Court of Appeal File No. C60799
Court File No. CV-14-507120

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

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

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ENTERED AT / INSCRIT A TORONTO
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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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
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ORDER

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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

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

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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

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

BETWEEN:

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

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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 A 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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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	*Rocco DiPucchio & Andrew Winton*, for the Plaintiff
– and –	
BRANDON MOYSE and WEST FACE CAPITAL INC. Defendants	*Jeff C. Hopkins & Justin Tetreault*, for the Defendant, Brandon Moyse *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

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[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.

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

CITATION: The Catalyst Capital Group Inc. v. Moyse et al., 2015 ONSC 2384
DIVISIONAL COURT FILE NO.: 541/14
DATE: 20150414

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE AND WEST FACE CAPITAL INC., Defendants

BEFORE: Harvison Young J.

COUNSEL: *Rocco Di Pucchio and Andrew Winton*, for the Plaintiff

Jeff C. Hopkins and Justin Tetreault, for the Defendant, Brandon Moyse

Jeffrey Mitchell and Andy Pushalik, for the Defendant, West Face Capital Inc.

HEARD at Toronto: In writing, April 10, 2015

ENDORSEMENT

[1] Brandon Moyse and West Face Capital Inc.("West Face") both seek leave to appeal from an interlocutory injunction imposed by Lederer J. dated November 10, 2014. which enjoined Mr. Moyse from working at West Face for approximately six weeks, until December 21, 2014.

[2] The order reads as follows:

1. An interlocutory injunction enjoining the defendant, Brandon Moyse, or anyone acting on his behalf or at his discretion 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.

2. A further interlocutory injunction enjoining the defendant, Brandon Moyes (sic), 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, 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.

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 an 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.

[3] There is no issue with respect to the first aspect of the order which simply seeks to enforce the confidentiality clause in the contract of employment. In addition, and as of December 12, 2014, the parties have agreed to a document review protocol pursuant to paragraphs 4 and 5 of the order. Thus, the only issue with respect to which leave is sought is the injunction restraining Mr. Moyse from working for West Face until December 22, 2014 and requiring Catalyst to pay his salary in the meantime.

[4] Mr. Moyse and West Face raise very similar grounds in their applications for leave. They both submit that their applications meet both limbs of the test set out in Rule 62.02(4). I do not agree.

[5] With respect to Rule 62.02(4)(a), I am not satisfied that there are conflicting decisions of another judge or court within the meaning of the Rule.

[6] A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts. In particular, this Court has held that exercising discretion in a way that is different from that of other cases is not a difference in principle, rather, it is merely a difference in the application of discretion and it is not a difference that will create any confusion in the law requiring a resolution by a full panel of the Divisional Court. The applicants in the present case take issue not with the principles applied but with the motion judge's application in the circumstances of the case, and the cases to which they refer do not reveal conflicts with respect to principle.

[7] The applicants' argument on the conflicting decisions issue is essentially an argument that Justice Lederer's decision to grant the injunction was incorrect. The heart of their claims is that he incorrectly applied the principles not that he applied the wrong tests and their arguments reiterate those made before the motions judge for the most part.

[8] In any event, with respect to Rule 62.04(a), I am not satisfied that that it is desirable that leave to appeal be granted. A central term of the order was the enforcement of the 6 month non-competition clause which expired on December 21, 2014. Whether or not this renders the matter

moot as the respondent submits, it is a factor I take into account in considering whether it is desirable that leave be granted, and I am of the view that the applicants have not established that it is desirable that leave be granted

[9] I am not satisfied that the applicants have met the second limb of the test set out in Rule 62.02(4)(a) which requires them to raise serious debate as to the correctness of the decision **and** that the matter involves matters of such public importance that, in the court's opinion, leave to appeal should be granted.

[10] The motions judge carefully and painstakingly applied the three limbs of the test set out in *RJR-Macdonald Inc. v. Canada*, 1194 CarswellQue 120 (S.C.C.) to the circumstances of this case.

[11] After a careful review of the record and authorities before him, the motions judge concluded that he "would not be prepared to find the non-competition clause unreasonable" (Reasons, para. 66) and that he was unprepared to find that the public interest militated against the acceptance of this particular non-competition clause. (Reasons, para. 67). He found that there was a serious issue to be tried on both issues and also found there to be a strong *prima facie* case that Mr. Moyse had breached the confidentiality clause in his contract of employment with Catalyst.

[12] Similarly, he did consider the evidence before him and the considered the issue of irreparable harm. Finally, he considered the balance of convenience question. He found that the balance of convenience favoured issuing the injunction in the circumstances. I note that the applicants submit that the motions judge misapplied the notion of "irreparable harm" in that he noted that complying with the non-competition agreement for the balance of the term would not cause Mr. Moyse irreparable harm. I disagree that this was an error with respect to the "irreparable harm" test. While the use of the term "irreparable harm" may not have been advisable in this context, it is clear that the effect of complying with the competition agreement was being considered in terms of the balance of convenience (and under that heading) and I see no error in this.

