Kris Borg-Olivier, Moyse's counsel, informed LOLG of their position that the order dismissing the contempt motion was interlocutory, not final, and that therefore the appeal lay to the Divisional Court, with leave. Mr. Borg-Olivier informed LOLG that Moyse intended to bring a motion to quash the appeal. Attached hereto as Exhibit "N" is a copy of the letter from Mr. Borg-Olivier to LOLG dated July 24, 2015.

19. In a separate letter sent that same day, Matthew Milne-Smith, West Face's outside counsel, informed LOLG that West Face agreed with Mr. Borg-Olivier's position. Mr. Milne-Smith took the position that because the appeal of the contempt order lay to the Divisional Court, with leave, section 6(2) of the *Courts of Justice Act* has no application to the appeal of the dismissal of the ISS motion.

20. LOLG did not agree with Mr. Borg-Olivier's or Mr. Milne-Smith's reasoning. We were of the opinion that the dismissal of the contempt motion was a final order and that it was therefore

possible to resort to section 6(2) of the *Courts of Justice Act* to join the dismissal of the ISS order with the appeal of the dismissal of the contempt motion, so that both appeals would be heard together at the Court of Appeal.

21. The defendants brought motions to quash Catalyst's appeal. In the interim, before those motions could be heard, Catalyst perfected its appeal. Attached hereto as Exhibit "O" is a copy of Catalyst's appeal factum dated September 21, 2015.

22. After the appeal was perfected, LOLG began to prepare materials to respond to the defendants' motions to quash, which were scheduled to be heard on November 5, 2015. In the course of those preparations, we came to realize that section 6(2) of the *Courts of Justice Act* did not permit an appellant to join an appeal that was subject to a leave requirement to an appeal as of right until after leave was granted. This affected the merits of West Face's motion to quash the appeal of the ISS order.

23. This realization did not occur until mid-October. Upon realizing the error, we immediately entered into without prejudice discussions with Mr. Milne-Smith to negotiate terms pursuant to which the appeal to the Court of Appeal of the ISS order would be quashed on consent, without prejudice to Catalyst's right to seek leave to the Divisional Court to pursue that appeal.

24. Those terms were negotiated in October 2015, and in the end the West Face motion proceeded on consent. Attached hereto as Exhibit "P" is a copy of a letter from Andrew Carlson, West Face's outside counsel, to the Court of Appeal confirming that West Face's motion would proceed on consent.

25. Moyse's motion to quash was different. We believed that the law was unsettled as to whether dismissal of a contempt motion was a final or interlocutory order. Moyse's motion to quash was argued on the merits on November 5, 2015.

26. The Court of Appeal granted Moyse's motion, with reasons dated November 17, 2015. Attached hereto as Exhibit "Q" is a copy of the Court of Appeal's endorsement dated November 17, 2015.

27. Thereafter, we immediately went about preparing a notice of motion to seek leave to appeal Justice Glustein's dismissal of the ISS and contempt motions. Initially, we served and attempted to file a notice of motion that combined Catalyst's motion for leave to appeal with a motion to extend the time to seek leave to appeal. However, the Divisional Court rejected that notice of motion and informed us that the motion to extend the time to seek leave to appeal had to be served and filed separately from the motion for leave to appeal. Attached hereto as Exhibit "R" is a copy of Catalyst's original notice of motion, dated December 2, 2015, with the attached cover memo from LOLG's process server noting the Divisional Court's rejection of the pleading.

28. On December 3, 2015, I exchanged correspondence with counsel for Moyse and West Face to update them on the situation and to inquire as to whether their clients would consent to a separate motion to extend the deadline to seek leave to appeal. The defendants did not give their consent, at which point Catalyst scheduled the motion to the extend time to seek leave to appeal for January 19, 2016, which was among the earliest dates available for the motion to be heard.

29. At all material times, Catalyst intended to appeal, or seek leave to appeal if necessary, Justice Glustein's order with respect to the contempt and ISS issues decided by him. The delay

caused by the failure to seek leave in July was inadvertent, based on its outside counsel's good-faith understanding of Catalyst's rights of appeal and the proper path of appeal.

30. I am unaware of any prejudice that West Face and/or Moyse would suffer if the motion to extend time to seek leave to appeal is granted. At all material times, West Face and Moyse were aware that Catalyst intended to appeal Justice Glustein's order and that if their motions to quash were successful, that Catalyst would seek leave to appeal to the Divisional Court. During this time, West Face and Moyse did not advert to any potential prejudice arising from the delay caused by the need to bring the motions to quash or otherwise suggest that they have since suffered any prejudice.

31. I swear this affidavit in support of Catalyst's motion to extend the time to seek leave to appeal and for no other or improper reason.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on January 8, 2016

Commissioner for Taking Affidavits
(or as may be)

Lauren P.S. Epstein

ANDREW WINTON

This is Exhibit "A" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

PURSUANT TO / CONFORMÉMENT À
RULE/LA RÈGLE 26.02 (
AMENDED THIS / MODIFIÉE CE
THE ORDER OF / L'ORDONNANCE DU
DATED / FAITE LE
REGISTRAR / GREFFIER
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, 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 Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, 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.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed

by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's Claim and $400.00 for costs and have the costs assessed by the Court.

Date June 25/14 ~~June 26, 2014~~ ~~October 7, 2014~~ ~~December 16, 2014~~ Issued by N. Mohammad

Local Registrar

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: Brandon Moyse
23 Brant Street, Apt. 509
Toronto ON M5V2L5

AND TO: West Face Capital Inc.
2 Bloor Street East, Suite 3000
Toronto, ON M4W 1A8

CLAIM

1. The Plaintiff claims:

(a) An interim, interlocutory and/or permanent injunction restraining the defendant Brandon Moyse ("Moyse"), his agents or any persons acting on his direction or on his behalf, and the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted, from:

(i) Soliciting or attempting to solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised or sponsored by Catalyst or the Catalyst Fund Limited Partnership IV (the "Fund") as at June 25, 2014, until June 25, 2015;

(ii) Interfering with the Plaintiff's relationships with its employees which, without limiting the generality of the foregoing, shall include any attempt to induce employees of the Plaintiff to leave their employment with the Plaintiff; and

(iii) Using or disclosing the Plaintiff's confidential and proprietary information (including, without limitation, (i) the identity or contact information of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of the Fund, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund (iv)

investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about Catalyst and employees of Catalyst (collectively, the "Confidential Information") in any way, including in relation to any present- and future-related business;

(b) An order requiring the defendants to immediately return to Catalyst (or its counsel) all Confidential Information in their possession or control;

(c) An order prohibiting any of the defendants from, in any way, deleting, modifying or in any way interfering with any of their electronic equipment, including computers, servers and mobile devices, until further Order of this Honourable Court;

(d) An interim, interlocutory and permanent injunction prohibiting the defendant Brandon Moyse ("Moyse") from commencing or continuing employment at the defendant West Face Capital Inc. ("West Face") until December 25, 2014;

(d.1) An interim, interlocutory and permanent injunction prohibiting West Face from voting its interest in Data and Audio Visual Enterprises Wireless Inc. in any proposed transaction involving Wind Mobile;

(d.2) General damages as against West Face in an amount to be particularized prior to trial;

(d.3) A constructive trust over all property, including, but not limited to, securities, security interests, debts and other financial instruments, acquired by West Face, its officers, directors, employees, agents or any persons acting under its direction or on its behalf, as a result of its misuse of the Confidential Information;

(d.4) In addition or in the alternative to the relief sought in paragraph 1(d.3), an accounting of all profits earned by West Face, its officers, directors, employees, agents, any persons acting under its direction or on its behalf, as a result of its misuse of the Confidential Information;

(e) Punitive damages in the amount of $300,000, as against West Face, and $50,000, as against Moyse;

(f) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(g) The plaintiff's costs of this action on a substantial indemnity basis, plus the applicable H.S.T.; and

(h) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

3. Catalyst uses a "flat" entrepreneurial staffing model whereby its analysts are given substantial training, autonomy and responsibility at a relatively early stage in their career as compared to its competitors in the special situations investments for control industry.

4. Moreover, Catalyst uses a unique compensation scheme to compensate its employees – in addition to their base salary and annual bonus, employees participate in a "60/40 Scheme" whereby the "carried interest" of each Fund is allocated sixty per cent to the deal team and forty per cent to Catalyst. The carried interest refers to the twenty per cent profit participation Catalyst may enjoy, subject to certain conditions.

5. Points in each deal that forms part of the sixty per cent are allocated on a deal-by-deal basis. At all material times, Catalyst employed only two investment analysts, and the deal teams on which Moyse participated involved only three or four Catalyst professionals. The 60/40 Scheme granted Catalyst's employees a partner-like interest in the success of the company.

The Defendants

6. West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments for control industry.

7. Moyse is a resident of Toronto. Pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement"), Moyse was hired as an investment analyst by Catalyst effective November 1, 2012. Moyse had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

The Special Situation Investment Market in Canada

8. The Canadian market for special situations investing is very competitive. A small number of Canadian firms seek opportunities to invest in situations where a corporation is distressed or undervalued, or face events that can have a significant effect on the company's operations, such as proxy battles, takeovers, executive changes and board shake-ups.

9. In these special situations, an investment firm's strategic plans and investment models are crucial to successfully executing an investment plan. Confidentiality is paramount: if a competitor has access to a firm's plans and modelling for a particular special situation, the competitor can "scoop" the opportunity, or it can take an adverse investment position which make the firm's plans either too costly to execute or, depending on the timing of the adverse action, can cause the plan to incur significant losses after it is past the point of no return.

10. Depending on how advanced a firm is in executing its investment strategy, a competitor's adverse position can have disastrous, immeasurable effects on the firm's goodwill and/or will cause a firm to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

11. Within the special situations investment industry, "investment for control or influence" is a sub-industry with unique characteristics. "Investment for control or influence" refers to acquiring controlling or influential equity or debt positions in distressed companies in order to add value through operational involvement in an investment target by, among other things:

(a) Appointing a representative as interim CEO and other senior management;

(b) Replacing or augmenting management;

(c) Providing strategic direction and industry contacts;

(d) Establishing and executing turnaround plans;

(e) Managing costs through a rigorous working capital approval process; and

(f) Identifying potential add-on acquisitions.

12. The "investment for control or influence" sub-industry within the distressed investment industry has unique needs, including the need to ensure that employees are unable to resign and begin working for a competitor for a reasonable period of time in order to ensure that the competitor is unable to take advantage of the former employee's knowledge of the firm's strategic plans and models.

13. In the special situations for control industry, information is critical. The ability to collect and analyze information and to prepare confidential plans for complex investment opportunities is the difference between a plan's success or failure. For this reason, it is commonplace for firms specializing in the special situations for control or influence industry to require its employees to agree to a non-competition covenant prior to commencing employment. Likewise, when a competitor hires directly from a firm within the industry, it is commonplace for the competitor to respect the other firm's non-competition covenant by not directly employing a lateral hire in the same market as they worked for the competitor during the term of the non-competition covenant.

The Employment Agreement

14. Under the Employment Agreement, Moyse was paid an initial salary of $90,000 and an annual bonus of $80,000. Moyse was also granted options on equity in Catalyst and participated

in the 60/40 Scheme. Moyse's equity compensation (options and the 60/40 Scheme) was equal to or exceeded his base salary and annual bonus.

15. The Employment Agreement also included the following non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"):

> Non-Competition
>
> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:
>
> (i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the "protected entities"), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employ; and
>
> (ii) render any services of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst];
>
> Non-Solicitation
>
> You agree that while you are employed by the Employer and for a period of one year after your employment ends, regardless of the reason, you shall not, directly or indirectly:
>
> (i) hire or attempt to hire or assist anyone else to hire employees of any of the protected entities who were so employed as at the date you cease to be an employee of [Catalyst] or persons who were so employed during the 12 months prior to your ceasing to be an employee of [Catalyst] or induce or attempt to induce any such employees of any of the protected entities to leave their employment; or
>
> (ii) solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised and/or sponsored by any of the protected entities as at the date you ceased to be an employee of [Catalyst] or during

> the 12 months prior to your ceasing to be an employee of [Catalyst].
>
> Confidential Information
>
> You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of same, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such partnership of or any such partnership or fund, (iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about [Catalyst] and employees of [Catalyst] and the like (collectively "Confidential Information"). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute "Confidential Information".
>
> You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular' businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

16. Moyse agreed that the Restrictive Covenants were reasonable and necessary and reflected a mutual desire of Moyse and Catalyst that the Restrictive Covenants would be upheld in their entirety and be given full force and effect. In addition, Moyse acknowledged that if he breached the terms of the Restrictive Covenants, it would cause Catalyst irreparable harm and that Catalyst

would be entitled to injunctive relief to prevent him from continuing to breach the Restrictive Covenants.

17. Under the Employment Agreement, Moyse was required to give Catalyst a minimum of thirty days' written notice of his intention to terminate his employment.

18. Moyse executed the Employment Agreement on October 3, 2012. In so doing, he acknowledged that he reviewed, understood and accepted the terms of the Employment Agreement, and that he had an adequate opportunity to seek and receive independent legal advice prior to executing the Employment Agreement.

Moyse Breaches the Employment Agreement

19. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to begin working for West Face.

20. Through its counsel, Catalyst communicated its intention to enforce the Restrictive Covenants. Through their counsel, the Defendants responded by communicating their intention to breach the Restrictive Covenants, in particular the non-competition covenant.

21. Moreover, on our about June 18, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face on June 23, 2014, prior to the expiry of the thirty-day notice period provided for in the Employment Agreement.

22. Catalyst continued to pay Moyse his salary until June 20, 2014, when it became clear to Catalyst that Moyse intended to breach the Employment Agreement.

The Misappropriation and Conversion of Catalyst's Confidential Information

23. As part of his deal screening/analysis responsibilities, Moyse performed valuations of companies using methodologies that are proprietary and unique to Catalyst in order to identify new investment opportunities for Catalyst.

24. Moyse received the Confidential Information in his capacity as an analyst at Catalyst, as acknowledged in the Employment Agreement.

25. In breach of his duty of confidence, Moyse forwarded the Confidential Information from his work email address – which is controlled by Catalyst – to his personal email address and to his personal Internet file storage accounts – which he alone controls – without Catalyst's knowledge or approval. The Confidential Information Moyse forwarded to his personal control includes information concerning projects Moyse was working on immediately prior to his resignation from Catalyst, including, but not limited to:

(a) Catalyst Weekly Reports – this document contains a summary of all existing investments and contemplated investment opportunities;

(b) Quarterly letters reporting on results of Catalyst's activities;

(c) Internal research reports;

(d) Internal presentations and supporting spreadsheets; and

(e) Internal discussions regarding the operations of companies in which Catalyst has made investments.

26. There was no legitimate business reason for Moyse to deal with the Confidential Information in this manner.

27. Moyse has wrongfully and unlawfully taken Catalyst's Confidential Information to advance his own business interests, and the interests of West Face, to the detriment of Catalyst. The Confidential Information was imparted to Moyse in confidence during the course of his employment with Catalyst and the unauthorized use of such information by the Defendants constitutes a breach of confidence.

West Face Induced Moyse to Breach the Employment Agreement

28. West Face and Moyse engaged in prolonged discussions regarding Moyse's resignation from Catalyst and immediate employment at West Face thereafter. During the course of these discussions, the parties discussed Moyse's contractual obligations to Catalyst.

29. Prior to Moyse's resignation from Catalyst, West Face was aware of the terms of the Employment Agreement and Moyse's duties and obligations to Catalyst, including the Restrictive Covenants. Nevertheless, West Face unlawfully induced Moyse to breach the Employment Agreement with, and his obligations owed to, Catalyst, including, but not limited to the Restrictive Covenants.

30. Moyse and West Face knew that Catalyst intended to promote Moyse to the position of "associate" in 2014. But for West Face's inducement to Moyse to resign from Catalyst and commence employment at West Face before the end of the six-month non-competition period, Moyse would still be employed at, and would continue to honour his contractual obligations to, Catalyst.

Catalyst Will Suffer Irreparable Harm

31. Catalyst will suffer irreparable harm as a result of West Face's unlawful inducement of Moyse to breach the Employment Agreement. In particular, without limiting the generality of the foregoing, Catalyst risks losing its strategic advantage with respect to distress for control investments it has been planning for several months of which Moyse, in his role as analyst at Catalyst, is aware.

32. If Moyse is permitted to commence employment at West Face, a direct competitor to Catalyst, before the expiry of the six-month non-competition period, West Face will gain an unfair advantage in the small distressed investing for control industry by learning about investment opportunities Catalyst was studying and Catalyst's plans for taking advantage of those opportunities.

33. These opportunities and strategies are unique to Catalyst and are crucial to its success – if those plans are compromised, Catalyst will suffer a loss that cannot be measured in mere damages. The damage will include damage to Catalyst's reputation as a leading distress for control investor and to its ability to solicit additional investments in its funds.

34. Moreover, by using the Confidential Information for their personal benefit and to Catalyst's detriment, Moyse and West Face will cause Catalyst to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

West Face Misused Catalyst's Confidential Information Concerning the Wind Opportunity

34.1 One of the special situations that Catalyst was studying before Moyse terminated his employment with Catalyst concerned Wind Mobile ("Wind"), a Canadian wireless

telecommunications company. Moyse was a member of Catalyst's investment team studying the Wind opportunity and was privy to Catalyst's Confidential Information concerning its plans concerning Wind opportunity, which included a potential acquisition of Wind.

34.2 In June 2014, Catalyst brought a motion for interim and interlocutory relief seeking, among other things, the return of any and all Confidential Information from West Face and Moyse. In particular, Catalyst was concerned about the potential communication of its Confidential Information relating to the Wind opportunity.

34.3 Catalyst's motion for interim relief was heard on July 16, 2014 and settled on consent.

34.4 Catalyst's motion for interlocutory relief was scheduled to be heard on August 7, 2014 but was adjourned to October 10, 2014. As a result, the motion for interim relief has not yet been determined.

34.5 On or about September 16, 2014, West Face publicly announced that it was leading a consortium of investors to purchase Wind. This was the very outcome Catalyst was concerned about when it learned that Moyse, a participant on Catalyst's Wind team, was joining West Face.

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.

34.7 As a result of West Face's misuse of Catalyst's Confidential Information, Catalyst has suffered damages, particulars of which will be provided prior to trial.

Through Moyse, West Face has Catalyst's Confidential Information Concerning Mobilicity

34.8 On September 29, 2013, Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and its wholly owned subsidiaries, Data & Audio-Visual Enterprises Wireless Inc. ("Wireless") and 8440522 Canada Inc. (collectively with Wireless and Holdings, the "Applicants" or "Mobilicity") filed an application for an Initial Order under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA") in order to restructure their business and affairs or complete a sale of their business and assets.

34.9 Catalyst owns over $60 million in First Lien Notes issued by Wireless pursuant to a First Lien Indenture dated April 20, 2011 (the "First Lien Notes").

34.10 West Face owns approximately $3 million in First Lien Notes.

34.11 For several months, both before and after Mobilicity applied for CCAA protection, Catalyst studied Mobilicity as a special situation. Moyse was a member of Catalyst's investment team in the Mobilicity situation. In that respect, Moyse was privy to Catalyst's confidential information concerning its analysis of the Mobilicity situation.

34.12 West Face has wrongfully used Catalyst's Confidential Information concerning the Mobilicity opportunity to obtain an unfair advantage over Catalyst with respect to that opportunity. If West Face is able to vote its interest in Mobilicity with the benefit of its wrongful possession of Catalyst's Confidential Information, Catalyst will suffer irreparable harm.

Unjust Enrichment

34.13 As a result of the foregoing, West Face has been enriched by its wrongful conduct. It has managed to acquire property, including, but not limited to, securities, secured debt and other

financial instruments, that it would not have been able to acquire but for its misuse of Catalyst's Confidential Information.

34.14 Catalyst suffered a deprivation that corresponds to West Face's enrichment. But for West Face's conduct, Catalyst would have acquired the property that West Face acquired through its misuse of Catalyst's Confidential Information.

34.15 There is no juristic reason for West Face's enrichment and it would be unjust for West Face to retain the property it acquired through its wrongful conduct. Catalyst is entitled to a constructive trust over all property acquired by West Face to remedy West Face's unjust enrichment resulting from its misuse of Catalyst's Confidential Information.

34.16 In addition or in the alternative, if a constructive trust is unavailable because West Face has sold the property it wrongfully acquired or for any other reason, Catalyst is entitled to an accounting of all profits earned by West Face as a result of its misuse of Catalyst's Confidential Information and payment of those profits to Catalyst.

Punitive Damages

35. Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's rights and interests so as to entitle ~~Execaire~~ Catalyst to a substantial award of punitive, aggravated and exemplary damages.

36. Accordingly, the Defendants are liable, on a joint and several basis, to the Plaintiff for punitive damages as described in subparagraph 1(e) above.

37. Catalyst proposes that this action be tried at Toronto.

~~June 25, 2014~~
October 9, 2014

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Lawyers for the Plaintiff

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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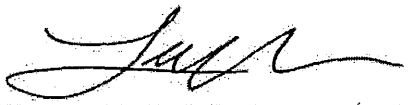
Lawyers for the Plaintiff

This is Exhibit "B" referred to in the Affidavit of Andrew Winton sworn January 8, 2016



Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants/
Responding Parties

NOTICE OF MOTION

The Plaintiff ("Catalyst") will make a motion to a Judge on a date to be scheduled by the Motion Scheduling Court, or as soon after that time as the motion can be heard at the court house, 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] orally.

THE MOTION IS FOR

(a) If necessary, an Order abridging the time for delivery of this Notice of Motion;

(b) An interim, interlocutory and/or permanent injunction restraining the defendant Brandon Moyse ("Moyse"), his agents or any persons acting on his direction or on his behalf, and the defendant West Face Capital Inc. ("West Face"), its officers,

directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted from:

(i) Soliciting or attempting to solicit equity or other forms of capital for any partnership, investment fund, pooled fun or other form of investment vehicle managed, advised or sponsored by Catalyst or the Catalyst Fund Limited Partnership IV (the "Fund") as at June 25, 2014, until June 25, 2015;

(ii) Interfering with the Plaintiff's relationships with its employees which, without limiting the generality of the foregoing, shall include any attempt to induce employees of the Plaintiff to leave their employment with the Plaintiff; and

(iii) Using or disclosing the Plaintiff's confidential and proprietary information (including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of the Fund, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such-partnership of or any such partnership or fund, (iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about Catalyst and employees of Catalyst (collectively, the

"Confidential Information") in any way, including in relation to any present- and future-related business;

(c) An order requiring the defendants to immediately return to Catalyst (or its counsel) all Confidential Information in their possession or control;

(d) An order prohibiting any of the Defendants from, in any way, deleting, modifying or in any way interfering with any of their electronic equipment, including computers, servers and mobile devices, until further Order of this Honourable Court;

(e) An Order authorizing the Plaintiff's expert to attend the Defendants' premises to create forensic images of all electronic devices, including computers and mobile devices of West Face and Moyse that contained Confidential Information, for preservation subject to further Order of this Honourable Court, and an Order that the Defendants shall co-operate with the Plaintiff's expert in this regard;

(f) An interim, interlocutory and permanent injunction prohibiting the Defendant Brandon Moyse ("Moyse") from commencing or continuing employment at the Defendant West Face Capital Inc. ("West Face") until December 25, 2014;

(g) The costs of this motion on a substantial indemnity basis, plus applicable G.S.T. or H.S.T.; and,

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

THE GROUNDS FOR THE MOTION ARE

The Parties

(a) Catalyst is a corporation with its head office is located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

(b) West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

(c) Moyse is a resident of Toronto. Pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement"), Moyse was hired by Catalyst effective November 1, 2012 as an analyst.

(d) Moyse was one of only two analysts and had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

The Employment Agreement

(e) Under the Employment Agreement, Moyse was paid an initial salary of $90,000 and an annual bonus of $80,000. In addition, Moyse was granted options on equity in Catalyst.

(f) The Employment Agreement included non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"), which, among other things, prohibit Moyse from rendering any services to a party with an economic interest in any business or undertaking of the type conducted by Catalyst for a period of six months after he leaves Catalyst of his own volition.

(g) The confidential information covenant prohibits Moyse from ever revealing, divulging, or making known to any person other than Catalyst, the Confidential Information.

Moyse Breaches the Employment Agreement

(h) On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of the non-competition clause in the Employment Agreement.

(i) In breach of his duties of confidence, non-competition and loyalty, Moyse intentionally:

(i) uploaded Confidential Information on personal Internet-based file-storage accounts without Catalyst's knowledge or approval;

(ii) commenced or is attempting to commence employment at West Face prior to December 25, 2014, which is when the six-month non-competition restrictive covenant in the Employment Agreement expires.

(j) There was no legitimate business reason for Moyse to transfer Catalyst's Confidential Information to his personal Internet storage accounts.

(k) Moyse has wrongfully and unlawfully taken Catalyst's Confidential Information, including but not limited to information concerning Catalyst's analysis and plans for opportunities to make investments in special situations for control or influence, to advance his own business interests, and the interests of West Face, to the detriment of Catalyst.

(l) Hard drives, mobile devices and Internet accounts that could be inspected to determine whether Moyse took Confidential Information and gave Confidential Information to West Face are beyond the control or possession of Catalyst.

Irreparable Harm

(m) The defendants' conduct, if continued, threatens the viability of Catalyst's "Catalyst Fund Limited Partnership IV" (the "Fund"), which Moyse was intimately involved with, as it will enable them to interfere with Catalyst's investment opportunities Catalyst has been analysing and making detailed plans to execute in the near future.

(n) The damage to Catalyst is not limited to damages. Catalyst carefully selects and executes its investment opportunities. If the opportunities Moyse was involved in at Catalyst cannot be pursued due to his imminent or continued employment at West Face during the non-compete period, Catalyst will suffer irreparable harm to its reputation and its ability to solicit additional investment in the Fund, leading to the equivalent of a loss of market share in a highly competitive and narrow market.

(o) Absent injunctive relief, Catalyst will suffer irreparable harm to its reputation and goodwill in the special situations for control investment industry, which is comprised of relatively few firms, all of whom compete to identify and take advantage of special situations in Canada.

(p) Catalyst will also suffer large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

(q) Sections 101 and 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

(r) Rules 1, 3, 37, 40 and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and

(s) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The Statement of Claim, issued June 25, 2014;

(b) The affidavit of James A. Riley, sworn June 26, 2014;

(c) The affidavit of Martin Musters, sworn June 26, 2014; and

(d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

June 26, 2014

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Lawyers for the Plaintiff

TO: Brandon Moyse
23 Brant Street, Apt. 509
Toronto ON M5V2L5

Defendant

AND TO: West Face Capital Inc.
2 Bloor Street East, Suite 3000
Toronto, ON M4W 1A8

Defendant

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the Plaintiff/Moving Party

This is Exhibit "C" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 16TH
	)	
MR. JUSTICE JUSTICE FIRESTONE	)	DAY OF JULY, 2014

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff for interim relief, was heard this day at the court house, 393 University Avenue, Toronto, Ontario, M5G 1E6.

On being advised of the consent of the parties to the following interim terms up to and including August 7, 2014, the hearing of the Plaintiff's motion for injunctive relief,

1. THIS COURT ORDERS that pending a determination of an interlocutory injunction or until varied by further Order of this Court, the defendant Brandon Moyse ("Moyse"), or anyone acting on his behalf or at his direction, is enjoined from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of The Catalyst Capital Group Inc. ("Catalyst") and all confidential information and/or proprietary third party information provided to Catalyst.

2. THIS COURT FURTHER ORDERS that until an interlocutory injunction is determined or until varied by further Order of this Court, Moyse is enjoined from engaging in activities competitive to Catalyst and shall fully comply with the restrictive covenants set forth in his Employment Agreement dated October 1, 2012.

3. THIS COURT FURTHER ORDERS that Catalyst shall pay Moyse his West Face Capital Inc. ("West Face") salary throughout this period.

4. THIS COURT FURTHER ORDERS that Moyse and West Face, and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed to by Catalyst.

5. THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power or control (the "Devices") to his legal counsel, Grosman, Grosman and Gale LLP ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Image"), to be conducted by a professional firm as agreed to between the parties.

6. THIS COURT FURTHER ORDERS that the costs of the Forensic Image shall be sent to and borne by Catalyst.

7. THIS COURT FURTHER ORDERS that the Forensic Image shall be held in trust by GGG pending the outcome of the interlocutory motion.

8. THIS COURT FURTHER ORDERS that prior to the return of the interlocutory motion, Moyse shall deliver a sworn affidavit of documents to Catalyst, including copies of Schedule "A" documents, setting out all documents in his power, possession or control, that relate to his employment with Catalyst (the "Documents"). Moyse shall also advise whether any of the Documents have been disclosed to third parties, including West Face, and the details of any such disclosure.

9. THIS COURT FURTHER ORDERS that the above terms are being agreed to on a without prejudice basis and shall not be voluntarily disclosed by the parties. The parties are agreed and request that the Court hearing the interlocutory motion shall not consider or draw any inference from the terms of this Consent Order.

10. THIS COURT FURTHER ORDERS that the Court File in this matter (Court File No. CV-14-507120) shall be sealed pending the outcome of the interlocutory relief motion.

11. THIS COURT FURTHER ORDERS that costs of this interim relief motion shall be reserved to the judge hearing the interlocutory relief motion.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
JUL 22 2014
PER / PAR:

Justice Firestone

Justice Stephen E. Firestone

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Plaintiff

This is Exhibit "D" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2014 ONSC 6442
COURT FILE NO.: CV-14-507120
DATE: 20141110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE CATALYST CAPITAL GROUP INC.	)	*Rocco DiPucchio & Andrew Winton*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
BRANDON MOYSE and WEST FACE CAPITAL INC.	)	*Jeff C. Hopkins & Justin Tetreault*, for the Defendant, Brandon Moyse
	)	
Defendants	)	*Jeff Mitchell & Matthew J.G. Curtis*, for the Defendant, West Face Capital Inc.
	)	
	)	
	)	
	)	
	)	
	)	**HEARD: October 27, 2014**

LEDERER J.:

INTRODUCTION

[1] This is a motion for an interlocutory injunction. The defendant, Brandon Moyse, has changed jobs. His former employer seeks to enjoin him from breaching a confidentiality clause that was part of his employment contract and compelling him to comply with a clause that, for a time, would prevent him from working for a competitor.

[2] An injunction is an equitable remedy. It has long been said that: "He who seeks equity must do equity" or "He who comes into equity must come to court with clean hands". This is not just true of those who ask for an injunction, but also to those who oppose it.

BACKGROUND

[3] Brandon Moyse was employed by the plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), as an analyst. On March 14, 2014, Brandon Moyse sent an e-mail to Thomas Dea, a partner at the defendant, West Face Capital Inc. ("West Face"), expressing interest in "working with West Face".[1] At the time, West Face was recruiting analysts. They met on March 26, 2014. On May 19, 2014, West Face offered Brandon Moyse a job. On May 24, 2014, while on vacation, Brandon Moyse gave notice of his resignation to Catalyst, effective June 22, 2014.[2] The e-mail sent by Brandon Moyse made no reference to his plans or to having accepted employment with West Face. This information came to light within the following few days. By letter, dated May 30, 2014, counsel for Catalyst wrote to West Face and counsel for Brandon Moyse concerned about the implications of the departure of Brandon Moyse and his accepting employment with West Face, a competitor in a narrow field of investing. In particular, the letter states that the valuation methodologies used by Brandon Moyse, at Catalyst, were proprietary and that the information he received and generated was "highly sensitive and confidential". It relates Catalyst's concern that Brandon Moyse "has imparted or will be imparting Confidential Information to West Face that he acquired in the course of his employment with [Catalyst]." The letter refers to provisions in the Catalyst's Employment Agreement with Brandon Moyse dealing with confidentiality, "Non-Solicitation" and "Non-Competition".[3]

[4] Answers were not long in coming. On June 3, 2014, counsel for West Face responded, followed two days later by counsel for Brandon Moyse. The former took the position that the non-competition and non-solicitation clauses were both unenforceable. The latter agreed. Counsel for West Face said little about the concern for confidentiality indicating only that West Face "had impressed upon Mr. Moyse that he is not to share or divulge any confidential information that he obtained during his employment with [Catalyst]".[4] Counsel for Brandon Moyse said more. He denied that Brandon Moyse had used "proprietary valuation methodologies" and said that Brandon Moyse did not understand what investment strategies were being referred to "in the context or proprietary information". Counsel assured the representatives of Catalyst that Brandon Moyse had no intention of revealing "any information which could reasonably be considered confidential or proprietary in nature". Counsel offered that Brandon Moyse would "abide by the confidentiality provisions contained in the [Catalyst] Employment Agreement".[5]

[5] A single reply was delivered by counsel for Catalyst. This letter, dated June 13, 2014, pointed out that the rejection of Catalyst's reliance on the non-competition and non- solicitation clauses failed to account for the fact that West Face was a direct competitor of Catalyst "...in a highly specialized field in which very sensitive and proprietary information is shared every day

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[1] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 20.
[2] *Affidavit of James Riley*, sworn June 26, 2014, at Exhibit H.
[3] *Ibid*, at Exhibit I.
[4] *Ibid*, at Exhibit J.
[5] *Ibid*, at Exhibit K.

with trusted analysts such as Mr. Moyse". The response recognized the assurances provided in respect of confidential information, but concludes that they "do not go far enough."[6]

[6] These letters demonstrate two things of importance. The first is that West Face and Brandon Moyse, while they did not and do not dispute the enforceability of the confidentiality clause, were unprepared to recognize any substance to the concerns for confidentiality raised by Catalyst. The second is how quickly this turned litigious. In his first letter, counsel for Catalyst, having repeated the concern of his client that confidential information had been or would be given to West Face, said that the business interests of Catalyst "have been and will continue to be irreparably harmed" and referred to the "Remedies" provision in the agreement. The letter went on to say that Catalyst would consider any proposal that would answer "the current situation".[7] In his response, the lawyer acting for West Face complained that "no evidence to support your allegation that your client has suffered irreparable harm"[8] had been provided. This letter was written on June 3, 2014, which is to say, three weeks before Brandon was to start working at West Face (June 23, 2014) and only ten days after he had given his notice to Catalyst. It is difficult to see how such proof could be prepared so early and so quickly without any understanding of what Brandon Moyse had in his possession and could have or had delivered to West Face. West Face and Brandon Moyse simply gave their assurances; thereby denying there was any reason for concern. Their letters propose that either Catalyst accept their assurance or go to court. They volunteered nothing.

[7] Was Catalyst right? Was there any reason for concern?

MARCH 27, 2014 E-MAIL AND THE INVESTMENT MEMOS

[8] Thomas Dea deposed that, at the meeting on March 26, 2014, he requested that Brandon Moyse provide a copy of his resumé "so that I could circulate it to others at West Face".[9] What Thomas Dea did not say was that, at the meeting, he also requested that Brandon Moyse deliver samples of his research and writing.[10] Rather, further on in the affidavit, Thomas Dea indicated that "[s]ince the commencement if this litigation...West Face has conducted a diligent search of its emails to determine whether there was any information of Catalyst disclosed by Brandon". He says that, as a result of the search, West Face found an e-mail, dated March 27, 2014, which delivered examples of the written work of Brandon Moyse.[11]

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[6] *Ibid*, at Exhibit L.
[7] *Ibid*, at Exhibit I.
[8] *Ibid*, at Exhibit J.
[9] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 21.
[10] *Cross-examination of Thomas Dea*, July 31, 2014, at qq. 289-292, *Cross-examination of Brandon Moyse*, July 31, 2014, at q. 624. In making this request, Thomas Dea cautioned Brandon Moyes that that these writing samples should not contain confidential material.
[11] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 42.

[9] Brandon Moyse deposed an affidavit he said was in response to two affidavits made in support of the application for an injunction.[12] The first of these was an affidavit of James Riley, the Chief Operating Officer of Catalyst; and the second, an affidavit of Martin Musters, a consultant retained by counsel for Catalyst to undertake a forensic examination of a computer that had been used by Brandon Moyse during his employment with Catalyst. Neither of these affidavits refers to the e-mail of March 27, 2014 and attached memos. Presumably for that reason, there is no mention of them in the affidavit of Brandon Moyse. It was not referred to and so it was not part of the response.

[10] What Brandon Moyse did say is that he was aware of "three potential investments" being considered by Catalyst. He reviewed his involvement with each and described Catalyst's interest and the information he had, and used, variously as "widely known", available "to any potential purchaser", "publically available" and containing "no confidential information".[13] He cited the paragraphs of the affidavit of James Riley this responds to and summarized them, as follows:

> Contrary to the allegations at paragraphs 8 and 67 of Mr. Riley's Affidavit, there was nothing confidential and proprietary in the methodology that I used to value certain investment opportunities while I worked at Catalyst. Rather, I used commonly used and well-known valuation methods.[14]

[11] In paragraph 8 of his initial affidavit, the first of the two paragraphs to which Brandon Moyse was responding, James Riley explained the harm that can arise if "... a competitor learns of the opportunities Catalyst is considering or studying, the investment models it is using for a particular situation, the methodology Catalyst is considering for acquiring control or influence, or the turnaround plan Catalyst is considering once it acquires control."[15] In paragraph 67, the second of the two paragraphs referred to, James Riley outlined the specific harm to Catalyst if Brandon Moyse is not compelled to comply with the non-compete clause and to return all confidential information to Catalyst.[16]

[12] James Riley swore a second and subsequent affidavit. It refers to the affidavit of Brandon Moyse and indicates that it was only upon its receipt that Catalyst learned that Brandon Moyse had sent "....Catalyst's confidential information to West Face as part of his efforts to secure employment there".[17] James Riley deposed that, prior to receiving the affidavit of Brandon Moyes, West Face did not inform Catalyst that it had received the memos attached to the e-mail

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[12] *Affidavit of Brandon Moyes*, sworn July 7, 2014, at para. 2.
[13] *Ibid*, at paras. 9-13.
[14] *Ibid*, at para. 15.
[15] *Affidavit of James Riley*, sworn June 26, 2014, at para. 8.
[16] *Ibid*, at para. 67.
[17] *Affidavit of James Riley*, sworn July 14, 2014, at para. 12.

of March 27, 2014.[18] He contested the assertions of Brandon Moyse that the information delivered was not confidential and publicly available:

> Moyse's analysis of active and potential investments contain highly confidential information belonging to Catalyst which Moyse should not have shared with a competitor such as West Face under any circumstances.[19]

[13] What is clear from this review is that, despite their assurances that there was no reason for concern, West Face and Brandon Moyse were both aware that memos, regarded by West Face as confidential, had been sent by Brandon Moyse to Thomas Dea with the e-mail of March 27, 2014. The memos, as delivered, each say on the first page, "Confidential" and "For Internal Discussion Purposes Only".[20] There can have been little doubt that West Face would have and did understand the perspective of those at Catalyst. Having received the memos, Thomas Dea circulated them to the other partners and a Vice-President at West Face.[21] He did this understanding that the information was confidential and of the concern associated with its disclosure. When he was cross-examined, Thomas Dea was asked and answered:

> Q. Did any of the partners, or did Mr. Zhu express any concern about the fact that Mr. Moyse had sent West Face Catalyst's confidential information?
>
> A. Yes. Prior to us extending the offer I discussed with one of the partners, with Tony, we were generally favourably disposed to his capabilities, but one concern we had was that he had conveyed confidential information to us, and I agreed with that, and so I asked our General Counsel to have a discussion with him specifically about that, to convey to him the seriousness with which we view the protection of confidential information, to make sure that -- and to explain that we'd have the highest expectation that he would uphold that if he were to come and work for us.[22]

[14] For his part, when cross-examined, Brandon Moyse professed not to understand what makes a memo confidential:

> Q. So what makes a memo confidential?
>
> A. I'm not sure really.[23]

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[18] *Ibid*, at para.13.
[19] *Ibid*, at para. 12.
[20] *Affidavit of Thomas Dea*, sworn July 7, 2014, at Exhibit L (The e-mail of Mach 27, 2014 and the enclosed "writing samples".
[21] *Cross-examination of Thomas Dea*, July 31, 2014, at q. 313.
[22] *Ibid*, at q. 335.
[23] *Cross-examination of Brandon Moyse*, July 31, 2014, at q. 429.

And, later, in the same cross-examination, after some discussion about the substance of confidentiality:

> Q. Right. Right? It's the level of analysis, that's the work product that's being performed for your employer; you surely understand that.
>
> A. Yes.
>
> Q. And that's what makes it confidential.
>
> A. I don't know.
>
> Q. Do you disagree with that?
>
> A. I don't know what makes it confidential.[24]

[15] I note that, during the course of his submissions, counsel for Brandon Moyes acknowledged that it was an error to deliver these memos to West Face. He referred to this as a "rookie mistake". I assume this refers to the idea that Brandon Moyes was young and inexperienced. He may be. Often, the term "rookie mistake" is used in the context of professional athletics. In hockey or football, or any other sport, a "rookie" (a first-year player) who makes a mistake, and in so doing breaks the rules, is penalized in the same way as a more experienced participant. The fact that Brandon Moyes is young, and may be inexperienced, does not serve to decrease any responsibility or liability for the harm that may attach to his actions.[25]

[16] What appears to have happened is that, rather than be forthcoming and allow Catalyst to understand what had happened and to consider what, if any, impact there was to its business, West Face and Brandon Moyse determined to take the position that there was no impact. They sought to have Catalyst rely on their assurances that this was so. Once it became known that information that was considered by Catalyst to be confidential had been delivered, West Face and Brandon Moyse chose to argue that the information really should not be considered as being confidential or proprietary. On his cross-examination, Brandon Moyes was asked and said:

> Q. Okay. And in terms of the actual confidential information, you say it didn't include any confidential information, you don't mean to suggest again that the analysis that you're performing is not confidential?
>
> A. I don't believe it is. It was based on publicly available information.

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[24] *Ibid*, at qq. 435-437.

[25] During his cross-examination, Thomas Dea also referred to the delivery of these memos as a "rookie error" (*Cross-examination of Thomas Dea,* July 31, 2014, at q. 336). I confess I find this peculiar in circumstances where Thomas Dea says and Brandon Moyse acknowledges that when asked to provide samples of his written work, Brandon Moyse was cautioned not to send material that was confidential (see: fn. 10).

> Q. Right. But lots of things are based on publicly available information, but the fact that you're performing an analysis that may not be readily available to the public is what makes it confidential. That's your work product is analyzing.
>
> A. I agree it's a work product and proprietary.
>
> Q. And that's what makes it confidential. That's what you're being paid for, to perform this analysis that's not publicly available.
>
> A. I multiply publicly available numbers by publicly available numbers. Like-minded people would have done the same thing.[26]

At this point, counsel for Catalyst makes the following comment and receives the following response:

> Q. You do far more than multiply, Mr. Moyes. Let's be fair. Anybody can take a calculator. You're not hired to be a calculator. You're hired to bring your experience and expertise in performing an analysis, right? That's why you're being paid $200,000 a year.
>
> A. One sixty-two.[27]

[17] Thomas Dea recognized that the information he received from Brandon Moyse was "confidential to Catalyst"[28]. Nonetheless, West Face concluded that the information disclosed was not particularly sensitive or damaging to Catalyst. Based on a review of the documents, West Face had concluded that the information in the documents was primarily a recitation of public information and contained a pedestrian analysis.[29]

[18] The determination of Brandon Moyse and those at West Face as to what constitutes confidential information that should be protected is too narrow. This is demonstrated by the assertion of Brandon Moyse that all he did he was to multiply publically-available numbers by publically-available numbers and that, in some way, this removes his work from being considered confidential. There is more to the question than that:

> A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public . . . the possessor of the confidential information still has a long start over any

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[26] *Cross-examination of Brandon Moyse,* July 31, 2014, at qq. 431-433.
[27] *Ibid,* at q. 434.
[28] *Cross-examination of Thomas Dea,* July 31, 2014, at q. 328.
[29] *Ibid,* at qq. 311-312.

> member of the public . . . the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start.[30]

and:

> Even when all of the information becomes public, if an ex- employee is able, by information provided by or developed for the previous employer, to gain an advantage that the ex-employee would not have had if he or she had to check only public sources such ex-employee would still be liable for breach of confidence despite public disclosure. This reflects an obligation to pay for the advantage gained from the 'convenient' confidential source, or the head start that the disclosure had given such employee over other members of the public.
>
> What is really being protected in situations of this nature is the original process of mind. The protection is enforced against persons who wish to use the confidential information without spending time, trouble and expense of going through the same process. One can reconcile the springboard principle with the overriding principle denying confidence and information in the public domain, by describing the 'springboard' as a measure of the scope and duration of the obligation enforcing good faith upon an ex-employee while the rest of the world catches up.[31]

[19] When, in the letter sent by its counsel on June 3, 2014, West Face told Catalyst: "Your assertion that West Face induced Mr. Moyse to breach his contractual obligation to [Catalyst] is...baseless"[32], it may have been technically accurate. (This depends on how you interpret the fact that Thomas Dea asked for the samples of the work of Brandon Moyse.) However, it is clear that this and the other assurances found in the letter were written knowing that West Face had received information marked "Confidential" and that West Face was sufficiently concerned that it felt it was necessary to remind Brandon Moyse of his obligations. Despite this, West Face said nothing to Catalyst other than to provide, what I believe can fairly be called, its ineffectual assurances.

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[30] *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.*, [1967] R.P.C. 375, at pp. 391-92, quoted in *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 OR (3d) 21, at p. [29].

[31] *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at pp. 2463-64, quoted in *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 OR (3d) 21, at p. [29].

[32] *Supra*, (fn. 4).

[20] Similarly, Brandon Moyse knew he had sent material marked "Confidential" and "For Internal Discussion Purposes Only" to West Face. More than that, he knew that the information it contained was confidential and should not have been given to West Face. Having come to this realization, he had deleted the e-mail:

> Q. Now, you yourself had actually deleted a copy of that March 27th email from your computer system, right?
>
> A. Yes.
>
> Q. And the reason you chose to delete that particular email, I take it, as opposed to other emails which you didn't delete, was because you thought that there was something perhaps improper about your having sent that email?
>
> A. Upon, further reflection after sending it, yes.
>
> Q. And that is what you thought was wrong about that? That you had disclosed confidential information to West Face?
>
> A. That I had disclosed information to West Face.
>
> Q. And you're not denying that your analysis and the analysis of other people at Catalyst in those memos that you did send to West Face was proprietary and that belonged to Catalyst?
>
> A. I agree it's proprietary.
>
> Q. And you're not denying I take it that the analysis that was performed, in particular – and we'll look in some detail at these presentations or memos. But some of the analysis that was performed was certainly confidential?
>
> A. Yes.
>
> Q. In other words, it wouldn't be known by third parties?
>
> A. Yes.
>
> Q. The, how long did it take you to come to that realization?
>
> A. That I shouldn't have sent it?

> Q. Yes.
>
> A. I don't remember exactly.
>
> Q. And was around the time that you came to that realization that you thought you might cover your tracks deleting it?

> A. No. I deleted it within a week of sending it probably I just don't remember exactly the date.[33]

[21] Yet, in the letter sent, on behalf of Brandon Moyse, on June 5, 2014[34], nothing was said about this. The letter makes the general assertion to the effect that Brandon Moyes, in performing valuations of companies, did not use "proprietary valuation methodologies" and that while he is aware of "3 to 5 prospective acquisitions", he would not disclose any confidential information concerning them. He said he is prepared to sign a letter confirming he would abide by the confidentiality provisions in his contract of employment, an agreement to which he was already bound.

[22] What is apparent is that both West Face and Brandon Moyse did not provide information or respond to the concerns of Catalyst, in a meaningful way, until the evolution of this motion required them to do so. They waited until Catalyst discovered that information it considered to be confidential had been delivered before acknowledging there was an issue and then proclaimed that, based on their analysis, the material should not be considered to be confidential.

[23] This is to be contrasted to the approach taken by the defendants in *GDL Solutions In. v. Walker.*[35] In that case, a business was sold. As part of the sale, a non-competition provision was negotiated and agreed to. The vendor and others joined a new company that was in direct competition with the business that had been sold. It was alleged that they had misappropriated confidential information. Upon the commencement of the ensuing action, they undertook to and did review their files and "promptly" returned all confidential proprietary information. They undertook to and did preserve the electronic and other records of the employees who had left.[36]

[24] In the case I am to decide, it is a question whether, in the end, the approach adopted by Brandon Moyse and West Face will meet the test that allows a party to obtain equity.

[25] It is important to note that Catalyst is adamant that the investment memos delivered with the March 27, 2014 e-mail were sensitive and confidential. [37] For his part, Brandon Moyse acknowledged that these memos may disclose strategies that Catalyst could employ in a given situation. In his cross-examination, Brandon Moyes did agree that these memos contain information that Catalyst would not want disclosed to a third party.[38] Thomas Dea acknowledged

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[33] *Cross-examination of Brandon Moyse,* July 31, 2014, at qq. 412-420.
[34] *Supra,* (fn. 5).
[35] [2102] O.J. No. 3768; 2012 ONSC 4378.
[36] *Ibid,* at para. 92.
[37] *Affidavit of James Riley,* sworn July 14, 2014, at para.12.

[38] *Cross-examination of Brandon Moyse,* July 31, 2014, at qq. 685-691.

that West Face considered its investment strategies to be confidential and that West Face has a proprietary interest in protecting that confidentiality.[39]

THE AFFIDAVIT OF DOCUMENTS

[26] This is not the first time this motion for an interlocutory injunction has been to court. On July 16, 2014. Mr. Justice Firestone made a consent order imposing interim terms that were to remain in place until August 7, 2014, the date it was, at that time, anticipated that this motion would be heard. It was subsequently re-scheduled to today. The order of Mr. Justice Firestone includes the following term:

> THIS COURT FURTHER ORDERS that prior to the return of interlocutory motion, Moyse shall deliver a sworn affidavit of documents to Catalyst, including copies of Schedule 'A' documents, setting out all documents in his power, possession or control, that relate to his employment with Catalyst (the 'Documents'). Moyse shall also advise whether any of the Documents have been disclosed to third parties, including West Face, and the details of any such disclosure.

[27] By letter, dated July 22, 2014[40], counsel for Brandon Moyse delivered an Affidavit of Documents, as required by the order of Mr. Justice Firestone. Like the letter, the Affidavit of Documents is dated July 22, 2014.[41] It lists 819 documents. The accompanying letter states that:

> Many (and possibly most) of the enclosed documents are public documents (publicly available financials/presentations/research, etc.) with many duplicates and various versions of the same document.[42]

[28] In a third affidavit, this one sworn on July 24, 2014, James Riley contests this understanding. From a review of the titles alone, he says that he, and a colleague, identified "at least 245 confidential documents that were in Moyse's possession on July 22, 2014".[43] He provides some examples:

- Document 27: a spreadsheet created by Catalyst to analyze the debt structure and asset valuation of an identified prospective investment. Catalyst used the spreadsheet to decide whether and how to invest in the situation and at what price.[44]

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[39] *Cross-examination of Thomas Dea*, July 31, 2014, at qq. 252-259.
[40] *Affidavit of James Riley*, sworn July 28, 2014, at Exhibit B.
[41] *Ibid*, at Exhibit A.
[42] *Supra*, (fn. 38).
[43] *Affidavit of James Riley*, sworn July 28, 2014, at para. 5.
[44] *Ibid*, at para. 7.

- Document 82: a presentation Catalyst gave to potential investment bankers it was interviewing to walk them through the concept, strategy and results of a situation. The aim was to explore the potential for debt and equity financing.[45]

- Document 88: is related to the presentation referred to in Document 82. It is a spreadsheet containing full details of the company's operating model, including projections on a granular, store-by-store basis.[46]

- Document 163: is one of many documents that contain Catalyst's analysis of information received pursuant to non-disclosure agreements.[47]

[29] James Riley summarizes this portion of his affidavit of July 22, 2014 with the following two paragraphs:

> The confidential documents identified by Michaud and I contain information that is not publicly available. In many cases, the documents disclose Catalyst's confidential financial modeling and/or analyses of situations and investments it is either considering or that it has invested in. In other cases, the documents shed insight into Catalyst's management of its investments, including its associates, which if shared with a competitor would give the competitor an insight into Catalyst's confidential operations.
>
> In all cases, the documents contained in the information that Moyse, as a former employee of Catalyst, should not have retained in his power, possession or control when he resigned from Catalyst, especially when he intended to immediately begin working for a competitor to Catalyst in the special situations investment industry.[48]

[30] As with the March 27, 2014 e-mail and enclosures, it took the processes of this motion before Catalyst learned that the documents it alleges are confidential had been retained by Brandon Moyse. In his initial affidavit, Brandon Moyse said:

> It is noteworthy that neither Mr. Riley nor Mr. Musters provide any actual evidence that I transferred information, confidential or otherwise, from Catalyst's

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[45] *Ibid*, at para. 8.
[46] *Ibid*, at para. 8.
[47] *Ibid*, at para. 9.
[48] *Ibid*, at paras. 10-11.

> services to my Dropbox or Box accounts or other personal devices. Instead, Mr. Riley and Mr. Musters rely solely on unsupported speculation and innuendo.[49]

[31] At his cross-examination, Brandon Moyse said that, when he made this statement, he did so in circumstances where his search of his personal electronic devices had not been "exhaustive enough".[50] He conceded that, at the time, he did have "confidential information on [his] personal computer devices".[51]

[32] It took the appearance before Mr. Justice Firestone and the order it produced to demonstrate that Brandon Moyse had retained documents belonging to Catalyst, some of them allegedly confidential. It is possible that there is more. At the cross-examination of Brandon Moyse, he could not say with absolute certainty that his most recent search had been exhaustive.[52]

[33] It bears asking if a party questions the concerns of the other as "speculation and innuendo" when it knew or should have realized that it was wrong to do so, does it come to court in a fashion that allows it to ask that equity balance in its favour?

[34] Having said this, counsel for Brandon Moyse, joined by counsel for West Face, pointed out that there is no evidence to suggest that any of these documents have been delivered to, or are in the possession of West Face. In the letter enclosing the Affidavit of Documents, counsel for Brandon Moyes, in compliance with the order of Mr. Justice Firestone, states: "save the March 27, 2014 email from [Brandon] Moyse to West Face Capital, there has been no documentary disclosure or dissemination to any third-party."[53]

THE PERSONAL COMPUTER OF BRANDON MOYSE

[35] The order of Mr. Justice Firestone included the following provisions:

> THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power or control (the "Devices") to his legal counsel, Grossman, Grossman and Gale LLP ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Images"), to be conducted by a professional firm as agreed to between the parties.

[36] It is not just that documents thought by Catalyst to be confidential have been found in the possession of Brandon Moyse. On June 19, 2014, Catalyst learned that not only was Brandon

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[49] *Affidavit of Brandon Moyes*, sworn July 7, 2014, at para. 36.
[50] *Cross-examination of Brandon Moyse*, at qq. 326-331.
[51] *Ibid*, at qq. 343-344.
[52] *Ibid*, at qq. 332-333
[53] *Affidavit of James Riley*, sworn July 28, 2014, at Exhibit B.

Moyse leaving Catalyst, but also that he had accepted employment with West Face. Catalyst sees West Face as a competitor. Although the factum filed on behalf of West Face tends to minimize competition between the two firms ("...while West Face and Catalyst do compete in certain respects, their primary business focuses are different"[54]), at the hearing of the motion, counsel for West Face conceded the two firms do compete. The next day, on June 20, 2014, Computer Forensics Inc., a company that "...specializes in the retrieval of data from hard drives, servers, laptops, cell phones... and other devices"[55] was retained, on behalf of Catalyst, to produce a forensic image of a desktop computer that had been used by Brandon Moyse. Martin Musters is the Director of Forensics at Computer Forensics Inc. In the affidavit he swore, Martin Musters said that, as a result of the analysis undertaken in respect of the desktop computer, he was able to determine that, on specific dates, Brandon Moyes had accessed particular files[56]:

- on March 28, 2014, over an eleven-minute period, Brandon Moyse accessed a series of files from an 'Investors Letters' directory;[57]
- on April 25, 2014, over a seventy-minute period, Brandon Moyse accessed several files which contain the word 'Stelco' in the file directory or in the file name; [58]
- on May 13, 2014, over a sixty-one-minute period, Brandon Moyse accessed several files through his Dropbox account which had the name 'Masonite' in the file name;[59]
- also, on May 13, 2014, over a twenty-four-minute period, Brandon Moyse accessed several files from a '2014 Potential Investment' directory.[60]
- on May 26, 2014, at 12:31 p.m., Brandon Moyse accessed a document entitled '14-05-26 Notes' from a directory entitled 'Monday Meeting'.[61]

[37] Brandon Moyse has answers that explain each of these inquiries. He wanted to review the Investment Letters (March 28, 2014) because he was thinking of leaving Catalyst and wanted to understand what might be said about him if he left.[62] Brandon Moyse reviewed the Stelco files (April 25, 2014) out of personal curiosity. At the time, the transaction was no longer active.[63]

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[54] *Factum of the Defendant/Responding Party, West Face Capital Inc.*, at para. 18.
[55] *Affidavit of Martin Musters*, sworn June 26, 2014, at para. 2.
[56] *Ibid*, at para. 11.
[57] *Ibid*, at para. 12 and Exhibit C. The exhibit suggests that, at that time, Brandon Moysse accessed 18 "files".
[58] *Ibid*, at para. 13 and Exhibit D. The exhibit suggests that, at that time, Brandon Moyse accessed 63 "files".
[59] *Ibid*, at para. 14 and Exhibit E. The exhibit suggests that, at that time, Brandon Moyse accessed 43 "files".
[60] *Ibid*, at para. 14 and Exhibit F. The exhibit suggests that, at that time, Brandon Moyse accessed 29 "files".
[61] *Ibid*, at para. 15 and Exhibit G.
[62] *Affidavit of Brandon Moyes*, sworn July 7, 2014, at para. 45.
[63] *Ibid*, at para. 48.

The Masonite material (May 13, 2014) he reviewed was not found in files that belonged to Catalyst. It was part of an exercise associated with an interview process being conducted by, or on behalf of, Mackenzie Investments. The material was provided to Brandon Moyse by Mackenzie Investments or obtained from Masonite's website.[64] On May 13, 2014, Brandon Moyse also accessed files related to WIND Mobile. This was done as part of his duties at Catalyst. He was working on a chart to include in an investment memo.[65] Lastly, the reference to Monday Meeting Notes (May 26, 2014) were his notes for, not from, that meeting.[66]

[38] Martin Musters has indicated that he cannot determine whether any Catalyst files were transferred by Brandon Moyse from his computer to any other device[67]; for example; to any personal computer he owned. There is no evidence that any of the material accessed by Brandon Moyse through the files of Catalyst have been disclosed to West Face. On the other hand, there is no certainty that everything that was accessed has been disclosed or discovered through the work of Martin Musters. At his cross-examination, Brandon Moyse admitted that, between March and May 2014, he deleted documents.[68] As already noted, one of these was the e-mail of March 27, 2014.[69]

[39] Pursuant to the order of Mr. Justice Firestone, forensic images of the electronic devices belonging to Brandon Moyse have been created. They are being held in trust by his counsel. At this point, it appears that any evidence of the presence and use of any confidential information belonging to Catalyst would be found on the personal computers and other electronic devices of Brandon Moyes.

THE MOTION

[40] On June 19, 2014, counsel for Brandon Moyse wrote to counsel for Catalyst reiterating the assurance that had already been given and that Brandon Moyse remained "amenable to confirming these legal obligations in writing".[70] Any effort to resolve the issues having failed, counsel for Catalyst responded by e-mail to counsel for Brandon Moyse, with a copy to counsel for West Face. He indicated that he had received instructions to commence proceedings and went on:

> I will try to get our materials to you and [counsel for West Face] forth with, but in the event that we cannot get the matter heard before next Monday, we trust that

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[64] *Ibid*, at paras. 51-52.
[65] *Ibid*, at para. 55.
[66] *Ibid*, at para. 60.
[67] *Affidavit of Martin Musters*, sworn June 26, 2014, at para. 18.
[68] *Cross-examination of Brandon Moyse*, at qq. 346-354.
[69] *Ibid*, at qq. 355-357; and, see para. [20], above.
[70] *Affidavit of James Riley*, sworn June 26, 2014, at Exhibit M.

> no steps will be taken by each of your clients to alter the existing status quo prior to the matter being heard by the court.[71]

[41] The only response, also dated June 19, 2014, was from counsel for West Face. It said that Brandon Moyse had "agreed, contractually with West Face" that he would maintain confidentiality over any confidential information he had obtained through his employment with Catalyst. The letter reiterates that Catalyst had not provided any evidence that Brandon Moyse had breached those obligations and that a "confidentiality wall" had been put in place in respect of a "telecom deal" that had been a particular concern of Catalyst. The letter indicated that any "litigation-related material" be directed to a particular lawyer in the firm.[72]

[42] Counsel for Catalyst took this as an indication that the status quo would not necessarily be maintained. On that basis, counsel "moved with urgency" to seek interim relief. Counsel for Catalyst says that receipt of the affidavits of Brandon Moyes and Thomas Dea, both sworn on July 7, 2014, "confirmed Catalyst's worst fears: [Brandon] Moyse had transferred Catalyst's confidential information to West Face....".[73] I understand this to refer to the e-mail of March 27, 2014, and the accompanying four "Investment Memos".

[43] As matters have developed:

- where West Face and Brandon Moyse provided assurance that no confidential information had been or would be received by West Face, material that Catalyst believes to be confidential had been delivered to West Face by Brandon Moyse; and,

- where Brandon Moyes challenged Catalyst on the basis that the allegation that he had maintained confidential information of Catalyst on his 'personal devices' was only speculation and innuendo, he has subsequently found such documents on a personal computer.

[44] Now, as part of the position taken on this motion, counsel for West Face and Brandon Moyse, submit that, in the absence of any immediate proof, the court should accept the assurances of Brandon Moyse that his accessing files of Catalyst between March 28, 2014 (two days after he met with Thomas Dea) and May 26, 2014 (two days after he resigned from Catalyst) was, in every respect, proper, innocent and should be of no concern to Catalyst.

[45] I repeat what was said at the outset. An injunction is an equitable remedy. Reliance on that premise is challenged where the assurances of parties who seek what equity offers are, based on past actions, open to question.

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[71] *Ibid*, at Exhibit N.
[72] *Ibid*, at Exhibit O.
[73] *Plaintiff's Factum (Motion for Interlocutory Relief)*, at para. 31.

[46] The test for an interlocutory injunction is well-known. It asks three questions:

(i) Is there a serious issue to be tried?

(ii) Will the moving party suffer irreparable harm if the injunction is not granted?

(iii) Where does the balance of convenience lie?[74]

(i) Is there a serious issue to be tried?

[47] There is a clause in the Employment Agreement signed by Brandon Moyse that deals with the requirement to maintain confidentiality. It says:

> You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation... and the like (collectively 'Confidential Information'). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute 'Confidential Information'.
>
> You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

[48] It is not possible on an interlocutory motion to determine if such a clause has been breached. The threshold is low:

> It is not possible on an interlocutory motion with conflicting affidavit evidence to determine finally whether or not the plaintiff is entitled to succeed at trial and whether or not the defendants are, in fact, guilty of copying or misappropriating confidential information acquired from the plaintiff. The test, as these cases hold,

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[74] *R.J.R.- MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17, at paras. 82-85.

> is whether there is a serious question to be tried. The Supreme Court in RJR MacDonald made it clear that, as Justices Sopinka and Cory put it: 'The threshold is a low one. The judge on the application must make a preliminary assessment of the merits. . . . A prolonged examination of the merits is generally neither necessary nor desirable'.[75]

[49] It is necessary that the threshold be low in light of the evidentiary challenges which face a moving party in cases involving confidential business information:

> In cases involving confidential business information misuse can rarely be proved by convincing direct evidence. In most cases employers must construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convince it that it is more probable than not that what employers alleged happened, did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced the testimony of employees and their witnesses who directly deny everything.[76]

[50] The parties agree that the Confidentiality clause applies to Brandon Moyse. It is enforceable. Given the evidence that the Investment Memos included with the e-mail of March 27, 2014 are marked confidential, were recognized as such by Thomas Dea and could demonstrate strategies in a narrow, competitive business, I have no trouble in finding that the standard has been met. There is a serious issue to be tried. This conclusion is strengthened by the demonstration that, despite his assurances to the contrary, there were confidential documents on personal electronic devices belonging to Brandon Moyse.

[51] This does not fully resolve the issue of whether the first of the three components of the test for an interlocutory injunction have been met. Counsel for Catalyst seeks an order that Brandon Moyse be prohibited from "commencing or continuing employment at [West Face] until December 25, 2014".[77] Counsel for West Face submitted that this request engages the non-competition clause also found within the Employment Agreement of Brandon Moyse. Counsel said only if that clause is enforceable and has been breached, can the court restrain Brandon Moyse from working. It is not clear that this is so. If it is apparent that without such restraint breaches of the confidentiality clause would or could be expected to continue and cause irreparable harm, why would it not be open to the court to require that a former employee not work in order to ensure the promised confidentiality is maintained? Thomas Dea had no compunction about taking documents he recognized as confidential and distributing them to other partners and senior management. Brandon Moyse had difficulty understanding the line that separates what is confidential from that which is not.

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[75] *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 O.R. (3d) 21, [1996] O.J. No. No 5382 (Gen, Div.), at para. 10.
[76] *Ibid*, quoting *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at p. 2246.
[77] *Notice of Motion*, dated June 26, 2014, at para. (f).

[52] The non-competition clause found in the contract of employment of Brandon Moyse states:

> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:
>
> (i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the 'protected entities'), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employees; and
>
> (ii) render any service of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst].
>
> [Emphasis by underlining added]

[53] It may be that covenants in restraint of trade are generally unenforceable as contrary to the public interest. Nonetheless, reasonable restraints of trade may be enforceable:

> The jurisprudence has recognized the reasonableness of restrictive covenants in two circumstances: (i) covenants which restrain competition by an employee with his former employer, and (ii) those restraining the vendor of a business from competing with its purchaser.[78]

[54] The validity of a restrictive covenant of employment is subject to a two-stage inquiry: the proponent of the covenant (in this case, Catalyst) must establish that it is reasonable, as between the parties, at which point the party seeking to challenge the covenant (in this case, Brandon Moyse) bears the onus of proving that the covenant is contrary to the public interest.[79]

[55] Reasonableness is to be determined by examining the details of the case being considered:

> The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other

[78] *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.* 2011 ONSC 1456, at para. 10.

[79] *Ibid.*

> cases may help in enunciating broad general principles but are otherwise of little assistance.
>
> . . .
>
> The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.[80]

[56] In *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.*[81], Mr. Justice David Brown posited that, where the nature of the employment may result in the employee gaining significant influence over the employer's customers, a non-solicitation covenant might be inadequate to protect the employer's interests and a non-competition clause would be reasonable.[82] Could it be that a similar idea is raised here? Could it be that the same principle applies to the potential harm arising from the misuse of confidential information? Counsel for Catalyst suggests that there may be circumstances where the advantage gained by the employee in taking and mis-using confidential information demonstrates that a confidentiality covenant will be inadequate to protect the employer's proprietary interests.

[57] In such circumstances, the non-competition clause would be available to protect against the harm caused by a breach of the confidentiality clause.

[58] For their part, counsel for West Face and Brandon Moyse say that the non-competition clause is ambiguous and overbroad and, on that basis, is unreasonable and unenforceable.[83] Counsel for West Face referred to the wording of the clause and pointed to the following areas of concern:

- What is the scope of the restraint? What "Fund" is being referred to? What businesses are caught by the terms "Associate" and "undertaking of the type conducted by Catalyst"?
- What is the time duration that would reasonably protect the interests of Catalyst, is it three months or six month?
- What is the reasonable geographic limit? Is it Ontario, as stated in the contract, or should it be Toronto?[84]

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[80] *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 865, at pp. 923-924, quoted in *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc., supra*, (fn. 75), at para. 11.
[81] *Supra*, (fn. 75).
[82] *Ibid*, at para. 17. In saying this, the Court referred to *Elsley v. J.G. Collins Ins. Agencies, supra*, (fn. 77), at 926-7.
[83] *KRG Insurance Brokers (Western) Inc. v. Shafron* 2009 S.C.C. 6, 2009 CarswellOnt 79, at para. 27.
[84] See para. [52], above where the non-competition clause is quoted and each of these terms underlined.

[59] This kind of dissection is not helpful. It considers the issue of whether the clause is reasonable out of any context and presumes no knowledge of the business involved:

> It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny.[85]

[60] Presumably, the requirement that a non-competition clause not be ambiguous is so that the limits it imposes are clearly understood by the employee. The prescription that it should not be overly-broad is to allow the employee to find work and not be limited in that regard by the overreaching of the employer. There is a question as to whether such concerns are warranted in the present case. In *GDL Solutions Inc. v. Walker*, in examining the scope of a restrictive covenant, Madam Justice C.J. Brown took into account what the employee would have known and understood:

> The plaintiff submits that on cross-examination, Walker agreed that he understands what the terms 'same as' and 'competitive with' mean.[86]

[61] It cannot be that Brandon Moyse was unaware that working for West Face was going to be a breach of the clause. The firms compete. Brandon Moyse knew it. In an e-mail, dated February 8, 2013, he observed:

> They've [meaning West Face] been hammered on one activist play we're [meaning Catalyst] looking at (though we don't like)---and we're fighting them on a different distressed name right now.[87]

[62] In *GDL Solutions Inc. v. Walker*, the judge found that a non-competition clause covering businesses "similar to or competitive with" the business of concern (in that case, a business that had been sold) was not vague. "Similar to" is plain language. It is clear what it means.[88] The same could be said for "any business ... of the type conducted by [Catalyst]."[89]

[63] For the purposes of the non-competition clause, "Associates" is to be taken as defined in the *Ontario Business Corporations Act*. Catalyst has only seven. The clause only applies to four of them. The other three are not located "within Canada".[90] It may be, as suggested by counsel for West Face and Brandon Moyse, that as a result of there being an "Associate" in the restaurant business[91], Brandon Moyse is unable, during the currency of the clause, to work in that

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[85] *Elsley v. J.G. Collins Ins. Agencies, supra*, (fn. 77), at pp. 923-924, quoted in *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc., supra*, (fn. 75), at para. 11.
[86] *GDL Solutions Inc. v. Walker, supra*, (f.n. 35), at paras. 61-63.
[87] *Affidavit of James Riley*, June 26, 2014, at Exhibit D.
[88] *GDL Solutions Inc. v. Walker, supra*, (fn. 35), at para. 63.
[89] See para. [52], above.
[90] *Ibid.*
[91] National Markets Restaurant Corporation described as a retail food and restaurant company.

industry.[92] I do not agree that this would have a "profound effect on [Brandon] Moyse's career options".[93] The clause, in these circumstances, is only effective for six months. It may be, as was suggested during the course of the hearing, that Brandon Moyse never did any work with the restaurant company, but he has made it plain that he reviewed files he was not working on. It is in the nature of its business that Catalyst would have various investments. I do not find it unreasonable that it would, for a brief time, seek to protect them all.

[64] Catalyst and West Face are in the same city. Regardless of whether "Ontario", as used in the non-competition clause, is vague when examined outside any particular context or whether, as suggested on behalf of Catalyst, the boundaries of "Toronto" are difficult to determine with certainty, it must have been clear that going to work with a competitor in Toronto would offend the clause.[94]

[65] It was suggested that there was some uncertainty as to how long the non-competition clause was to be effective. Was it six months? Was it three months?[95] The difference is both understandable and justified. When an employee leaves of his own volition or is terminated for cause, the company will not be ready. If the parting is cordial, or accompanied by working notice, the employer will be able to prepare. The employer will not require protection of the same duration.

[66] Taken as a whole, read in context, I would not be prepared to find the non-competition clause unreasonable.

[67] Little was said and I am not prepared to find that the public interest militates against the acceptance of this non-competition clause. There are two competing policy concerns. On the one hand, there is a reticence to allow a restraint of trade. On the other hand, parties should be left free to contract.[96] In this case, there was consideration to be accounted for by Brandon Moyse if he was considering leaving Catalyst. In addition to his base salary and annual bonus, Brandon Moyse participated in "Catalyst's 60/40 Scheme", whereby sixty percent of the carried interest from Catalyst's investment funds is allocated to the professionals who participated on the deals made by the fund. By May 2014, that is, within one- and-a-half years of his joining Catalyst, Brandon Moyse had accrued over $500,000 in this scheme.[97]

[68] In the circumstances, I find that there is, at least, a serious case to be tried:

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[92] *Cross-examination of James Riley,* July 29, 2014, at q. 591.
[93] *Factum of the Responding Party, Brandon Moyse,* at para. 69.
[94] Catalyst is or was located at 77 King Street West, Royal Trust Tower, TD Bank Centre in Toronto (see: *Affidavit of James Riley,* sworn June 26, 2014, at Exhibit A) and West Face Capital is located at 2 Bloor St. East, in Toronto (see: *Statement of Claim*).
[95] See para. [52], above.
[96] *GDL Solutions Inc. v. Walker, supra,* (fn. 34), at para. 44, quoting *Elsley v. J.G. Collins Ins. Agencies, supra,* (fn. 79), at pp. 923-924.
[97] *Affidavit of James Riley,* sworn June 26, 2014, at paras. 11-13 and 16; *Affidavit of James Riley,* sworn July 14, 2014, at para. 9; and, *Cross-examination of Brandon Moyes,* July 31, 2014, at qq. 160-168 .

- Was information confidential to Catalyst delivered to West Face and was it used by West Face to the detriment of Catalyst?

  and

- Was the non-competition clause found in the employment contract of Brandon Moyse enforceable and, if it was enforceable, has it been breached?

[69] Counsel for West Face and counsel for Brandon Moyse say that, in the circumstances, this is not enough to demonstrate that the first test from *R.J.R.- MacDonald v. Canada (Attorney General)*[98] has been met. Counsel for Brandon Moyse relied on cases which demonstrate that "when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong *prima facie* case is the more appropriate test to be applied".[99]

[70] In *Kohler Canada Co. v. Porter,* [100] the defendant had worked for Kohler, in its plumbing products business, since his graduation from university in 1988. He was promoted from time to time until he became Sales Manager for Central and Western Canada, In 2001, for the first time, he was asked to sign an employment contract. It contained a non-competition clause. He signed without giving the matter much thought. In 2002, he accepted a job, offered by a competitor, with more responsibility and better pay. Kohler sought an injunction to restrain its former employee from working for his new employer on the grounds that he was in breach of the agreement he had signed. The judge observed that the overwhelming preponderance of case authority supported applying the strong *prima facie* test in non-competition injunction cases. The higher standard was not met; the injunction was refused.

[71] In the case I am asked to decide, there is a strong *prima facie* case that Brandon Moyse had breached the confidentiality clause of his Employment Agreement. He has taken and delivered to his new employer confidential information which may demonstrate strategies his former employer used in a narrow and competitive business. Upon receipt, the new employer understood the material would be seen by the former employer as confidential, warned the employee that he should do nothing similar with any information he obtained while in its employ and distributed the information to each of the partners and a Vice-President. When the former employer raised concern, it was met with assurances that did not stand up. It is difficult to see how, in such circumstances, the higher standard should necessarily inure to the benefit of the employee and the new employer. Put another way, it is with this analysis that the direction that one who seeks equity should do equity becomes relevant to this situation.

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[98] *Supra*, (fn. 72).
[99] *Jet Print Inc. v. Cohen,* 1999 CarswellOnt 2357 (Sup. Ct. J.), at para. 11, relying on *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 35 C.C.E.L. 128, 4 O.R. (3d) 191, 35 C.P.R. (3d) 448 (Ont. Gen. Div.); and see: *Kohler Canada Co. v. Porter* 2002 CarswellOnt 2009 14-16.
[100] *Ibid,* (*Kohler Canada Co. v. Porter*).

[72] In *Jet Print Inc. v. Cohen,*[101] a principal of the plaintiff had two brothers. They worked for the company. They both fell out with their brother (the principal of the company): one because he was accused of submitting fraudulent invoices to the plaintiff; and the other because the plaintiff did not pay him a bonus he said he was owed. Subsequently, the brothers who had left went into business for themselves. The plaintiff brought a motion for an interlocutory injunction prohibiting the two brothers from soliciting the business of the plaintiff, contrary to the employment agreements they had entered into. The higher standard, the requirement that there be a strong *prima facie* case, was applied. The motion did not succeed. In that case, the non-competition clause was so onerous that it made it almost impossible for the two brothers to work. First, it applied for two years. Second, under the terms of the employment agreement, they were not permitted to solicit work from any client of the employer. "Client" was defined to include "...clients existing at the time of the termination of the contractual relationships together with any clients during the proceeding year [*sic*] and any prospective clients to which the Employer had a presentation within the proceeding two years [*sic*]." The employment agreement went on to specify that any breach of these restrictions "...will cause irreparable injury to the Employer and that any money damages will not provide an adequate remedy to the Employer".[102] At the time the employment agreement was presented, the two brothers (the employees) were denied the time to seek legal advice. They were instructed that they must sign the agreements and were not provided with copies until after the litigation seeking the injunctions against them had been commenced. It is not difficult to see that these agreements were unremittingly burdensome, unfair and contrary to the broader public concern that people should be permitted to work. If the contract had been sustained, employers could effectively ruin the careers of former employees and make it impossible for them to continue to earn a living in areas of work with which they were familiar.

[73] This is not the case here. Where the employee left of his or her own volition, the non-competition clause at issue would apply for six months. Brandon Moyse left Catalyst on June 23, 2014. This matter was heard on October 27, 2014. If an order is made requiring Brandon Moyse to abide by the non-competition clause, it can be for no longer than to December 22, 2014, that is less than two months. Moreover, counsel for Catalyst, while not agreeing, acknowledged that it would be possible for the court to order that Catalyst pay the salary of Brandon Moyse for the few weeks remaining before the non-competition clause expires. This situation is not comparable to that confronting the two brothers in *Jet Print Inc. v. Cohen.* There is no long-term inability to work and there need be no short-term material loss.

[74] The better view is that the failure to satisfy the higher standard does not inexorably lead to the refusal of an interlocutory injunction. In *GDL Solutions Inc. v. Walker*, Madam Justice C. J. Brown considered the impact of any determination that there was more than a serious issue to be tried. She considered several lines of cases and opted for the view that, where a strong *prima facie* case can be made out, there is no need to give great regard to the second and third parts of

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[101] *Ibid.*
[102] *Jet Print Inc. v. Cohen, supra,* (fn. 72), at para. 5.

the injunction test (irreparable harm and the balance of convenience). Where only a serious issue to be tried can be established, greater regard should be given to those considerations:[103]

> ...[I]n the case of an interlocutory injunction to restrain a breach of a negative covenant, irreparable harm and the balance of convenience need to be still considered. The extent of the consideration, however, will be directly influenced by the strength of a plaintiff's case. Even where there is a clear breach of a negative covenant which is reasonable on its face, the issues of irreparable harm and balance of convenience cannot be ignored. They may, however, become less of a factor in reaching the final determination of the issue depending on the strength of the plaintiff's case.[104]

[75] In this case, I do not propose to forego or limit consideration of the second and third parts of the test for an interlocutory injunction. For that reason, I see no reason to go beyond finding that there is a serious issue to be tried and, on that basis, to conclude that the first part of the test has been met. Before going further, it may be as well to recall that the three tests which mark the standard for the granting of an interlocutory injunction are, in any event, not to be seen as a checklist:

> The list of factors which the courts have developed – relative strength of the case, irreparable harm and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.[105]

> *(ii) Will the moving party suffer irreparable harm if the injunction is not granted?*

[76] I turn to irreparable harm. Catalyst is concerned that the delivery of confidential material will, or has, put it at a competitive disadvantage. In particular, reference was made to a "telecom situation". This refers to a matter that was clearly of some sensitivity. West Face constructed a

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[103] *GDL Solutions Inc. v. Walker, supra,* (fn. 35), at para. 34.

[104] *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.*, [2008] O.J. No. 190 (S.C.), at para. 39, leave to appeal refused, [2008] O.J. No. 1707 (Div. Ct.). In coming to this conclusion, Mr. Justice Pattillo "pointed to statements from *Canada (Attorney General) v. Saskatchewan Water Corp.*, [1991] S.J. No. 403, at para. 37 (Sask. C.A.), which had been adopted in *CBJ International Inc. v. Lubinsky*, [2002] O.J. No. 3065 (Div. Ct.); and see Sharpe, *Injunctions and Specific Performance,* looseleaf, (Toronto: Canada Law Book, 2013, at para. 9.40:

> ....The stronger the plaintiff's case, however, the less emphasis should be placed on irreparable harm and balance of convenience and, in cases of a clear breach of an express negative covenant, interlocutory relief will ordinarily be granted.

[105] *Ibid,* (Sharpe, *Injunctions and Specific Performance* looseleaf), at para. 2.630.

"confidentiality wall". While there is considerable disagreement about its effectiveness, the fact that it was put in place substantiates the concern. As already noted, among the Catalyst documents accessed by Brandon Moyse on May 13, 2014, were files related to WIND Mobile.[106] As I understand it, this relates to the "telecom situation" of concern. The chart Brandon Moyse was working on was to be included with an investment memo. The delivery of the information it contained would be advantageous to West Face, which had an interest in the same opportunity. Unfair competition can lead to irreparable harm:

> Cases of unfair competition have often been recognized as ones in which damages may not adequately compensate the plaintiff for the loss suffered due to the defendant's conduct. Not only is it difficult to quantify the loss of goodwill or market share suffered by the plaintiff due to the defendant's actions, but the damage to relationships with customers is inherently difficult to assess. In a competitive industry, where there can be considerable fluidity of customer allegiances, it may be difficult for the moving party to establish an accurate measure of damages.[107]

[77] As this suggests, misappropriation and use of confidential information can give rise to irreparable harm:

> Messa has no way of knowing the extent to which Phipps might be using successfully any confidential information from Messa to effectively compete with Messa; and therefore Messa cannot easily quantify damages in this action.[108]

[78] In such circumstances, it is not possible to quantify the damage. The harm that may be caused would be irreparable. In this case, the problem is underscored by the apparent uncertainty of Brandon Moyse as to what is confidential information, that he accused Catalyst of innuendo and speculation as to the possibility that he had maintained confidential information when, in fact, he had and that information that was considered by Catalyst to be confidential and was marked as such had been delivered to West Face despite assurances that suggested the contrary. This points, again, to the proposition that those seeking to rely on equity must act in a fashion that is consistent with the request; they have to do equity. In this situation, how can the court be certain that, if Brandon Moyse goes to work for West Face, confidential information won't slide through some crack in whatever protections are erected? I am not sure it can be. This is all the more true where Thomas Dea, rather than returning the material, decided, in effect on behalf of Catalyst, that the material was not confidential and distributed it to partners and a Vice-President at West Face.

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[106] See para. [37], above.

[107] *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703, at para. 25, which, in turn, refers to *EJ Personnel Services Inc. v. Quality Personnel Inc.* (1985), 6 C.P.R. (3d) 173 (Ont. H.C.J.); *Sheehan & Rosie Ltd. v. Northwood*, 2000 CarswellOnt 670 (S.C.J.); and, *KJA Consultants Inc. v. Soberman*, 2002 CarswellOnt 467 (S.C.J.).

[108] *Messa Computing Inc. v. Phipps*, [1997] O.J. No. 4255, at para. 32.

(iii) Where does the balance of convenience lie?

[79] To take into account the balance of convenience, I turn to the possible impact on Brandon Moyse. I cannot see how delaying his career at West Face until December 22, 2014 would have any lasting effect.

[80] I pause to point out that the order of Mr. Justice Firestone contains the following paragraph:

> THIS COURT FURTHER ORDERS that the above terms are being agreed to on a without prejudice basis and shall not be voluntarily disclosed by the parties. The parties are agreed and request that the court hearing the interlocutory motion shall not consider or draw any inference from the terms of this consent order.

[81] I draw no inference from this order. On the other hand, it is difficult to ignore the fact that, pursuant to this order, Brandon Moyse agreed to be bound by the non-competition clause in his Employment Agreement until this interlocutory injunction is determined. This being so, he has not been at work. An order requiring him to continue to abide by the non-competition clause would prevent him from working at West Face for approximately seven more weeks. This does not, nor would the full six months, constitute irreparable harm. Nor will it have any short term effect if Calalyst is required to continue to pay Brandon Moyse while he waits for the period affected by the non-competition clause to wind down.

[82] The balance of convenience favours Catalyst.

CONCLUSION

[83] This is not a case where the actions of Brandon Moyse and West Face demonstrate that equity should balance in their favour. In the circumstances, I make the following orders:

In order to ensure that any information, confidential to Catalyst, that may remain in the possession of Brandon Moyse is not provided to West Face.

1. An interlocutory injunction enjoining the defendant, Brandon Moyse, or anyone acting on his behalf or at his direction from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of The Catalyst Capital Group Inc.

To ensure that Brandon Moyse does not, through carelessness, by accident or with intention, communicate information, confidential to Catalyst, to representatives of West Face and, thus, create unfair competition.

2. A further interlocutory injunction enjoining the defendant, Brandon Moyes, from engaging in activities competitive to Catalyst in compliance with the non-competition clause of his employment agreement (clause 8) until its

expiry six months after his leaving his employment with The Catalyst Capital Group Inc., being December 22, 2014.

3. On the understanding that, as a result of this order, Brandon Moyse will be unable to commence his employment with West Face until December 22, 2014, The Catalyst Capital Group Inc. shall pay Brandon Moyse his West Face Capital Inc. salary until December 21, 2014.

Finally, counsel for Catalyst submitted that an independent supervising solicitor should be identified and required to review the forensic images that have been created and held in trust by counsel for Brandon Moyse to identify what, if any, material these images may contain that are confidential to Catalyst. What is personal to Brandon Moyse would be returned to him. Counsel for Brandon Moyse opposed this request. It would be an extraordinary order. It is the view of counsel for Brandon Moyse that material that is confidential to Catalyst will have to be produced. It should be left to Brandon Moyse to review and determine what must be produced. The difficulty with this is that it is another assurance where those made in the past were not sustained.

4. The forensic images that were created in compliance with the order of Mr. Justice Firestone shall be reviewed by an independent supervising solicitor identified, pursuant to a protocol to be jointly agreed to by counsel for the parties, or, failing such agreement, by way of further direction of the court.

5. The review of the forensic images by the independent supervising solicitor shall be completed before any examinations-for-discovery are conducted in this action.

[84] The order will recognize the undertaking made by The Capital Catalyst Group Inc. that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that this order ought not to have been granted, and that the granting of this order has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them.

COSTS

[85] If the parties are unable to agree as to costs, I will consider written submissions on the following terms:

1. On behalf of The Catalyst Capital Group Inc., within fifteen days of the release of these reasons, such submissions are to be no longer than five pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

2. On behalf of Brandon Moyse, within ten days thereafter, such submissions ae to be no longer than four pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

3. On behalf of West Face Capital Inc., within ten days thereafter, such submissions are to be no longer than four pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

4. If necessary, in reply, on behalf of The Catalyst Capital Group Inc., within five days thereafter such submissions to be no longer than four pages, double-spaced (two pages with respect to any submissions made on behalf of Brandon Moyse and two pages with respect to any submissions made on behalf of West Face Capital Inc.).

Lederer J.

LEDERER J.

Released: 20141110

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2014 ONSC 6442
COURT FILE NO.: CV-14-507120
DATE: 20141110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

JUDGMENT

LEDERER J.

Released: 20141110

This is Exhibit "E" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	MONDAY, THE 10TH
MR. JUSTICE LEDERER	)	DAY OF NOVEMBER, 2014

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff, was heard on October 27, 2014 at the court house, 393 University Avenue, 8th Floor, Toronto, Ontario, M5G 1E6.

ON READING the records and factums of the Parties, and on hearing the submissions of the lawyers for the Parties,

1. THIS COURT ORDERS that Brandon Moyse or anyone acting on his behalf or at his direction, is enjoined from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of the Plaintiff ("Catalyst").

2. AND THIS COURT FURTHER ORDERS that Brandon Moyse shall be enjoined from engaging in activities competitive to Catalyst in compliance with the non-competition clause of his

employment agreement (Clause 8) until its expiry six months after his leaving his employment with Catalyst, being December 22, 2014.

3. AND THIS COURT FURTHER ORDERS that Catalyst shall pay Brandon Moyse his West Face Capital Inc. ("West Face") salary until December 21, 2014.

4. AND THIS COURT FURTHER ORDERS that the forensic images that were created in compliance with the Order of Mr. Justice Firestone dated July 16, 2014, shall be reviewed by an independent supervising solicitor ("ISS") identified pursuant to a protocol to be jointly agreed to by counsel for the Parties, or, failing such agreement, by way of further direction of the Court.

5. AND THIS COURT FURTHER ORDERS that the review of the forensic images by the ISS shall be completed before any examinations for discovery are conducted in this action.

6. AND THIS COURT FURTHER ORDERS that Catalyst will comply with any order regarding damages the Court may make in the future if it ultimately appears that this Order ought not to have been granted, and that the granting of this Order has caused damage to Brandon Moyse and West Face for which Catalyst should compensate them.

7. AND THIS COURT FURTHER ORDERS that if the Parties are unable to agree as to costs, they may make written submissions in accordance with the terms set out in Paragraph 85 of the Reasons dated November 10, 2014.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

DEC 22 2014

PER / PAR:

(Signature of Judge)

G. Argyropoulos, Registrar
Ontario Superior Court of Justice

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al,
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Plaintiff

This is Exhibit "F" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

REPORT OF THE INDEPENDENT SUPERVISING SOLICITOR

PART I - BACKGROUND & NATURE OF THE PROCESS

1. This report describes the results of the review by our firm as Independent Supervising Solicitor, of certain electronic data recovered through the forensic analysis of a personal computer, an Apple iPad device, and a Samsung Android smartphone device (the "Devices"), supplied by the Defendant Brandon Moyse ("Moyse") (the "Review"). Moyse is a former employee of the Plaintiff ("Catalyst") who departed his employment and took up employment with the Defendant West Face Capital Inc. ("West Face").

2. The three devices supplied by Moyse were imaged for purposes of preservation and potential review as a result of an interim consent order of Justice Firestone dated July 16, 2014. On November 10, 2014, after a contested motion, Justice Lederer ordered that the images were to be reviewed by an independent supervising solicitor in accordance with a protocol to be agreed upon by the parties (reported at 2014 ONSC 6442). The general purpose of the review, as characterized by Justice Lederman in paragraph 83 of his decision,

is "to identify what, if any, material these images may contain that are confidential to Catalyst".

3. We were appointed to conduct that Review by the parties pursuant to, and in accordance with the terms of, a Document Review Protocol executed by counsel for all parties to this action on December 12, 2014 (the "Protocol"). A copy of the Protocol is attached hereto as **Appendix "A"**. While the specific language of the Protocol has governed the conduct of the Review, the process adopted was in essence designed to protect all three parties' privacy/confidentiality interests, *i.e.* to protect:

(a) Moyse's confidential information from being accessed by Catalyst;

(b) Catalyst's confidential information from being accessed by its alleged competitor West Face; and

(c) West Face's confidential information from being accessed by Catalyst.

4. To that end, distinctive features of the Protocol adopted in this matter include:

(a) A requirement that communications with the ISS remain in writing only unless they are by way of a minuted teleconference with counsel for Moyse and Catalyst;

(b) A prohibition (subject to Court order or Catalyst's consent) on Catalyst's proposed search terms being disclosed to West Face by any party or by the ISS;

(c) A prohibition on the ISS providing Catalyst with access to any of the images or "work product" generated during the Review;

(d) The provision of a draft report to Moyse and Catalyst and a ten-day period for Moyse to object to the inclusion of any document referred to therein before the report is finalized;

(e) The production, both to Moyse and to Catalyst, of all those documents referred to in the final report;

(f) In the event that the ISS were to find evidence that Catalyst Confidential Information was transferred to West Face, the provision of a redacted version of the report to West Face.

PART II - THE CONDUCT OF THE REVIEW PROCESS

5. On December 10, 2014, I was supplied with a series of sixty-seven (67) proposed search terms by Catalyst counsel. These search terms were intended to be employed by the forensic expert selected and appointed by the ISS to run a keyword search of all of the data resident on the Devices and provide all those documents which contained one or more such keywords to the ISS for review. This communication from Catalyst counsel, including the list of keywords, is attached as **Appendix "B"**. Under the Protocol, Moyse's counsel was to have five business days to register any objection to any such search term. In the event of objection, ISS was to have sole discretion to decide whether or not to use such a term.

6. On December 15, 2014, the parties convened a conference call to discuss the process. On that call, the parties approved my proposed retainer of Digital Evidence International ("DEI") to serve as forensic expert. Moyse's counsel agreed to make arrangements to ship the images of the Devices directly to DEI. The parties confirmed as well that Moyse's counsel would be stating their position on the proposed search terms in writing. I also raised

with counsel the prospect that the list of keywords might generate an excessively large number of "hits", which in my experience often indicate that a keyword is insufficiently distinctive and is returning large volumes of irrelevant or duplicative data. The parties agreed that "if any of the search terms generate an excessive number of hits requiring a recalibration of the process, the parties will discuss that in a subsequent call and agree on an alternative approach." I undertook to ask DEI to report to me on this possibility at the earliest stage in the search process. Attached as **Appendix "C"** is a copy of the Minutes of this telephone conference, which I circulated and which counsel for Moyse and counsel for Catalyst subsequently approved.

7. Later on December 15, 2014, Moyse's counsel confirmed that they did not object to the search terms proposed, while expressing reservations about the possible over-responsiveness of certain terms such as "telephone", "cellular" and "box". I supplied the search terms to DEI thereafter.

8. On December 16, 2014, in response to direction from Moyse's counsel, the custodian of the images of the Devices advised that he would provide a copy of the images to DEI by courier on Thursday, December 18, 2014. On Friday, December 19, 2014, DEI confirmed to me and to Moyse's forensic expert that the images had been received at DEI's offices.

9. On December 22, 2014, I received initial feedback from DEI with respect to the number of "hits" generated by applying the search terms to the images. I was concerned with the large volume of overall "hits" in view of the parties' direction in the Protocol that this matter be concluded by January 30, 2015, or sooner if possible. Therefore, I sought further clarification and a breakdown of how many "hits" each search term was generating from DEI.

On Tuesday, December 23, 2014, Wayne Doney of DEI provided me with a full breakdown of the number of "hits" generated by each such search term. Mr. Doney also offered some suggested automated filtering techniques that could be used to reduce the number of actual files necessary for review while avoiding the exclusion of potentially relevant documents.

10. Accordingly, later on December 23, 2014, I wrote to counsel for Moyse and counsel for Catalyst by email. As contemplated by our December 15, 2014 telephone conference, I advised them that the search terms applied had resulted in what I regarded as an excessive number of "hits" for purposes of manual document review. I supplied two image files I had received from DEI which listed the number of hits generated by each search term, and indicated that it would be necessary to agree on filtering techniques in order to reduce potential duplication and capture of irrelevant material, and result in a manageable review process for ISS in view of the parties' desired timetable. I then proposed several methods of filtering and asked for the parties' approval to implement those filters. This correspondence of December 23, 2014 is attached hereto as **Appendix "D"**.

11. By January 5, 2015, I had not had a response or direction from either of the parties. Accordingly, I wrote to request a response to my December 23, 2014 correspondence. On January 6, 2015, counsel for Catalyst responded, accepting certain of my recommendations as to filters. In short, Catalyst agreed that in the case of keywords with extremely large "hit counts", I should restrict the file-types that I would receive to the most commonly used user files, *i.e.*, Microsoft Office documents, Adobe PDF documents, email messages, and applying similar restrictions to the items on the Apple iPad and Samsung Android smartphone.

12. In response, counsel for Moyse suggested that a time-frame filter be applied so that nothing dated prior to December, 2013 should be reviewed. Catalyst counsel objected to this proposal and asked that I review documents prior to that date as well. The parties were unable to come to an agreement on an approach after several further email exchanges, and so later on January 6, 2015 (at 5:09 p.m.), I informed the parties of the approach that I would take. A copy of that communication from myself is attached as **Appendix "E"**. Ultimately, given the number of documents eventually delivered (as set out below), I did not find it necessary to apply that date restriction. Instead, my colleague Naomi Greckol-Herlich and I reviewed all material from the beginning of Moyse's employment at Catalyst in November, 2012, to the date of the imaging of the Devices.

13. That same evening of January 6, 2015, I directed DEI to proceed to limit the data it produced to me in accordance with the limitations to which counsel for Catalyst had agreed in an effort to limit the number of actual documents provided. Furthermore, I directed DEI to automate the process of de-duplication, so that any document or file which was identified as a "hit" from more than one keyword would only be produced once, and not produced in multiple copies which would have to repetitively reviewed for no substantive reason. I directed DEI to nevertheless preserve a record of the number of "hits" each keyword had generated after applying the other agreed-upon filters, in the event such information later proved to be of interest or relevance. DEI confirmed to me that it would proceed in accordance with this direction.

14. The morning of January 7, 2015, counsel for Moyse and counsel for Catalyst had another disagreement as to how to proceed to review the material. In an effort to move

forward, I wrote to inform counsel for these parties how we would be proceeding. A copy of this communication is attached as **Appendix "F"**.

15. On January 8, 2015, Catalyst's counsel wrote me to request a more detailed breakdown of the number of "hits" that had been provided by file-type. In addition, Catalyst's counsel now requested that I have a further set of fourteen (14) keywords used to run a second search of the images of the Devices, subject to Moyse's right to object to those additional terms within a five-day period. (If Moyse were to object, then the Protocol provided for my absolute discretion in deciding whether to employ such terms or not). This communication including this second list of search terms is attached as **Appendix "G"**. I initially directed DEI to prepare the detailed breakdown of "hits" requested but, as matters developed and for reasons described below, did not ultimately obtain or provide this breakdown.

16. On January 13, 2015, DEI informed me that in the course of preparing the data for my review, they had determined that a very substantial amount of document duplication existed on the Devices particularly with respect to email messages. I was informed that this was due to Moyse's practice of using multiple archival functions on his various email accounts so that multiple copies of the same messages were stored in numerous places. I instructed DEI to de-duplicate the email messages to the greatest extent possible without disturbing the file structure of the archives.

17. On January 14, 2015, a further dispute emerged. I received correspondence from Jeff Hopkins, one of Moyse's counsel. Mr. Hopkins enclosed a Notice of Motion that had been served by counsel for Catalyst the previous day (January 13) which sought substantial relief

against West Face, including an order precluding West Face from "participating in the management and/or strategic direction" of Wind Mobile Inc., and from participating in the 30 mHz Wireless Spectrum Auction to be held by Industry Canada in March of this year. The notice of motion further sought an order directing an independent supervising solicitor to image West Face's computers and mobile devices for purposes of a review similar in nature to the review I have conducted of Moyse's Devices.

18. Mr. Hopkins' letter expressed an objection to the Catalyst notice of motion because among the grounds listed by Catalyst for the relief it seeks are references to the number of "hits" generated by the original sixty-seven search terms, as described in Appendix "D". Mr. Hopkins objected to any further provision of information to Catalyst until the provision of my report, including the then-outstanding request for further details on the nature of the "hits" generated by the various search terms. A copy of his letter is attached as **Appendix "H"**.

19. After considering Mr. Hopkins' position, I became concerned that his objection meant that it would become impossible for me to seek direction from counsel jointly on technical issues without the ability to communicate about the output of DEI's search and document production process. Accordingly, given the limited time remaining before the parties' stated deadline of January 30, I wrote to counsel for Moyse and for Catalyst on January 15. I indicated that given this objection, I could only proceed if the parties agreed and/or clarified that I was to have sole discretion to make any decisions with respect to how to complete the review (including giving any direction or imposing any limitation I thought necessary to DEI in terms of what was produced for our manual review). Alternatively, I would move for directions. I attach my letter of January 14, 2015 as **Appendix "I"**.

20. On January 15, 2015, I received correspondence from Moyse's counsel confirming that Moyse agreed that I should have sole discretion in the circumstances to determine how to complete the process. Moyse's counsel also expressed an objection to the use of the additional list of fourteen (14) search terms supplied by Catalyst. Later on January 15, 2015, I received correspondence from Catalyst's counsel, again confirming that I should have sole discretion to determine how to complete the process. Catalyst advised that it wished me to over-ride Moyse's objection and to employ these further search terms. Ultimately, I determined that I would indeed use these search terms having regard to the volume of material involved, and I did review the material resulting therefrom. Attached as **Appendix "J"** are copies of both of these letters of January 15, 2015.

21. Late in the day on Friday, January 16, 2015, I received approximately 6.6 gigabytes of data from DEI contained on two DVD-ROM disks for our review, produced in accordance with my exchanges and instructions to them as described herein. We were able to have this data installed on our server for review at the outset of Monday, January 19, 2015. My associate Naomi Greckol-Herlich and myself began the physical process of document and email review that day and continued through the week and into the week of January 26, 2015 leading to the preparation of this report. My conclusions from that review are described in the next section. The total volume of the material provided, while occupying a large volume of data, consisted of only 1,197 unique file items (totalling approximately 3 gigabytes), with the balance consisting of email material. It is not possible to accurately quantify the total number of unique emails due to the fact that there remained substantial duplication, but in excess of 23,000 email items were provided to us in total (totalling, including attached files, approximately 3.6 gigabytes of data).

22. While we began the process of manual review, I next received correspondence from Jeff Mitchell, counsel to West Face, the evening of January 19, 2015. Mr. Mitchell's correspondence, attached as **Appendix "K"**, expressed further concerns about the content of the Catalyst notice of motion. Mr. Mitchell further requested that:

(a) I disclose to him the details concerning what "interim reporting" had been done to Catalyst which had led to the references to the "hit counts" in Catalyst's notice of motion;

(b) I attend at a scheduled attendance at Practice Court on Wednesday, January 21, booked to establish a timetable for the Catalyst motion, in order to answer any questions the Court might have about the Review.

23. While continuing the process of review, I replied to Mr. Mitchell on January 20, 2015, and attach this response as **Appendix "L"**. In short, I expressed the intention to attend Practice Court and provided limited disclosure (consistent with the restrictions in the Protocol) of the information that had been relayed to Catalyst's and Moyse's counsel for purposes of narrowing the manual review process. Subsequently, Catalyst's counsel expressed the position that if I were to attend Practice Court, that Catalyst would not accept responsibility for my fees for that attendance.

24. I elected to attend Practice Court on January 21, 2015 notwithstanding this position, and in the event no party will accept responsibility for my account for that attendance, I will seek directions in due course from the Court. By the time of that attendance, my review had progressed sufficiently to be able to advise the parties and the Court that I did expect, having regard to the volume of actual material to review after de-duplication, to complete my report

by January 30, 2015 and to provide it (in draft form in accordance with the Protocol) to counsel for Moyse and Catalyst.

25. Later on January 21, 2015, I received the exported content of Moyse's iPad and Samsung Android phone from DEI for manual review, and installed it in our file server for that purpose. Taking into account the de-duplication completed by DEI (resulting in no email messages being produced), the material reviewed consisted of the following:

(a) A list of content resident in a Dropbox folder;

(b) Twitter messages and postings;

(c) Phone call logs;

(d) Text messages;

(e) A list of downloaded files and associated file-paths;

(f) A list of contacts.

26. Later on January 21, 2015, I received further correspondence from West Face. West Face counsel expressed more concerns about the possibility that West Face confidential information was also contained within Moyse's Devices, and asked how I intended to protect that information. I ultimately replied on January 23, 2015 to address Mr. Mitchell's expressed concerns. Copies of these two letters are attached hereto as **Appendix "M"**.

27. Meanwhile, having regard to the progress of the review and in order to ensure that its objectives were met, I considered the further set of fourteen (14) search terms supplied by Catalyst. On January 22, I determined and proceeded to direct DEI to use these search terms

to search the Devices and to provide me with any results that were not duplicative of earlier provided documents or emails. This resulted in the provision of a very small number of unique additional items (5 files in total, and 179 emails) for review.

PART III - CONCLUSIONS AS TO CONFIDENTIAL CATALYST INFORMATION MAINTAINED ON MOYSE'S DEVICES

28. My colleague Naomi Greckol-Herlich and I manually reviewed each of the files and emails provided by DEI as described above. In doing so, we had regard to the two Affidavits of Documents sworn by Moyse on July 22 and July 29, 2014, which outline some 833 items (including duplicates) which Moyse acknowledges to either be items containing Catalyst confidential information, or items that are in any event relevant to the issues in this proceeding.

29. Owing to an earlier suggestion by Moyse's counsel that only documents subsequent to December 1, 2013 be reviewed (on the theory that Moyse had not begun to contemplate leaving Catalyst's employment until that time), we had directed DEI to segregate the files it provided so that those that were last accessed prior to December 1, 2013 were grouped together separately from those last accessed subsequent to December 1, 2013. We prioritized the review of the post-December 1, 2013 documents, but were ultimately able to review all of the material provided. In the interest of timely completion of this report, we have reported separately on the results of the two groups of documents.

30. In drawing conclusions as to what was Catalyst confidential information,[1] we had regard to (a) the motion material provided to us by Catalyst counsel; (b) the content of

[1] Including both matters appearing to be confidential to Catalyst itself, and information provided to Catalyst in confidence by its clients or other entities.

Moyse's email communications (reviewed separately as described below); and (c) the names and contents of the documents themselves. It is possible that some of the items may not contain "confidential information" based on (a) subsequent public release of such items; or (b) its public disclosure through other means. In a small number of cases, we were not able to determine the identity of the information source, but have included reference to these documents so that the parties can, through their further evidence, make submissions to the Court concerning the status of such materials if that proves necessary.

Post-December 1, 2013 Documents and Files

31. We first reviewed all documents with a date modified record after December 1, 2013 (a total of 845 documents). Among those items, we identified twelve (12) documents which appear to be West Face-related documents, six of which appear to contain confidential West Face information or analysis and five of which are duplicate copies of Moyse's employment contract.

32. Of the remaining documents, we have assessed the next listed items to contain Catalyst confidential information subject to the caveats expressed above. These items were found in several different source folders within Moyse's computer: "Users/Brandon Moyse/AppData.../Content.MSO"; "Users/Brandon Moyse/Documents"; and "Users/Brandon Moyse/Downloads". We also reviewed a series of files contained at "Users/Brandon Moyse/Desktop" and at "Users/Brandon Moyse/Dropbox" but identified no items there that contained Catalyst confidential information. We have grouped the following list according to the folder in which it was found. Where those documents have been previously disclosed by Moyse, we have made a notation to that effect in the final column, which cross-references the

document to the document numbering in Moyse's two affidavits of documents. Where the document is marked "N/A", the item was not disclosed in those affidavits.

Users/Brandon Moyse/AppData/Microsoft/Windows/Temporary Internet Files/Content.MSO

Filename	Description of item	Document #
2B65A333.wmf	Image file containing Catalyst financial analysis appearing to relate to Advantage Rent A Car	N/A
25BC51FF.emf	Image file containing Catalyst funding reconciliation related to Homburg restructuring	N/A
658831A1.wmf	Image file containing personnel analysis of Advantage Rent A Car	N/A
A32A9B98.wmf	Image file containing Catalyst financial analysis appearing to relate to Advantage Rent A Car	N/A
F522C3F4.emf	Image file containing Catalyst funding reconciliation related to Homburg restructuring	N/A

Users/Brandon Moyse/Documents[2]

Filename	Description of item	Document #
[Q1 2013 Letter V6.docx]	Contains file named "image1.emf" which contains Therapure financial data	35
14-02-11 NMFG-Piper Jaffray Meeting Notes.docx	Word document containing notes re team meeting	1
14-02-19 BCG meeting.docx	Word document containing notes re team meeting	2
14-02-19 Minutes from NMFG-BCG Meeting.docx	Word document containing notes re team meeting	3
14-02-26 NMFG Real Estate Committee Call.docx	Word document containing notes re team meeting	4
Additional WIND Due Diligence Questions.docx	Word document containing questions to be answered re WIND	7
Avis-Budget Earnings Summary.docx	Word document containing written synopsis of Avis' finances	9

[2] In the interest of timely completion of this report, we have not broken out each individual sub-folder, where applicable, in which these items were found.

Filename	Description of item	Document #
Bonding Analysis.xlsx	Excel spreadsheet containing financial data, client unknown	10
Cash Rec.xlsx	Excel spreadsheet containing financial data, client unknown	12
EWR.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data, revenue projections	17
Forward looking to actual.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data, revenue projections	21
Fresh Market Earnings.docx	Word document containing letter to "Team" and financial assessment of Fresh Market	22
Natural Markets Restaurants Corp.docx	Word document describing financial status of NMRC	28
NMFG Weekly Report - Week 8.pdf	Financial summary for NMFG	29
NMRC FAQs.docx	Word document setting out FAQ's re financial analysis of NMRC	30
NYC-BWI Sensitivities.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	33
Preqin Data.xlsx	Spreadsheet containing yearly analysis of multiple funds	34
Sprouts Summary.docx	Word document containing analysis re financial health of Sprouts	36
What adjustments are in adjusted EBITDA each year.docx	Word document explaining the use of EBITDA in NMFG reports	37

Users/Brandon Moyse/Downloads[3]

Filename	Description of item	Document #
032014_AtlanticPower_DrewMallozzi_FINAL.pdf	Drew Mallozzi analysis re Atlantic Power	39
13-01-04 Geneba News Tracker.xlsx	Spreadsheet containing data re Geneba Properties	46
13-02-09 Geneba News Tracker.xlsx	Template for data re Geneba Properties	48
13-02-16 Geneba News Tracker.xlsx	Unopenable	49

[3] In the interest of timely completion of this report, we have not broken out each individual sub-folder, where applicable, in which these items were found.

13-02-16 Geneba News Tracker.xlsx	Additional copy from folder "[14-01-28 DIP Funding Request.xlsx]"	49
13-02-23 Geneba News Tracker (1).pdf	Data re Geneba Properties	50
13-02-23 Geneba News Tracker.pdf	Data re Geneba Properties	51
13-02-23 Geneba News Tracker.xlsx	Data re Geneba Properties	52
13-09-24 NMRC Presentation.pptx	NMFG Presentation "2013 Overview"	55
13-09-27 Funding Memo v2.docx	NMRC Funding Request	56
13-12-09 Geneba News Tracker.xlsx	Unopenable	63
13-12-11 Concessions Analysis.xlsx	Financial data re Advantage Rent-a-Car concessions	64
13-12-14 Geneba News Tracker.xlsx	Data re Geneba Properties	65
13-12-16 Reservation Outlook.xlsx	Spreadsheet containing data on Advantage Rent-a-Car reservations	66
13-12-21 Geneba News Tracker.xlsx	Spreadsheet containing data re Geneba Properties	67
14-01-06 Funding Memo.docx	NMFG Funding request	70
14-01-28 DIP Funding Request.xlsx	Spreadsheet containing financial data of Advantage Rent-a-Car	71
14-02-08 NMRC Presentation Slide 2.pptx	Slide from NMRC presentation	72
14-02-08 NMRC Presentation.pptx	NMFG PowerPoint presentation February 2014	73
14-02-10 NMRC Presentation v10.pptx	NMFG PowerPoint presentation February 2014	76
14-02-10 NMRC Presentation v10 (1).pptx	Duplicate	74
14-02-10 NMRC Presentation v10 (2)	Duplicate	75
14-02-10 NMRC Presentation v12.pptx	NMFG PowerPoint presentation February 2014	77
14-02-12 NMRC Presentation vF.PDF	PDF version of NMFG PowerPoint presentation February 2014	80
14-02-12 NMRC Presentation vF (1).PDF	Duplicate	78
14-02-12 NMRC Presentation vF (2).PDF	Duplicate	79
14-02-12 NMRC Presentation vF.pptx	NMFG PowerPoint presentation February 2014	81
14-02-13 NMRC Presentation vF.pdf	PDF version of NMFG PowerPoint presentation February 2014	82
14-02-20 Airport Concessions.pdf	PDF version of spreadsheet detailing	83

	Advantage Rent-a-Car airport locations	
14-02-20 Airport Concessions.xlsx	Spreadsheet detailing Advantage Rent-a-Car airport locations	84
14-02-21 NMFG Operating Model - BM version.xlsx	Spreadsheet containing NMFG financial data	86
14-02-21 NMFG Operating Model - BM version (1).xlsx	Duplicate	85
14-02-25 NMFG Operating Model.xlsx	Spreadsheet containing NMFG financial data	88
14-02-25 NMFG Operating Model (1).xlsx	Duplicate	87
14-04-04 SunTrust Presentation v10.pptx	PowerPoint presentation for NMFG "Management Update," April 4, 2010	89
19-02-16 NMFG Operating Model - BM version.xlsx	Spreadsheet containing NMFG financial data	94
2013_11_30ADVNov MTD Flash PL.pdf	PDF containing Advantage Rent-a-Car financial data	119
2013_12_05ADV Dec MTD Flash PL.pdf	PDF containing Advantage Rent-a-Car financial data	121
2013_12_05ADV Dec MTD Flash PL (1).pdf	Duplicate	120
2014 03 26 - Therapure payroll wire for approval - Cda.pdf	Fax re: Wire Transfer Directions	125
2014 03 26 - Therapure payroll wire for approval - Cda (1).pdf	Duplicate	124
2014 03 26 - Therapure payroll wire for approval - US.pdf	Fax re: Wire Transfer Directions	127
2014 03 26 - Therapure payroll wire for approval - US (1).pdf	Duplicate	126
2014 Operating Plan v5.pptx	PowerPoint presentation "2014 Operating Plan," February 6, 2014	129
2014 Operating Plan v6.pptx	Further version	131
2014 Operating Plan v6 (1).pptx	Duplicate	130
2014_Marketing_CA[2].pptx	PowerPoint presentation "2014 Marketing Overview," February 5, 2014	135
2014_Marketing_CA[6].pptx	Further version	137
20140204 Natural Markets Food Group.pdf	PDF titled "Natural Markets Food Group: Delivering Breakthrough Profitable Growth" authored by McKinsey, marked "proposal document" and "confidential and proprietary"	134
ABS deals.xlsx	Spreadsheet re Auto rental/leasing 2013 ABS transactions	156
ABQ Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	155

ADV - Feb 2014 sold days.xlsx	Spreadsheet re Advantage Rent-a-Car "Sold days"	159
ADV - Feb 2014 Stmt.pdf	Counter product Statement, February 2014 "Sold Days"	160
Advantage - Business Plan Model (11-15-13) DRAFT - 38 locations v20.xlsx	File unopenable – content assessed by name	163
Advantage - Business Plan Model (11-15-13) DRAFT - 38 locations v20 (1).xlsx	Duplicate	161
Advantage - Business Plan Model (11-15-13) DRAFT - 38 locations v20 (2).xlsx	Duplicate	162
Advantage - DIP Funding Borrowing Certificate 3-13-2014.pdf	DIP Loan facility agreement	165
Advantage - Fleet Planning Template 1.23.2014 v2.xlsx	Advantage Rent-a-Car fleet data	166
Advantage - FP - Master Copy 2 4 14 PM.xlsx	Advantage Rent-a-Car fleet financing data	167
Advantage - FP - Master Copy 2.4.14 PM.xlsx	Duplicate	168
Advantage - Funding Request #9 3-13-2014.xlsx	Advantage Rent-a-Car funding request	169
Advantage - Interest Rate Rider.pptx	Single PowerPoint slide showing Advantage Rent-a-Car fleet carrying costs, marked "confidential"	170
Advantage - Updated Business Plan Model - 1.16.2014 DRAFT for Mgmt.xlsx	File unopenable – content assessed by name	173
Advantage - Updated Business Plan Model - DRAFT - v3.xlsx	Financial data re Advantage Rent-a-Car, Simply Wheelz LLC	174
Advantage - Updated Business Plan Model - DRAFT - v5.xlsx	Further version	176
Advantage - Updated Business Plan Model - DRAFT - v5 (1).xlsx	File unopenable – content assessed by name	175
Advantage - Updated Business Plan Model - DRAFT - v6.xlsx	Further version	177
Advantage - Updated Business Plan Model - DRAFT - v7.xlsx	Further version	178
Advantage Catalyst Presentation March 2014 vF.PDF	Advantage Rent-a-Car presentation by Deutsche Bank marked "confidential"	179
Advantage corporate budget - FY2014 (1-24-14) DRAFT.xlsx	File is password protected. Content assessed by file name	180
Advantage Model.xlsx	Advantage Rent-a-Car "2014 Budget and 2015 Projection"	182

Advantage Overview Presentation 2-11-14.pdf	Presentation of strategic overview re Advantage Rent-a-Car	183
Advantage Preliminary Budget Review.pptx	Presentation re Advantage Rent-a-Car budget review	186
Advantage Rent A Car - 2014 Budget 2015 Projection (1-22-14) DRAFT.xlsx	File unopenable – content assessed by name	187
Advantage Rent A Car - 2014 Budget 2015 Projection (1-25-14) DRAFT.xlsx	File unopenable – content assessed by name	188
Advantage Rent A Car - 2014 Budget 2015 Projection (1-26-14) DRAFT (1).xlsx	File unopenable – content assessed by name	189
Advantage Rent A Car - 2014 Budget 2015 Projection (1-26-14) DRAFT (2).xlsx	File unopenable – content assessed by name	190
Advantage Rent A Car - 2014 Budget 2015 Projection (1-26-14) DRAFT.xlsx	File unopenable – content assessed by name	191
Advantage Rent A Car - 2014 Budget 2015 Projection (1-29-14) DRAFT v3.xlsx	File unopenable – content assessed by name	192
Advantage Rent A Car - 2014 Budget 2015 Projection (2-4-14) DRAFT.xlsx	File unopenable – content assessed by name	197
Advantage Rent A Car - 2014 Budget 2015 Projection (2-11-14) (1).xlsx	File unopenable – content assessed by name	193
Advantage Rent A Car - 2014 Budget 2015 Projection (2-11-14) DRAFT.xlsx	File unopenable – content assessed by name	195
Advantage Rent A Car - 2014 Budget 2015 Projection (2-11-14) DRAFT - Updated.xlsx	File unopenable – content assessed by name	194
Advantage Rent A Car - 2014 Budget 2015 Projection (2-11-14).xlsx	File unopenable – content assessed by name	196
Advantage Rent A Car - Bid Summary v1 (1).xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	200
Advantage Rent A Car - Bid Summary v1.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	201
Advantage Rent A Car - Reforecast DIP Budget (Through 4-5-14) v2 - Net Exposure.pdf	Unopenable – confidential contents inferred from file name	204
Advantage Rent A Car - Reforecast DIP Budget (Through	Unopenable – confidential contents inferred from file name	205

4-5-14) v2 - Net Exposure.xlsx		
Advantage Rent A Car - Reforecast DIP Budget (Through 4-5-14) v5 - Net Exposure.xlsx	Unopenable – confidential contents inferred from file name	208
Advantage Term Sheet 2-21-14 v2.docx	Advantage Rent-a-Car "Indicative Term Sheet"	209
AGS-FSNA SOW2 (Advantage) Amendment 1.pdf	Document titled "Statement of Work #2" as part of Master Services Agreement between Ahesi Global Services Inc. and Franchise Services of North America, marked confidential	211
Airport Agreements (1).xlsx	Duplicate	213
Airport Agreements.xlsx	Spreadsheet containing information on Advantage Rent-a-Car airport locations	214
Airport Concessions.xlsx	Spreadsheet containing information on Advantage Rent-a-Car airport locations	215
Airport Data.xlsx	Spreadsheet containing information on Advantage Rent-a-Car airport locations	216
ARAC Purchases 2013 -Mar 2014 8-31 v2.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	238
AT Kearney Qualifications for Catalyst Capital Group - Jan2014.pdf	Presentation re A.T. Kearney	240
AUS Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	243
Balduccis-Kings backup.xlsx	Spreadsheet containing financial data re Balducci's	244
Balduccis-Kings Summary v3.pptx	PowerPoint presentation re Balducci's, marked confidential	245
BCG Grocery credentials 1-7-14_vF.pptx	PowerPoint presentation titled "BCG's Retail Credentials for NMFG"	246
BCG NMFG - Economic proposal v3.pptx	PowerPoint presentation titled "Building the foundation for growth and expansion"	248
BCG NMFG - Economic proposal v3 (1).pptx	Duplicate	247
BCG NMFG Proposal Jan 30.pptx	PowerPoint presentation titled "Building the foundation for growth and expansion"	250
BCG NMFG Proposal Jan 30 (1).pptx	Duplicate	249
BOS Monthly Revenue Report & CFC2.pdf	Advantage Rent-a-Car location monthly revenue report	251
BTV Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	255
BUR Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly	257

	revenue report	
Catalyst - funds to be remitted_March 19.xlsx	Spreadsheet containing financial data of Homburg Invest Inc.	260
Catalyst - NMFG Proposal 140130.pdf	Document prepared by Kurt Hammon titled "Natural Markets Food Group Strategic and Operational Plans" and marked confidential	263
Catalyst - NMFG Proposal 140130 (1).pdf	Duplicate of above item	261
Catalyst - NMFG Proposal 140130 (2).pdf	Duplicate of above item	262
Catalyst Capital - Grocery Assessment Proposal_1_6_14.pdf	Atlanta Retail Consulting proposal for professional services re Mrs. Green's, January 2013	264
Catalyst Capital - PwC Intro 011014vf.pdf	Titled "PwC Qualifications" and marked strictly private and confidential	265
Catalyst Capital Intro to Kurt Salmon 1-8-2014.pptx	PowerPoint titled "Introduction to Kurt Salmon" and marked confidential	266
Catalyst FTC Presentation v1.pptx	PowerPoint prepared by Catalyst re Advantage Rent-a-Car marked confidential	268
Catalyst FTC Presentation v2.pptx	Duplicate of above	271
Catalyst FTC Presentation v3.pptx	Duplicate of above	272
Catalyst FTC Presentation v12.pptx	Further version of above now titled "Presentation to the Federal Trade Commission regarding Advantage Rent-a-Car"	270
Catalyst FTC Presentation v12 (1).pptx	Duplicate	269
Catalyst Overview (2).pptx	PowerPoint presentation titled "The Catalyst Group Inc.: Overview" marked confidential	274
Catalyst_Advantage -- Consent Missing Information Checklist(1777867_4_CH....xlsx	Unopenable – content assessed by file name	278
CHS Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	298
CLE Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	299
CLT Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	300
Concessions Overview.pdf	PDF titled "Advantage Rent-a-Car: Concessions Overview" marked confidential	306
Consolidated Forecast 2013-10-21 - Business Plan.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	310

Copy of 12-27 New Fleet Available as discussed.xlsx	Spreadsheet containing financial data of Advantage Rent-a-Car	311
Copy of Fleetjan1CATCAP.xlsx	Spreadsheet containing data re Advantage Rent-a-Car locations	312
Copy of P4 MDA Backupv5 LINKS BROKEN.xlsx	Spreadsheet containing NMFG data	316
COS Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	317
CVG Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	320
DAL Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	322
DCA Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	328
DEN Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	332
DFW Monthly Revenue Report & CFC & CTC.pdf	Advantage Rent-a-Car location monthly revenue report	333
DIP Balance to December 19.xlsx	Spreadsheet containing financial data of Advantage Rent-a-Car	334
DIP Balance v8.xlsx	Spreadsheet containing financial data of Advantage Rent-a-Car	335
DRAFT Bridge Term Sheet_20140311.pdf	Document titled "Preliminary Summary of Indicative Terms and Conditions" and marked confidential	341
DSM - Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	342
EL-The Catalyst Capital Group Inc.pdf	Letter from Deloitte+Touch confirming retainer marked confidential	344
Europcar Agreement v2.pdf	Document summarizing Europcar agreement with Advantage Rent-a-Car	351
Europcar Cooperation Agreement dated 6-3-2013.pdf	Agreement between Europcar International and Franchise Services of North America	352
EWR-Newark Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	354
EWR-Wyndham Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	355
FinalMaster presentation vF.pdf	Presentation titled: "Board Meeting, Management Presentation, January 22, 2013"	362
Financing Facilities Comparison.pdf	Presentation for Advantage Rent-a-Car titled "Financing Facilities Comparison" marked confidential	363
Financing Facilities Comparison.pptx	PowerPoint version of above	364

Fleet Analysis 1-27-14.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	369
Fleet Composition Plan v3.xlsx	Spreadsheet containing Advantage Rent-a-Car fleet summary and analysis	370
Fleet Composition Plan v4.xlsx	Further version of above	371
Fleet Composition Plan v5.xlsx	Further version of above	374
Fleet Composition Plan v5 (1).xlsx	Further version of above	372
Fleet Composition Plan v5 (2).xlsx	Further version of above	373
FLL Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	376
Forward looking to actual v3.xlsx	Spreadsheet containing financial data and forecasts for Advantage Rent-a-Car	382
Forward looking to actual v3 (1).xlsx	Duplicate of above	381
Funding Memo (12 Mar 2014).pdf	NMRC March 12, 2014 Funding Request	393
Funding Memo (12 Mar 2014) (1).pdf	Duplicate of above	392
Funding Memo (27 Jan 2014 update).docx	NMRC January 27, 2014 Funding Request	394
Funding Memo Period 12 (final).docx	NMRC December 27, 2013 Funding Request	395
Funding Request #8 2-27-2014 v4.xlsx	Funding request from Advantage Rent-a-Car	400
Funding Request #8 2-27-2014 v4 (1).xlsx	Duplicate from above	398
Funding Request #8 2-27-2014 v4 (2).xlsx	Duplicate from above	399
Hawaii CFC Report.pdf	Advantage Rent-a-Car location monthly revenue report	415
HFC Presentation.pdf	Presentation titled "Advantage Rent-a-Car: Presentation to HFC"	418
HNL Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	420
Homburg Funding Reconciliation v2.xlsx	Spreadsheet containing Homburg financial information	423
Homburg Invest - Investment Memo.pdf	Catalyst confidential analysis memo re Homburg, May 2013	424
HOU Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	426
IAD Exhibit C - Oct 2013.xlsx	Advantage Rent-a-Car location monthly revenue report	429
IAD Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	430
IAH Monthly Revenue Report &	Advantage Rent-a-Car location monthly	431

CFC.pdf	revenue report	
Initial Memo ARN v2.docx	Catalyst prepared memo re Arcan, confidential	436
Initial Memo ARN v3.docx	Further version of above	437
Initial Memo ARN v5.pdf	Further version of above	438
Initial Memo DGI v1.docx	Catalyst memo re Data Group, confidential	440
Initial Memo LPR v2.docx	Catalyst memo re Lone Pine Group, confidential	442
Initial Memo LPR v2 (1)	Further version of above	441
Initial Memo LPR v2.docx	Further version of above	442
Initial Memo NSI v17.pdf	Catalyst memo re NSI NV, confidential	443
initial_financial_screening DGI v1.xlsm	Financial data re Arcan Resources Inc.	444
Investor+Presentation+September_ 2013.pdf	Unopenable	452
ITO Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	453
JAX Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	455
LAS Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	461
LAX Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	462
LIH Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	463
Master Schedule for Concession and CFC Payments(4).xlsx	Unopenable	503
Master Schedule for Concession and CFC Payments February 2014.xlsx	Unopenable	502
MCO Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	505
MDW Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	506
MGM_Index-slide.pptx	PowerPoint slide containing Mrs. Green's financial data	507
MHT Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	508
MIA Monthly CFC - Wells Fargo.pdf	Advantage Rent-a-Car location monthly revenue report	509
MIA Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	510
MKE Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	515

NMFG Model.xlsx	Spreadsheet containing NMFG financial data	526
NMFG Operating Model.xlsx	Spreadsheet containing NMFG financial data	561
NMFG Operating Model (1).xlsx	Duplicate	527
NMFG Operating Model (2).xlsx	Duplicate	528
NMFG Operating Model (3.12.14).xlsx	Further version of above	530
NMFG Operating Model (3.12.14) (1).xlsx	Further version of above	529
NMFG Operating Model (5.2.14).xlsx	Further version of above	532
NMFG Operating Model (5.2.14) (1).xlsx	Further version of above	531
NMFG Operating Model 2 4 14 v9.xlsx	Further version of above	533
NMFG Operating Model 2 6 14 v17.xlsx	Further version of above	534
NMFG Operating Model 2 6 14 v18 brs.xlsx	Further version of above	535
NMFG Operating Model 2 6 14 v18.xlsx	Further version of above	536
NMFG Operating Model 2 6 14 v25 (brs updated).xlsx	Further version of above	537
NMFG Operating Model 2 6 14 v26.xlsx	Further version of above	538
NMFG Operating Model 2 6 14 v27.xlsx	Further version of above	539
NMFG Operating Model 2 6 14 v28.xlsx	Further version of above	540
NMFG Operating Model 2 6 14 v30.xlsx	Further version of above	542
NMFG Operating Model 2 6 14 v30 (1).xlsx	Further version of above	541
NMFG Operating Model 2 6 14 v31.xlsx	Further version of above	543
NMFG Operating Model 2 6 14 v32.xlsx	Further version of above	547
NMFG Operating Model 2 6 14 v32 (1).xlsx	Further version of above	544
NMFG Operating Model 2 6 14 v32 (2).xlsx	Further version of above	545
NMFG Operating Model 2 6 14 v32 (3).xlsx	Further version of above	546
NMFG Operating Model 2 6 14 v33.xlsx	Further version of above	548

NMFG Operating Model 2 6 14 v34.xlsx	Further version of above	549
NMFG Operating Model v2 -- CHECK RX EXPENSES.xlsx	Further version of above	552
NMFG Operating Model v2.xlsx	Further version of above	553
NMFG Operating Model v3.xlsx	Further version of above	554
NMFG Operating Model v4.xlsx	Further version of above	555
NMFG Operating Model v5.xlsx	Further version of above	556
NMFG Operating Model v6.xlsx	Further version of above	557
NMFG Operating Model v7.xlsx	Further version of above	558
NMFG Operating Model v8.xlsx	Further version of above	559
NMFG Operating Model v9.xlsx	Further version of above	560
NMFG Operating Model v10.xlsx	Further version of above	550
NMFG Operating Model v11.xlsx	Further version of above	551
NMFG Overview v4.pptx	Presentation titled "Overview" for NMFG	562
NMFG Overview v5.pptx	Further version of above	563
NMFG Overview v6 (1).pptx	Further version of above	564
NMFG Overview v6.pptx	Further version of above	565
NMRC 2013-2014.pdf	Document containing NMRC financial data	568
NMRC Bank Presentation v1.pptx	Presentation titled "Natural Food Markets Group – Update 2013"	569
NMRC Board Presentation v11 (1).pdf	Duplicate of below	571
NMRC Board Presentation v11.pdf	Presentation titled "Natural Food Markets Group – Board of Directors Meeting, October 22, 2013""	572
NMRC comps v5.xlsx	Spreadsheet containing financial data and comparative analysis re NMRC, competitors	573
NMRC Model - Feb 2014 (PwC Model).xlsx	Spreadsheet containing NMRC financial data, analysis and forecast	574
NMRC Model - Feb 2014.xlsx	Spreadsheet containing NMRC financial data, analysis	575
NMRC Model Outputs.pdf	Document containing NMRC financial data	576
NMRC Operating Model (27 Jan 2014) (1).xlsx	Duplicate of below	577
NMRC Operating Model (27 Jan 2014) (2).xlsx	Duplicate of below	578
NMRC Operating Model (27 Jan 2014) (3).xlsx	Duplicate of below	579
NMRC Operating Model (27 Jan 2014).xlsx	Spreadsheet containing NMRC financial data	580

NMRC Peers - 2-6-2014 (1).xlsx	Duplicate of below	582
NMRC Peers - 2-6-2014.xlsx	Spreadsheet containing comparative analysis of NMRC competitors	583
NMRC Run-Rate by Store (1).pdf	Duplicate of below	584
NMRC Run-Rate by Store.pdf	NMRC store by store financial data	585
NMRC_09302013 Valuation Memo.pdf	Catalyst memo re NMFG valuation, September 30, 2013	586
NMRC_12312013 Valuation Memo (1).pdf	Duplicate of below	587
NMRC_12312013 Valuation Memo (2).pdf	Duplicate of below	588
NMRC_12312013 Valuation Memo v4.pdf	Duplicate of below	590
NMRC_12312013 Valuation Memo.pdf	Catalyst memo re NMFG valuation, December 31, 2013	591
OAK Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	594
OKC Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	598
OMA Monthly Revenue Report .pdf	Advantage Rent-a-Car location monthly revenue report	599
ONT Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	600
Operating Summary v3.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	603
Operating Summary v4.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	604
OperatingSummary 20131202.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data by rental location	607
OperatingSummary 20131203 (1).xlsx	Duplicate of below	608
OperatingSummary 20131203.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	609
OperatingSummary 20131204 (1).xlsx	Duplicate of below	610
OperatingSummary 20131204.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	611
OperatingSummary 20131205 (1).xlsx	Duplicate of below	612
OperatingSummary 20131205.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	613
OperatingSummary 20131206 (1).xlsx	Duplicate of below	614
OperatingSummary 20131206.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	615

OperatingSummary 20131207 (1).xlsx	Duplicate of below	616
OperatingSummary 20131207.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	617
OperatingSummary 20131208 (1).xlsx	Duplicate of below	618
OperatingSummary 20131208.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	619
OperatingSummary 20131209 (1).xlsx	Duplicate of below	620
OperatingSummary 20131209.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	621
OperatingSummary 20131210 (1).xlsx	Duplicate of below	622
OperatingSummary 20131210 (2).xlsx	Duplicate of below	623
OperatingSummary 20131210.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	624
OperatingSummary 20131211 (1).xlsx	Duplicate of below	625
OperatingSummary 20131211.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	626
OperatingSummary 20131212.xlsx	Spreadsheet containing Advantage Rent-a-Car financial data	627
ORD Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	627
ORD MonthlyCFC.pdf	Advantage Rent-a-Car location monthly revenue report	629
ORF Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	630
P11 Funding Request.pdf	NMFG Funding request, November 25, 2013	638
P12 Cash Model v12.xlsx	Further version of below	639
P12 Cash Model.xlsx	Spreadsheet containing NMFG financial data and analysis	640
P12 Funding Sources and Uses v5.xlsx	Spreadsheet containing NMFG financial data	641
PDX Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	646
Period 4 2014 MDA (final).pptx	Presentation titled "Period 4, 2014: Management Discussion and Analysis, May 2, 2014"	648
Period 13 MDA (10 Jan 2014).pptx	Presentation titled "Period 13, 2013: Management Discussion and Analysis, January 10, 2014"	647
PHX - Monthly Revenue Report &	Advantage Rent-a-Car location monthly	649

CFC.pdf	revenue report	
PIT Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	650
PNS Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	651
PR_Catalyst Capital Group_27JAN2014_draft (1).pdf	Duplicate of below	655
PR_Catalyst Capital Group_27JAN2014_draft (2).pdf	Duplicate of below	656
PR_Catalyst Capital Group_27JAN2014_draft.pdf	Report titled "Mrs. Green's Natural Market: Strategy, Execution and Roadmap Support," marked confidential	657
PR_Catalyst Capital Group_NMFG_LEK Credentials.pdf	Report titled "Introduction to L.E.K. Consulting," marked confidential	658
Project Turbine - Preliminary Diligence Request List.xls	Document containing due diligence questions for project turbine	654
PVD Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	659
Q4 2013 Letter v7 - Newton's Mark Up.pdf	Document containing portfolio reports on Therapure, Advantage Rent-a-Car and Homburg, including handwritten revision notes	663
Quarterly Letter v3 (1).docx	Duplicate of below	665
Quarterly Letter v3.docx	Document containing narrative updates on numerous Catalyst clients, tracked changes	666
Quarterly Letter v4.docx	Letter containing updates on many Catalyst clients	667
Quarterly Letter v4.pdf	Duplicate of above, PDF format	668
RDU Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	671
Real Estate Development and Controls (27 Jan 2014) (1).pptx	Duplicate of below	672
Real Estate Development and Controls (27 Jan 2014).pptx	Presentation titled "Real Estate Development and Controls, January 27, 2014"	673
Reforecast DIP Budget (WE12-7) (1).xlsx	Duplicate of below	680
Reforecast DIP Budget (WE12-7).xlsx	Spreadsheet containing Advantage Rent-a-Car budget details, budget forecast	681
Reservation Outlook 11252013nf (1).xlsx	Duplicate of below	684
Reservation Outlook 11252013nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by	685

-	location	
Reservation Outlook 12022013nf (1).xlsx	Duplicate of below	686
Reservation Outlook 12022013nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by location	687
Reservation Outlook 12092013nf (1).xlsx	Duplicate of below	688
Reservation Outlook 12092013nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by location	689
Reservation Outlook 12162013nf (1).xlsx	Duplicate of below	690
Reservation Outlook 12162013nf (2).xlsx	Duplicate of below	691
Reservation Outlook 12162013nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by location	692
Reservation Outlook 12232013nf (1).xlsx	Duplicate of below	693
Reservation Outlook 12232013nf (2).xlsx	Duplicate of below	694
Reservation Outlook 12232013nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by location	695
Reservation Outlook 12302013nf (1).xlsx	Duplicate of below	696
Reservation Outlook 12302013nf (2).xlsx	Duplicate of below	697
Reservation Outlook 12302013nf (3).xlsx	Duplicate of below	698
Reservation Outlook 12302013nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by location	699
Reservation Outlook 20140106nf.xlsx	Spreadsheet containing Advantage Rent-a-Car reservation outlook data by location	700
RNO Monthly Revenue Report .pdf	Advantage Rent-a-Car location monthly revenue report	703
RON Initial Memo v10.pdf	Catalyst memo re RONA Inc, November 2012, marked confidential	704
RSW Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	705
SAN Forecast.xlsx	Spreadsheet containing financial data and forecasting for Advantage Rent-a-Car San Diego location	706

SAN Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	707
SAT Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	708
SDF Exhibit I - Oct 2013.xlsx	Spreadhseet for Advantage Rent-a-Car location monthly report	717
SDF Monthly Revenue Report &CFC.pdf	Advantage Rent-a-Car location monthly revenue report	718
SEA Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	719
SFB Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	724
SFO Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	725
simply wheelz doc WL master lease agreement 20140220 (2).doc	Draft of lease agreement between Westlake Inc. And Advantage Rent-a-Car, tracked changes	726
SJC Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	727
SLC Monthly Revenue Report & CFC2.pdf	Advantage Rent-a-Car location monthly revenue report	728
SMF Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	729
SNA Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	730
SRQ Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	732
Summary of Advantage AP Agreements - 12-Dec-2013.doc	Chart summarizing Advantage Rent-a-Car rental and lease agreements by location	741
TFM_News_2013_5_29_Financial _Releases.pdf	Unopenable	743
Therapure Payroll - 3-21.pdf	Fax re wire transfer directions for Therapure	748
Therapure - Advanced Manufacturing Fund - Proposal v7 without comments.docx	Report summarizing business and financial strategy of Therapure	747
TPA Exhibit B - Oct 2013.xlsx	Monthly rental activity for Tampa, FL Advantage Rent-a-Car location	754
TPA Monthly Revenue Report.pdf	Advantage Rent-a-Car location monthly revenue report	755
TUL Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	759
UNTITLED.PPTX	PowerPoint slides, client unknown, marked confidential	763
VINs at 11-5-13 v 12 19	Advantage Rent-a-Car fleet summary	765

(MASTER) 3.10.14.xlsx		
VPS Monthly Revenue Report & CFC.pdf	Advantage Rent-a-Car location monthly revenue report	766
Weekly report - W18 2014.xlsx	Spreadsheet containing Mrs. Green's financial data	770
Weekly report - w 8 2014 v10CM (1).xlsx	Further version of above	768
Weekly report - w 8 2014 v10CM.xlsx	Further version of above	769

33. We conclude that with respect to this group of post-December 1, 2013 documents, that all of the documents generated by the search process are items previously disclosed in Moyse's affidavit of documents, other than the five (5) image files identified in the "AppData...Content.MSO" folder and listed above.

34. We did not find specific evidence from this process concerning the possibility of Moyse supplying these documents to West Face. However, we note one issue of significance concerning the four documents contained in the Dropbox folder and listed above. Each of these documents has a "date modified" metadata record of June 24, 2014 (between 10:43 and 10:49 p.m.). We understand June 24, 2014 to have been Moyse's second day employed at West Face. The "date modified" entry is consistent with the document being added to the Dropbox, or accessed from the Dropbox by the user of Moyse's computer, on that date.

Pre-December, 2013 Documents and Files

35. We then reviewed all of the pre-December, 2013 documents and files generated. The following are documents which we concluded contain Catalyst confidential information. As in the previous table, where those documents have been previously disclosed by Moyse, we have made a notation to that effect in the final column, which cross-references the document

to the document numbering in Moyse's two affidavits of documents. Where the document is marked "N/A", the item was not disclosed in those affidavits.

Filename	Description of item	Document #
4F7F4274.emf	Image file containing an excerpt from an Excel spreadsheet of financial data from Geneba Properties NV.	N/A
Advantage Agenda – Nov18.docx	A meeting agenda for a meeting with Advantage Rent-A-Car on November 18, 2013	8
Catalyst Press Release – Mar 4.pdf	March 4, 2013 press release announcing Catalyst's participation in the CCAA proceedings associated with Homburg Investments	N/A
Catalyst Press Release – Mar 4.pdf.docx	Microsoft Word version of last document	N/A
HII Analysis v79.xlsx	Extensive analysis spreadsheet of Homburg Investments	26
HII Analysis v80.xlsx	Extensive analysis spreadsheet of Homburg Investments	27
NMRC Gant Chart.xlsx	Single-page spreadsheet of employee hiring process	31
Q1 2013 Letter V6.docx	Draft of results reporting letter addressed to Catalyst Fund Limited Partnership II/III/IV Investors	35
13-10-11 Geneba News Tracker.xlsx	Spreadsheet containing notes as to key developments affecting Geneba tenants, financial results, and regional economic data	57
13-10-25 Geneba News Tracker(1).xlsx	Different version of previous item	58
13-10-25 Geneba News Tracker.xlsx	Different version of previous item.	59
13-11-01 Geneba News Tracker.xlsx	Different version of previous item	60
13-11-15 Geneba News Tracker.xlsx	Different version of previous item	61
13-11-28 MAG and Rent Calculation.xlsx	A payables spreadsheet associated with Advantage Rent-A-Car	62
Advantage – Business Plan Model 11-15-13 DRAFT.xlsx	Large, multi-sheet spreadsheet outlining Advantage Rent-A-Car's business plan	164
Advantage – Memo 10 2013 v3.docx	Draft Catalyst analysis memo of Advantage Rent-a-Car	172
Advantage – Memo 10 2013 v15.docx	Different version of previous item	171

Filename	Description of item	Document #
Advantage Data.xlsx	Spreadsheet of rental data from Advantage Rent-A-Car	181
Advantage PPA (Concessions Summary) Updated.xlsx	Spreadsheet of value of airport concessions held by Advantage Rent-A-Car	184
Advantage PPA FINAL Report.pdf	KPMG valuation report of Advantage assets provided to Adreca Holdings Corp.	185
Advantage Rent A Car Additional Hertz KPI and Revenue Data(1).xlsx	Table of revenue data from Advantage Rent-A-Car	198
Advantage Rent A Car Additional Hertz KPI and Revenue Data.xlsx	Duplicate of previous item	199
Advantage Rent A Car – Hertz Discussion Materials (10-22-13).pdf	Presentation prepared for a without prejudice negotiation between Advantage and Hertz	202
Advantage Rent A Car – Operating Data Template for Review (11-30-13)	Table of operating data	203
Airport Schedule 11022013(1).xlsx	Table of airport based locations for Advantage Rent A Car	217
Airport Schedule 11022013.xlsx	Duplicate of previous item	218
Capital Call Out Section of LPA Fund III.pdf	Excerpt from Second Amended and Restated Limited Partnership Agreement for Catalyst LPA Fund III	258
Catalyst Credit Analysis – Tuckamore	Letter from Gabriel de Alba to Brandon Moyse instructing him to prepare a credit analysis on Tuckamore Capital Management	N/A
Catalyst Final Offer.pdf	Letter from Catalyst to Homburg Investments proposing investment terms, marked "strictly confidential" (undated)	267
Catalyst Overview(1).ppt	Four-page description of Catalyst Capital Management	273
Catalyst Overview.ppt	Duplicate of previous item	275
CH-1692782-v6 CatalystAdvantage – Asset Purchase Agreement.docx	Draft purchase agreement for Advantage Rent A Car	293
Concessions Overview(1).pptx	Airport locations information concerning Advantage Rent A Car	305
Concessions Overview.pptx	Duplicate of previous item	307
Copy of Master Bond List Projected Bons In-Force	List of bond obligations of Advantage Rent A Car	314

Filename	Description of item	Document #
as of 11-5-2013(2).xlsx		
Copy of P11 Funding Sources and Uses.xlsx	Budgeting spreadsheet for Natural Medicines Food Group	315
dpny-23799263-v1 Blue Amended and Restated Purchase Agreement – Dec 10....pdf	Marked Confidential, purchase agreement between Hertz and Adreca Holdings Inc. dated December 10, 2012	340
FSNA Memo v1.docx	Catalyst research memorandum concerning Franchise Services of North America Inc.	388
FSNA Memo v2.docx	Updated version of previous item	389
FullInventory(2).xlsx	Complete inventory of vehicles owned by Advantage Rent A Car	390
Funding Memo Period 12 – v1(1).docx	Funding proposal from Natural Market Restaurants Corp.	396
Funding Memo Period 12 – v1.docx	Duplicate of previous item	397
HII Analysis v94 – for memo.pdf	Spreadsheet containing Homburg financial data	419
Homburg analysis v31.xlsx	Spreadsheet containing analysis of Homburg	421
Homburg Analysis.pptx	PowerPoint presentation containing investment analysis of Homburg	422
Homburg Investment Overview.pdf	Spreadsheet containing investment analysis of Homburg	425
Impact of fleet mix change.xlsx	Spreadsheet containing analysis of Advantage rental fleet	435
Initial Memo BB v1.docx	Draft Catalyst memorandum concerning investment in BlackBerry	439
initial_financial_screening BB v1.xlsx	Spreadsheet containing financial modelling on BlackBerry	446
Location Review 0501nf.xlsx	Spreadsheet containing location-based revenue data for Advantage	465
Location Review 0603.xlsx	Different version of previous item	471
Location Review 0701nf.xlsx	Different version of previous item	473
Location Review 0730nf.xlsx	Different version of previous item	475
Location Review 0904nf.xlsx	Different version of previous item	477
Location Review 1001nf.xlsx	Different version of previous item	479
Location Review 1030nf.xlsx(1)	Different version of previous item	480
Location Review	Different version of previous item	482

Filename	Description of item	Document #
1030nf.xlsx		
Location Review 1127nf.xlsx	Different version of previous item	486
Master Schedule for Concession and CFC Payments(4).xlsx	Spreadsheet containing financial data for Advantage	503
Miscellaneous Info v2.xlsx	Spreadsheet containing financial and business information about Advantage	512
Miscellaneous Info v4.xlsx	Different version of previous item	513
Miscellaneous Info v7.xlsx	Different version of previous item	514
NMFG Team Assessment and HR Plan.pptx	Presentation on Natural Markets Foods Group personnel roles & capacities	566
NMRC Board Package.pdf	Natural Markets Restaurant Corp. Board agenda and material	570
NMRC Operating Model v42.xlsx	Financial model for Natural Markets Restaurant Corp.	581
October 2013 Activity.xlsx	Flight data for McCarran International Airport	595
October MAG & Rent JILL.xlsx	Payables spreadsheet for Advantage	596
OP Model Reconciliation v5.pptx	Presentation reconciling 2 operating models for Natural Markets Food Group	601
Operating Summary v2.xlsx	Revenue model for Advantage	602
Operating Summary.xlsx	Different version of previous item	603
Organizational Chart 2013-11-19 v.1.3.pptx	Organizational charts for Natural Markets Food Group	631
Organizational Chart Brandon.pptx	Presentation on Natural Markets Foods Group personnel roles & capacities	632
P11 Cash Model v3.xlsx	Revenue model for Natural Markets Food Group	636
P11 Cash Model v4.xlsx	Different version of previous item	637
Real Estate Pipeline – P11 v3.xlsx	Table of lease information for Natural Markets locations	679
Schedules B and C (HII-Shareco) – 2013-04-28(1).pdf	Form of proxy for Homburg creditors	713
Schedules B and C (HII-Shareco) – 2013-04-28(2).pdf	Duplicate of previous item	714
Schedules B and C (HII-Shareco) – 2013-04-28.pdf	Duplicate of previous item	715

Filename	Description of item	Document #
Strategic Initiatives Update.pptx	Presentation on various initiatives of Natural Markets Food Group	740
Top 10 Locations.xlsx	Table of rental and revenue data for Advantage	753
traf-ops072013.xlsx	Table of flight data for Seattle-Tacoma International Airport	756
Travelport Market Demand.xlsx	Table of rental data for Advantage	757
Tuckamore Capital Management vF2.pdf	Catalyst investment memorandum re: Tuckamore prepared by Moyse	758
Tuckamore Capital Management vF.pdf	Different version of previous item	N/A

36. As is evident from the above, we found a further total of five (5) documents containing Catalyst confidential information which were not previously disclosed in Moyse's affidavits of documents within this pre-December 1, 2013 set of documents. Again, we did not identify specific evidence showing Moyse to have further disclosed these materials to West Face simply from the review of documents.

Files Recovered through application of second set of search terms

37. After considering the parties' respective positions, we decided to instruct DEI to employ the second set of search terms supplied by Catalyst counsel on January 8, 2015. A total of five non-duplicative, unique files were identified and supplied to us as a result of the use of this second set of search terms. We reviewed all of these items, and none of them bear any relevance to Moyse's employment with Catalyst, nor do they contain any confidential information.

Moyse's Email Accounts

38. We were provided with email messages responsive to the search terms provided from the following personal accounts maintained on Moyse's computer: bmy1987@gmail.com and brandonmoyse@hotmail.com. We reviewed all messages provided from November, 2012 onward (although a large volume of pre-2012 messages were included in the search results dating back as far as 2008). We also reviewed, in the same exercise, those additional emails that were provided after the application of the second set of search terms provided by Catalyst's counsel.

39. The large majority of messages were personal in nature. However, we identified a number of instances of Catalyst confidential information contained within emails, as follows:

Date	Description of Item	Document #
April 18, 2013	Email from Moyse's Catalyst email account to his Gmail account forwarding diligence summaries and deal summaries concerning the Homburg transaction, from Stephen Eddy of McMillan LLP	820
April 19, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding a draft Plan of Arrangement document with comments from McMillan LLP, together with draft Order and Motion documents with further comments from McMillan LLP, sent originally by Marc-André Morin of that firm. This material again relates to the Homburg transaction.	821
April 19, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding McMillan's comments on the "Homco 61 Plan", again related to the Homburg transaction.	N/A
April 19, 2013	Email from Moyse's Catalyst account to his Gmail account attaching document markups from Sandra Abitan of Osler, Hoskin & Harcourt LLP on the draft HII/Shareco Plan related to the Homburg investment.	N/A
April 20, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding comments from Greg McIlwain of McMillan	822

Date	Description of Item	Document #
	LLP on the Information Circular for the Homburg matter.	
April 21, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding the revised HII/Shareco plan provided by Sandra Abitan of Osler, Hoskin & Harcourt LLP.	N/A
April 21, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding further revisions to the Amended and Restated HII Plan from McMillan LLP.	823
April 25, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding a draft letter from Marc-André Morin of McMillan LLP, to be sent to Osler, Hoskin & Harcourt in the event that negotiations are not successful.	824
April 27, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding comments from Zach Michaud on the Information Circular.	825
April 28, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding a Media Script proposed by public relations advisor Jessie Bullens relating to the Homburg transaction.	826
May 7, 2013	Email from Moyse's Catalyst account to his Gmail account forwarding the documents "Homburg Investment Overview.pdf" and "HII Analysis v94 – for memo.pdf"	828
September 2, 2013	Email from MOyse's Catalyst account to his Gmail account attaching a marked-up copy of a Business Plan for a new entity (Geneba Properties) incorporated in connection with the Homburg transaction.	830
September 24, 2013	Email from Moyse's Catalyst account to the address wabdullah@nmfg.com containing only an attachment, NMRC Operating Model v8.xlsx, appearing to be information pertaining to Natural Markets Food Group	N/A
November 21, 2013	Email from Moyse's Catalyst account to his Gmail account containing a 165-page Organizational Chart for Natural Markets Food Group	831
February 3, 2014	Email from Zach Michaud to Moyse's Gmail account forwarding an exchange with Andrew Tully of the firm Kurt Salmon, enclosing a document entitled "NMFG Proposal 140130.pdf", appearing to be an investment proposal concerning Natural Markets Food Group	N/A

40. As is evident from the above, we identified a total of five (5) email items containing Catalyst confidential information which were not disclosed in Moyse's affidavits of documents. Further, we note that the search process did not result in copies being returned for

documents 829, 832 or 833 listed in Moyse's affidavit of documents and we have not reviewed these items.

41. There are several further areas warranting comment arising from our review of the email messages that were generated in the search. First, we identified one email dated October 30, 2013, in which Moyse emails an individual named Ian Quint (iquint@quintcap.com) seeking information on the Dutch commercial real estate market such as cap rates and market values, and indicating that he is seeking to generate a rough estimate of what certain properties in the Netherlands might be worth. It appears this inquiry is related to the Homburg matter. There is no identifiable confidential information contained in the exchange, but since it is possible that such information might be inferred from the subject-matter of the inquiry, we have included reference to it.

42. Second, we did not find evidence contained within the email messages delivered to us of Moyse transmitting Catalyst investment documents or information to West Face. The only Catalyst document we found transmitted to West Face is contained in an email from Moyse (via his Hotmail account) to Alex Singh, West Face's General Counsel, on May 28, 2014, in which Moyse supplied Singh with a copy of his Employment Agreement. That document as sent to West Face was redacted to prevent disclosure of information "related to the equity/carry structure of the firm".

43. I am aware from paragraph 62 and 63 of Moyse's July 7, 2014 Affidavit that he acknowledges having sent four Catalyst "research pieces" to West Face to serve as "writing samples" in the course of seeking employment at that firm, and that he acknowledges having deleted these email messages. We did not, however, find the original copy of this email

message in our own review of the material provided through the search process, other than a forwarded version contained within a solicitor-client privileged communication.

44. Third, we located two email messages sent to Moyse's Hotmail account dated Saturday, July 12 and Wednesday, July 16, 2014, which require comment. These emails constitute payment receipts and license keys for a software product. The software product purchased on July 12, 2014 was "RegClean Pro" and it is indicated to include "Special Disk Cleaning Tools". The product purchased on July 16, 2014 was "Advanced System Optimizer 3 [Special Edition]" which is said to include "Free PhotoStudio" and "Special Disk Cleaning Tools". According to the promotional website for these products (http://www.systweak.com/aso/), Advanced System Optimizer 3 is software which includes a feature named "Secure Delete", that is said to permit a user to delete, and over-write to military-grade security specifications, data so that it cannot be recovered through forensic analysis.

45. Given the nature and timing of the software installed, I requested that DEI take steps to determine whether the product was installed and whether it could be determined if the product had been used to over-write data or files prior to the computer being imaged. DEI advised me that, based on the creation date of the associated folders, RegClean and Advanced System Optimizer 3 were installed on July 16, 2014 at 8:50 and 8:53 a.m. respectively. The executable files for the Secure Delete feature are contained within the Advanced System Optimizer 3 folder. On July 20, 2014 at 8:09 p.m., a folder entitled "Secure Delete" was created, which suggests that a user of Moyse's computer took steps to make the use of that function available at that point in time.

46. DEI reported to me that the Secure Delete feature of the software provides several options for over-writing (i.e., "securely deleting") files. By default, the setting is "Fast secure delete" which causes a single pass overwriting process in which data is over-written with random characters. The second option is to use three passes using random characters and the third option is the so-called "military-grade" option which uses seven passes overwriting with random characters.

47. In terms of what may be deleted using this feature, DEI reports that the user may select from any of the following options within the software:

(a) To wipe specific, individual files or folders;

(b) To wipe an entire drive;

(c) To wipe only "free space", *i.e.* currently unused or unallocated space which may contain fragmentary data from deleted files which have not yet been over-written either through ordinary usage of the computer or through deliberate over-writing.[4]

48. I asked DEI to advise me whether there was evidence that the product had been used in any of these ways. DEI reported that the content of the Moyse computer was not consistent with any use of the Secure Delete function to delete all free space and thereby prevent forensic analysis of the drive as a whole, on the assumption that the product indeed writes

[4] By way of a more detailed explanation, this technique could be used to destroy evidence that might otherwise be recoverable of "deleted files", *i.e.*, files which the user has instructed the operating system to delete. The ordinary "delete" function of common operating systems does not, when employed, actually result in the destruction of the underlying data, but simply records the file as "deleted" and makes it inaccessible without forensic recovery techniques. The underlying data will generally remain present in the "unallocated space" of the hard drive. Unallocated space is space that the operating system treats as available to use for the storage/writing of new data or files. Thus, after a period of ordinary use, unallocated space will gradually be populated or filled in with new data, over-writing the old. Until the unallocated space where a "deleted file" is resident is over-written with new data, forensic recovery software can recover the file. The purpose of over-writing software such as Secure Delete, when applied to wipe all "free space" (aka "unallocated space") is to force the over-writing, with random data, of the latent content. Multiple, repetitive over-writing then simply increases the likelihood that forensic recovery tools cannot be used to recover the "deleted" content.

with random characters as is claimed in the product literature. Further, it is clear that the function was not used to wipe the entire drive, since there were substantial volumes of data produced to us. DEI cannot determine whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly cannot express any conclusion on that possibility other than to note that it exists.

Samsung Android Smartphone

49. The Android phone contained reviewable, potentially relevant information of the following types: (a) the user's Contacts; (b) records of documents downloaded to the device; (c) records of documents accessed or accessible through the Dropbox cloud-storage application installed on the device; (d) SMS and MMS text messages; and (e) data recovered from the Twitter application installed on the device.

50. DEI produced spreadsheets with the content of each such category of information recovered from the device, which we reviewed. We found no relevant content (and therefore no record of Catalyst confidential information being communicated) from reviewing Moyse's Contacts, his SMS and MMS text messages, or the recovered content of the Twitter application.

51. With respect to the record of downloaded documents, the data on the device recorded only those downloads occurring from and after May 27, 2014 (and continuing to July 21, 2014). While there are several entries appearing to be West Face-related documents (potentially employment-related documentation), there are no documents recorded which provide any basis to conclude that they might contain Catalyst confidential information.

52. With respect to the Dropbox account, all but a small number of file records were contained in folders marked "/Education", "/Camera Uploads" and "/Personal". Although we are not able to actually access the files themselves (since they are stored not on the device, but on the cloud-based Dropbox storage facility), it can at least be said that the file names of the documents appear to be consistent with those categorizations, and they do not appear to be Catalyst-related. Of the other files contained in the Dropbox, none appear to contain Catalyst confidential information.

Apple iPad

53. The Apple iPad contained limited reviewable, potentially relevant information of two types: (a) records of documents accessible through the "Dropbox" cloud storage application, and (b) information derived from the user's Twitter account.

54. DEI was able to generate a list of documents accessible from this device from the "Dropbox" iOS application. The iPad contained records for some 1,327 total documents which were recorded by the operating system as accessible to the user at some point in time. Of these documents, a total of 1,017 documents were contained in a folder entitled "Catalyst". I have attached as **Appendix "N"** a copy of the list of all files contained within the "Catalyst" folder, from the data supplied by DEI. The data generated also include a record of the last time that each file was recorded to have been accessed by the user, which is contained within that spreadsheet. I note that there are no records of the documents in the Dropbox being reviewed on any date subsequent to April 16, 2014, and therefore no evidence that the Dropbox files were viewed subsequent to Moyse's departure from Catalyst on the iPad device.

55. In addition, DEI recovered the Twitter direct messages and "tweets" associated with the account deployed on this device. I reviewed those items and identified nothing of relevance nor any confidential information contained therein belonging to any party to this action.

PART IV - OBJECTIONS TO THE DRAFT REPORT PURSUANT TO THE PROTOCOL

56. On February 1, 2015 we provided a draft report pursuant to paragraph 10 of protocol to counsel for Catalyst and Moyse.

57. On February 13, 2015 we received an email response from counsel for Moyse. The email contained a letter to me setting out a number of objections to documents that had been identified and included in the draft report. I have attached a copy of this email as "**Appendix O**".

58. Pursuant to the Protocol, we have reviewed the objections raised by Moyse's counsel, and made alterations to our report to exclude those objections we were able to conclude were valid. Accordingly, the documents to which Moyse's counsel has objected, and which objections we have determined to be justified, have been excluded from the Report. The documents pertaining to objections that we determined were not justified remain included in this Report.

PART V - CONCLUSIONS AS TO THE PROVISION OF CONFIDENTIAL INFORMATION TO WEST FACE

59. We found no further concrete evidence from our review of the files, their surrounding metadata, or Moyse's email material or mobile devices, that confidential information

belonging to Catalyst was provided to West Face. That of course does not exclude the possibility that such information was transmitted to West Face in other ways, or that records of other confidential information could have been destroyed through deletion and over-writing, as noted above.

PART VI - CONCLUSION

60. The above represents the conclusions we have been able to draw with respect to the content of the Devices. If the parties require further information about our analysis to date, or the provision of copies of some or all of the documents, we await their direction or further direction from the Court as may be appropriate.

February 17, 2015

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Independent Supervising Solicitor

CATALYST CAPITAL GROUP INC.
Plaintiff

and

MOYSE *et al.*
Defendants

Court File No: CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

REPORT OF THE INDEPENDENT SUPERVISING SOLICITOR

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This is Exhibit "G" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants/
Responding Party

AMENDED NOTICE OF MOTION

The Plaintiff ("Catalyst") will make a motion to a Judge on March 19, 2015 at 10:00 a.m., or as soon after that time as the motion can be heard at the court house, 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] orally.

THE MOTION IS FOR

(a) If necessary, an Order abridging the time for delivery of this Notice of Motion;

(b) An interim, interlocutory and/or permanent injunction restraining the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted from:

(i) Participating in the management and/or strategic direction of Wind Mobile Corp. and any affiliated or related corporations (collectively, "Wind"); and

(ii) Without limiting the generality of the foregoing, participating in the Spectrum Auction, as that term is defined below;

(c) An Order authorizing an Independent Supervising Solicitor ("ISS") to attend West Face's premises to create forensic images of all electronic devices, including computers and mobile devices of West Face (the "Images") and to prepare a report which shall:

(i) identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and

(ii) in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:

(1) who authored the email;

(2) to whom the email was sent, copied and/or blind copied;

(3) the date and time when the email was sent;

(4) the subject line of the email;

(5) whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);

(6) the contents of the email; and

(7) if the email was deleted, when the email was deleted.

(c.1) A declaration and finding that the Defendant Brandon Moyse ("Moyse") is in contempt of the Order of Justice Firestone dated July 16, 2014;

(c.2) An Order that Moyse be committed to jail for such period as the Court deems just;

(c.3) In addition or in the alternative to paragraph (c.2) above, an Order that Moyse be fined in an amount to be determined by the Court;

(c.4) An Order that Moyse reimburse Catalyst for the full costs of the ISS and forensic expert retained pursuant to a Document Review Protocol executed on December 12, 2014 and any related costs thrown away by Catalyst on account of related legal fees and disbursements, such amounts to be determined and fixed by the Court on a reference;

(d) The costs of this motion on a substantial indemnity basis, plus applicable taxes; and,

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

THE GROUNDS FOR THE MOTION ARE

The Parties to this Action

(a) Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

(b) West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

(c) The defendant Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014. Moyse was one of only two analysts and had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

(d) On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

(e) On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

Moyse and West Face Falsely Assure Catalyst there has been no Wrongdoing

(f) Between May 30 and June 19, 2014, counsel for the parties to this action exchanged correspondence and communicated by telephone. Catalyst's counsel tried, but failed, to get the defendants' counsel to agree to terms which would avoid the need for litigation.

(g) In this exchange of correspondence, counsel for West Face and Moyse claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality. In particular, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is [...] baseless."

(h) As discussed in detail below, this statement is wrong: in March 2014, Tom Dea, a Partner at West Face ("Dea"), expressly asked Moyse to send him samples of his work at Catalyst, and Moyse sent Dea four Catalyst investment analysis memos stamped "Confidential" and "For Internal Discussion Purposes Only".

(i) On June 19, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. Moyse and West refused to preserve the *status quo* while Catalyst sought to enforce restrictive covenants which prevented Moyse from working at West Face prior to December 22, 2014. On June 24, West Face rebuffed Catalyst's efforts to negotiate a resolution, following which Catalyst commenced this action and brought a motion for injunctive relief.

(j) Notably, the defendants insisted on rushing to destroy the status quo even though West Face had no immediate need for Moyse's services: for the first two weeks of Moyse's employment at West Face, he was not assigned any tasks.

The Interim Injunction

(j.1) On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

(k) On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to an order (the "Interim Order"), pursuant to which:

(i) ~~West Face~~The Defendants ~~agreed~~ were ordered to preserve and maintain all records in ~~its~~ their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to ~~West Face's~~ their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against ~~West Face~~the Defendants;

(ii) Moyse agreed not to work at West Face pending the determination of Catalyst's motion for interlocutory relief;

(iii) Moyse ~~consented~~ was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image ~~of his personal computer, iPad and smartphone~~of the data stored on the

Devices, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(iv) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.

(l) The affidavits of documents Moyse swore pursuant to the Interim Order revealed very damning facts which demonstrate that Moyse and West Face casually disregarded Catalyst's proprietary interest in its confidential information.

Moyse Communicated Catalyst's Confidential Information to West Face

(m) As a result of the Defendants' refusal to respect the status quo in June 2014, Catalyst moved with urgency to seek interim relief and prepared its interim relief materials without the benefit of any evidence from the Defendants.

(n) On July 7, 2014, Moyse and Dea swore responding affidavits which confirmed Catalyst's worst fear: Moyse had transferred Catalyst's confidential information to West Face, and West Face distributed that confidential information throughout the firm.

(o) At a meeting with Moyse on March 26, Dea asked Moyse to send him research and writing samples so Dea could assess Moyse's writing and research ability.

(p) In response to this request, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contain Moyse's and other Catalyst

employees' analyses of investment opportunities and were marked "Confidential" and "For Internal Discussion Purposes Only".

(q) Moyse admitted he did not consider these markings to have any meaning, that he knew what he did was wrong, and that he deleted his email to Dea.

(r) Dea also admitted that after he received the Investment Memos, he reviewed them and saw that they were marked confidential. Dea admitted that West Face considered the types of documents Moyse sent him to be confidential and that he would not want Moyse to treat West Face's confidential information in a similar fashion.

(s) Dea admitted that after he reviewed the documents and saw that they were marked "Confidential", he circulated the Investment Memos to his partners and to a vice-president at West Face.

(t) West Face never informed Catalyst that Moyse had given it copies of Catalyst's confidential information. Instead, West Face attached the Investment Memos to its responding motion record and filed them in open court. West Face did not seek Catalyst's permission to do so or otherwise give Catalyst an opportunity to seal the court file prior to the hearing of the motion for interim relief on July 16.

Moyse Reviewed Confidential Information Unrelated to his Work before he Resigned

(u) In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time

period when Catalyst was active in an investment in Stelco. Catalyst and West Face were in direct competition with respect to the Stelco situation. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.

(v) On April 25, 2014, Moyse reviewed dozens of files related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse would review these documents, which he did in an insufficient amount of time to read the material he was accessing. Moyse admitted during cross-examination that he "routinely" reviewed transaction files from Catalyst's old transactions.

(w) At all material times, Moyse had accounts with two Internet-based file-storage services. These services enable users to create a folder on their computer which is synchronized over the Internet so that files stored in the folder can be viewed from any computer with an Internet connection. The services are capable of moving large amounts of data in a relatively brief period of time without leaving a record of the activity on the computer from which it was copied.

(x) In the opinion of Martin Musters, Catalyst's forensic IT expert ("Musters"), Moyse's conduct of reviewing several documents over a relatively brief period of time is consistent with transferring files to an Internet-based file storage account.

Moyse Retained Hundreds of Catalyst Documents After He Left Catalyst

(y) In his first affidavit sworn in response to Catalyst's motion for injunctive relief, Moyse swore that Catalyst had not provided any "actual" evidence that Moyse had transferred information from Catalyst's servers to his personal devices.

(z) However, pursuant to the Interim Order, Moyse provided Catalyst with two affidavits of documents which allegedly set out all of the documents in his power, possession or control that relate to his employment at Catalyst. Those affidavits disclosed over 830 Catalyst documents that remain in his possession. Just by reviewing the document titles alone, Catalyst identified 245 confidential documents that remained in Moyse's possession, power or control following his resignation from Catalyst and commencement of employment at West Face.

(aa) Moyse also admitted that he frequently emailed Catalyst documents to his personal email accounts and that he retained those documents on his personal devices. Moyse could not say with absolute certainty that his most recent search has been exhaustive, and he admitted that he deleted documents between March and May 2014, that he did not inform Catalyst when he resigned that he had its confidential information and that he did not offer to return confidential information to Catalyst.

(bb) Moyse's conduct fits the profile of an employee who took confidential information prior to his resignation from Catalyst.

West Face's Porous Confidential Wall

(cc) Prior to his resignation from Catalyst, Moyse was part of a team working on a significant investment opportunity in the telecommunications industry – the potential acquisition by Catalyst of Wind, one of Canada's few remaining independent mobile telecommunications companies.

(dd) Moyse had access to confidential information pertaining to Catalyst's plans for Wind.

(ee) At some point after it commenced its discussions with Moyse to come work at West Face, West Face also took an interest in Wind.

(ff) In addition, both West Face and Catalyst owned secured debt of Mobilicity, another mobile telecommunications company. Catalyst is Mobilicity's largest secured creditor while West Face owns or owned a much smaller portion of Mobilicity's secured debt.

(gg) In June 2014, after Catalyst's counsel expressed concern to West Face's counsel about the implications of West Face's efforts to hire Moyse on the rival investment firm's pursuit of the Wind opportunity, West Face claimed to have erected a "confidentiality wall" to separate Moyse from its own pursuit of Wind.

(hh) The "wall" erected by West Face was incredibly weak:

(i) it did not apply to all of West Face's employees;

(ii) it applied to Wind, but not to Mobilicity;

(iii) West Face took no steps to obtain acknowledgments from its investment team that a wall had been established;

(iv) No prohibition was imposed to prevent West Face's employees from accessing Moyse's data; and

(v) West Face has refused to state what consequences, if any, an employee would face if he or she did not comply with the confidentiality wall.

West Face Purchased Wind Using Catalyst's Confidential Information

(ii) In August 2014, Catalyst had an exclusive negotiation period to negotiate the purchase of Wind from its then-owners.

(jj) Those negotiations failed and the exclusivity period expired. The negotiations failed on issues relevant to the regulatory regime affecting Wind.

(kk) Within days of negotiations failing with Catalyst, West Face, together with partners in a syndicated investment group, successfully negotiated the purchase of Wind. Notably, the West Face syndicate waived any regulatory concerns that Catalyst continued to have.

(ll) West Face could not have negotiated the deal it did with Wind without access to Catalyst's confidential information, which was provided to it by Moyse.

(mm) Catalyst has amended its claim against West Face to seek a declaration that West Face holds its interest in Wind in trust for Catalyst.

The Interlocutory Injunction and the ISS

(nn) On November 10, 2014, the Court released its decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images of Moyse's personal devices.

(oo) The Court granted the relief sought by Catalyst: Moyse was enjoined from working at West Face prior to December 22, 2014 and an ISS was authorized to review the Images and prepare a report.

(pp) ~~The ISS is in the midst of preparing its report.~~ The ISS process involves a review of the Images using search terms submitted by Catalyst to determine whether the Images contain or contained Catalyst's confidential information;

(qq) The ISS's ~~work is ongoing and its~~ report is not yet final. However, the ISS has reported on an interim basis on the number of "hits" that the search terms requested by Catalyst have generated. Among other things, the following search terms generated an unexplainably large number of "hits" on Moyse's personal computer:

(i) West Face: 5,360;

(ii) Callidus: 132;

(iii) Wind: 26,118;

(iv) Mobilicity: 768;

(v) Turbine (Catalyst's codename for the Wind opportunity): 756;

(vi) Boland (West Face's CEO): 554;

(vii) Dea: 4,013;

(viii) Auction: 6,489;

(ix) Spectrum: 3,852.

(rr) There is no legitimate business reason why these search terms would yield such a large number of hits on Moyse's personal computer. The inference to be drawn from these hits is that Moyse copied Catalyst's confidential information to his personal computer and transferred it to his new employer's at West Face, either before or after he officially commenced employment there in June 2014.

(ss) Hard drives, mobile devices and Internet accounts that could be inspected to determine whether West Face possesses or possessed Confidential Information are beyond the control or possession of Catalyst.

Moyse's Contempt

(ss.2) On February 1, 2015, the ISS delivered a draft report (the "Draft ISS Report") to counsel for Catalyst and Moyse. Pursuant to the document review protocol agreed to and executed by the parties on December 12, 2014 (the "DRP"), Moyse has 10 business days to object to the inclusion of a document in the ISS's report. At the end of this 10-day period, the ISS's report becomes final.

(ss.3) The Draft ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

(ss.5) As set out above, at the interim injunction motion, which commenced at approximately 10:00 a.m. on July 16, 2014, Moyse consented to the Interim Order, which, among other things, ordered him to preserve the data on the Devices and to give the Devices to his counsel so that a forensic expert could create forensic images of the data on the Devices (the "Images").

(ss.6) Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images.

(ss.7) On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

(ss.8) On Sunday, July 20, 2014, at 8:09 p.m., Moyse used the Secure Delete programme to delete files and/or folders from his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer. This folder is created when a user uses the

Secure Delete function to delete files and/or folders in such a manner that the files and/or folders cannot be recovered through forensic analysis.

(ss.9) It is impossible to tell what files and/or folders Moyse deleted on July 20, 2014.

(ss.10) By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse has acted in contempt of Court.

(ss.11) The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

(ss.12) The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme on July 20, 2014, was a breach of the Interim Order.

(ss.13) It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

(ss.14) Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

(ss.15) Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential

Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

(ss.16) As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

The Callidus Report

(tt) Callidus Capital Corporation ("Callidus") is a publicly traded corporation that specializes in innovative and creative financing solutions for companies that are unable to obtain adequate financing from conventional lending sources. Catalyst owns a 60 per cent interest in Callidus.

(uu) In November 2014, shortly after Catalyst successfully argued the interlocutory motion, the share price of Callidus began to drop precipitously without any apparent reason for the rapid decline.

(vv) Catalyst was initially unable to discover the cause of the price drop. However, based on confidential sources, it learned that West Face was "talking down" the stock on the street and had prepared a research report that purported to reveal problems with Callidus's loan book.

(ww) The identity of Callidus's borrowers is, in large part, not public information. If West Face had access to information about Callidus's borrowers, it obtained that information through improper means, likely from Moyse, who had no

involvement with Callidus and yet who had 132 Callidus "hits" on his personal computer.

(xx) Despite repeated requests to West Face, it has refused to disclose its research report on Callidus. West Face's conduct of talking down the stock was directed primarily at attempting to cause harm to Catalyst, a majority shareholder in Callidus.

The Upcoming Spectrum Auction

(yy) In March 2015, Industry Canada is going to auction 30 MHz of AWS-3 spectrum to new entrants to the mobile telecommunications industry, including Wind and Mobilicity, to enable those new entrants to deliver services to more users at faster speeds (the "Spectrum Auction").

(zz) Bidders who intend to participate in the Spectrum Auction must submit a pre-auction financial deposit with their application to participate in the auction by no later than January 30, 2015.

(aaa) Armed with Catalyst's Confidential Information, which it obtained from Moyse, West Face will be able to help Wind compete unfairly against Mobilicity in the Spectrum Auction or otherwise use this information to its advantage in relation to Mobilicity.

Irreparable Harm

(bbb) The damage to Catalyst caused by West Face's conduct is not limited to monetary damages.

(ccc) Absent injunctive relief, Catalyst will suffer irreparable harm.

(ddd) Sections 101 and 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

(eee) Rules 1, 3, 37, 40, ~~and~~ 57 and 60 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. and

(fff) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The pleadings in this action;

(b) The Reasons for Decision of Justice Lederer dated November 10, 2014;

(b.1) The affidavit of Martin Musters, to be sworn;

(c) The affidavit of James A. Riley, to be sworn; and

(d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

~~January 13, 2015~~
February 6, 2015

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THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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This is Exhibit "H" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

AFFIDAVIT OF JAMES A. RILEY
(Sworn February 18, 2015)

I, JAMES A. RILEY, of the City of Toronto, MAKE OATH AND SAY:

1. I am the Chief Operating Officer of The Catalyst Capital Group Inc. ("Catalyst"), the plaintiff in this proceeding, and, as such, have knowledge of the matters set out in this affidavit. To the extent my knowledge is based on information and belief, I identify the source of such information and believe the information to be true.

2. I have previously sworn three affidavits in this proceeding – on June 26, July 14 and July 28, 2014. Those affidavits, without exhibits, are attached to this affidavit as Exhibits "A", "B" and "C", respectively, and I adopt and re-state the facts set out in those affidavits in this affidavit. In some cases those facts are repeated in this affidavit to provide a consistent narrative flow of events.

The Parties

3. Catalyst is an independent investment firm that is considered a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence. These are known in the investment industry as "special situations for control". Catalyst currently has in excess of $3 billion dollars under management.

4. Within Canada, the "special situations" investment industry is fairly small. "Special situations," also known as "distressed investments," is the term used to describe investment opportunities where a company is considered to be under-managed, under-valued, or poorly capitalized. The term "special situation" is also used to refer to significant corporate events such as a proxy battle, take-over or board shake-up.

5. In these cases, "special situations" investors try to find ways to find value and profit in the situation to purchase the debt or equity of the target company with the hope of making a significant gain on the investment.

6. Within the special situations investment industry, there is a small sub-group of investors who invest for control or influence. This is known as investing in "special situations for control". "Control" often refers to acquiring a sufficient amount of debt or equity to gain control or influence at the company in order to be able to provide direct operational and/or strategic guidance. "Influence" can include acquiring a tactical "blocking position" in order to force management and other creditors/investors to consider Catalyst's views.

7. In any situation, Catalyst's confidential information is critical to the successful implementation of an investment plan to capitalize on a special situation. Catalyst spends

substantial time studying opportunities and planning its investment strategy before it decides to pursue a particular situation.

8. If a competitor learns of the opportunities Catalyst is considering or studying, the investment models it is using for a particular situation, the methodology Catalyst is considering for acquiring control or influence, or the turnaround plan Catalyst is considering once it acquires control, that competitor can use that information to acquire blocking positions to prevent Catalyst from implementing its plan or it can "scoop" the opportunity by acquiring the control position that Catalyst intended to acquire. Trading on this Confidential Information (as that term is defined in my affidavit dated June 26, 2014) may also be a breach of the Ontario *Securities Act* or other regulations that govern the investment industry.

9. In these situations, the loss of confidential information can cause significant harm to Catalyst, as explained in greater detail below.

10. The defendant Brandon Moyse ("Moyse") is a former employee of Catalyst. Moyse worked at Catalyst as an investment analyst from November 1, 2012 until June 22, 2014.

11. The defendant West Face Capital Inc. ("West Face") is a competitor to Catalyst. Like Catalyst, West Face investigates and invests in Canadian "special situations for control" opportunities.

Moyse Resigns, Breaches his Employment Agreement

12. As one of two investment analysts at Catalyst, Moyse was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

13. Moyse's employment agreement with Catalyst included non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"). In particular, the non-competition covenant prohibited Moyse from working in Ontario for a competitor of Catalyst for a period of six months following termination of his employment with Catalyst if Moyse resigned.

14. On Saturday May 24, 2014, Moyse gave Catalyst thirty days' notice of his intention to resign from the firm. On May 26, 2014, Moyse informed me that he had accepted a job at West Face. I understood from Moyse that he intended to begin working at West Face immediately after the thirty-day notice period expired, notwithstanding the clear terms of his Employment Agreement, which prohibited him from doing so.

15. Catalyst was troubled by the fact that Moyse intended to breach the Restrictive Covenants and it arranged for Moyse to work from home for the remainder of his thirty-day notice period.

16. Before he gave notice, Moyse had been working extensively on a particular opportunity in the telecommunications industry that Catalyst had been considering for several years. Catalyst was actively investigating the potential purchase of Wind Mobile, one of the Canadian wireless telecommunications industry's few "independent" wireless carriers. Before he resigned from Catalyst, Moyse was part of Catalyst's due diligence team for the Wind Mobile situation, which was known internally by the codename "Project Turbine".

17. The unique plans Catalyst was considering to execute were highly confidential to it. Among other things, Catalyst was thoroughly considering the regulatory risk of attempting to purchase a business that is heavily regulated by Industry Canada and the Canadian Radio-

Television and Telecommunications Commission ("CRTC"). Catalyst's analysis of that risk was one of the issues actively reviewed by Catalyst while Moyse was part of the Project Turbine review team.

18. By choosing to leave Catalyst for West Face, which is located in Toronto, Moyse chose to transfer to one of the investment firms in Canada that falls within the scope of the non-competition covenant.

19. Catalyst was very concerned about West Face's reasons for hiring Moyse when it knew, or ought to have known, of the Restrictive Covenants in Moyse's employment agreement with Catalyst. If Moyse were to disclose Catalyst's plans for Wind Mobile to West Face, West Face would be able to interfere with those plans by, among other things, scooping the opportunity, thereby causing immeasurable damage to Catalyst's good will and investment losses that will be almost impossible to quantify given the many possible outcomes of any given investment.

The Defendants Refused to Respect the Restrictive Covenants

20. Between May 30 and June 19, 2014, Catalyst's outside counsel, Rocchhho Di Pucchio ("Di Pucchio"), exchanged correspondence with Jeff Hopkins ("Hopkins"), Moyse's counsel, and Adrian Miedema ("Miedema"), West Face's outside counsel, in which Catalyst expressed its concerns over potential misuse by Moyse and West Face of Catalyst's confidential information.

21. By June 19, 2014, the parties were at an impasse. West Face and Moyse had offered empty reassurances that they were aware of and would respect Catalyst's confidentiality interests, but they refused to respect the terms of the non-competition covenant. Hopkins

informed Di Pucchio that Moyse intended to commence employment at West Face on Monday, June 23, 2014.

22. Having exhausted all efforts to resolve the situation without resort to litigation, by email dated June 19, 2014 (attached as Exhibit "D"), Di Pucchio informed Hopkins and Miedema that Catalyst had instructed him to commence legal proceedings against West Face and Moyse, which would include seeking injunctive relief to enforce the Restrictive Covenants. Di Pucchio wrote,

> I will try to get our materials to you and to Mr. Miedema forthwith, but in the event that we cannot get the matter heard before next Monday, we trust that no steps will be taken by each of your clients to alter the existing status quo prior to the matter being heard by the Court.

23. By letter dated June 19, 2014, Miedema responded to Di Pucchio's email. Miedema wrote that Moyse has contractually agreed with West Face to maintain "strict confidentiality" over all confidential information obtained by him in the course of his employment with Catalyst, and that both Moyse and West Face take that obligation seriously. Miedema also wrote, "Your client has not provided any evidence that Mr. Moyse has breached any of his confidentiality obligations to Catalyst." Attached as Exhibit "E" is a copy of Miedema's letter to Di Pucchio dated June 19, 2014.

Catalyst Learns Moyse Gave its Confidential Information to West Face

24. Left with no other option, Catalyst began preparing for an action against Moyse and West Face and brought a motion for urgent interim and interlocutory relief to enforce the Restrictive Covenants.

25. Catalyst retained Martin Musters ("Musters"), a forensic IT expert, to conduct a forensic analysis of Moyse's workplace computer. Musters' findings are explained in detail in my June 26, 2014 affidavit and in an affidavit sworn by Musters on that date. Briefly stated, Musters analysis of Moyse's computer revealed:

(a) On March 28, 2014, between 6:28 p.m. and 6:39 p.m., shortly after Moyse met with Dea, Moyse reviewed Catalyst's letters to investors in the Catalyst Fund Limited Partnership II ("Fund II") sent between 2006 and 2011 (the "Investor Letters"). In the Investor Letters, Catalyst reported to our investors on events that transpired with respect to Fund II's investments. The Investor Letters also contained forward-looking statements. The time period for which Moyse was reviewing the Investor Letters relates to activity on Catalyst's Stelco investment, which was no longer active and in which Catalyst and West Face were in direct competition. Moyse accessed these files outside of regular office hours at Catalyst. Moreover, eleven minutes is insufficient time to read these letters.

(b) On April 25, 2014, over a 75-minute period, Moyse reviewed dozens of files related to Catalyst's investment in Stelco. There was no legitimate business reason why Moyse would review those documents. Moreover, 75 minutes was an insufficient amount of time to read all of the material Moyse was accessing.

(c) On the evening of May 13, 2014, Moyse accessed several files relating to Project Turbine between 8:39 p.m. and 9:03 p.m. As on the other occasions described above, this was an insufficient amount of time for Moyse to read the documents he was accessing.

(d) According to Musters, Moyse's conduct between March 27 and May 26, 2014, was consistent with uploading confidential Catalyst documents from Catalyst's server (which Catalyst controls) to Moyse's personal accounts with two Internet-based file storage services, "Dropbox" and "Box", which Catalyst does not control and cannot access.

(e) Over the course of his employment at Catalyst, Moyse regularly emailed Catalyst's Confidential Information to his personal email accounts. There was no legitimate business reason for Moyse to do this, as Catalyst has a secure virtual private network that enables remote access to its servers.

26. Musters later analyzed the Blackberry smartphone Moyse used while he was employed at Catalyst, which belonged to Catalyst. Musters' analysis revealed that on June 18, 2014, prior to returning the Blackberry to Catalyst, Moyse "wiped" all of the data from his Blackberry such that it was incapable of being recovered through forensic analysis.

27. On July 7, 2014, Moyse and West Face filed responding records in Catalyst's motion for injunctive relief. In their records, for the first time, and without prior notice to Catalyst, Moyse and West Face confirmed that Moyse had transferred Catalyst's Confidential Information to West Face prior to giving notice of his intent to resign.

28. West Face attached the Confidential Information to its responding motion record and filed it in open court without notice to Catalyst. Catalyst later learned that this confidential information had been circulated to all of the partners and to a senior manager of West Face by Thomas Dea ("Dea"), the West Face partner who was primarily responsible for hiring Moyse.

29. In his responding affidavit, Moyse made the following statement concerning his conduct and the merits of Catalyst's action and its motion for interlocutory relief:

> Furthermore, there is no basis to order a forensic review of my personal computer equipment and accounts, which is requested only as a fishing expedition. Despite retaining an expert to forensically examine my Catalyst computer, Catalyst was unable to provide any actual evidence that I transferred any confidential information to my personal equipment or accounts.

30. As explained below, this statement appears to have been intended to deceive the Court, as at this point Moyse knew or ought to have known that in fact he had retained hundreds of Catalyst documents on his personal devices after he resigned and started to work for West Face.

The Preservation Undertaking and the Interim Relief Order

31. On June 30, 2014, the parties' counsel attended Motion Scheduling Court to schedule Catalyst's motion for urgent interim relief. Attached to this affidavit as Exhibit "F" is a copy of Justice Himel's endorsement dated June 30, 2014 from that attendance. In her endorsement, Justice Himel records that Andy Pushalik of Dentons LLP, counsel for West Face and speaking for Moyse, agreed to preserve the status quo regarding documents, etc. The specific language of the undertaking is attached to the endorsement:

> Defendants' counsel agree to preserve the status quo with respect to relevant documents in the defendants' power, possession or control.

32. Catalyst's motion for interim relief was on July 16, 2014. On that date, the parties consented to interim terms, which were incorporated into an Order of Justice Firestone (the "Interim Relief Order"). The Interim Relief Order is attached to this affidavit as Exhibit "G". Among other things, pursuant to the Interim Relief Order:

(a) Pending a determination of an interlocutory injunction, Moyse was enjoined from misusing or disclosing any and all confidential and/or proprietary information of Catalyst, including all confidential information and/or proprietary information provided to Catalyst by third parties;

(b) Pending a determination of an interlocutory injunction, Moyse was enjoined from engaging in activities competitive to Catalyst and was to fully comply with the restrictive covenants set forth in his employment agreement with Catalyst;

(c) Moyse and West Face, and its employees, directors and officers, were to preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 24, 2014, and /or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed by Catalyst;

(d) Moyse was to turn over any personal computer and electronic devices owned by him or within his power or control (the "Devices") to his legal counsel for the taking of a forensic image of the data stored on the Devices (the "Images"), to be conducted by a professional firm as agreed to by the parties;

(e) The Images were to be held in trust by Moyse's counsel pending the outcome of the interlocutory motion; and

(f) Prior to the return of the interlocutory motion, Moyse was to deliver a sworn affidavit of documents to Catalyst, including copies of Schedule "A" documents, setting out all documents in his power, possession or control, that relate to his

employment at Catalyst. Moyse was also to disclose whether any of the documents had been disclosed to third parties, including West Face, and the details of any such disclosure.

The Image is Created on July 21, 2014

33. After the parties consented to the Interim Relief Order, by emails dated July 16 and 17, 2014, Hopkins and Andrew Winton ("Winton"), outside counsel for Catalyst, agreed to retain Harold Burt-Gerrans of H&A eDiscovery ("H&A") to create the Images. Attached to this affidavit as Exhibit "H" is a copy of the email correspondence between Hopkins and Winton dated July 16 and 17, 2014.

34. By email dated July 17, 2014, Hopkins forwarded a draft engagement letter from H&A to outside counsel for Catalyst and West Face. Attached to this affidavit as Exhibit "I" is a copy of Hopkins' email of July 17, 2014, with the attached draft engagement letter. In his cover email, Hopkins wrote:

> The imaging can be conducted (and I assume completed) on Monday, July 21. Given the need to complete the imaging prior to Mr. Moyse reviewing any Catalyst documents on his computer devices, we cannot commit to delivering the [affidavit of documents] on Tuesday, July 22. However, we should be able to deliver the [affidavit of documents] on the 23rd.

35. By email correspondence exchanged on Friday, July 18, 2014, counsel for Catalyst and Moyse agreed to amend the terms of H&A's engagement. Attached to this affidavit as Exhibit "J" is a copy of the July 18, 2014 email correspondence between counsel.

36. After the parties agreed to terms, by email dated July 18, 2014, Hopkins forwarded a summary of the changes to H&A. Hopkins' email is attached to this affidavit as Exhibit "K". In his email, Hopkins wrote:

> Mr. Moyse has confirmed he will be at our office by 10:00 am Monday with his three computer devices.

37. Hopkins' July 18, 2014 email to H&A included copies of his earlier correspondence with H&A. In that earlier correspondence, H&A informed Hopkins that it could create the Images on Friday, July 18 or Monday, July 21, 2014. Hopkins scheduled the Images to be created at his firm's office on July 21.

38. By email dated July 18, 2014, Hopkins forwarded a signed engagement letter with H&A. That email and the attached engagement letter are attached to this affidavit as Exhibit "L".

39. By email dated July 22, 2014, Hopkins forwarded a report from H&A on its creation of the Images. The report confirmed that the Images were created on Monday, July 21, 2014. Hopkins' July 22, 2014 email is attached to this affidavit as Exhibit "M".

Moyse Delivers Affidavits of Documents Disclosing Hundreds of Catalyst Documents

40. Pursuant to the Interim Relief Order, on July 22, 2014, Moyse swore an affidavit of documents which purported to disclose all of the documents belonging to Catalyst in his power, possession or control. Attached to this affidavit as Exhibit "N" is a copy of a cover letter from Hopkins dated July 22, 2014 and the enclosed affidavit of documents sworn by Moyse.

41. Despite having previously sworn an affidavit in which he attempted to suggest that he did not have any of Catalyst's proprietary or confidential information on his personal devices, the

July 22, 2014 affidavit of documents revealed that in fact there were hundreds of such documents in his power, possession or control.

42. As explained in my July 28, 2014 affidavit, Zach Michaud, a Catalyst employee, and I reviewed Moyse's affidavit of documents and we were able to identify approximately 250 confidential documents belonging to Catalyst in Moyse's possession.

West Face did not Require Moyse's Services in June/July 2014

43. On July 31, 2014, Moyse was cross-examined by Di Pucchio. During his cross-examination, Moyse admitted that for the first two weeks he was employed by West Face, he did not do any work, after West Face and Moyse had previously refused to postpone his employment at West Face to let the parties attempt to negotiate a resolution of their dispute.

West Face Purchases Wind Mobile Immediately after Catalyst's Negotiations Fail

44. In July and August 2014, Catalyst was negotiating with Vimpelcom Ltd. ("Vimpelcom") for the potential purchase of Wind Mobile. During this period, Catalyst had exclusive negotiating rights (the "Exclusivity Period").

45. During the Exclusivity Period, Catalyst and Vimpelcom were able to negotiate almost all of the terms of the potential sale of Wind Mobile to Catalyst. The only point over which the parties could not agree was regulatory approval risk – Catalyst wanted to ensure that its purchase was conditional on receiving certain regulatory concessions from Industry Canada, but Vimpelcom would not agree to the conditions Catalyst sought.

46. The Exclusivity Period expired in mid-August 2014. Very shortly thereafter, Catalyst learned that a syndicate of investors led by West Face (the "Consortium") was negotiating with Vimpelcom to purchase Wind. Ultimately, the Consortium purchased Wind from Vimpelcom on what I believe were essentially the same terms as Catalyst had proposed, with the one exception that the Consortium waived the regulatory conditions Catalyst had been seeking.

47. I believe that Moyse may have communicated Catalyst's Confidential Information concerning its negotiation plans and concerns to West Face, based on the following facts:

(a) Moyse was working on Catalyst's Wind project prior to his resignation from Catalyst;

(b) West Face insisted on rushing ahead with Moyse's employment on June 23, 2014, even though it had no legitimate immediate use for his services;

(c) The Consortium led by West Face was able to negotiate a deal with Vimpelcom very shortly after the Exclusivity Period ended by agreeing to the one term that Catalyst had been concerned about from the outset of its review of the Wind Mobile situation;

(d) If West Face had been starting from scratch, without the benefit of inside information, it would not have been able to negotiate a deal with Vimpelcom that easily;

(e) In Musters' opinion, Moyse's conduct is consistent with the pattern of employees who take confidential information from their former employer when they depart to immediately begin working for a competitor; and

(f) As explained in greater detail below, Moyse breached the Interim Relief Order by using a software "scrubber" to permanently delete files and/or folders from his personal computer the night before the Images were created.

The Interlocutory Order

48. The parties argued Catalyst's motion for interlocutory relief on October 27, 2014. On November 10, 2014, Justice Lederer released reasons for decision in which he granted Catalyst the interlocutory relief it sought. In particular:

(a) Moyse was enjoined from working at West Face until his six-month non-competition covenant expired on December 22, 2014; and

(b) The Court ordered that an ISS was to review the Images created on July 21, 2014 to determine if Moyse had taken any Catalyst Confidential Information and/or had communicated any Catalyst Confidential Information to West Face.

49. Attached to this affidavit as Exhibit "O" is a copy of Justice Lederer's reasons for decision dated November 10, 2014. Attached to this affidavit as Exhibit "P" is a copy of the Order of Justice Lederer dated November 10, 2014 (the "Interlocutory Order").

50. Moyse and West Face have sought leave to appeal the Interlocutory Order. Their motions for leave to appeal has not yet been determined by the Court.

The ISS Process

51. Pursuant to the Interlocutory Order, Stockwoods LLP was retained to act as the ISS. Between November 10 and December 16, 2014, the parties negotiated a document review

protocol ("DRP") to govern the ISS's review of the Images. The DRP executed by counsel for the parties is attached to this affidavit as Exhibit "Q".

52. Among other things, pursuant to the DRP:

(a) Catalyst provided the ISS with a list of search terms to use to help identify potential documents containing Catalyst's Confidential Information;

(b) Moyse had five business days to object to the use of a search term by the ISS;

(c) Subject to further order of the Court or the agreement of the parties, the ISS was not to provide Catalyst or its counsel with access to the Images or any work product generated during the ISS's review of the Images;

(d) The ISS shall provide a draft report to Catalyst and Moyse. Moyse then had ten business days to object to the inclusion of a document or documents referred to in the draft report; and

(e) If Catalyst believes that a document has been improperly excluded from the final report, it may bring a motion for production of that document.

53. By email dated December 23, 2014, Brendan van Neijenhuis of Stockwoods LLP ("van Neijenhuis") shared with counsel for Catalyst and Moyse the results of an initial report from the ISS's forensic expert as to the results of the search terms proposed by Catalyst. Van Neijenhuis's email Attached to this affidavit as Exhibit "R" is a copy of Van Neijenhuis' email dated December 23, 2014 and the attached search results.

54. The search results indicated that there was a significant number of "hits" for several search terms proposed by Catalyst that are unique to the Wind Mobile situation. Examples include:

(a) Wind: 26,118 hits;

(b) Turbine: 756 hits;

(c) Spectrum: 3852 hits;

(d) MHZ: 5885 hits;

(e) Ministry of Industry: 105 hits; and

(f) Industry Canada: 80 hits.

55. In addition, these results indicated there were 132 hits on Moyse's personal computer for the term "Callidus". Callidus Capital Corporation ("Callidus") is a publicly-traded company in which investment funds managed by Catalyst now own a 60 per cent interest. Prior to April 2014, when Callidus completed an initial public offering, Callidus was wholly owned by investment funds managed byh Catalyst.

56. During his employment at Catalyst, Moyse had no involvement with the operations of Callidus, so it was very suspicious that he would have any hits relating to Callidus on his personal computer.

57. Based on these hit results, and other activity by West Face concerning Callidus that is explained in greater detail below, by email dated January 8, 2015, Catalyst submitted additional search terms relating specifically to Callidus to the ISS. Attached to this affidavit as Exhibit "S"

is a redacted copy of the email from Winton to Van Neijenhuis dated January 8, 2015 asking for the additional search terms to be included in the ISS's review.

58. The ISS released its draft report (the "Draft Report") on February 1, 2015 and its final report (the "ISS Report") on February 17, 2015. Attached to this affidavit as Exhibit "T" is a copy of the ISS Report, without the appendices referred to therein.

59. The ISS listed hundreds of documents that it reviewed from the Images that it classified as containing Catalyst's Confidential Information. However, the ISS only identified a relatively small number of documents that were not already disclosed in Moyse's July 22, 2014 affidavit of documents. Based on my review of the ISS Report, it is my belief that the ISS did not disclose more documents because it made mistaken assumptions as to certain facts. The potential errors by the ISS concern Wind Mobile, Mobilicity and Callidus.

60. With respect to Wind Mobile, as explained above, the search terms indicated that there were hundreds of "hits" for many Wind-related search terms, such as "Turbine" and "Spectrum". While a word such as "wind" may have many contexts, there are many fewer contexts for a word such as "Turbine", which was Catalyst's codename for the Wind Mobile situation. I believe that the ISS must have inadvertently omitted relevant documents from the ISS Report based on a misunderstanding as to the origins of certain documents that were responsive to the search terms provided by Catalyst.

61. Mobilicity is another wireless telecommunications situation that both Catalyst and Wind are heavily involved with. Mobilicity is currently in CCAA proceedings. While he was employed at Catalyst, Moyse had some involvement with the Mobilicity situation. The search term results for his personal computer revealed a significant number of "hits" for Mobilicity-related terms

such as Mobilicity (765 hits), DAVE (2216 hits) and Data & Audio-Visual (36 hits). Again, it is likely that the ISS erred in excluding all of the documents that were responsive to these terms, as Catalyst has generated thousands of documents related to the Mobility situation.

62. With respect to Callidus, the ISS Report states that it found five documents that were solely responsive to the additional Callidus-related search terms submitted on January 8, 2015, but the ISS determined that none of the documents contained Catalyst's Confidential Information. This classification appears to be based on a misunderstanding as to the relationship between Callidus and Catalyst, as potentially any document in Moyse's possession that was responsive to the additional search terms by its nature very likely contained Catalyst's Confidential Information.

63. On February 12, 2015, the ISS and counsel for Catalyst and Moyse participated in a conference call to discuss Catalyst's concerns that its confidential information was potentially mistakenly omitted from the Draft Report. Minutes of that conference call taken by the ISS are attached to this affidavit as Exhibit "U".

64. As recorded in the minutes, during the call, Winton, on behalf of Catalyst, asked the ISS four questions:

(a) The additional search terms that were supplied on January 8, 2015 apparently yielded only five independent documents for review by the ISS. Winton proposed to ask the ISS to indicate which specific terms yielded those results. Depending on which terms generated those "hits", Catalyst may or may not continue to have a concern that an error occurred in the evaluation having regard to the uniqueness of the terms, particularly with regard to "Callidus" and associated terms;

(b) Catalyst proposed that the ISS also advise about the total number of hits which would have resulted, had the second set of terms been run without regard to de-duplicating previously-produced items (i.e., items produced as a result of raising a 'hit' under the original set of search terms supplied in December 2014);

(c) Catalyst expressed the concern that the number of hits associated with Wind Mobile and directly related search terms such as "Turbine" exceeded the actual number of documents identified in the search process by a very wide margin. Winton proposed that ISS should provide an explanation, if possible, for the divergence between the number of "hits" and the ultimate number of documents found and identified in the report; and

(d) Catalyst expressed the same concern with respect to hits associated to Mobilicity and directly-related search terms, asking again for an explanation as to the large difference between the raw hit-count identified in the initial results and the ultimate number of documents identified.

65. By email dated February 12, 2015, in response to Catalyst's questions, Moyse's counsel objected to letting the ISS answer the questions and insisted that Catalyst had to bring a motion if it wanted its questions answered. Attached to this affidavit as Exhibit "V" is a copy of the email from Hopkins to Winton sent February 12, 2015.

66. Catalyst's position is simple: if Moyse had Wind Mobile or Mobilicity documents on his personal computer, those documents either originally belonged to Catalyst or they belonged to West Face. In either case, possession of those documents prejudices Catalyst:

(a) If the documents belonged to Catalyst, then it is possible that Moyse shared those documents with West Face but covered up his actions by deleting files from his computer, as described below; or

(b) If the documents belonged to West Face, then West Face and Moyse breached the "ethical wall" that West Face purported to erect on June 19, 2014 to prevent Moyse from participating in West Face's involvement in the Wind Mobile and Mobilicity situations.

Moyse Scrubbed Data from his Computer Before the Images were Created

67. The Draft Report was not restricted to listing documents reviewed by the ISS that it classified as containing Catalyst's Confidential Information. Paragraphs 44 to 48 of the ISS Report reveal that:

(a) On Wednesday, July 16, 2014, an email message was sent to Moyse's Hotmail account. The email constituted a receipt and license key for a software product entitled "Advanced System Optimizier 3 [Special Edition]";

(b) Based on the creation date of associated folders, the forensic IT expert assisting the ISS was able to determine that Advanced System Optimizer 3 was installed on Moyse's personal computer on July 16, 2014 at 8:53 a.m.;

(c) On July 20, 2014, at 8:09 p.m., a folder entitled "Secure Delete" was created on Moyse's personal computer;

(d) Due to the military-grade nature of the Secure Delete tool, the ISS's forensic expert was unable to determine what files were deleted on June 20, 2014.

68. I have reviewed the affidavit sworn by Musters on February 15, 2015, in which Musters confirms that the creation of the "Secure Delete" folder on Moyse's computer on July 20, 2014 at 8:09 p.m. can only result from the operation of the Secure Delete program.

69. Based on the correspondence attached to this affidavit which indicated that Moyse retained possession of his personal computer between July 16 and July 21, 2014, it is my belief that Moyse ran a military-grade software deletion program to hide evidence that he shared Catalyst's Confidential Information with West Face. I cannot think of any other reason why Moyse, whom I know to be an intelligent man, would knowingly breach a Court Order requiring him to preserve evidence.

The Callidus Report

70. While the ISS process was ongoing, West Face engaged in other conduct that I believe was intended to harm Catalyst by defaming Callidus.

71. In November 2014, West Face began a "whisper campaign" in which it suggested to other market participants that Callidus' loan book was not as strong as disclosed in its publicly filed information. Beginning in mid-November 2014, around the same time West Face commenced its whisper campaign, Callidus' share price began a rapid decline.

72. In December 2014, Callidus learned that West Face had prepared a research report on Callidus that it was circulated to market participants. By letter dated December 15, 2014, David Hausman ("Hausman"), Callidus' outside counsel, wrote to Greg Boland of West Face to seek

confirmation that a West Face report on Callidus exists and if so, to request a copy of that report. Attached to this affidavit as Exhibit "W" is a copy of Hausman's letter dated December 15, 2014.

73. West Face did not reply to Hausman's letter. By letter dated December 24, 2014, attached to this affidavit as Exhibit "X", Hausman repeated his request for the report. Hausman noted that given the report would be producible in the context of litigation, it made sense for West Face to produce the report at that time so as to potentially avoid litigation.

74. By letter dated January 6, 2015, attached to this affidavit as Exhibit "Y", Matthew Milne-Smith ("Milne-Smith"), outside counsel for West Face, responded to Hausman's December 24 letter.

75. Among other things, Milne-Smith wrote:

(a) "West Face is confident in the accuracy of its investment research";

(b) "It does not discuss companies with third parties without extensive research to supports its analysis"; and

(c) Should Callidus commence defamation proceedings against West Face, West Face will vigorously defend itself in its Statement of Defence and **demonstrate the truth of any statements that it has made about Callidus**". [Emphasis added.]

76. By letter dated January 13, 2015, attached to this affidavit as Exhibit "Z", Di Pucchio responded to Milne-Smith on behalf of Callidus. Di Pucchio thanked Milne-Smith for

confirming that West Face prepared a report on Callidus that it has circulated to third parties and for the third time requested a copy of the report.

77. By letter dated January 14, 2015, attached to this affidavit as Exhibit "AA", Milne-Smith responded to Di Pucchio to "clarify" his statements from his January 6 letter by stating that he had neither confirmed nor denied that a report existed. Apparently Milne-Smith was only speaking in generalities on January 6.

78. By letter dated January 16, 2015, attached to this affidavit as Exhibit "BB", Di Pucchio asked Milne-Smith to clarify whether in fact a report exists and if so, was it shared with third parties. For the fourth time, Callidus' outside counsel requested a copy of the report.

79. By letter dated January 20, 2015, attached to this affidavit as Exhibit "CC", Milne-Smith stated that West Face is "neither required nor inclined to share its research with **the target** of such research, let alone a target majority-owned by one of West Face's competitors" [emphasis added].

80. By letter dated January 26, 2015, attached to this affidavit as Exhibit "DD", Di Pucchio questioned why it took an exchange of several letters for West Face to finally confirm that it had prepared a research report on Callidus.

81. The final letter in this exchange, dated January 28, 2015, is from Milne-Smith to Di Pucchio and is attached to this affidavit as Exhibit "EE". In this letter, Milne-Smith denies any wrongdoing by West Face and indicates that it was not appropriate for the parties to engage in further correspondence since the matter was now before the Court.

82. Catalyst has found independent evidence that a West Face report exists and was shown to third parties in an effort to drive down Callidus' stock price. Attached to this affidavit as Exhibit "FF" is a copy of the "Stockchase" online blog report for Callidus and for Jerome Hass, the author of one of the comments published by Stockchase.

83. Mr. Hass's comment about Callidus, dated December 30, 2014, confirms that "a firm presented a very formidable 'Short' case recently, which is probably part of the reason for the selloff." I believe that Mr. Hass's comment referred to the West Face report.

84. Catalyst is concerned that Moyse had confidential information pertaining to Callidus on his personal computer that he shared with West Face and which West Face used to prepare its research report. That is one of the reasons why Catalyst attempted to clarify with the ISS why Callidus-related documents were not included in the Draft Report.

85. The correspondence with West Face's outside counsel and Moyse's objection to the questions Catalyst posed to the ISS are consistent with the way West Face and Moyse have dealt with Catalyst throughout this proceeding – first they deny that documents exist, or they admit documents exist but deny wrongdoing, and then they insist that Catalyst bring a motion or otherwise commence litigation to protect its interests.

Catalyst's Vulnerability to the Defendants' Unfair Competition

86. As indicated above, based on Moyse's conduct of breaching a Court Order by deleting files the night before his computer was to be imaged, I believe that Moyse destroyed evidence of serious wrongdoing.

87. I have already stated in my affidavit sworn June 26, 2014 how Catalyst is vulnerable to unfair competition by West Face. That vulnerability was borne out by West Face's apparent "scooping" of Wind Mobile, possibly through the use of Catalyst's Confidential Information.

88. If West Face was able to succeed in its negotiations with Vimpelcom through the wrongful use of Catalyst's Confidential Information, monetary damages will not give Catalyst an appropriate or adequate remedy. For this reason, Catalyst has amended its claim to seek a constructive trust over West Face's interest in Wind Mobile. Attached to this affidavit as Exhibit "GG" is a copy of Catalyst's Amended Amended Statement of Claim dated December 16, 2014.

89. In the interim, West Face continues to own a significant interest in Wind Mobile. Attached to this affidavit as Exhibit "HH" is a flowchart setting out the various beneficial interests in Wind Mobile owned by the Consortium members. This chart indicates that West Face controls 35 per cent of Wind Mobile and constitutes the largest of the four beneficial owner groups.

90. As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

The Need to Conduct a Forensic Review of West Face's Computers and Electronic Devices

91. A forensic review of any computers or personal electronic devices such as smartphones or tablet computers owned by West Face or its partners will reveal whether Moyse in fact

communicated Catalyst's Confidential Information to West Face and what use West Face made of such information. Given Moyse's conduct of scrubbing his personal computer the night before he knew a forensic image was being made of that computer, after he had already consented to a preservation order, Catalyst has no other means of ascertaining this information.

92. In light of (a) the suspicious nature of his actions to date, which only came to light because of Catalyst's forensic review of Moyse's hard drive; and (b) the fact that on June 19, the Defendants refused to agree to maintain the *status quo* pending the determination of Catalyst's motion for injunctive relief because Catalyst had not provided evidence that Moyse had breached his confidentiality undertakings to Catalyst, I have no confidence that Moyse will disclose this information honestly and forthrightly.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on February 18th, 2014.

Commissioner for Taking Affidavits, etc.

ANDREW WINTON

JAMES A. RILEY

This is Exhibit "I" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

AFFIDAVIT OF MARTIN MUSTERS
(sworn February 15, 2015)

I, MARTIN MUSTERS, of the City of Oakville, in the Regional Municipality of Halton, MAKE OATH AND SAY:

1. I am the Director of Forensics at Computer Forensics Inc. ("CFI"), a computer security consulting firm based in Oakville, Ontario. In this capacity, I am responsible for all aspects of CFI's computer forensic services.

2. I previously swore an affidavit in this proceeding on June 26, 2014. That affidavit, without exhibits, is attached hereto as Exhibit "A" and I incorporate the evidence therein into this affidavit.

Expertise

3. My expertise as a forensic investigator is set out in my June 26, 2014 affidavit. A copy of my detailed *curriculum vitae* is attached hereto as Exhibit "B".

Review of Independent Supervising Solicitor's Draft Report

4. As explained in detail in my June 26, 2014, affidavit, on June 20, 2014, CFI was retained by Lax O'Sullivan Scott Lisus LLP, lawyers for the plaintiff, Catalyst Capital Group Inc. ("Catalyst"), to conduct a forensic analysis of a desktop computer that I was advised had

previously been used by Brandon Moyse ("Moyse"), a former employee of Catalyst, while Moyse was employed by Catalyst (the "Desktop Computer"). On June 21, 2014, CFI created a forensic image of the Desktop Computer and then conducted an analysis of the image. The results of that analysis are described in my June 26, 2014 affidavit.

5. Prior to swearing this affidavit I have reviewed the Order of Justice Firestone dated July 16, 2014 and the Order of Justice Lederer dated November 10, 2014. I understand from my review of those documents that:

(a) On July 16, 2014, Moyse was ordered to preserve and maintain all records in his possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to his activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in this proceeding, except as otherwise agreed to by Catalyst;

(b) On July 16, 2014, Moyse was ordered to turn over any personal and electronic devices owned by him or within his power or control to his legal counsel for the taking of a forensic image of the data stored on those devices; and

(c) On November 10, 2014, Justice Lederer ordered that the forensic images created in compliance with the July 16, 2014 Order of Justice Firestone be reviewed by an independent supervising solicitor ("ISS") identified pursuant to a protocol to be jointly agreed to by counsel for the parties to this action, or, failing such agreement, by way of further direction of the Court.

6. Attached as Exhibit "C" to my affidavit is a copy of the document review protocol ("DRP") agreed to by the parties in December 2014. Pursuant to the DRP, after the ISS delivers a draft report to Catalyst and Moyse, Moyse has ten business days to object to the inclusion of a document or documents referred to in the draft report.

7. Now produced and shown to me and marked as Exhibit "D" to my affidavit is a redacted copy of the ISS's draft report dated February 1, 2015 (the "Draft ISS Report"). I am informed by Andrew Winton, counsel for Catalyst, and I believe, that on February 13, 2015, ten business days after the ISS delivered the Draft ISS Report to Catalyst and Moyse,

Moyse's counsel communicated Moyse's objection to the inclusion of dozens of documents referred to in the Draft ISS Report.

8. For the purposes of this affidavit, those objections are not relevant, as this affidavit only relates to information in the Draft ISS Report that does not concern the listing of specific documents referred to therein.

9. Rather, this affidavit concerns information set out in paragraphs 44 to 48 of the Draft ISS Report. According to the information set out in those paragraphs:

(a) On Wednesday, July 16, 2014, an email message was sent to Moyse's Hotmail account. The email constituted a receipt and license key for a software product entitled "Advanced System Optimizier 3 [Special Edition]";

(b) Based on the creation date of associated folders, the forensic IT expert assisting the ISS was able to determine that Advanced System Optimizer 3 was installed on Moyse's personal computer on July 16, 2014 at 8:53 a.m.; and

(c) On July 20, 2014, at 8:09 p.m., a folder entitled "Secure Delete" was created on Moyse's personal computer.

10. Attached to my affidavit as Exhibit "E" is a copy of the promotional information for Advanced System Optimizer 3. Advanced System Optimizer 3 includes a "Secure Delete" tool, which is described in the promotional information as being capable of deleting files or folder from a computer in a manner that prevents recovery of the deleted data by forensic recovery tools:

> Did you know that whenever you delete a file or folder from your system using the 'Delete' key or Recycle Bin, that item isn't permanently removed? In fact, it's quite an easy process to recover deleted files and folders using widely available data recovery utilities, leaving you open to identity theft, and loss of confidential information and trade secrets.
>
> Secure Delete keeps the privacy and security of your system intact. By implementing a secure deletion method developed by the United States Department of Defense, Secure Delete ensures that no tool can ever recover your deleted files and folders! By

> using Secure Delete to securely remove your sensitive files, deleted items are permanently removed from your system.

11. After I reviewed the Draft ISS Report, I downloaded the Advanced System Optimizer 3 software and installed it on my own personal computer to investigate how the software works.

12. In my own experience using the Secure Delete feature, merely downloading and installing the software on one's computer does not lead to the creation of a folder entitled "Secure Delete". That folder is only created when a user runs the Secure Delete feature to delete a file or folder from his computer.

13. Based on my own experience using the software, it is my opinion that someone using Moyse's computer on July 20, 2014 deleted one or more files or folders beginning at 8:09 p.m. Based on my experience using the software, there is no other explanation as to why a "Secure Delete" folder would be created on Moyse's personal computer on that date.

14. Because of the random data generated by Secure Delete to overwrite the data it is deleting, it is impossible for any forensic investigator to determine the extent to which the tool was used to delete individual files or folders. The software generates a random pattern of data to overwrite the deleted files, which leaves no trace of its use, other than the "Secure Delete" folder that is created when the tool is used.

15. As a result, it is impossible to tell what documents Moyse, or someone using his personal computer on Sunday, July 20, 2014 at 8:09 p.m., deleted on that date.

16. In my experience, in situations involving the departure of an employee to a competitor, when I encounter evidence that someone used a secure delete tool to delete data in such a way as to make it impossible to review through forensic analysis, the deletion was committed to hide evidence that the person took confidential information from a former employer and communicated it to their new employer.

17. Attached as Exhibit "F" is a signed Acknowledgment of Expert's Duty form, which I signed prior to swearing this affidavit.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on February 15, 2015

Commissioner for Taking Affidavits, etc.

MARTIN MUSTERS

This is Exhibit "J" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

SUPPLEMENTARY AFFIDAVIT OF JAMES A. RILEY
(Sworn May 1, 2015)

I, JAMES A. RILEY, of the City of Toronto, MAKE OATH AND SAY:

1. I am the Chief Operating Officer of The Catalyst Capital Group Inc. ("Catalyst"), the plaintiff in this proceeding, and, as such, have knowledge of the matters set out in this affidavit. To the extent my knowledge is based on information and belief, I identify the source of such information and believe the information to be true.

2. I have previously sworn four affidavits in this proceeding – on June 26, July 14, July 28, 2014 and February 18, 2015. Those affidavits are not attached to this affidavit but I adopt and re-state the facts and defined terms set out in those affidavits in this affidavit.

3. This affidavit is sworn in reply to the affidavit of Anthony Griffin ("Griffin"), sworn March 7, 2015 (the "Griffin Affidavit"), which was sworn in response to my February 18, 2015 affidavit, and the affidavit of Brandon Moyse, affirmed April 2, 2015 (the "Moyse Affidavit").

West Face's Questionable Motivation to Sell Callidus Shares Short

4. Attached as Exhibit "A" is a copy of a report that sets out the total short sale interest in Callidus' shares and the daily closing share price (the "Callidus Short-Sale Analysis"). Short interest information is only updated twice a month, so the information concerning the current short position is based on the share balance as of April 15, 2015.

5. The Callidus Short-Sale Analysis suggests that prior to October 16, 2014, there were no short sales of Callidus shares. Then, between October 16 and November 15, 2014, a short interest of approximately 600,000 shares was accumulated. Based on the limited information disclosed in the Griffin Affidavit regarding West Face's trading activity, I believe that West Face, acting alone or in concert with other entities, was building up its short position over this period of time.

6. The Short-Sale Analysis also indicates that the short position in Callidus essentially peaked before December 15, 2014, which is around the same time that rumours began circulating on Bay Street that West Face was selling short Callidus shares. Immediately after these rumours started circulating, Callidus' share price dropped significantly, to the benefit of whoever had accumulated the short position in Callidus' shares before the rumours were circulated.

7. The Short-Sale Analysis also indicates that the short position was reduced by approximately 25 per cent between March 30 and April 14, 2015. This partial closing out of the short position is consistent with a market participant taking some profits shortly after West Face's attack on Callidus received widespread public attention, as shown in an article dated March 30, 2015, published on the Business News Network's website (attached as Exhibit "B").

8. Griffin's sworn evidence is that West Face had been monitoring Callidus since its IPO in April 2014 (the "IPO"). He claims that West Face "questioned" the premium trading value of Callidus' shares following the IPO, and that in October 2014, West Face made the decision to begin short selling Callidus' share price *before* West Face pursued any "detailed research" into Callidus.

9. It is my belief that Griffin's explanation lacks credibility. Rather, it is my belief that West Face's short attack on Callidus' stock was intended to open up another "front" in the pre-existing litigation between Catalyst and West Face in order to cause harm to Catalyst.

10. Moreover, I believe that West Face did not begin selling Callidus stock short on a "hunch", as suggested by Griffin in his affidavit, but on material, non-public confidential information about Callidus disclosed to it by Moyse that it believed supported a short-selling strategy.

11. My beliefs are based on the following facts:

(a) West Face began accumulating its short position in mid-October 2014, a few days after Catalyst amended its statement of claim in this action to plead that West Face had misused Catalyst's confidential information to acquire its interest in Wind Mobile. Attached as Exhibit "C" is a copy of Catalyst's amended statement of claim dated October 9, 2014, and the related affidavit of service dated October 10, 2014.

(b) In our industry, funds are often managed as limited partnerships, and fund managers such as West Face owe fiduciary obligations to their investors. In my

experience, it is virtually unheard of for an experienced and qualified investment fund manager to use its investors' funds to sell a stock short on the basis of a "hunch", as suggested by Griffin in his affidavit.

(c) In my experience, it would be bordering on negligent and possibly a breach of one's fiduciary obligations for a fund manager such as West Face to invest other people's money without conducting proper research and analysis beforehand.

West Face's "Research" is Deficient and Misstates Material Facts about Callidus

12. In his affidavit, Griffin sets out a detailed description of the research purportedly conducted by West Face in 2014 as part of its campaign to sell short the stock of Callidus, a company that is controlled by Catalyst. Griffin also implicitly admits, without giving details, that West Face circulated to third parties its "research" with respect to Callidus.

13. As it concerns Callidus, the Griffin Affidavit is replete with material misrepresentations of fact concerning the quality of Callidus' loan portfolio. Those misrepresentations are repeated in the "Callidus Analysis" attached as Exhibit 46 to the Griffin Affidavit. My affidavit will not list all of these misrepresentations, but Catalyst cannot allow the most egregious misrepresentations to pass without comment.

Misleading Excerpt from Callidus Conference Call

14. In his affidavit, Griffin included a short quotation from a conference call with Callidus investors held November 7, 2014. Although the full transcript is attached as Exhibit "42" to the Griffin Affidavit, the quotation is potentially misleading as to the statement made by Newton Glassman on that call. During the conference call, Mr. Glassman stated:

> So IFRS is a bit annoying. Technically, under IFRS, you have to allocate the provision on a loan-by-loan basis. So and I think we went through this in the IPO, but just to remind people, we set out a separate watch list, which is the stock that although performing, because we don't have a single loan in the portfolio that's not performing, and just to remind again everybody, performing means current in interest and all obligations.
>
> So we don't have a single loan in our book that is non-performing, but we do have loans that we are worried about, and put on what we call our watch list, which triggers a change in how we monitor those loans internally, they become much more actively reviewed daily. And then weekly, it's reviewed by everybody, especially the committee at least once, sometimes twice a week. Once it's on the watch list, we do something what we call VAR, which isn't really technically correct. VAR standing for value at risk and we analyze what we think the recovery will be, it: we had to sell the loan immediately or liquidate it.
>
> And in most cases, except for two currently that VAR is actually positive. In other words, we have excess collateral and we would actually yield more than what is necessary under the loans. In two cases, the VAR is slightly negative and it's actually not a meaningful number relative to the entire portfolio, it's quite, quite small. And in those two cases, where the VAR is negative, we actually attribute the provision against those loans specifically.
>
> [...]
>
> And in both cases, **those two loans that have negative VAR, actually have a guarantee from Catalyst. So although we do have the provisions, the actual exposure for Callidus is zero, because they were loans that were purchased as part of the IPO and therefore, come with the guarantee. So the actual dollars at risk for Callidus is zero,** notwithstanding the fact that on the face of our financial statements, we actually have a dollar provision amount. [Emphasis added.]

15. The Griffin Affidavit reproduced a portion of the first paragraph of this quotation. By omitting the references to "value at risk" and the guarantee from Catalyst, which shortly follows the quotation in the Griffin Affidavit, the Griffin Affidavit provides a potentially misleading summary of Mr. Glassman's statements during the conference call and the risk to Callidus.

West Face Omitted Material Facts Concerning Callidus' Loans

16. The Griffin Affidavit included detailed analyses of certain loans made by Callidus. Those analyses are faulty and misrepresent the facts concerning the loans that a qualified analyst ought to know would potentially mislead investors. In this affidavit, I deal only with West Face's analysis of Arthon Industries ("Arthon"), which is indicative of the seemingly deliberate omission of relevant facts that permeates the other analyses.

17. Arthon was a construction holding company that owned, among other things, mining equipment, a coal mine and an aggregates (gravel) deposit. These assets were owned in separately owned subsidiaries commonly referred to as "Contractors", "Equipment", "Coalmont" and "Sandhill".

18. In November 2013, Arthon, Equipment and Coalmont, among others, applied for CCAA protection to restructure secured debt owed to HSBC. Sandhill was liable for the debts to HSBC and other Arthon creditors, but it did not seek or require CCAA protection.

19. In December 2013, Callidus assumed the position of HSBC ultimately at a substantial discount to the book value of the secured debt, thus assuming the position of the senior secured lender and debtor-in-possession ("DIP") lender.

20. Throughout 2014, Arthon engaged in restructuring activities. The ultimate outcome of the restructuring is that Equipment sold all of its assets to Arthon, and Arthon and Sandhill assumed joint responsibility for the secured debt owed to Callidus. After the assets were transferred out of Equipment and Coalmont, those corporations were assigned into bankruptcy.

21. Thus, in a little over a year, Callidus purchased approximately $50 million of senior secured debt and transferred the assets of an insolvent borrower to a related solvent company, which assumed responsibility for the full amount of the secured debt.

22. Arthon is the furthest thing from an "impaired" loan – it was a very successful workout situation where Callidus was able to use its unique expertise to identify and profit from a lending opportunity that traditional lenders could not take advantage of.

23. In its analysis, West Face selectively refers to facts that portray Arthon as a worthless company and all but accuses Callidus of throwing good money after bad. That portrayal is inconsistent with publicly known facts about Arthon and is the exact opposite of what actually happened.

24. By ignoring publicly available information and attempting to portray a fully secured CCAA workout situation as an impaired loan, West Face has either misapprehended facts that most analysts would be able to understand or it deliberately painted a misleading picture to support the short position it had already taken out.

West Face Improperly Compares Callidus to BDCs

25. In his affidavit and in the West Face analysis of Callidus, Griffin states that Callidus is trading at too high a multiple as compared to U.S. business development corporations ("BDCs"), which Griffin states are the appropriate comparable businesses to Callidus.

26. As with the Arthon analysis, this statement is either negligently or deliberately misleading. As anyone involved in distressed lending is aware, BDCs have several characteristics that are not shared with Callidus:

(a) BDCs tend to have external management, whereas Callidus is managed internally;

(b) BDCs are close-ended funds and are required to return cash to investors with a payout ratio of at least 90 per cent, whereas Callidus has publicly stated that it will not distribute dividends and re-invests its income for future growth;

(c) BDCs tend to finance subordinate debt and unsecured positions, including equity, whereas Callidus focuses almost exclusively on senior secured debt;

(d) BDCs are not taxable at the corporate level – they are taxed at the personal level because of the high distribution ratio.

27. For these reasons, it is misleading to refer to the gross yields commonly achieved by BDCs (in the 10-12% range) and suggest that that is the yield level that one can expect from Callidus in the future. Callidus has repeatedly publicly disclosed information that demonstrates that it is nothing like a BDC.

28. A less sophisticated investor may not be able to recognize the false comparison to a BDC in West Face's analysis, which may lead that investor to think that Callidus' stock is over-valued, as stated by West Face. In a hypothetical situation where an investor decides to sell his or her Callidus shares as a result of reviewing West Face's analysis, the stock price would decline, thus creating a profit for whomever sold the stock short.

West Face May Have Mis-stated Material Facts as Part of its Trading Strategy

29. Leaving aside other deficiencies in West Face's "analysis" of Callidus' loan portfolio, the obvious deficiencies in West Face's analysis of Callidus lead me to believe that West Face was

not conducting *bona fide* research into the quality of Callidus' loan portfolio, because any reasonably qualified analyst would avoid making these errors

30. These errors, West Face's conduct of selling Callidus' stock short *before* it began sharing its "research" with other market participants, and other facts about West Face and Moyse learned through the course of this litigation, lead me to believe that West Face may have engaged in a trading strategy with respect to Callidus' stock price that caused it to spread misleading information about Callidus *after* it had taken a short position on the stock.

31. If this is the case, then West Face profited from the selling activity of other market participants who relied on West Face's thesis to sell the shares *after* West Face had already placed a "bet" that Callidus' share price would decline. In this scenario, as the purveyor of information it knew or reasonably ought to have known was misleading, West Face induced other market participants to sell their shares based on misleading information, to the profit of West Face, which profited from the drop in Callidus' share price in November 2014.

32. My belief that West Face was not motivated by a good faith effort to profit from a market anomaly is re-enforced by West Face's refusal to share its report with Callidus despite Callidus' repeated requests that it do so in December 2014 and January 2015. Instead, the first time any "report" was shared with Catalyst was when the Griffin Affidavit was served on Catalyst. Had West Face shared its "research" with Callidus before it shared its findings with third parties, Callidus would have been able to show West Face its obvious error, which would have prevented the market from being misinformed about the quality of Callidus' loan portfolio.

33. Moreover, I note that the "report" attached to the Griffin Affidavit is dated March 2015 and recites facts about Callidus' loan book that post-date the period when West Face was

shorting the stock and sharing its "research" with other market participants in November and December 2014.

34. After the Griffin Affidavit was sworn but before it was filed, Catalyst's outside counsel attempted to engage with West Face's outside counsel to persuade West Face not to file the Griffin Affidavit in open court so as to avoid potentially misleading the market with its faulty analysis. Attached as Exhibit "D" is a copy of email correspondence between Catalyst's outside counsel and West Face's outside counsel between March 9 and 13, 2015. As shown in this correspondence, Catalyst's efforts were firmly rebuffed by West Face, which insisted on publicly filing the Griffin Affidavit even after it was warned that the affidavit contained material misstatements of fact about Callidus.

Moyse's Involvement with the Wind File was Much More than "Minimal"

35. In his affidavit, Moyse attempts to downplay his involvement in the Wind situation at Catalyst by describing his role as "minimal". This is simply untrue.

36. For example, Moyse refers at paragraph 19 of his affidavit to a PowerPoint presentation he helped create for Catalyst to show representatives of Industry Canada in early 2014. What he does not disclose is that the PowerPoint presentation primarily concerned Catalyst's plans for Wind and outlined regulatory concessions Catalyst needed in order to carry out a Wind transaction.

37. Through his assistance with this presentation and participation in other discussions concerning Wind, Moyse knew not only that regulatory risk was a major sticking point for Catalyst, but also what types of regulatory concerns Catalyst had with respect to Wind.

38. Moyse was a member of Catalyst's Wind and Mobilicity team up until May 26, 2014, when he informed us that he had resigned from Catalyst to take a job at West Face, whom Moyse knew was also working on the Wind situation. Up until that date, Moyse participated as an involved member of Catalyst's due diligence and financial analysis team and received dozens of emails relating to the Wind situation, many of which attached confidential documents concerning Catalyst's negotiation strategy for Wind and Mobilicity.

39. For example, on May 24, 2014, two days before Moyse was put on "garden leave", he received an email that was distributed to the entire Wind team at Catalyst. The email attached a draft share purchase agreement ("SPA") and a blackline to a previous draft of the SPA. That email and its attachments are attached as Exhibit "E".

40. As shown in the SPA, even at this early stage of the proposed transaction, Catalyst was concerned with regulatory risk and the SPA was conditional on Catalyst receiving Industry Canada's approval to acquire Wind.

41. I am informed by Gabriel de Alba ("de Alba"), a partner at Catalyst, that in early August 2014, de Alba and representatives of Vimpelcom participated in a conference call with representatives of Industry Canada. The purpose of the call was to inform Industry Canada that Catalyst had final, but unsigned, paperwork for a transaction to acquire Wind and that there were no significant gaps between the parties. The call was intended as a courtesy prior to Catalyst formally seeking Industry Canada's approval to acquire Wind.

42. At the time, the anticipated deal with Vimpelcom was conditional on Industry Canada approval and the granting of certain regulatory concessions to a Catayst-owned Wind that in Catalyst's mind would make it easier for a fourth national carrier to succeed. These concessions

were essentially the same regulatory concessions summarized in the PowerPoint presentation Moyse helped create in early 2014.

43. I am informed by de Alba that shortly after the call with Industry Canada, Vimpelcom changed its negotiating strategy and began insisting that Catalyst yield on regulatory risk issues that had previously been agreed to by the parties.

44. As explained above, Moyse was an involved member of the Wind team and had full access to all of the relevant confidential information concerning Catalyst's due diligence, financial analysis, and regulatory drivers in the Wind situation. This involvement included knowledge of the precise regulatory concerns articulated by Catalyst to Industry Canada while it was negotiating to purchase Wind.

45. It is my belief that Vimpelcom changed its strategy after it received the unsolicited offer from West Face referred to at paragraph 77 of the Griffin Affidavit. I believe that West Face may have obtained confidential information from Moyse relating to Catalyst's confidential regulatory concerns and used that information to develop its Wind strategy, which ultimately led to West Face successfully purchasing Wind.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on May 1st, 2015.

Commissioner for Taking Affidavits, etc.

ANDREW WINTON

JAMES A. RILEY

This is Exhibit "K" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

SUPPLEMENTARY AFFIDAVIT OF MARTIN MUSTERS
(sworn April 30, 2015)

I, MARTIN MUSTERS, of the City of Oakville, in the Regional Municipality of Halton, MAKE OATH AND SAY:

1. I am the Director of Forensics at Computer Forensics Inc. ("CFI"), a computer security consulting firm based in Oakville, Ontario. In this capacity, I am responsible for all aspects of CFI's computer forensic services.

2. I previously swore affidavits in this proceeding on June 26, 2014 and on February 15, 2015. Since the swearing of my February 15, 2015 affidavit, I have reviewed the affidavits of Brandon Moyse ("Moyse") and Kevin Lo ("Lo") affirmed on April 2, 2015. This affidavit is sworn in reply to those affidavits.

"Cleaning" a Computer's Registry does not Hide Web Browsing Activity

3. In his April 2 affidavit, Moyse states that he "cleaned" the registry of his computer before turning it over to be imaged for a forensic review in order to "fully" erase his World Wide Web activity.

4. This explanation makes no sense. A computer's registry does not store information concerning a user's Web browsing history. The most common data relating to a Web browser

application such as Google Chrome or Microsoft Internet Explorer that is stored in the registry are the application's settings, which likely include a pre-set start page when the application is first launched. Other settings include set preferences or extensions added to the application.

5. Thus, unless Moyse's start page for his Web browser was a pornographic site, he would have no reason to "clean" his registry if his only reason for doing so was to attempt to hide his Web browsing activity.

The Secure Delete History is Stored in the Registry and Can be Deleted

6. The Lo affidavit states that Moyse's computer registry did not contain a Secure Delete Log, which one would expect to find if someone had used Secure Delete. I cannot verify that information without reviewing the images of Moyse's computer myself. However, assuming this fact to be true, that fact is insufficient to support Lo's conclusion that the Secure Delete program was not used to delete any files or folders from Moyse's computer.

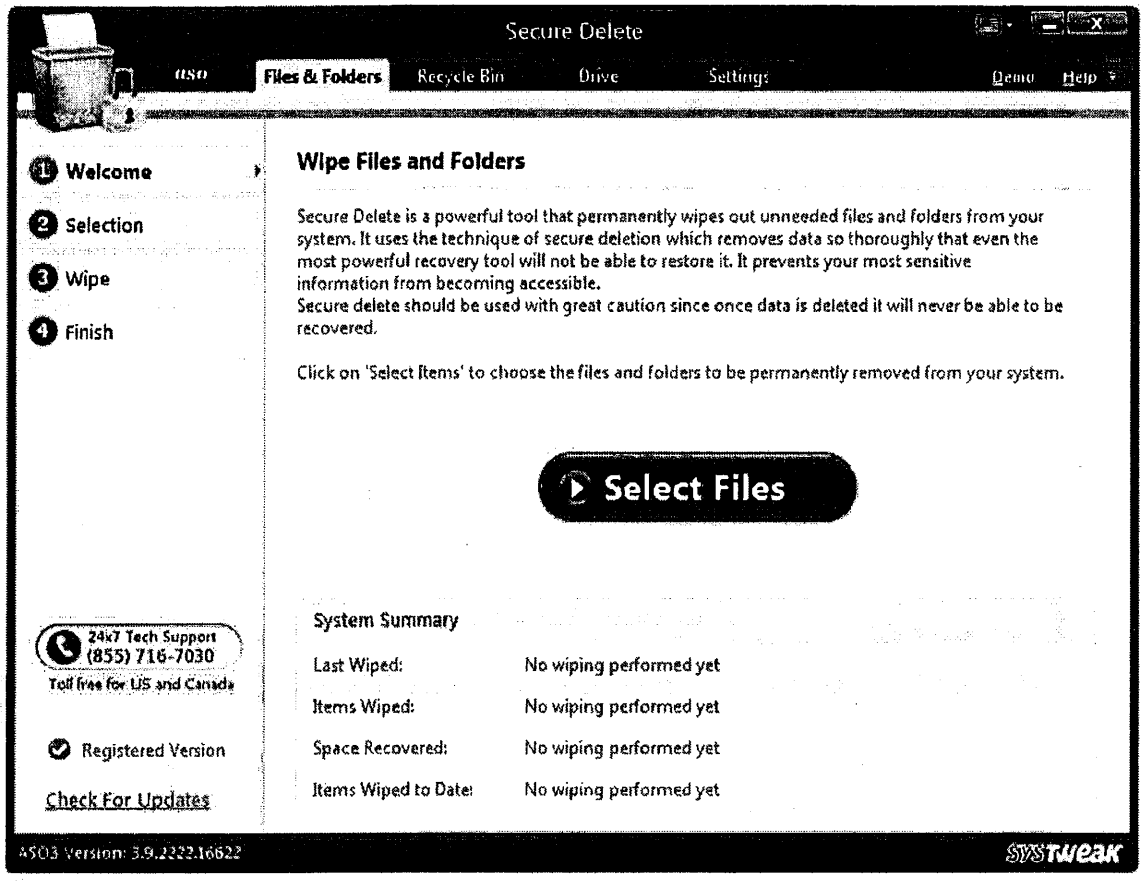
7. Lo's conclusion is based on the absence of a Secure Delete Log in the registry and a screenshot of the Secure Delete system summary for Moyse's computer.

8. In fact, it is a relatively simple matter to "reset" Secure Delete to hide any trace of having run the program. A simple internet search on how to delete the remanent files of Advanced System Optimizer (the software program that contains the Secure Delete tool) from a computer's registry. This publicly available information walks a user through the steps necessary to open the registry, identify the Secure Delete files, and delete those files so as to remove all traces of the user having run Secure Delete to delete files without a trace.

9. I am not surprised that Lo did not find any evidence of a Secure Delete Log on Moyse's computer, because Moyse, who admitted to conducting research relating to the computer registry, could very easily have deleted the Secure Delete Log after he deleted folders or files from his computer.

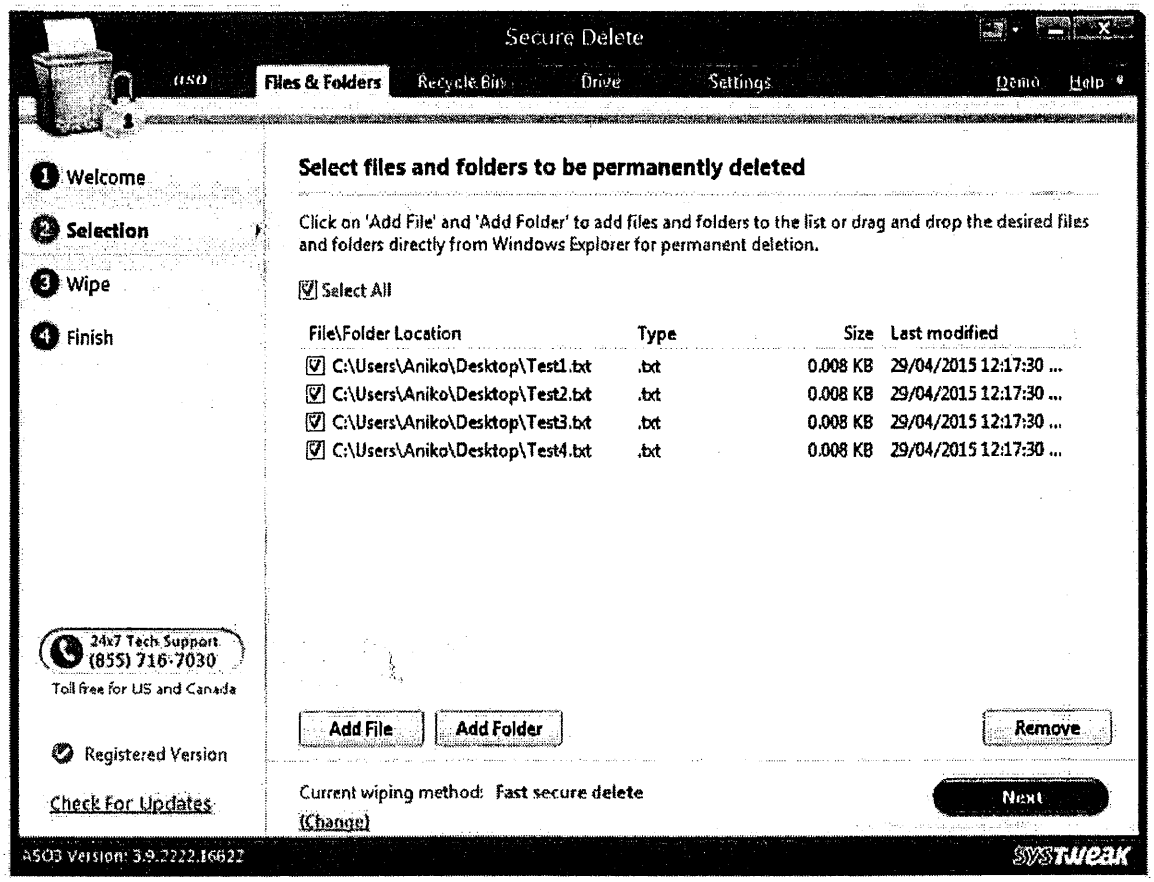
10. To demonstrate how easy it is to "reset" Secure Delete, I conducted a test on a computer on which I used Secure Delete to delete test files and then reset the Secure Delete system summary by deleting the Secure Delete Log from the computer's registry.

11. In my test, I began by opening the Secure Delete tool, as shown in the following screenshot:

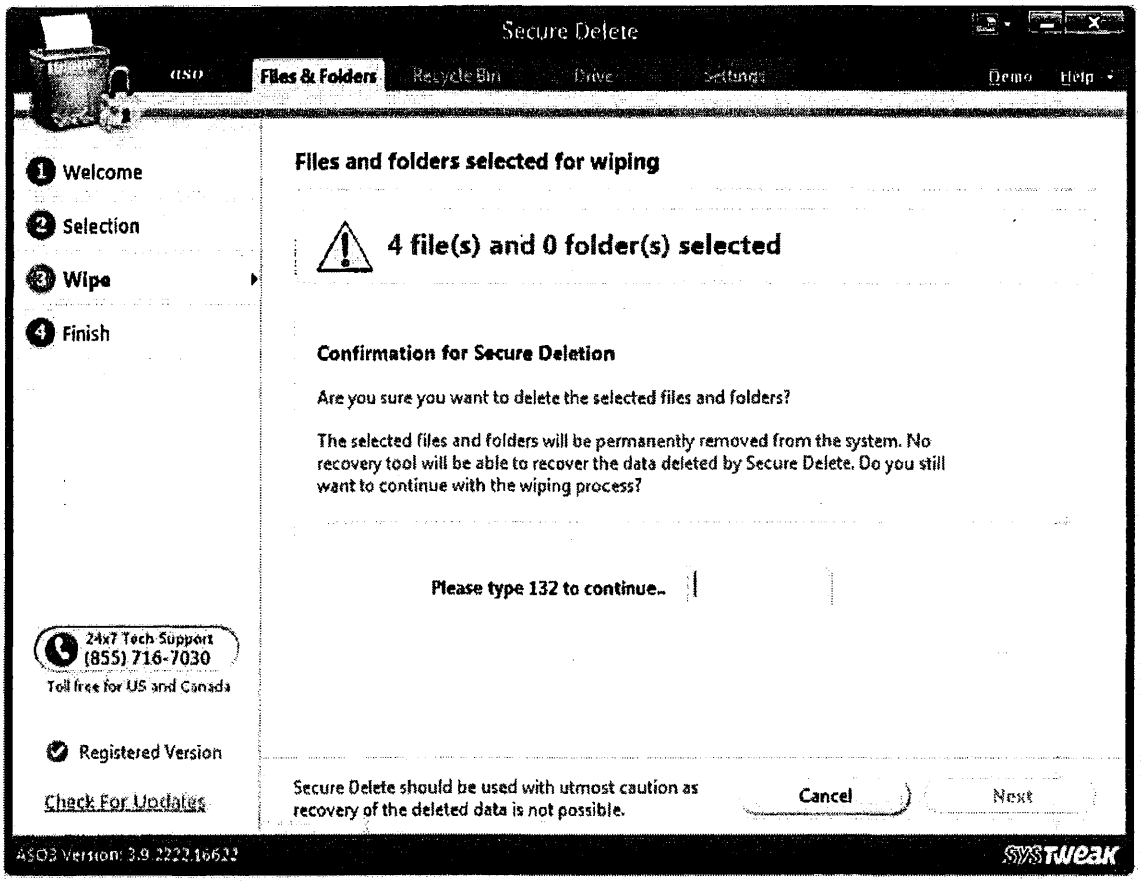


12. This screenshot shows what the Secure Delete system summary looks like before the program has been run.

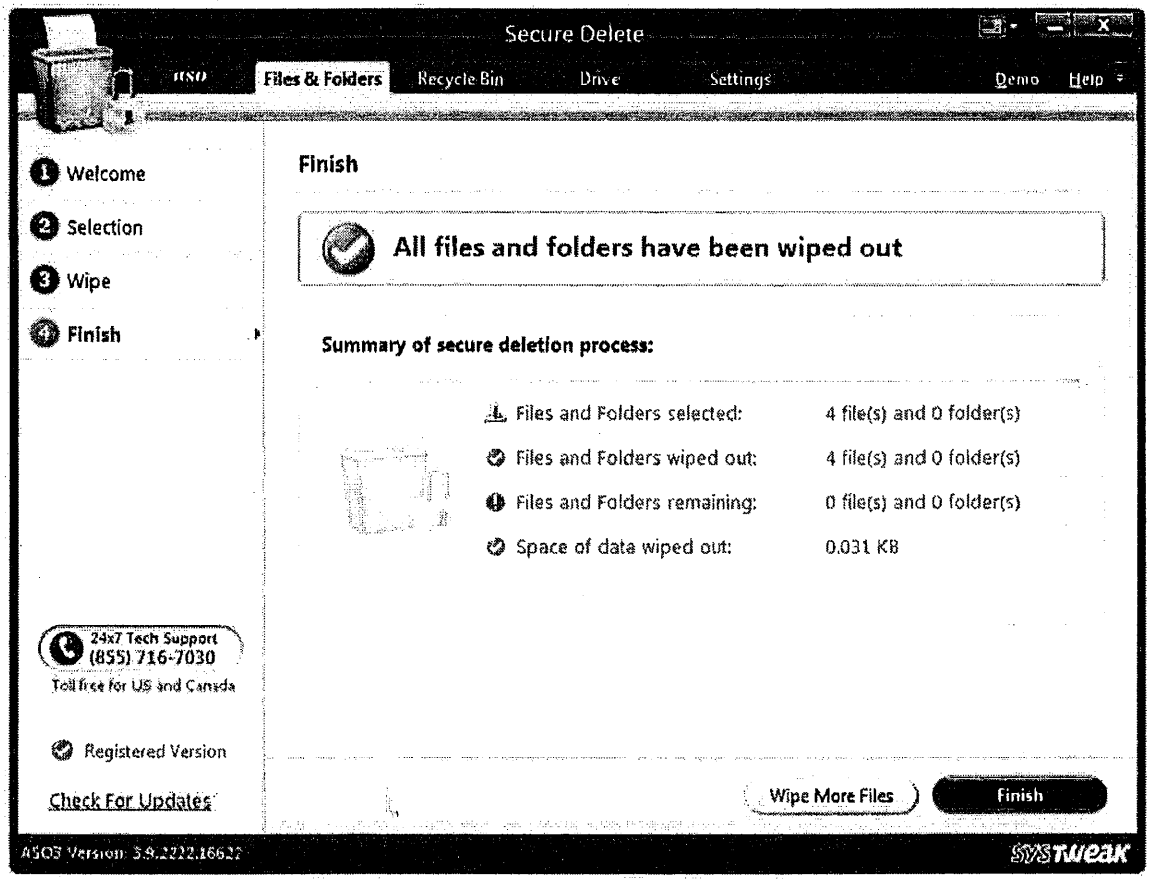
13. Next, I added four documents to the list of documents that I wanted to delete using the Secure Delete tool:



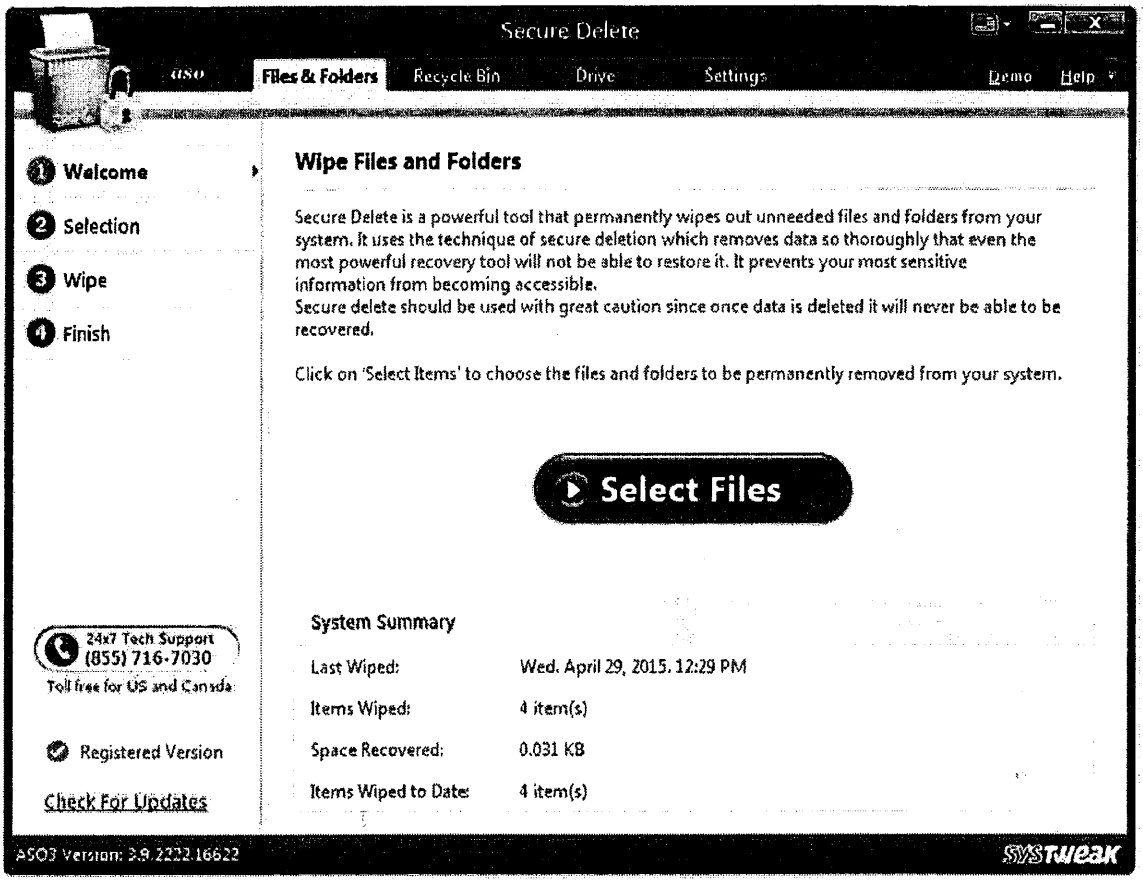
14. After clicking on the "Next" button in the bottom-right corner, the program asked me to confirm that I wanted to permanently delete the files:



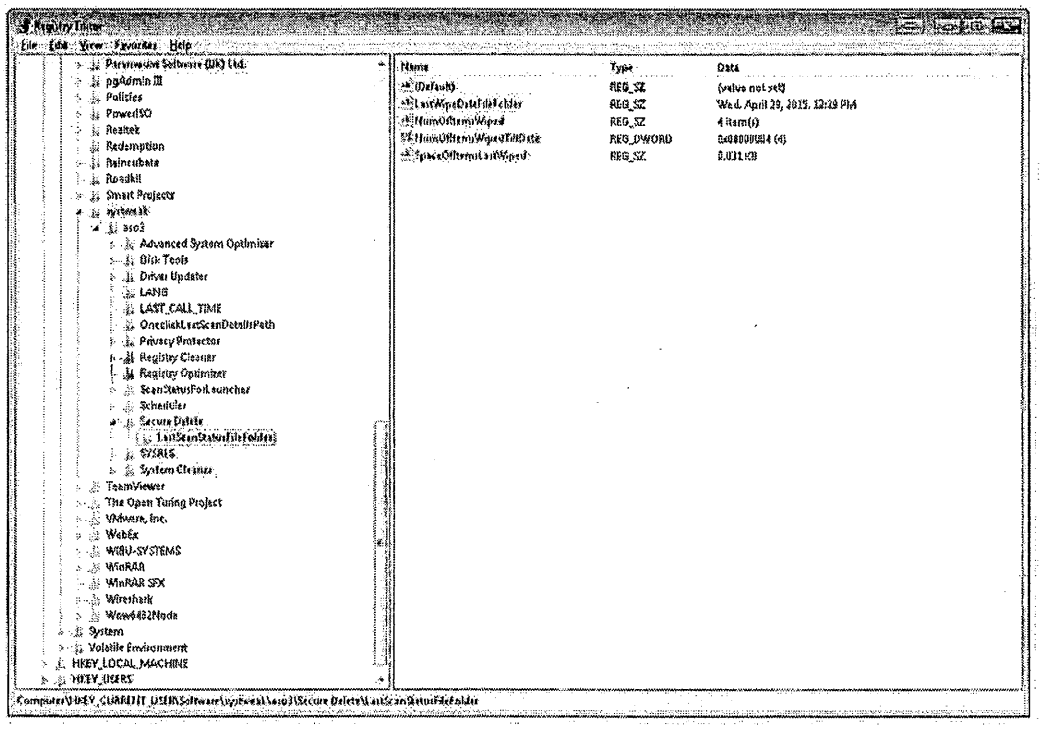
15. The user has to type "132" into the dialogue box and click "Next" to permanently delete the files. After doing so, the confirms the user's activity:

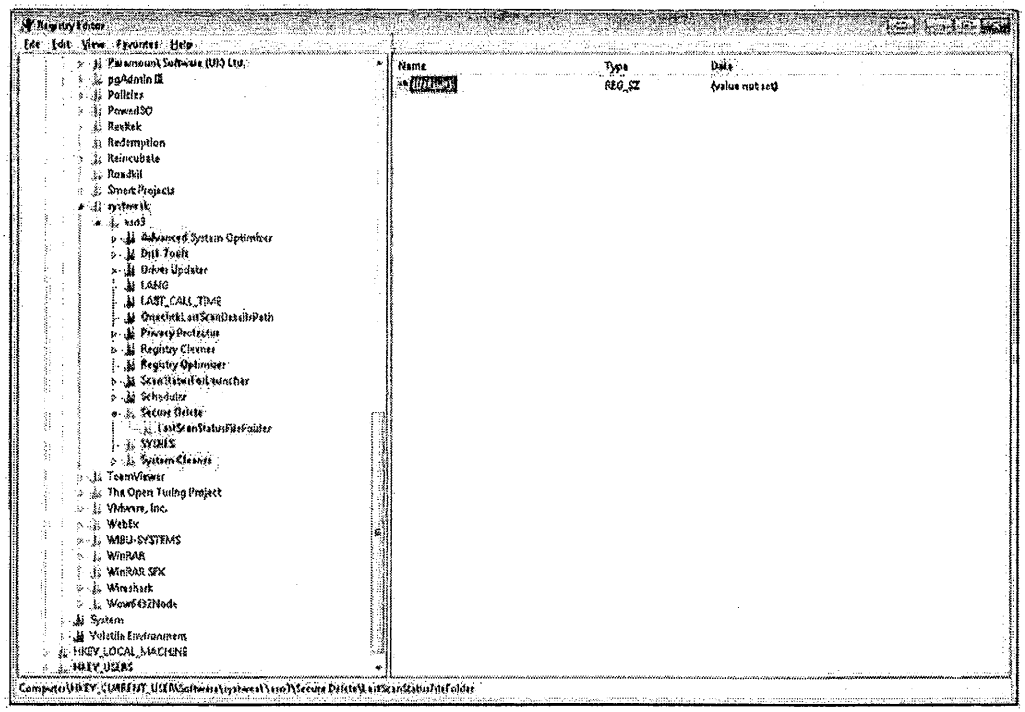


16. Clicking on "Finish" brings the user back to the start page, this time with the system summary updated to reflect the recent deletion activity:

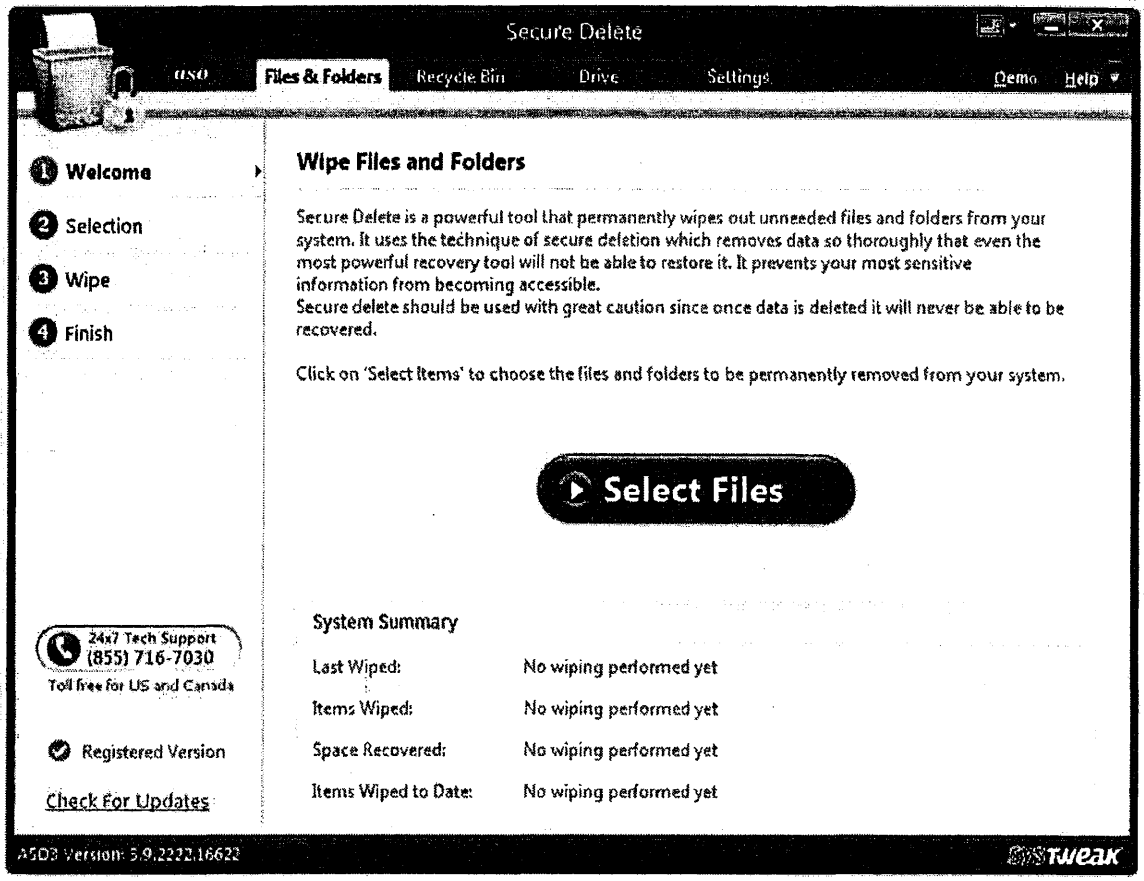


17. As shown above, the system summary recorded the fact that I had deleted four files from the test computer. In order to "reset" this summary, I opened the Registry Editor, selected the Secure Delete folder, and deleted its contents, as shown in the following two screenshots:





18. After deleting the Secure Delete registry information, the program's system summary reset itself to appear as if no wiping activity had been performed:



19. Thus, the fact that Lo did not find any evidence of wiping activity does not mean that no such activity took place. Moreover, because deletions to the registry leave no trace, it is impossible to determine whether the absence of wiping history in the Secure Delete system summary means that Moyse did not use the software to permanently delete files or folders or whether he used the software and then removed the evidence of his having done so by deleting the Secure Delete files from his registry.

20. In my experience as a computer forensic IT investigator, the most likely conclusion to draw from Moyse's conduct of June and July 2014 is that he did in fact use Secure Delete to permanently delete files from his computer on July 20, 2014. I base this conclusion on the following facts:

(a) Prior to July 20, 2014, Moyse exhibited a pattern of conduct that is consistent with taking confidential information from his former employer, as set out in my June 26, 2014 affidavit and my evidence given during my cross-examination held August 1, 2014;

(b) Moyse's admitted conduct of investigating how to "clean" his registry displays a level of IT sophistication that exceeds that of the ordinary user;

(c) Moyse wiped the Blackberry smartphone that had been issued to him by Catalyst prior to returning it to Catalyst, thereby permanently destroying evidence of his phone and data usage at a time when he knew litigation would likely result from his conduct; and

(d) The running of the Secure Delete program the night before Moyse was scheduled to deliver his computer to a forensic expert is too coincidental to be an innocent "mistake".

21. Based on the foregoing, while it is impossible to know for sure, it is my opinion that Moyse most likely did use the Secure Delete program on July 20, 2014 to delete files from his computer so as to prevent those files from being recovered by a forensic analysis of his computer by an independent supervising solicitor.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on April 30, 2015

Commissioner for Taking Affidavits, etc.

Andrew Winton

MARTIN MUSTERS

This is Exhibit "L" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 4388
COURT FILE NO.: CV-14-507120
DATE: 20150707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Rocco DiPucchio* and *Andrew Winton*, for the Plaintiff

Matthew Milne-Smith and *Andrew Carlson*, for the Defendant, West Face Capital Inc.

Robert A. Centa, Kristian Borg-Olivier and *Denise Cooney*, for the Defendant, Brandon Moyse

HEARD: July 2, 2015

ENDORSEMENT

Nature of motion and overview

[1] The plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), brings this motion for:

(i) an order that the defendant, West Face Capital Inc. ("West Face") is prohibited from voting its 35% share interest in WIND Mobile ("WIND") pending a determination of the issues raised in this action (the "Voting Injunction"),

(ii) an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face, at the expense of Moyse and West Face, to take place before any examination-for-discovery (the "Imaging Order"), and

(iii) an order (the "Contempt Order") that the defendant, Brandon Moyse ("Moyse"), is in contempt of an interim consent order of Firestone J., dated July 16, 2014 (the "Consent Order").

[2] At the hearing, the parties prepared extensive material. West Face filed a four-volume motion record with (i) a lengthy affidavit with 163 exhibits from Anthony Griffin ("Griffin"), a partner at West Face, (ii) an affidavit from Assar El Shanawany ("El Shanawany"), the

Corporate Planning & Control Officer of WIND, and (iii) an affidavit from Harold Burt-Gerrans, a forensic computer expert retained by West Face.

[3] Moyse filed two motion records, including a lengthy affidavit from Moyse and two affidavits from Kevin Lo ("Lo"), a forensic computer expert retained by Moyse.

[4] The defendants also filed a joint motion record with answers to undertakings from cross-examinations, transcripts, and an affidavit from West Face's head of technology.

[5] Catalyst filed three separate motion records, including (i) two extensive affidavits with approximately 40 exhibits from James Riley ("Riley"), the Chief Executive Officer of Catalyst, and (ii) three affidavits from Martin Musters ("Musters"), a computer forensic expert retained by Catalyst.

[6] In total, the parties filed over 3,000 pages of motion material, three factums totalling more than 110 pages, and 66 authorities.

[7] In this endorsement, I address only the key evidence and law which I find are necessary to consider the issues raised by the parties. For the reasons I discuss below, I dismiss the motion for all grounds of relief sought by Catalyst.

The Voting Injunction

a) The failure to provide an undertaking

[8] The Voting Injunction cannot be granted as Catalyst provided no undertaking as to damages.

[9] Rule 40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), provides that:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[10] The failure to provide an undertaking (or request to be relieved) is fatal to an injunction. Such an undertaking in damages "is almost invariably required in commercial cases" (Sharpe J.A., *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, 2014), at paras. 2.470 and 2.500).

[11] The court will dismiss a motion for an injunction if the moving party fails to provide an undertaking under Rule 40.03 (*Mandel v. Morguard Corp.*, [2014] OJ No. 1088 (SCJ), at paras. 20-21; *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.*, [2007] OJ No. 89 (SCJ), at para. 70, affirmed without separate reasons [2008] OJ No. 2567 (CA)).

[12] West Face raised the lack of an undertaking in its factum, as was appropriate since Catalyst failed to provide the undertaking in its evidence before the court on this injunction.

[13] Catalyst knew and understood the need for an undertaking to obtain an injunction.

[14] At the outset of the hearing, I raised directly with Catalyst's counsel the issue of an undertaking with respect to the injunctive relief sought on this motion.

[15] I advised counsel that Catalyst could consider, prior to argument, whether it was necessary to adjourn the hearing to provide the court with an undertaking. I further advised Catalyst's counsel that if he chose to argue the motion on the basis of the existing evidentiary record, the court could not adjourn the hearing in mid-argument to permit further evidence on the issue. Counsel for Catalyst assured the court that he was prepared to argue the motion on the basis of the evidentiary record and would set out in his oral submissions why the requirement for an undertaking had been satisfied.

[16] During his submissions, when asked to address the issue of the undertaking, Catalyst sought to rely on the undertaking it provided to the court to obtain an interim injunction from Justice Lederer by reasons dated November 10, 2014 (the "Interim Injunction"). Justice Lederer had granted interim relief, by which he, *inter alia*, enjoined Moyse from working for West Face until December 21, 2014 and ordered that an independent supervising solicitor (previously defined as the "ISS") be put into place to review the images of Moyse's personal computer and electronic devices that had been conducted pursuant to the Consent Order (Reasons of Lederer J., at para. 83).

[17] In support of the Interim Injunction, Riley swore an affidavit on June 26, 2014 in which he gave an undertaking to the court that Catalyst "will comply with any order regarding damages the Court may make in the future, if it ultimately appears that the injunction requested by the plaintiff ought not to have been granted" (para. 75 of the June 26, 2014 Riley affidavit).

[18] Justice Lederer relied on the evidence from Riley to find that Catalyst had complied with its requirement under Rule 40.03 to provide an undertaking for damages which might arise if the court ultimately found that the injunction requested by Catalyst ought not to have been granted.

[19] Justice Lederer's reasons made it clear that the undertaking related only to the order he made. He stated that Catalyst gave an undertaking (Reasons of Lederer J., at para. 84):

> that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them. [Emphasis added.]

[20] At the hearing before me, Catalyst submitted that this undertaking "continued" (in effect, could be transferred) to the present Voting Injunction. Catalyst submitted that Riley was not required to provide a separate undertaking for the Voting Injunction since Riley

stated in his affidavit for this motion that "I adopt and re-state the facts set out in those affidavits [filed in support of the Interim Injunction] in this affidavit".

[21] I do not agree that an undertaking for an injunction seeking to prevent employment for a limited time or having documents imaged by an ISS can be "transferred" to an injunction seeking to prevent a 35% shareholder of WIND from exercising voting rights at any time until trial of the action.

[22] First, an undertaking is not a "fact" to be repeated and relied upon in a subsequent affidavit. It is a promise to the court to pay damages arising out of the injunctive relief sought before the court at that time. At no point until this injunction did Catalyst seek an order preventing West Face from exercising its 35% voting interest in WIND.

[23] Second, the damages that could be incurred as a result of the Voting Injunction are exponentially greater than any possible damages that could arise on an order to prevent competition by an analyst (Moyse) who leaves for a competitor. The Interim Injunction, based on the earlier Riley affidavits, protected Catalyst's interests through (i) a review by the ISS of the forensic images of Moyse's computer and electronic devices before discovery, and (ii) orders prohibiting Moyse from competing for six months and using confidential information. Any damage associated with the order sought on the Interim Injunction could pale to the losses West Face could incur as a result of the Voting Injunction if West Face is unable to vote its shares in WIND on all decisions between the present and trial.

[24] Justice Lederer was clear that the undertaking he accepted was based on the relief sought in the specific motion before him, as it was based on the undertaking to pay damages if "it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them" [Emphasis added.] (Reasons of Lederer J., at para. 84).

[25] At the present hearing, Catalyst attempted to rely on the evidence in the current Riley affidavit that it "currently has in excess of $3 billion dollars under management". However, the existence of assets under management is not an undertaking to the court to pay damages for an injunction.

[26] When an undertaking is provided, a responding party has the opportunity to challenge the sufficiency of the undertaking. Regardless of the amount of assets managed or owned by a corporation, the undertaking provided by the moving party depends on its ability to pay the damages which could arise from the injunction. A responding party is entitled to cross-examine to test the sufficiency of the undertaking.

[27] Consequently, there is no undertaking before the court on the present injunction, which is between sophisticated commercial parties with Catalyst seeking a Voting Injunction to enjoin West Face from voting any of its 35% share interest in WIND until trial.

[28] This is not a case of West Face's counsel "laying in the weeds" (as submitted by Catalyst). Catalyst knew the requirements for an injunction, as demonstrated by the earlier injunction sought before Justice Lederer. West Face raised the issue directly in its factum.

Catalyst was advised by the court at the outset that the court was providing it with an opportunity to consider whether it would seek an adjournment to file further evidence, and Catalyst chose not to do so. West Face is not required to create evidence for Catalyst on cross-examination when Catalyst chose not to provide the evidence.

[29] Consequently, Catalyst made a decision to rely on the earlier undertaking with full knowledge that no adjournment mid-hearing could be obtained if the court was not satisfied that there was a proper undertaking.

[30] For these reasons, I dismiss the Voting Injunction on the basis of the failure to provide an undertaking under Rule 40.03.

b) The failure to satisfy the requirements of irreparable harm and balance of convenience

[31] Catalyst's counsel acknowledges that Catalyst has the burden of establishing irreparable harm and that the Voting Injunction cannot be granted if Catalyst does not meet this burden.

[32] The only evidence of harm to Catalyst if the injunction is not granted is Riley's statement in his affidavit that:

> As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

[33] The above evidence does not meet the test of harm that "could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory application", or "harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald Inc. v. Canada*, [1994] SCJ No. 17, at paras. 58-59).

[34] Evidence of irreparable harm must be clear and not speculative (*Trapeze Software Inc. v. Bryant*, [2007] OJ No. 276 (SCJ), at para. 52). It is not enough to show that a moving party is "likely" to suffer irreparable harm; one must establish that he or she "would suffer" irreparable harm (*Burkes v. Canada (Revenue Agency)*, [2010] OJ No. 2877 (SCJ), at para. 18, leave to appeal refused, [2010] OJ No. 5019 (Div. Ct.)).

[35] Riley's assertion is speculative. He does not state that West Face "will" use its voting interest in WIND to harm Catalyst's purported interest. Rather, he states only that West Face "can" do so without explaining how such conduct would arise.

[36] Even if Catalyst has a contingent interest in WIND, Riley admitted during cross-examination that (i) "West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do"; and (ii) West Face "would obviously have an incentive to

maximize the value of its investment in [WIND]" in the same manner as Catalyst claims that it would.

[37] Catalyst submits at paragraph 114 of its factum that West Face could provide capital to WIND (or WIND could seek to raise capital) "on terms to which Catalyst, in West Face's shoes, would not agree". However, there is no evidence to that effect. To the contrary, West Face has been a shareholder and an active part of the management of WIND since September 16, 2014, and Catalyst led no evidence that it is worse off today than it was almost nine months ago.

[38] In essence, Catalyst's position on irreparable harm is that West Face, as a 35% shareholder in WIND, might vote their shares in a manner that decreases the value of the company, and as such, harm Catalyst's "contingent" interest based on Catalyst's claim of constructive trust. However, any claim of constructive trust over property raises a speculative concern that the property may be worth less at trial than at the outset of pleadings. In the present case, there is no evidence to suggest any past or future conduct which will cause irreparable harm, and as such, the injunction must fail.

[39] With respect to the balance of convenience, since Catalyst offers no proper evidence of irreparable harm, it cannot establish that the balance of convenience favours granting the injunction.

[40] Further, West Face filed evidence (in the Griffin and El Shanawany affidavits) that West Face is the single largest investor in WIND, designates two of the ten seats on the board of directors, and plays an important role in WIND's governance, strategic and capital funding direction. An inability for West Face, as the largest WIND shareholder, to vote on issues that affect a significant investment is evidence of the type of harm that cannot be cured in monetary terms, as other shareholders would then have the ability to control the future of WIND without any voting from a 35% shareholder.

[41] For the above reasons relating to Catalyst's failure to provide the undertaking, Catalyst's failure to establish irreparable harm, and given my finding that the balance of convenience is against granting an injunction, I dismiss the motion for a Voting Injunction.

[42] Consequently, I do not address whether there is a serious question to be tried.

The Imaging Order

[43] West Face characterizes the Imaging Order as either an *Anton Piller* order or a Rule 30.06 order. For the purposes of this argument, I make no finding as to whether the higher threshold of an *Anton Piller* order should apply because I agree with West Face that even under the lower "Rule 30.06" threshold as considered in cases where a similar imaging order was sought, the motion must fail.

[44] In the present case, Catalyst proposes to have the ISS conduct a review of West Face's corporate servers and the electronic devices of five West Face representatives and then "prepare a report which shall": (i) "identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and (ii)

provide particulars of who authored or saw any emails which contained or referred to the Confidential Information.

[45] I note that many of the cases relied upon by West Face arise in the context of a request by an adverse party to review the documents sought to be imaged, typically through a forensic expert retained by the moving party. It may be that the discussion in those cases could apply to the Catalyst request for ISS review, since the nature of a review is similarly intrusive, even if not conducted directly by the moving party.

[46] However, it is not necessary to rely on those authorities and I make no finding as to whether the test to permit a moving party to have direct access to the servers of a responding party requires a higher threshold to obtain such relief.

[47] Under Rule 30.06, the principle remains that a party has an obligation under the *Rules* to produce relevant documents, and the court will only order further and better production if there is good reason to believe that the responding party has not complied with its production obligations. I agree that the same approach should apply to a request that a responding party image computer servers and electronic devices.

[48] This approach was followed by Justice Stinson in *Brown v. First Contact Software Consultants Inc.*, [2009] OJ No. 3782 (SCJ) ("*Brown*"). Justice Stinson was not faced with a request by a moving party to review the responding party's server, but only with a request for "an order that would require the responding parties to 'image' the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them" (*Brown*, at para. 67). The intrusiveness of such a request would be less than the ISS review proposed by Catalyst.

[49] In *Brown*, Justice Stinson refused to order the plaintiffs (responding parties) to image their hard drives or computers. He held (*Brown*, at para. 67):

> There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

[50] Orders for production of computer hard drives will not be made when a party can explain any delay or errors in producing relevant documents (*Baldwin-Jones Insurance Services (2004) Ltd. (c.o.b. Baldwin Janzen Insurance Brokers) v. Janzen*, [2006] BCJ (S.C.) at paras. 34, 36). Further, the number of "hits" of a term does not demonstrate that a party has failed to produce relevant documents (*Mathieson v. Scotia Capital Inc.*, [2008] OJ No. 3500 (Mast.) at par. 9).

[51] As Morgan J. held in *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] OJ No. 6082 (SCJ) ("*Zenex*"), "it is not sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden'" (*Zenex*, at paras. 13-14).

[52] There is 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.

[53] The evidence relied upon by Catalyst at the hearing to demonstrate an effort to thwart discovery obligations was not convincing. Evidence with respect to Callidus Capital Corporation ("Callidus") was produced by West Face once Catalyst put Callidus in issue by alleging misuse of confidential information. West Face disclosed its investment in Arcan voluntarily.

[54] West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer.

[55] The error of West Face to recall the March 27, 2014 email arose not in the context of litigation production, but only when West Face received Catalyst's pre-litigation correspondence. The email was immediately produced in the July 7, 2014 responding material, six business days after Catalyst brought its motion for interim relief. West Face's failure to recognize prior to litigation that the March 27, 2014 email had been received and forwarded is not evidence of an intention to hide or delete electronic information.

[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.

[57] For the above reasons, I find that Catalyst has not met its burden to establish that West Face has engaged in any destruction of evidence or in any conduct "designed to hide or delete electronic or other information". Consequently, I dismiss the motion for an Imaging Order.

Contempt Order

[58] For the reasons that follow, I do not find Moyse to be in contempt of the Consent Order.

[59] I summarize the relevant legal principles below:

(i) The contempt power rests on the power of the court to uphold its dignity and process. It is necessary to maintain the rule of law (*Carey v. Laiken*, 2015 SCC 17 ("*Carey*"), at para. 30);

(ii) There are three elements which must be established beyond a reasonable doubt before a court may make a finding of civil contempt:

(a) The order that was breached must state clearly and unequivocally what should and should not be done;

(b) The party alleged to have breached the order must have had actual knowledge of it; and

(c) The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey*, at paras. 31-35);

(iii) Any reasonable doubt must be resolved in favour of the person or entity alleged to have breached the order (*Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (CA), at para. 270);

(iv) The contempt power is discretionary and courts should discourage its routine use to obtain compliance with court orders. The contempt power should be used "cautiously and with great restraint" and as "an enforcement power of last rather than first resort" (*Carey*, at para. 36); and

(v) The court retains a discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith (*Carey*, at para. 37).

[60] I review the relevant evidence against the backdrop of these principles.

[61] The impugned contemptuous acts of Moyse are (i) he deleted his personal browsing history immediately prior to turning his personal computer over to the ISS; and (ii) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.

a) The relevant evidence

[62] Moyse's evidence was that when he was ordered to deliver his computer, he was concerned and embarrassed by some of the content on his computer related to adult entertainment sites. Moyse's evidence is that he was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in the lawsuit since he had reasonable explanations for every Catalyst-related document that would be found on the computer and intended to disclose all such documents in his affidavit of documents, as required under the Consent Order.

[63] Moyse's evidence is that he understood and respected his obligations under the Consent Order and was careful in how he maintained his computer following the Consent Order. Moyse's evidence that if Catalyst had sought and obtained an order requiring that he maintain the computer "as is", he would not have used it at all prior to the image being taken.

[64] Moyse's evidence was that he did not have advanced knowledge about computers but was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently-deleted material.

[65] Moyse did some internet searches on how to ensure a complete deletion of his internet browsing history. He came to believe that "cleaning" the computer's registry following the deletion of the internet history would ensure the permanent deletion of the history.

[66] Moyse then purchased the "RegCleanPro" product on July 12, 2014 to delete his internet browser history and four days later purchased the "Advanced System Optimizer" ("ASO") program which contains a suite of programs for personal computer tune-up. One product on the ASO suite is a program called "Secure Delete".

[67] Moyse made no efforts to hide the purchase of these products. The payment receipts and license keys for Moyse's purchases of the two Systweak products were found by the ISS in his electronic personal mail box.

[68] On Sunday, July 20, 2014, the day before Moyse was scheduled to deliver his computer and other devices to counsel, he (i) opened the RegClean Pro and ASO software products on his computer, (ii) looked into how each operated, and (iii) ran the "RegCleanPro" software to clean up the computer registry after he deleted his internet browser history.

b) Deleting personal browsing history

[69] With respect to the first impugned act, there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches.

[70] The Consent Order only requires Moyse to preserve and maintain records "that relate to Catalyst", "relate to their activities since March 27, 2014" or "are relevant to any of the matters raised in this action".

[71] If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.

[72] Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

[73] Catalyst's submission as to the purported contempt is that the court should find, on a standard of beyond reasonable doubt, that Moyse's deletion of his personal browsing history resulted in deletion of any references to his searching his "Dropbox" files, and that such searches would have been relevant as evidence that Moyse was taking confidential information with him prior to departing Catalyst.

[74] However, the evidence does not support a finding beyond a reasonable doubt that there were such files on Moyse's personal computer. It is not enough for Catalyst to speculate

that in the course of deleting his personal browsing history, Moyse may have deleted references to searches of Dropbox files.

[75] The Amended Report of the ISS, dated March 13, 2015, states that Digital Evidence International ("DEI"), the forensic computer expert retained by the ISS, searched Moyse's iPad and found over 1,000 "Catalyst" documents in Moyse's iPad Dropbox. The ISS stated:

> DEI was able to generate a list of documents accessible from this device from the 'Dropbox' iOS application. The iPad contained records for some 1,327 total documents which were recorded by the operating system as accessible to the user at some point in time. Of these documents, a total of 1,017 documents were contained in a folder entitled 'Catalyst'. I have attached as **Appendix 'N'** a copy of the list of files contained within the 'Catalyst' folder, from the data supplied by DEI. The data generated also include a record of the last time that each file was recorded to have been accessed by the user, which is contained within that spreadsheet. I note that there are no records of the documents in the Dropbox being reviewed on any date subsequent to April 16, 2014, and therefore no evidence that the Dropbox files were viewed subsequent to Moyse's departure from Catalyst on the iPad device. [Emphasis in original.]

[76] Catalyst seeks to rely on Moyse's evidence that he accessed Dropbox from time to time, and as such, relevant search history from his computer must have been deleted. However, there was no evidence as to whether Moyse accessed Dropbox through his personal computer or his iPad. Moyse's evidence was that he did not know whether he accessed Dropbox through an "app" (which could have been on his iPad) or by internet (which could also have been through his iPad) (see questions 254-260 of his cross-examination transcript).

[77] Further, Moyse was asked by Catalyst counsel that "if I'm correct that your Dropbox, your history of accessing Dropbox, was retained in your browsing history, you would also have been successful in deleting that, right?" Moyse answered that "I access my Dropbox through a variety of other means" (see questions 294-300 of his cross-examination transcript).

[78] Consequently, there is no evidence, on the standard of beyond reasonable doubt, that Moyse deleted Dropbox information from his personal computer when he deleted his personal browsing history and ran the registry cleaner. Given the over 1000 "Catalyst" files on his iPad Dropbox account, and Moyse's explanation that he may have accessed Dropbox files through an "app", I cannot find (on a standard of beyond reasonable doubt) that Moyse deleted his personal browsing history relevant to Dropbox from his personal computer and as such, I cannot find contempt of court for deleting relevant information from his personal computer.

[79] I note that even if I found that it was beyond reasonable doubt that Moyse deleted relevant Dropbox searches from his personal computer, I would exercise my discretion to decline to making a finding of contempt as such conduct would have occurred as a result of Moyse's "good faith" efforts to comply with the Consent Order while deleting embarrassing personal files which were not relevant to the litigation.

c) Use of the Secure Delete program

[80] Catalyst submits that it is beyond reasonable doubt that Moyse ran the Secure Delete program to delete relevant files from his personal computer. I do not agree that the evidence supports such a conclusion.

[81] First, all of the forensic experts agreed that the presence of a Secure Delete folder on Moyse's system is not evidence that he ran the program.

[82] DEI, on behalf of the ISS, indicated that it could not conclude from the presence of a folder whether the program had been used to delete files. Musters, the forensic expert retained by Catalyst, acknowledged on cross-examination that "the Secure Delete program was launched, but it doesn't yet speak to whether or not files or folders were deleted". Lo, the forensic expert retained by Moyse, gave the same opinion, *i.e.*, that the presence of a Secure Delete folder is not evidence that Moyse ran the program.

[83] Second, Lo's evidence was that he had conducted a complete forensic analysis of Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Moyse's computer. Lo's expert opinion evidence was that if the Secure Delete program had been run on the computer, a log would have been found which maintains records of the files deleted (the "Secure Delete Log"), but no such log exists on Moyse's computer.

[84] Catalyst's expert, Musters, initially gave opinion evidence that it was a "relatively simple" matter to "reset" the Secure Delete Log by using a function called Registry Editor to hide any trace of having run the program. Musters did not append as an exhibit to his affidavit the "publicly available information" on which he relied. Musters maintained his position in cross-examination. However, in an answer to an undertaking, Musters sought to "correct an error in his testimony" in that "the [publicly-available] information includes advice on the removal of the entire ASO program".

[85] Consequently, the evidence is that Moyse could not have easily deleted only the Secure Delete Log with publicly-available information. Instead, the conclusion sought by Catalyst, at a level of beyond reasonable doubt, is that Moyse ran Secure Delete to remove files and then (i) obtained information which explained how to remove the ASO software from his computer, (ii) chose not to use that information to remove all traces of that ASO software, (iii) instead removed only the Secure Delete Log files of the ASO (though Musters did not provide any publicly-available information which would simply instruct Moyes how to do so), (iv) but still left the ASO software, receipts, and emails in place to be easily found by a forensic investigator.

[86] I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO

software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

[87] For the above reasons, I dismiss the Contempt Motion.

Order and costs

[88] Consequently, I dismiss Catalyst's motion in its entirety. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a costs outline), to be delivered by West Face and Moyse within 14 days of this order, with Catalyst to respond within 14 days from receipt of the Defendants' submissions. The Defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of Catalyst's costs submissions.

GLUSTEIN J.

Date: 20150707

This is Exhibit "M" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court of Appeal File No.
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

NOTICE OF APPEAL

THE PLAINTIFF APPEALS to the Court of Appeal from the Order of Justice Glustein dated July 7, 2015, made at Toronto.

THE APPELLANT ASKS that the Order be set aside and an Order be granted as follows:

1. An Order authorizing an Independent Supervising Solicitor ("ISS") to attend the Defendant West Face Capital Inc.'s premises to create forensic images of all electronic devices, including computers and mobile devices of the principals of West Face (the "Images") and to prepare a report which shall:

    a. identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was

located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and

b. in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:

i. who authored the email;

ii. to whom the email was sent, copied and/or blind copied;

iii. the date and time when the email was sent;

iv. the subject line of the email;

v. whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);

vi. the contents of the email; and

vii. if the email was deleted, when the email was deleted.

2. A declaration and finding that the Defendant Brandon Moyse is in contempt of the Order of Justice Firestone dated July 16, 2014 (the "Interim Order");

3. An Order that the determination of the appropriate sanction for Brandon Moyse's contempt be determined by another Judge of the Superior Court of Justice;

4. An award of costs of the motion below and this appeal; and

5. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

A. Background to this Action

1. The Appellant ("Catalyst") is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

2. The Respondent West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

3. The Respondent Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014.

4. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

5. On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

6. Shortly thereafter, Catalyst commenced this action and brought an urgent motion for injunctive relief seeking, among other things, preservation of documents and enforcement of the Non-Competition Covenant.

B. The Interim Order

7. On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

8. On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to the Interim Order, pursuant to which, among other things:

(a) The Respondents were ordered to preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against the Respondents; and

(b) Moyse was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image the data stored on the Devices (the "Images"), to be held in trust by his counsel pending the outcome of the motion for interlocutory relief.

C. Moyse's Contempt of the Interim Order

9. Catalyst's motion for interlocutory relief was heard on October 27, 2014. On November 10, 2014, Justice Lederer of the Superior Court of Justice released his decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images.

10. On February 17, 2015, the ISS delivered a its report (the "ISS Report") to counsel for Catalyst and Moyse.

11. The ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

12. Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images. On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

13. On Sunday, July 20, 2014, at 8:09 p.m., Moyse ran the Secure Delete programme on his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer.

14. In addition, Moyse admits that on July 20, 2014, he deleted his Internet browsing history from his personal computer. Moyse's browsing history would have included information related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

15. As a result of Moyse's conduct, it is impossible to know for sure what information, files and/or folders he deleted on July 20, 2014.

16. By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse acted in contempt of Court.

17. The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

18. The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme and deletion of his Internet browsing history on July 20, 2014, was a breach of the Interim Order.

19. It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

20. Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

21. Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

22. As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

D. Appeal of the Contempt Decision

23. The motion judge erred in dismissing the Appellant's motion for a declaration that Moyse acted in contempt of the Interim Order:

(a) The motion judge erred in interpreting the Interim Order to mean that "activities that relate to [the Respondents'] activities since March 27, 2014 was not intended to encompass all of the Respondents' activities, and/or that if this was the intended meaning, then the Interim Order was ambiguous.

(b) The motion judge erred in concluding that there was no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of his Internet searches.

(c) In particular, the motion judge erred in concluding that the Appellant could only speculate that information deleted from Moyse's computer included evidence of Moyse's activities related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

(d) In addition, the motion judge erred in concluding that, even if Moyse had acted in contempt of the Interim Order, it was appropriate to exercise his discretion to decline to make a finding of contempt. Such discretion is limited to situations

where a finding of contempt would impose an injustice in the circumstances of the case, and is not available in situations where a party's acts in violation of an order make subsequent compliance impossible.

E. Appeal of the ISS Decision

24. The motion judge erred in dismissing the Appellant's motion to create forensic images of the electronic images belonging to the principals of West Face and for the appointment of an ISS to review those images.

25. Justice Lederer had already determined that it was appropriate to authorize an ISS to review the Images of Moyse's devices prior to the discovery process in this Action.

26. As a result of Moyse's conduct, described above, the ISS's review of Moyse's devices was tainted in a manner unanticipated by Justice Lederer.

27. The creation of forensic images of West Face's devices for review of an ISS prior to the discovery process in this Action is necessary to give effect to the Order of Justice Lederer, from which leave to appeal was unsuccessfully sought by the Respondents.

28. The motion judge erred by failing to consider the need to create the Images of West Face's devices and for an ISS review in order to give effect to the Order of Justice Lederer in this Action.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: *(State the basis for the appellate court's jurisdiction, including (i) any provision of a statute or regulation establishing jurisdiction, (ii) whether the order appealed from is final or interlocutory, (iii) whether leave to appeal is required*

1. Sections 6(1)(b) and 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;

2. The Order of Justice Glustein dismissing the Plaintiff's contempt motion is final;

3. The Order of Justice Glustein dismissing the Plaintiff's motion for an ISS is an interlocutory order in the same proceeding as the contempt motion, which lies to and is taken to the Court of Appeal; and

4. Leave to appeal is not required.

July 22, 2015

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THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

BRANDON MOYSE et al.
Defendants (Respondents)

Court of Appeal File No.
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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This is Exhibit "N" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

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File 23622

July 24, 2015

VIA EMAIL

Andrew Winton
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Dear Mr. Winton:

Re: The Catalyst Capital Group Inc. v. Brandon Moyse et al.
Court File No. CV-14-507120

We have received your client's notice of appeal to the Court of Appeal purporting to appeal the Order of Justice Glustein dated July 7, 2015, which dismissed your client's motion to have Mr. Moyse found in contempt of court (the "Order"),.

The notice of appeal states that the Order is final, and that therefore an appeal lies to the Court of Appeal pursuant to s. 6(1)(b) and 6(2) of the *Courts of Justice Act*.

This is not correct in law. The Order is interlocutory, not final: *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.). I have enclosed a copy of the decision for your reference.

An appeal of the Order only lies to the Divisional Court, with leave, pursuant to s. 19(1)(b) of the *Courts of Justice Act* and rule 62.02 of the *Rules of Civil Procedure*. The Court of Appeal has no jurisdiction to hear the appeal.

If your client withdraws the notice of appeal within five business days, Mr. Moyse will not seek costs against your client. If your client does not do so, we will bring a motion to strike the notice of appeal, and will rely on this letter to seek substantial indemnity costs on success of that motion.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Kris Borg-Olivier

Encl.

c: Matthew Milne-Smith / Andrew Carlson

Case Name:

Simmonds v. Simmonds

Between
Garfield Simmonds, Applicant (Appellant), and
Michelle Simmonds, Respondent (Respondent in Appeal)

[2013] O.J. No. 4680

2013 ONCA 479

117 O.R. (3d) 479

Docket: C56555

Ontario Court of Appeal
Toronto, Ontario

A. Hoy A.C.J.O., K.N. Feldman and J.M. Simmons JJ.A.

Heard: July 5, 2013.
Oral judgment: July 5, 2013.
Released: July 16, 2013.

(6 paras.)

Family law -- Maintenance and support -- Practice and procedure -- Courts -- Jurisdiction -- Contempt -- Orders -- Interim or interlocutory orders -- Appeals and judicial review -- Appeal by husband from dismissal of motion for a finding wife was in contempt for failing to comply with court order dismissed -- Motion judge found wife complied with order that required her to provide disclosure in respect of her income loss claim arising from motor vehicle accident that occurred in 2004 -- Court lacked jurisdiction as motion judge's order was interlocutory and not binding on trial judge.

Appeal From:

On appeal from the order of Justice E. Ria Tzimas of the Superior Court of Justice, dated January 22, 2013.

Counsel:

Peter M. Callahan, for the appellant.

Orlando da Silva Santos, for the respondent.

ENDORSEMENT

The judgment of the Court was delivered by

1 THE COURT (orally):-- The appellant appeals the January 22, 2013 order of the motion judge dismissing his motion for a finding that the respondent was in contempt of court because she had failed to comply with the August 3, 2012 order of Mossip J. requiring her to provide specified disclosure in respect of her income loss claim arising from the motor vehicle accident that occurred in 2004.

2 The motion judge reviewed the materials that had been provided and found that the respondent had complied with the order of Mossip J. and provided all relevant disclosure.

3 The appellant relies on *Pimiskern v. Brophey*, [2013] O.J. No. 505 to argue that an order dismissing a motion for contempt is a final order.

4 The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, the motion judge's order is interlocutory and not binding on the trial judge, and that an appeal accordingly does not lie to this court.

5 We agree with the respondent and reject the conclusion reached in *Pimiskern*.

6 This appeal is accordingly dismissed for lack of jurisdiction. Costs are fixed in the amount of $3,500 all inclusive.

A. HOY A.C.J.O.
K.N. FELDMAN J.A.
J.M. SIMMONS J.A.

cp/e/qljel/qlrdp/qlmll/qlpmg/qlhcs

This is Exhibit "O" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

Court File No. C60799

ONTARIO
COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

FACTUM OF THE PLAINTIFF/APPELLANT, THE CATALYST CAPITAL GROUP INC.

September 21, 2015

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Lawyers for the Respondent, West Face Capital Inc.

PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. This appeal raises important issues concerning the enforcement of preservation orders after the plaintiff had made out a strong *prima facie* case for possession and misuse of its confidential information by the defendants. The question on this appeal is whether a party can disobey a preservation order and destroy evidence without consequence.

2. In the motion below, Justice Glustein (the "Motion Judge") dismissed a contempt motion on the basis that the plaintiff ("Catalyst") had not proven beyond a reasonable doubt that the defendant Brandon Moyse ("Moyse") had breached a preservation order.

3. Catalyst also sought an order providing for the imaging of electronic devices belonging to the defendant West Face Capital Inc. ("West Face") for review by an Independent Supervising Solicitor ("ISS"). This relief was required to ensure Moyse's conduct did not nullify a Court order that authorized an ISS to review a forensic image of Moyse's computer.

4. Catalyst appeals the dismissal of the contempt motion and of the imaging motion. The latter appeal is joined to Catalyst's appeal of the contempt decision pursuant to section 6(2) of the *Courts of Justice Act*.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

5. On July 16, 2014, Moyse consented to an order that required him, among other things, to preserve documents relevant to his activities since March 27, 2014 and to turn over his personal computer to a forensic IT expert for the purpose of creating an "image" of the computer for potential review by an ISS (the "Interim Order").

6. In breach of the Interim Order, Moyse deleted his web browsing history and ran military-grade deletion software the night before he turned his computer over for imaging. Despite overwhelming evidence that Moyse breached the Interim Order, the Motion Judge concluded that Catalyst did not prove beyond a reasonable doubt that Moyse acted in contempt of court.

7. In November 2014, in a prior motion in this action, Justice Lederer authorized an ISS to review the forensic image of Moyse's computer. At the time, only Moyse knew that he had tampered with the imaging process by deleting potentially relevant information prior to the creation of the image of his computer.

8. Moyse's secret conduct defeated the purpose for the ISS review. In order to remedy this interference with the Court's order, Catalyst sought an order to create images of West Face's devices for review by an ISS (the "Imaging Motion").

9. The Motion Judge dismissed the Imaging Motion. In so doing, Catalyst submits the Motion Judge failed to give proper consideration to the fact that the relief sought was necessary to prevent a prior order of the Court from being rendered meaningless.

10. The issues on appeal are:

(a) whether the Motion Judge erred by finding that the Interim Order was ambiguous if it was intended to encompass Moyse's personal activities;

(b) whether the Motion Judge erred by finding that Moyse's admitted conduct of deleting his web browsing history did not breach the Interim Order;

(c) whether the Motion Judge erred by failing to draw the only reasonable inference of fact available to be drawn from the known facts, namely, that Moyse used the Scrubber to delete documents from his computer;

(d) whether the Motion Judge erred by finding that even if Moyse had breached the Interim Order, he could decline to hold Moyse in contempt of court; and

(e) whether the Motion Judge erred by dismissing the Imaging Motion without giving due consideration of the effect of his decision on Justice Lederer's prior order.

PART III - SUMMARY OF FACTS

A. Background to the Motion Below: The Interlocutory Motion

11. The reasons for decision of Justice Lederer in the motion decided on November 7, 2014, (the "Interlocutory Motion") accurately record the facts relating to that motion, which were also relevant to the motion below. What follows is a summary of Justice Lederer's relevant findings of fact:

(a) Beginning in March 2014, Moyse and Thomas Dea ("Dea"), a partner at West Face, communicated in writing and in person to discuss the possible employment by Moyse at West Face.

(b) By email dated March 27, 2014, Moyse sent Dea four confidential investment memos belonging to Catalyst. Shortly after doing so, Moyse deleted the email message.

(c) West Face did not inform Catalyst that Moyse had sent it Catalyst's confidential information; instead, even though he understood that the memos contained confidential information, Dea circulated the memos to his partners and to Yu-Jia Zhu ("Zhu"), a vice-president at West Face.

(d) By email dated May 24, 2014, while on vacation, Moyse gave notice of his resignation to Catalyst, effective June 22, 2014. Moyse's email made no reference to his having accepted employment with West Face.

(e) Shortly after Catalyst learned that Moyse had resigned to go work for West Face, Catalyst's outside counsel wrote to West Face and to Moyse's counsel to express concerns about Moyse's employment at West Face, and in particular that Moyse was in breach of his non-competition covenant and/or would communicate Catalyst's confidential information to West Face.

(f) In response, West Face's and Moyse's outside counsel took the position that the restrictive covenants were unenforceable and offered assurances that Moyse would comply with his confidentiality obligations to Catalyst. Neither counsel alerted Catalyst's counsel to the fact that Moyse had already communicated confidential information to West Face.

(g) Catalyst's counsel's reply stated that the defendants' replies and assurances did not go far enough in light of the fact that Catalyst and West Face are competitors and Moyse possessed Catalyst's highly sensitive and proprietary information.

(h) Moyse and West Face insisted on proceeding with Moyse's employment at West Face commencing June 23, 2014. Days later, Catalyst commenced this action and brought its motion for urgent interim and interlocutory relief.

(i) Catalyst retained an IT expert to analyze an image of the computer Moyse used while employed at Catalyst. That analysis revealed that:

(i) on March 28, 2014, over an 11-minute period, Moyse accessed a series of files from an "Investors Letters" directory;

(ii) on April 25, 2014, over a 70-minute period, Moyse accessed dozens of files related to the "Stelco" matter out of "personal curiosity";

(iii) on May 13, 2014, over a 20-minute period, Moyse accessed 29 files relating to the Wind Mobile situation;

(j) In his initial affidavit sworn in response to Catalyst's motion, Moyse described Catalyst's concerns about his misuse of confidential information as speculation and innuendo when he knew or should have known it was wrong to do so.

(k) After litigation commenced, West Face disclosed the existence of the March 27 email from Moyse. In cross-examinations, Moyse professed not to understand what makes a memo "confidential".

(l) The Interim Order required Moyse to deliver a sworn affidavit of documents disclosing documents in his power, possession or control relating to Catalyst, prior to the return of the Interlocutory Motion. Moyse's affidavit disclosed over 800 documents, at least 245 of which Catalyst identified as confidential.

(m) Moyse admitted at his cross-examination that he could not say with absolute certainty that his search of his Devices had been exhaustive, and he admitted that between March and May 2014, he deleted documents.[1]

12. What follows is a summary of additional facts relevant to the motion below.

B. Moyse Breached the Interim Order by "Scrubbing" his Computer

1) The ISS Reveals Moyse Purchased and Ran Deletion Software

13. On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to the Interim Order, pursuant to which:

(a) Moyse agreed not to work at West Face pending the determination of Catalyst's motion for interlocutory relief;

(b) The defendants agreed to preserve their records, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014 and/or relate to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst;

[1] Judgment of Justice Lederer dated November 10, 2014; Appeal Book & Compendium ("AB"), Tab 6.

(c) Moyse consented to the creation of a forensic image of his personal computer, iPad and smartphone, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(d) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[2]

14. The Interim Order was negotiated by the parties' counsel during a recess at the hearing of a contested motion before Justice Firestone. Moyse was present when his counsel negotiated the terms of the Interim Order.[3]

15. On November 10, 2014, Justice Lederer granted Catalyst's motion for an Order authorizing and ISS to analyze the Images created pursuant to the Interim Order.[4]

16. The parties retained Stockwoods LLP to act as the ISS and negotiated a document review protocol (the "Protocol") pursuant to which the ISS was to review the Images.[5]

17. The ISS retained an independent forensic IT expert to assist with its analysis and review of the Images. In its report, the ISS revealed that on the morning of July 16, 2014, Moyse downloaded and installed military-grade deletion software (known colloquially as "scrubbing software" and referred to herein as the "Scrubber") on his personal computer. On July 20, 2014, the night before the Images were created, Moyse ran the Scrubber.

18. The ISS's report stated:

> 44. Third, we located two email messages sent to Moyse's Hotmail account dated Saturday, July 12 and Wednesday, July 16, 2014, which require comment. These emails constitute payment receipts and license keys for a software product. The software product purchased on July 12, 2014 was "RegClean Pro" and it is indicated to include "Special Disk Cleaning Tools". The product purchased on July 16, 2014 was "Advanced System Optimizer 3 [Special Edition]" which is said to include "Free PhotoStudio" and "Special

[2] Order of Justice Firestone dated July 16, 2014; AB, Tab 4, p. 32.
[3] Moyse Cross-Examination, pp. 60-61, qq. 304-313; AB, Tab 11, pp. 202-203.
[4] Order of Justice Lederer, dated November 10, 2014; AB, Tab 5, p. 36.
[5] The Protocol is attached as Exhibit "C" to the affidavit of Martin Musters, sworn February 15, 2015 ("Musters Feb 2015 Affidavit"); AB, Tab 17, pp. 377-81.

Disk Cleaning Tools". According to the promotional website for these products (http://www.systweak.com/aso/), Advanced System Optimizer 3 is software which includes a feature named "Secure Delete", that is said to permit a user to delete, and over-write to military-grade security specifications, data so that it cannot be recovered through forensic analysis.

45. Given the nature and timing of the software installed, I requested that DEI [the ISS's forensic IT expert] take steps to determine whether the product was installed and whether it could be determined if the product had been used to over-write data or files prior to the computer being imaged. DEI advised me that, based on the creation date of the associated folders, RegClean and Advanced System Optimizer 3 were installed on July 16, 2014 at 8:50 and 8:53 a.m. respectively. **The executable files for the Secure Delete feature are contained within the Advanced System Optimizer 3 folder. On July 20, 2014 at 8:09 p.m., a folder entitled "Secure Delete" was created, which suggests that a user of Moyse's computer took steps to make the use of that function available at that point in time.**

46. DEI reported to me that the Secure Delete feature of the software provides several options for over-writing (i.e., "securely deleting") files. By default, the setting is "Fast secure delete" which causes a single pass overwriting process in which data is over-written with random characters. The second option is to use three passes using random characters and the third option is the so-called "military-grade" option which uses seven passes overwriting with random characters.

47. In terms of what may be deleted using this feature, DEI reports that the user may select from any of the following options within the software:

(a) To wipe specific, individual files or folders;

(b) To wipe an entire drive;

(c) To wipe only "free space", i.e. currently unused or unallocated space which may contain fragmentary data from deleted files which have not yet been over-written either through ordinary usage of the computer or through deliberate over-writing.4

[Footnote 4 text: By way of a more detailed explanation, this technique could be used to destroy evidence that might otherwise be recoverable of "deleted files", i.e., files which the user has instructed the operating system to delete. The ordinary "delete" function of common operating systems does not, when employed, actually result in the destruction of the underlying data, but generally remain present in the "unallocated space" of the hard drive. Unallocated space is space that the operating system treats as available to use for the storage/writing of new data or files. Thus, after a period of ordinary use, unallocated space will gradually be populated or filled in with new data, over-writing the old. Until the unallocated space where a "deleted file" is resident is over-written with new data, forensic recovery software can recover the file. The purpose of over-writing software such as Secure Delete, when applied to wipe all "free space" (aka "unallocated space") is to force the over-writing, with random data, of the latent content. Multiple, repetitive over-writing then simply increases the likelihood that forensic recovery tools cannot be used to recover the "deleted" content.]

48. I asked DEI to advise me whether there was evidence that the product had been used in any of these ways. DEI reported that the content of the Moyse computer was not consistent with any use of the Secure Delete function to delete all free space and thereby prevent forensic analysis of the drive as a whole, on the assumption that the product indeed writes with random characters as is claimed in the product literature. Further, it is clear that the

> function was not used to wipe the entire drive, since there were substantial volumes of data produced to us. **DEI cannot determine whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly cannot express any conclusion on that possibility other than to note that it exists.**[6]

19. Upon learning of Moyse's conduct, Catalyst brought a motion to hold Moyse in contempt of court (the "Contempt Motion").

2) Moyse Admits to Deleting his Web Browsing History, Claims He did not Run the Scrubber

20. In response to the ISS report, Moyse admitted (as he had to in the face of the conclusive evidence) that he downloaded the Scrubber, but he claimed that he did not use the Scrubber to delete "relevant" data. Moyse claimed that he only deleted data that he unilaterally determined, without the assistance of counsel, was "irrelevant" and therefore outside the scope of the Interim Order. The "irrelevant" information Moyse deleted included his Internet browsing history.[7]

21. Moyse explained why he deleted his Internet browsing history by putting his state of mind at issue:

> I was also concerned that the irrelevant information on the images [a reference to Moyse's alleged accessing of pornographic websites] would somehow become part of the public record through this litigation. **At this point it was not clear to me what would happen to the images, which would include the irrelevant personal information.**[8]

22. At his cross-examination, Moyse claimed he tried to get information from his lawyers about the ISS process, but they were not sure how the process would unfold. Despite putting his state of mind at issue and admitting to having communicated with his lawyers about this issue, Moyse refused to produce his communications with his counsel.[9]

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[6] Report of the ISS, pp. 41-43, ¶44-48; AB, Tab 16, pp. 352-54.
[7] Affidavit of Brandon Moyse, affirmed April 2, 2015 ("Moyse Affidavit"), ¶38-41; AB, Tab 20, pp. 418-419.
[8] Moyse Affidavit, ¶40; AB, Tab 20, pp. 418-19 [emphasis added].
[9] Cross-Examination of Brandon Moyse held May 11, 2015 ("Moyse 2015 Cross"), p. 70-71, qq. 363-67; AB, Tab 11, pp. 212-13; Moyse Answers to Undertakings, q. 368; AB, Tab 12, p. 239.

23. Moyse claimed he did not run the Scrubber, but he could not explain why a "Secure Delete" folder was created on his computer the night before it was imaged.[10] Moyse claimed that he purchased the Advanced System Optimizer software, which includes the Scrubber, the morning of the Interim Motion because his computer was running slowly and he wanted to "optimize" it.[11]

24. By deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014. The web browsing history included, among other things, his use of personal web-based email services such as "Gmail", evidence of Moyse's use of web-based storage services at issue in this action, and evidence of Moyse's web-searching activity, including, for example, the searches Moyse ran in July 2014 when he was looking for deletion software.[12]

2) Expert Evidence Confirms Moyse Most Likely Ran the Scrubber on July 20, 2014

25. Martin Musters, Catalyst's forensic IT expert ("Musters"), ran independent tests on the operation of the Scrubber. Through his analysis, Musters determined that:

(a) Merely downloading and installing the Scrubber does not lead to the creation of a "Secure Delete" folder on one's computer;

(b) A "Secure Delete" folder is created when a user launches the Scrubber software; and

(c) Although the Scrubber includes a summary log recording a user's deletion activity, it is possible to delete the log to remove evidence that the Scrubber was used to delete documents.[13]

26. The steps required to erase evidence of one's use of the Scrubber are not technically complicated. All the user has to do is use the computer's registry editor software to erase the "registry log" on the computer associated with the Secure Delete software, at which point the summary resets to zero. Information about the registry editor is readily available on the Internet.

[10] Moyse Affidavit, ¶47; AB, Tab 20, pp. 420-21.
[11] Moyse 2015 Cross, pp. 66-67, qq. 338-345; AB, Tab 11, pp. 208-209.
[12] Cross-Examination of Kevin Lo, pp. 23-26; qq. 95-105; AB, Tab 13, pp. 243-46.
[13] Musters Feb 2015 Affidavit, ¶12; AB, Tab 17, p. 362. Supplementary Affidavit of Martin Musters, sworn April 30, 2015, ¶10-19; AB, Tab 18, pp. 395-401.

3) Moyse's Expert's Inadequate Excuses for Moyse's Conduct

27. Moyse retained Kevin Lo, an IT expert ("Lo"), to respond to Musters' evidence. Lo reviewed a copy of the Image that was provided to him by Moyse's counsel.[14] In his first affidavit, Lo noted, correctly, that the "Secure Delete" folder is created when a user launches the Scrubber, whether or not the user actually uses it to delete data. Lo also noted that he could not find a registry log for Secure Delete on Moyse's computer. Lo relied on the absence of a registry log for Secure Delete to conclude that the Scrubber was not used to delete data from Moyse's computer.[15]

28. In response to this opinion, Musters conducted additional investigations and determined that it is a simple matter to use a computer's registry editor to delete the registry log for the Scrubber. This ability to delete the log for the Scrubber undermined Lo's conclusion, as it demonstrated that the absence of a log did not mean that Moyse did not use the Scrubber.

29. In response to this evidence, Lo affirmed a second affidavit in which he stated that through a review of the metadata for the registry editor on Moyse's computer, Lo could conclude that Moyse never ran the registry editor on his computer. Lo's conclusion was based on the fact that the metadata for the registry editor recorded a "last accessed date" of July 13, 2009, which is the factory default date.[16]

30. Lo's evidence on this point was misleading and is based on facts that he knew were incorrect.

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[14] Moyse has refused to provide a copy of the Image to Catalyst, so it is impossible for Catalyst to verify the accuracy of Lo's information by replicating his analyses.
[15] Affidavit of Kevin Lo, affirmed April 2, 2015, ¶11-20; AB, Tab 21, pp. 432-34.
[16] Supplementary Affidavit of Kevin Lo, affirmed May 12, 2015, ¶6-9; AB, Tab 22, p. 452.

31. As every IT expert knows or ought to know, by default, recent releases of Windows do not update the metadata for the registry editor program to record when the program is run.[17] Thus, the fact that the "last accessed date" for the registry editor on Moyse's computer was recorded as July 13, 2009, was not probative as to whether or not Moyse ran the registry editor.

32. At his cross-examination, Lo's explanation for his mistake was that while he knew that the metadata is not updated, this fact did not occur to him when he swore his affidavit.[18] Despite swearing two affidavits that attempted to support Moyse's position, Lo was unable to point to any evidence that supported his conclusion that Moyse did not use the Scrubber to delete documents.

33. The very nature of this type of software makes it impossible for anyone to know for certain whether it was used, because the data it deletes is deleted forever without a trace, and it is a simple matter of deleting the registry log for the Scrubber to delete the record of its activity.

C. Moyse's Credibility Problems

34. Moyse has engaged in a long-standing course of conduct that demonstrates he is willing to say whatever he feels is necessary to get what he wants. For example:

(a) He admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[19]

(b) He admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have led a due diligence process that he merely participated in with more senior employees at Catalyst;[20]

(c) Moyse justified the "embellishments" on his deal sheet because he wanted a job, and it was not a "sworn" document;

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[17] Second Supplementary Affidavit of Martin Musters, sworn May 13, 2015, ¶5; AB, Tab 19, p. 404.
[18] Cross-Examination of Kevin Lo, held May 14, 2015 ("Lo Cross"), pp. 46-49, qq. 210-223; AB, Tab 13, pp. 247-50.
[19] Cross-Examination of Brandon Moyse, held July 31, 2014 ("Moyse 2014 Cross"), p. 15, qq. 57-62; AB, Tab 10, p. 110.
[20] Moyse 2014 Cross, pp. 17-20, qq. 69-91; AB, Tab 10, p. 111-14.

(d) Moyse now claims that he did not understand all of the terms of his employment agreement with Catalyst, even though he indicated by signing the contract that he had reviewed, understood and accepted the terms of the offer;[21]

(e) Moyse admitted he made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[22]

(f) Moyse admitted that by disclosing a confidential memo to West Face, he knowingly caused Catalyst to breach a non-disclosure agreement;[23]

(g) Moyse admitted he wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device;[24]

(h) Moyse claimed he misrepresented his opinion of his employment at Catalyst in an email to Dea and another partner at West Face;[25]

(i) Moyse admitted that contrary to his affidavit evidence regarding his "limited" role on the Wind Mobile situation, he was in fact part of the Catalyst deal team for the situation and received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement;[26] and

(j) In his first cross-examination, although asked in general terms what matters he worked on at West Face, Moyse omitted reference, even in general terms, to his work on the Arcan investment, which was only disclosed by West Face in response to the motion below.[27]

35. Catalyst's position is that, based on Moyse's prior conduct of misleading the Court, his undisputed credibility problems, his expert's reliance on incorrect evidence, and the undisputed fact that Moyse deleted his web browsing history, the only reasonable inference that the Motion Judge could have drawn from the undisputed evidence in the record is that Moyse used the Scrubber to delete relevant data from his computer.

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[21] Moyse 2014 Cross, pp. 27-28, qq. 126-130; AB, Tab 10, pp. 115-16.
[22] Moyse 2014 Cross, pp. 85-86, qq. 394-396; AB, Tab 10, pp. 144-45.
[23] Moyse 2014 Cross, pp. 96-98, qq. 446-452; AB, Tab 10, pp. 153-55.
[24] Moyse 2014 Cross, pp. 103-106, qq. 473-486; AB, Tab 10, pp. 160-63.
[25] Moyse 2014 Cross, pp. 126-27, qq. 596-602 and pp. 153-54, q. 729; AB, Tab 10, pp. 169-70 and 186-87.
[26] Moyse 2014 Cross, pp. 174-75, qq. 803-809; AB, Tab 10, pp. 194-95.
[27] Moyse 2014 Cross, pp. 171-72, qq. 794-96; AB, Tab 10, pp. 191-92.

D. Moyse worked on a Catalyst-Related Matter During his First Week at West Face

36. In the Interlocutory Motion, Catalyst tried to find out what Moyse worked on while he was employed at West Face, but the defendants refused to disclose this information.[28] In its factum for the Interlocutory Motion, West Face stated that it was not involved in any of the transactions that were the subject of the Catalyst investment memos and had no use for the information contained therein.[29]

37. It turns out that during his first week at West Face, Moyse worked on an analysis of Arcan Resources Ltd. ("Arcan"), one of the companies he analyzed in the Catalyst confidential memos he disclosed to West Face.[30] West Face and Moyse actively hid this relevant evidence from Catalyst and Justice Lederer in the previous motion.

38. West Face has tried to minimize the significance of it conduct, but the fact remains that relevant evidence was only disclosed after Catalyst brought the Imaging Motion, which, if granted, would have demonstrated that West Face had attempted to withhold relevant evidence from the Court at the return of the motion before Justice Lederer.

E. The Unlikely Series of "Coincidences" at West Face

39. Just as Moyse lacks credibility, so does West Face. According to West Face, the following facts are nothing more than an unfortunate series of coincidences, which only came to light as a result of Catalyst's dogged pursuit of the truth in both the prior motions and the current motion:

(a) Moyse sent West Face Catalyst's confidential information as part of his effort to be hired by West Face;

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[28] Moyse Answers to Undertakings, Q. 173; AB, Tab 12, p. 239.
[29] West Face's Factum, dated August 5, 2014, p. 12, ¶39; Exhibit "1" to the Cross-Examination of Anthony Griffin held May 8, 2015 ("Griffin Cross"); AB, Tab 14, p. 264.
[30] Affidavit of Anthony Griffin, sworn March 7, 2015 ("Griffin Affidavit"), ¶52-57; AB, Tab 23, pp. 478-80.

(b) Catalyst's confidential information was circulated to the partners and vice-president;

(c) West Face hired an analyst from the one investment fund manager it was in competition with to purchase Wind Mobile; and

(d) On his second day at West Face, Moyse performed analysis of Arcan, one of the companies that he had worked on at Catalyst for which he sent a confidential memo to West Face in March 2014.

40. The problem with all of these "coincidences" is that they only turn up when Catalyst pursues the truth through its motions.

F. The Motion Judge's Decision

41. The Motion Judge dismissed the Contempt Motion. In particular, he held that:

(a) If the words "activities since March 27, 2014" were intended to encompass non-litigation-related activities, then the Interim Order was ambiguous;

(b) Any activities referred to in the Interim Order would have to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation;

(c) Catalyst did not prove beyond a reasonable doubt that Moyse deleted files relevant to his conduct at Catalyst and/or with respect to issues raised in the litigation;

(d) Even if Catalyst had proved beyond a reasonable doubt that Moyse had deleted relevant files from his personal computer, the Motion Judge would have exercised his discretion to decline to make a finding of contempt as such conduct occurred as a result to make "good faith" efforts to comply with the Interim Order while deleting embarrassing personal files that were not relevant to the litigation; and

(e) Catalyst did not prove beyond a reasonable doubt that Moyse ran the Scrubber.[31]

42. The Motion Judge also dismissed the Imaging Motion. In particular, he held that there was no evidence that West Face failed to comply with its production obligations or that it is evading its discovery obligations.[32]

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[31] Endorsement of Justice Glustein dated July 7, 2015; AB, Tab 3.
[32] *Ibid.*

43. In the motion below, Catalyst also sought injunctive relief. That relief was not granted and Catalyst does not appeal from that decision. It is only appealing the dismissal of the Contempt Motion and of the Imaging Motion.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. The Errors of the Motion Judge

44. The Motion Judge's decision was the product of five errors:

(a) he erred in finding that the words "activities since March 27, 2014" were ambiguous if they were intended to encompass non-litigation-related activities;

(b) he erred in finding that Moyse's admitted conduct of deleting his web browsing history did not breach the Interim Order;

(c) he erred by failing to draw the only reasonable inference to be drawn from Moyse's conduct before the forensic image was made, namely, that Moyse had run the Scrubber to delete documents from his computer;

(d) he erred by concluding that even if Moyse had breached the Interim Order, he could decline to hold Moyse in contempt of court; and

(e) he erred in dismissing the Imaging Motion without considering the need to uphold the integrity of the equitable relief already ordered by Justice Lederer.

B. Standard of Review

45. The question of whether or not a party's conduct amounts to contempt is a question of law that is reviewable on a correctness standard. No deference is owed.[33]

46. Findings of fact, including inferences of fact, should not be reversed unless it can be established that the Motion Judge made a palpable and overriding error. Where the inference-drawing exercise is palpably in error, an appellate court can interfere with the factual conclusion.[34] For example, it is a reviewable error if the Motion Judge failed to draw the only reasonable inference of fact based on the evidence before him.[35]

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[33] *Sabourin and Sun Group of Companies* v. *Laiken*, 2013 ONCA 530 at ¶41 ("*Sabourin*").
[34] *Housen v. Nikolaisen*, 2002 SCC 33 at ¶10 and 23.
[35] *Kamin v. Kawartha Dairy Ltd.*, 2006 CanLII 3259 at ¶8 (ON CA).

47. Discretionary orders are entitled to deference on appeal unless the Motion Judge exercised his discretion unreasonably or acted on a wrong principle.[36]

C. Contempt of Court does not Require Subjective Intent

48. Civil contempt has three elements which must be established beyond a reasonable doubt:

(a) the order alleged to have been breached must state clearly and unequivocally what should and should not be done;

(b) the party alleged to have breached the order must have had actual knowledge of it; and

(c) the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.[37]

49. An order is not unclear just because it is unduly restrictive.[38] Once having knowledge of the order, a person must obey the order in both letter and spirit with every diligence. They cannot escape a finding of contempt by "finessing" the interpretation of an order.[39]

50. In order to constitute contempt, it is not necessary to prove that the alleged contemnor intended to disobey or flout the order of the Court. All that is required is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice.[40]

51. Even if a party acts on legal advice, the party can be found in contempt if the conduct violates terms of a court order.[41]

D. The Motion Judge Erred in his Interpretation of the Interim Order

52. Paragraph 4 of the Interim Order provided as follows:

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[36] *Burtch v. Barnes Estate* (2006), 80 OR (3d) 365 at ¶22 (CA).
[37] *Carey v. Laiken*, 2015 SCC 17 at ¶32-35 ["*Carey*"].
[38] *Sabourin, supra* at ¶48.
[39] *Ceridian Canada Ltd. v. Azeezodeen*, 2014 ONSC 3801 at ¶32.
[40] *Carey* at ¶38.
[41] *Ibid.* at ¶60-61.

> This Court further orders that Moyse and West Face, and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, **and/or relate to their activities since March 27, 2014,** and/or relate to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst.[42]

53. The Motion Judge held that the phrase "relate to their activities since March 27, 2014" would be ambiguous if it was intended to encompass non-litigation related activities, as "reasonable people could have a different understanding of whether non-work-related activities were to be included". The Motion Judge concluded that the phrase was therefore not intended to include non-work-related activities, and therefore only applied to Moyse's Internet browsing history if Catalyst could prove beyond a reasonable doubt that his browsing history included records of his work-related activities.[43]

54. This interpretation is flawed, as it ignores the plain wording of paragraph 4 in the Interim Order, which, in addition to Moyse's "activities", referred to documents relating to "Catalyst" as a separate category of documents that were ordered preserved. The Motion Judge's interpretation of the Interim Order ignored the explicit inclusion of "and/or" to separate "Catalyst" and "activities", which can only be interpreted to mean that the Interim Order was intended to apply not only to activities related to Catalyst, but also to **any** activities engaged in by Moyse since March 27, 2014.

55. The phrase is not ambiguous. "Activity" means a specific deed, action, or function. The Interim Order was intended to ensure that any evidence of Moyse's deeds, actions or functions since March 27, 2014, if it resided on his personal computer, would be preserved to ensure that evidence of those deeds, actions or functions could be reviewed by the ISS, an independent third party, to determine if Moyse retained Catalyst's confidential information and/or communicated Catalyst's confidential information to any third parties.

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[42] Order of Justice Firestone dated July 16, 2014; AB, Tab 4, p. 32 [emphasis added].
[43] Endorsement of Justice Glustein dated July 7, 2015, ¶71-73; AB, Tab 3, p. 26.

56. The Motion Judge's error lies in the fact that the terms of the Interim Order were broad in nature, in that they required Moyse to preserve evidence of **all** of his activities since March 27, 2014, whether they related to Catalyst or not.

57. The purpose of this broad restriction is evident from the problem Catalyst now faces in its pursuit of the action – Moyse has admittedly deleted his web browsing history from his computer, which makes it impossible to verify whether his web browsing activities were relevant to this action. The only source of evidence as to what was deleted by Moyse is through Moyse himself, which is exactly the situation the parties sought to avoid through an Interim Order that required Moyse to preserve documents relating to **all** of his activities since March 27, 2014, for review by an independent third party.

58. It is no defence to a motion for contempt to argue that the order is improper or should not have been granted. Moyse, through his counsel, consented to the terms of Interim Order on July 16, 2014. Four days later, he deleted his web browsing history. If he was concerned that the phrase "activities since March 27, 2014" was so broad as to include embarrassing personal activities, he should have openly addressed that concern when the parties negotiated the terms of the Interim Order, or by subsequent motion to the Court.

59. It is no defence for Moyse to now argue that the broad terms of the Interim Order were ambiguous. The Motion Judge erred by accepting this argument. The terms of the Interim Order are clear, unambiguous, and required Moyse's full compliance.

F. The Motion Judge Erred In his Conclusion that Moyse's Web Browsing History was not Subject to the Interim Order

60. By intentionally destroying the record of his web browsing activities since March 27, 2014, Moyse put the Court in the position that the Interim Order was intended to avoid – the Motion Judge erroneously concluded that he had to determine whether Catalyst could prove beyond a reasonable doubt that the web browsing history contained records relevant to the action. That was the wrong question, which led to the wrong result on the motion.

61. A computer user's web browsing history records the user's Google searching activities, access to Internet storage services such as Dropbox, and access to Internet email services such as Gmail.[44] The deletion of the web browsing history destroys the record of that activity.[45]

62. Whether or not Moyse admitted to having used Google search, Dropbox or Gmail on his computer, it is beyond dispute that his web browsing history would have recorded whether he accessed those services from his personal computer or not, and on what dates and times. The point of preserving documents and evidence such as Moyse's web browsing history was to provide the ISS with a record of Moyse's web browsing activities as part of his investigation of Moyse's digital records.

63. It is no defence to the contempt motion for Moyse to argue that Catalyst had not proven beyond a reasonable doubt that the record he deleted contained relevant information – the plain wording of the Interim Order applied to any document that evidences his activities since March 27, 2014, and clearly applied to the web browsing history on his personal computer, which Moyse knew was going to be imaged the day after he deleted that history.

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[44] Lo Cross, pp. 23-25, qq. 95-105; AB, Tab 13, pp. 243-45.
[45] Lo Cross, pp. 23-26, qq. 97, 104 and 110; AB, Tab 13, pp. 243-46.

64. By deleting his web browsing history, Moyse put the parties in a position where he was the only person with evidence as to what that history would have revealed. His self-serving evidence on this point should not have been accepted, but in any event, the fact that web browsing history is capable of recording relevant activities is the very reason why it was subject to the Interim Order and should not have been deleted. By doing so, Moyse breached the order and on that basis alone should have been held to acted in contempt of the Interim Order.

G. The Motion Judge Erred by Failing Infer that Moyse had Used the Scrubber

65. It is a reversible error to draw inferences that do not flow logically and reasonably from established facts, because doing so draws the Motion Judge into the impermissible realms of conjecture and speculation.[46]

66. The Motion Judge's conclusion that the evidence does not support a finding beyond a reasonable doubt that Moyse ran the Scrubber was not based on established fact. It was a conclusion based on the failure to draw the only reasonable and logical inference available to be drawn from the established facts.

67. The facts established by the evidence proved, beyond a reasonable doubt, that Moyse:

(a) purchased the Scrubber the morning of the motion for interim relief;

(b) had engaged in Internet searches to research how to permanently delete information from his computer;

(c) deleted his web browsing history the night before his computer was to be imaged;

(d) deleted other damning evidence (his email to Tom Dea sent in March 2014) from his computer when he realized he should not have sent that email; and

(e) launched the Scrubber software the night before his computer was to be imaged.

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[46] *R. v. MacIsaac*, 2015 ONCA 587 at ¶46.

68. From this established evidence, the **only** reasonable inference that the Motion Judge could have drawn is that Moyse used the Scrubber at the same time as he deleted his web browsing history. Instead, the Motion Judge concluded that Moyse launched the Scrubber software but did not use it, which is both unreasonable and illogical.

69. Had the Motion Judge made proper and allowable inferences of fact, instead of illogical and unreasonable inferences, he would have made the only determination available to him from the known facts: that Catalyst had proven beyond a reasonable doubt that Moyse had run the Scrubber to delete documents from his computer, contrary to the terms of the Interim Order and in contempt of court. This is especially so given that Moyse had no credible explanation for the fact that the Scrubber was opened the night before he was required to give his computer to his lawyer for the purpose of creating a forensic image.

H. The Motion Judge Erred in Holding that Moyse was Entitled to an Immediate Discharge

70. The Motion Judge held that even if he had found that Moyse had breached the Interim Order by deleting his web browsing history, he would have exercised his discretion to decline to make a finding of contempt "as such conduct would have occurred as a result of Moyse's 'good faith' efforts to comply with the [Interim Order] while deleting embarrassing personal files which were not relevant to the litigation".[47]

71. In *Carey,* the Supreme Court acknowledged that a judge hearing a contempt motion retains some discretion to decline to make a finding of contempt. However, the examples cited in *Carey* illustrate the scope of this discretion, namely, to avoid an injustice in the circumstances of the case,

[47] Endorsement of Justice Glustein dated July 7, 2014 at ¶79; AB, Tab 3, p. 27.

such as where the alleged contemnor took steps to attempt to comply with the order but was unable to do so.[48]

72. An injustice can occur when the alleged contemnor acts in good faith to take reasonable steps to comply with the order. But "reasonable steps" refer to steps taken in an attempt to comply with a mandatory order or where the defendant did everything possible to comply with the terms of the order.[49] By that measure, Moyse falls short of the standard.

73. The purpose of a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. The rule of law depends on the ability of the courts to enforce their process and maintain their dignity and respect.[50]

74. In the motion below, the Motion Judge erred in holding that he had the discretion in these circumstances to decline to make a finding of contempt. Paragraph 4 of the Interim Order, while positive in its syntax, was prohibitive in nature: Moyse and West Face were ordered to preserve and maintain certain records.

75. One complies with such an order **by not deleting records.** Moyse deleted records that fell within the scope of the Interim Order. When he deleted his web browsing history without **at minimum** consulting first with his counsel or bringing a motion to the Court, Moyse was not exercising diligence or taking reasonable steps to comply with the order; rather, he was taking steps that undermined the spirit and intent of the order.

76. Moyse claimed that his conduct was motivated by his concern regarding the scope of a review of the forensic image of his computer by an ISS. However, after putting his state of mind at

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[48] *Carey, supra* at ¶37.
[49] *Ibid.* See also *TG Industries Ltd. v. Williams*, 2001 NSCA 105 at ¶31.
[50] *Carey, supra*, at ¶30.

issue, he refused to disclose his communications with his counsel that he allegedly engaged in to address this concern.

77. These circumstances do not fall within the limited circumstances where an alleged contemnor can be said to have exercised due diligence in an attempt to comply with a court order. Moyse did no such thing and should not escape liability for the consequences of his actions.

I. The Motion Judge Failed to Consider the Context of the Imaging Motion

78. In the motion below, Catalyst sought to have an ISS review forensic images of West Face's corporate servers and the electronic devices of five West Face representatives for the purpose of preparing a report which would detail whether the Images contain or contained Catalyst's confidential and proprietary information and if so, whether any emails exist in relation to this confidential and proprietary information.

79. The Motion Judge applied Rule 30.06 and determined that Catalyst had not established that West Face had failed to comply with its production obligations or intentionally deleted materials to thwart the discovery process.[51]

80. The Imaging Motion was equitable in nature, and is therefore subject to the discretion of the Court. But that discretion is not wholly unfettered: the Motion Judge was still required to consider all of the relevant principles, including the need for the court to uphold the integrity of its processes and prior court orders.

81. In the unique circumstances of the motion below, where the Court had ordered an ISS review of Moyse's computer, the Imaging Motion should not have been treated as a motion *de*

[51] Endorsement of Justice Glustein dated July 7, 2015 at ¶57; AB, Tab 3, p. 24.

novo; rather, it should have been considered in the context of the relief already ordered by Justice Lederer in the prior motion.

82. While the relief sought in the Imaging Motion was discretionary in nature, the Motion Judge erred by failing to consider the principle of the importance of the relief sought to the need to maintain the dignity and respect for the Court's process. The Imaging Order is required in order to redress the damage to the Court's process caused by Moyse's conduct, while he was an employee of West Face.

83. At the Interlocutory Motion, Moyse's counsel argued that it should be left to Moyse to review and determine what should be produced. Justice Lederer rejected this argument on the basis that this was "another assurance where those made in the past were not sustained."[52] Justice Lederer ordered that an ISS review the forensic images of Moyse's devices and deliver his report before any examinations for discovery are conducted in this action.

84. The ISS process ordered by Justice Lederer was irredeemably tainted by Moyse's conduct of deleting his web browsing history and running the Scrubber before the image of his computer was made. We will never know what was deleted.

85. However, a second source of the same evidence exists – West Face's devices. An ISS review of West Face's devices will remedy the deficiencies of the first ISS process that were caused by West Face's employee (Moyse), and will ensure that Moyse's subversion of the court's process is not left without a remedy.

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[52] Judgment of Justice Lederer dated November 10, 2014 at ¶83; AB, Tab 6, pp. 65-66.

86. The Motion Judge failed to consider the context of the Imaging Motion, and in so doing, erred in his exercise of discretion. In order to preserve the integrity of the court's process, the Motion Judge's decision should be reversed and the Imaging Order Motion be granted.

PART V - ORDER REQUESTED

87. For the reasons stated above, the Motion Judge erred in his decisions on the Contempt Motion and the Imaging Motion. His dismissal of those motions will lead to an injustice that cannot be remedied, and will allow a defendant to avoid answering for intentional conduct that breached a court order to which he consented mere days before.

88. Moyse consented to a preservation order and then deleted relevant documents. The consequences of that conduct should not be that he escapes without a finding of contempt and Catalyst is left without the ISS process that Justice Lederer already found it was entitled to benefit from before oral discoveries.

89. Catalyst respectfully requests that the appeal be granted, the Motion Judge's order be overturned and that:

(a) Moyse is held to be in contempt of the Interim Order, with the appropriate sanction to be determined at a subsequent hearing before a judge of the Superior Court of Justice other than the Motion Judge;

(b) Forensic images of the electronic devices belonging to principals of West Face be created for review by an ISS prior to the discovery process in this action; and

(c) Costs be awarded to the Appellant for the motion below and the within appeal on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of September 2015.

Rocco DiPucchio/Andrew Winton

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Lawyers for the Appellant

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

CERTIFICATE

I estimate that 3 hours will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 20th day of September, 2015.

Andrew Winton

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sabourin and Sun Group of Companies* v. *Laiken*, 2013 ONCA 530.

2. *Housen v. Nikolaisen*, 2002 SCC 33.

3. *Kamin v. Kawartha Dairy Ltd.*, 2006 CanLII 3259 (ON CA).

4. *Burtch v. Barnes Estate* (2006), 80 OR (3d) 365 (CA).

5. *Carey v. Laiken*, 2015 SCC 17.

6. *Ceridian Canada Ltd. v. Azeezodeen*, 2014 ONSC 3801.

7. *R. v. MacIsaac*, 2015 ONCA 587.

8. *TG Industries Ltd. v. Williams*, 2001 NSCA 105.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Rule 60.11: Contempt Order

Motion for Contempt Order

60.11(1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily.

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Appellant

-and-

BRANDON MOYSE et al.
Defendants/Respondents

Court File No. C60799

ONTARIO
COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

APPELLANT'S FACTUM

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Lawyers for the Appellant

This is Exhibit "P" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

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November 3, 2015

File No. 250486

BY E-MAIL

Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

Attention: Lily Miranda

Dear Ms Miranda:

Court of Appeal File No. C60799

We are counsel to the Defendant (Respondent) West Face Capital Inc. in the above-noted matter. You have requested that we provide a letter confirming the status of the two motions filed in the above-noted matter.

Both West Face and the Defendant (Respondent) Brandon Moyse filed motions to quash the appeal of the Plaintiff (Appellant) The Catalyst Capital Group Inc. from the Order of Justice Glustein dated July 7, 2015. West Face's motion to quash Catalyst's appeal of the relief it had sought against West Face is filed under Motion File No. M45387. Mr. Moyse's motion to quash Catalyst's appeal of the relief it had sought against him is filed under Motion File No. M45378. Both motions are scheduled to be heard on Thursday, November 5, 2015, at 10:30 a.m.

We have conferred with Andrew Winton, counsel to Catalyst, and confirm that West Face's motion to quash will proceed on consent. We estimate that the only time required at the hearing for West Face's motion will be 5 minutes to settle the terms of the Order.

We have conferred with Kris Borg-Olivier, counsel to Mr. Moyse, and confirm that Mr. Moyse's motion to quash will proceed on a contested basis.

This is Exhibit "Q" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONCA 784
DATE: 20151117
DOCKET: M45378 M45387 (C60799)

Hoy A.C.J.O., MacFarland, and Lauwers JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant/Responding Party)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents/Moving Party)

Rocco Di Pucchio, for the appellant/responding party

Kristian Borg-Olivier and Denise Cooney, for the respondents/moving party Brandon Moyse

Andrew Carlson, for the respondents/moving party West Face Capital Inc.

Heard: November 5, 2015

Motion to quash an appeal from the judgment of Justice B.T. Glustein of the Superior Court of Justice, dated July 7, 2015, with reasons reported at 2015 ONSC 4388.

Lauwers J.A.:

[1] The motion judge dismissed the motion of Catalyst Capital Group Inc. for a declaration that its former employee, Brandon Moyse, is in contempt of the July 16, 2014 order of Firestone J. for failing to preserve certain electronic records relating to Catalyst.

[2] The moving party, Mr. Moyse, seeks to quash Catalyst's appeal on the basis that the judgment appealed from is interlocutory and therefore falls within the jurisdiction of the Divisional Court under s. 19 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. For the reasons set out below, I would quash the appeal.

FACTUAL BACKGROUND

[3] Mr. Moyse is a former employee of Catalyst. He accepted employment with a competitor of Catalyst. Catalyst was concerned that he had or would impart its confidential information to his new employer.

[4] Eventually, on Catalyst's motion, Firestone J. issued an interim consent order for injunctive relief, dated July 16, 2014. The court ordered that "Moyse and [his new employer], and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst." Paragraph 5 of this order provided:

> THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power of control (the "Devices") to his counsel, Grosman, Grosman and Gale LLP, ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Image"), to be conducted by a professional firm as agreed to between the parties.

[5] Catalyst brought a motion for a declaration that Mr. Moyse was in contempt of the consent order.

MOTION JUDGE FOUND NO CONTEMPT

[6] The motion judge's reasons set out a lengthy review of the evidence. He was unable to find "beyond a reasonable doubt" that Catalyst had established that Mr. Moyse was in contempt. His specific findings are relevant to Catalyst's argument on this motion to quash.

[7] With respect to Mr. Moyse's actions in deleting the personal browsing history from his computer, the motion judge found, at para. 69: "there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches."

[8] With respect to Mr. Moyse's conduct in buying and using software to "scrub" files from his personal computer before delivering it, the motion judge stated, at para. 86:

> I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

ANALYSIS

[9] Mr. Moyse argues that an order dismissing a contempt motion is interlocutory for the purpose of an appeal, and therefore lies to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*. He relies on this court's brief endorsement in *Simmonds v. Simmonds,* 2013 ONCA 479, which was an appeal from an order of a motion judge dismissing a motion for a finding of contempt against the respondent's spouse in a family dispute. There, the motion judge found that the respondent had complied with the disclosure order in question. In *Simmonds,* this court accepted the respondent's argument that while an order finding contempt is final, the dismissal of the motion for contempt was interlocutory: the motion judge's finding was not binding on the trial judge. The court rejected the conclusion to the contrary found in *Pimiskern v. Brophey*, [2013] O.J. No. 505 (S.C.).

[10] Catalyst argues that the ruling precedent is this court's decision in *Sabourin and Sun Group of Companies v. Laiken*, 2013 ONCA 530, in which the court heard an appeal from a decision dismissing a contempt motion. That case was about the possible breach of a *Mareva* injunction. I observe that the court did not advert to the interlocutory/final distinction or to the question of jurisdiction at all. The issue appears not to have been argued.

[11] In fairness to the parties, this court's decisions on the final/interlocutory distinction have not been models of clarity. Much ink has been spilled, and court and counsel time wasted in exploring the nuances. But the root principle that all can and do accept was expressed by Middleton J.A in *Hendrickson v. Kallio*, [1932] O.R. 675:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.

[12] This important case is one to which this court frequently returns. See, for example, *Waldman v. Thomson Reuters Canada Ltd.*, 2015 ONCA 53, MacFarland J.A. at para. 22. On the *Hendrickson v. Kallio* test, there can be no doubt that the dismissal of the contempt motion is interlocutory. The merits of the case remain to be determined.

[13] But Catalyst drills deeper and argues that in this case the outcome of the motion is effectively final in a significant dimension. It submits that the important point for the court to keep in mind is that it would not be open to a party who was unsuccessful in a contempt motion to revisit the contempt motion at trial. Counsel argues that the motion judge's decision that Mr. Moyse's conduct did not contravene the order is *res judicata,* and Mr. Moyse's conduct in deleting the

browser history, for example, "can't be re-litigated even in cross-examination." It is therefore final in the sense contemplated by the *Courts of Justice Act*.

[14] I disagree. The motion judge's findings are clear. He simply concluded that Catalyst had not proven, beyond a reasonable doubt, that Mr. Moyse breached Firestone J.'s order. There is nothing in the motion judge's decision that would prevent Catalyst from exploring, in Mr. Moyse's cross-examination at discovery or at trial, what he did with his computer, when he did it, why he did it, who assisted him (if anyone), how he did it and for what purpose or purposes. While the finding that Mr. Moyse was not in contempt may not itself be re-litigated, barring some new revelation, all of the factual issues between the parties may be fully and exhaustively explored at any discovery and at the trial.

[15] In the circumstances of this appeal, the principle in *Simmonds* applies. The order dismissing the contempt motion against Mr. Moyse is interlocutory, and therefore appealable to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*.

[16] I would quash the appeal without prejudice to Catalyst's right to seek leave to appeal to the Divisional Court. I would award Mr. Moyse costs fixed in the agreed amount of $5,000, all-inclusive.

Pharies JA

I agree Alexandra Hoy ACJO

I agree. Juriaefriland JA

Released:

NOV 17 2015

This is Exhibit "R" referred to in the Affidavit of Andrew Winton sworn January 8, 2016

Commissioner for Taking Affidavits (or as may be)

Lauren P.S. Epstein

LAX O'SULLIVAN SCOTT LISUS

Memorandum

Fran
JO

To:	Reliable Process Servers	**Date:**	December 2, 2015
From:	Andrew Winton 416-644-5342	**File No.:**	13094
Client:	The Catalyst Capital Group Inc		
Re:	The Catalyst Capital Group Inc. v Brandon Moyse et al. Court File No. CV-14-507120		

Attached is a Motion for Leave to Appeal together with an affidavit of service. Please file with the Divisional Court today.

Please call if you have any questions or concerns.

Thank you.

Dec 2

address wrong, should be 130 Queen.

Need separate Motion for extension of time, Rule 37

Samantha @ Divisional Court spoke with Rocco

Divisional Court File No.
Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

NOTICE OF MOTION FOR LEAVE TO APPEAL

The Plaintiff ("Catalyst") will make a motion to a Divisional Court Judge sitting as a Superior Court Justice to be heard in writing 36 days after service of the moving party's Motion Record, Factum and Transcripts, if any, or on the filing of the moving party's reply Factum, if any, whichever is earlier, at 393 University Avenue, Toronto, Ontario, M5G 1E6, on a date to be fixed by the Registrar from the Order of Justice Glustein dated July 7, 2015.

PROPOSED METHOD OF HEARING: The Motion is to be heard (choose appropriate option)

[ ] in writing under subrule 37.12.1(1) because it is (insert one of on consent, unopposed or made without notice);

[X] in writing as an opposed motion under subrule 37.12.1(4);

THE MOTION IS FOR:

1. Leave to extend the time for filing this notice of motion in accordance with Rule 62.02 and 61.03.1 of the *Rules of Civil Procedure*;

2. An order granting Catalyst leave to appeal the Order of the Honourable Justice Glustein made on July 7, 2015;

3. The costs of this motion; and,

4. Such further and other Relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

A. Background to this Action

5. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

6. The Responding Party West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

7. The Responding Party Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014.

8. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

9. On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

10. Shortly thereafter, Catalyst commenced this action and brought an urgent motion for injunctive relief seeking, among other things, preservation of documents and enforcement of the Non-Competition Covenant.

B. The Interim Order

11. On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

12. On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to the Interim Order, pursuant to which, among other things:

(a) The Respondents were ordered to preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against the Respondents; and

(b) Moyse was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image the data stored on the Devices (the "Images"), to be held in trust by his counsel pending the outcome of the motion for interlocutory relief.

C. Moyse's Contempt of the Interim Order

13. Catalyst's motion for interlocutory relief was heard on October 27, 2014. On November 10, 2014, Justice Lederer of the Superior Court of Justice released his decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images.

14. On February 17, 2015, the ISS delivered a its report (the "ISS Report") to counsel for Catalyst and Moyse.

15. The ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

16. Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images. On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

17. On Sunday, July 20, 2014, at 8:09 p.m., Moyse ran the Secure Delete programme on his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer.

18. In addition, Moyse admits that on July 20, 2014, he deleted his Internet browsing history from his personal computer. Moyse's browsing history would have included information related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

19. As a result of Moyse's conduct, it is impossible to know for sure what information, files and/or folders he deleted on July 20, 2014.

20. By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse acted in contempt of Court.

21. The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

22. The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme and deletion of his Internet browsing history on July 20, 2014, was a breach of the Interim Order.

23. It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

24. Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

25. Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

26. As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

D. Leave to Appeal the Contempt Decision

27. The Contempt Decision conflicts with other decisions in Ontario and elsewhere on a number of issues, including:

(a) the motion judge's application of the principle of ambiguity in court orders;

(b) the motion judge's failure to apply the proper principles for determining credibility of witnesses as part of the fact-finding process, including, among others, failing to determine whether Moyse's evidence was credible in light of the objective and undisputed evidence in the record before the Court; and

(c) the motion judge's determination that he could exercise his discretion to decline to make a finding of contempt based on the undisputed facts before him.

28. It is desirable that leave to appeal be granted so that the Division Court can clarify the interpretation of orders and findings of ambiguity in court orders and clarify the circumstances in which a motion judge is permitted to exercise his or her limited discretion to decline to make a finding of contempt.

29. In addition or in the alternative, there is good reason to doubt the correctness of the motion judge's decision:

(a) The motion judge erred in interpreting the Interim Order to mean that "activities that relate to [the Respondents'] activities since March 27, 2014 was not intended to encompass all of the Respondents' activities, and/or that if this was the intended meaning, then the Interim Order was ambiguous.

(b) The motion judge erred in concluding that there was no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of his Internet searches.

(c) In particular, the motion judge erred in concluding that the Appellant could only speculate that information deleted from Moyse's computer included evidence of Moyse's activities related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

(d) The motion judge erred by failing to apply the proper and established legal test for determining whether the evidence before him proved contempt beyond a reasonable doubt.

(e) The motion judge erred in concluding that, even if Moyse had acted in contempt of the Interim Order, it was appropriate to exercise his discretion to decline to make a finding of contempt. Such discretion is limited to situations where a finding of contempt would impose an injustice in the circumstances of the case, and is not available in situations where a party's acts in violation of an order make subsequent compliance impossible.

30. The proposed appeal of the contempt motion involves matter of such public importance that leave should be granted.

E. Appeal of the ISS Decision

31. The ISS Decision conflicts with other decisions in Ontario, in particular the decision of Justice Lederer in this same case, in which the Court held that the circumstances warranted an order authorizing an ISS process.

32. It is desireable that leave to appeal the ISS Decision be granted so that the Divisional Court can clarify how the court is to apply the test to authorize an ISS process in circumstances where previous court orders were tainted by a parties' conduct.

33. In addition or in the alternative, there is good reason to doubt the correctness of the ISS Decision. Catalyst respectfully submits that the motion judge erred in dismissing the Appellant's motion to create forensic images of the electronic images belonging to the principals of West Face and for the appointment of an ISS to review those images.

34. Justice Lederer had already determined that it was appropriate to authorize an ISS to review the Images of Moyse's devices prior to the discovery process in this Action.

35. As a result of Moyse's conduct, described above, the ISS's review of Moyse's devices was tainted in a manner unanticipated by Justice Lederer.

36. The creation of forensic images of West Face's devices for review of an ISS prior to the discovery process in this Action is necessary to give effect to the Order of Justice Lederer, from which leave to appeal was unsuccessfully sought by the Respondents.

37. The motion judge erred by failing to consider the need to create the Images of West Face's devices and for an ISS review in order to give effect to the Order of Justice Lederer in this Action.

38. The proposed appeal of the ISS Decision involves matters of such importance that leave should be granted.

F. Extension of Time to Seek Leave to Appeal

39. On July 22, 2015, Catalyst served a Notice of Appeal in which it sought to appeal the Contempt Decision and the ISS Decision to the Court of Appeal for Ontario. Catalyst had good reason to believe that the Contempt Decision was a final decision such that an appeal therefrom could be brought to the Court of Appeal, without leave.

40. Catalyst sought to appeal the ISS Decision in conjunction with its appeal of the Contempt Decision through the application of s. 6.02 of the *Courts of Justice Act*, which it believed applied to the circumstances of its appeal.

41. In November 2015, Catalyst's appeal of the Contempt Decision and the ISS Decision was quashed by the Court of Appeal, without prejudice to Catalyst's right to seek leave to appeal those decisions to the Divisional Court.

42. It was at all times the intention of Catalyst to appeal, or seek leave to appeal, the Contempt Decision and the ISS Decision within the time period for doing so and to have its appeal of those decisions heard together if possible.

43. Moyse and West Face will not be prejudiced by the granting of an extension of the time for serving this notice of motion.

44. Subsection 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

45. Rules 1, 3.02, 37, 61.03, 61.03.1 and 62.02 of the *Rules of Civil Procedure.*

46. Such further and other *grounds* as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The Order of the Honourable Justice Glustein, made on July 7, 2015;

2. Catalyst's motion record as provided for in Rule 61.03(2) of the *Rules of Civil Procedure*;

3. The affidavit of Andrew Winton, to be sworn; and

4. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 27, 2015

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-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Plaintiff/Moving Party

and

BRANDON MOYSE et al
Defendants/Responding Parties

Divisional Court File No. 648/15
Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD
(PLAINTIFF'S MOTION TO EXTEND TIME FOR LEAVE TO APPEAL RETURNABLE JANUARY 19, 2016)

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