[13] In any event, I do not find that the proposed appeal involves matters of such importance that, in my opinion, leave to appeal should be granted. The period covered by the non-competition period has passed. The issues raised here are not issues of principle but a dispute between these individual parties concerning the application of established principles to the facts and circumstances of this case. The central issue was whether an interlocutory injunction should be granted. I note that media interest does not, in my view, satisfy the "importance" limb of the test for leave.

[14] I am not satisfied that there is any reason to doubt the correctness of the motions judge's decision to grant the injunctive relief in the circumstances before him at that time, and I am not satisfied in any event the matter is of such importance that warrants an appeal to this court. The applications are therefore dismissed.

[15] Having reviewed the costs submissions filed by the parties, I conclude that costs are payable by the defendants to the plaintiff in the amount of $5,550.02.

Harvison Young J.

Date: April 14, 2015

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

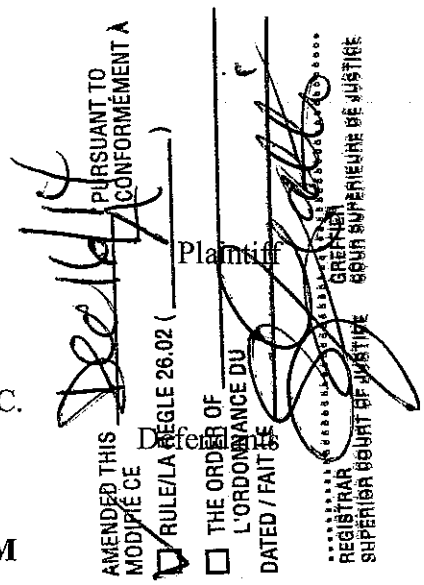
THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants



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, 2014~~ ~~October 9, 2014~~ ~~December 16, 2014~~ June 25/14 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

LAX O'SULLIVAN SCOTT LISUS LLP
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Lawyers for the Plaintiff

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

AMENDED THIS ... PURSUANT TO ... CONFORMÉMENT À ... RÈGLE 26.02 (...)
THE ORDER OF ... L'ORDONNANCE DU ... DATED / FAIT LE ...
REGISTRAR ... GREFFIER ... COUR SUPÉRIEURE DE JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

AMENDED AMENDED STATEMENT OF DEFENCE

1. The Defendant, West Face Capital Inc. ("**West Face**"), admits the allegations contained in paragraphs 11, 15, ~~and~~ 17, 34.2 (first sentence only), 34.5 (first sentence only), 34.8, 34.9 and 34.10 of the Amended Amended Statement of Claim.

2. West Face denies that the Plaintiff is entitled to any of the relief claimed in paragraph 1 of the Amended Amended Statement of Claim, and denies the allegations contained in paragraphs 2, 6 through 10 inclusive, 12, 13, 16, 18 through 21 inclusive, 23, ~~and~~ 25 through 34 inclusive, 34.3, 34.4, 34.6, 34.7, 34.12, 34.13, 34.14, 34.15, 34.16, 35 and 36 of the Amended Amended Statement of Claim.

3. West Face has no knowledge of the allegations contained in paragraphs 3, 4, 5, 14, 22, ~~and~~ 24, 34.1, 34.2 (second sentence only), 34.3, 34.5 (second sentence only) and 34.11 of the Amended Amended Statement of Claim.

The Parties

4. West Face is an investment manager based in Toronto that has been in business since 2006. It manages a number of funds and accounts covering a broad range of investments.

5. The Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), is an independent investment firm focused on making investments in distressed and undervalued Canadian entities for control or influence.

6. The Defendant, Brandon Moyse ("**Brandon**"), is a 26 year old resident of the City of Toronto. He was employed by Catalyst as an Analyst for less than two years, from October 2012 until June 2014.

The Nature of West Face's Business

7. West Face manages a number of funds and accounts covering a broad range of investment strategies. Its investments, which are in publicly traded and privately negotiated securities, include "long positions" in common equities, bonds, convertible debentures and distressed debt situations as well as certain "short positions". It has assets under management of over $2.5 billion.

8. West Face has two principal groups of funds: the Long-Term Opportunities Fund (the "**LTOF**") and the Alternative Credit Fund (the "**ACF**"). The LTOF, which is West Face's principal and inaugural fund, has a broad investment mandate which is principally focused on making minority investments in public common equity strategies and publicly traded debt opportunities primarily related to companies located in North America.

9. The investment mandate of the ACF, which was launched in December 2013, is to make investments in illiquid private debt with terms greater than two years, with the expectation of holding each investment until its maturity. Contrary to the allegations contained in the Amended Amended Statement of Claim, this fund was not established to compete with Catalyst. The ACF was created in order to continue activities previously undertaken in the LTOF on a limited basis. The ACF allows West Face to better match assets' liquidity characteristics with investor requirements.

10. Unlike Catalyst which is focused on control or influence-based "distressed investments", West Face generally does not become involved with the management of target companies. Further, due to market conditions, West Face has focused less and less on making distressed investments, although it is not out of this market entirely. In any event, the relatively small number of investment opportunities in this field means that the investment opportunities that are available are widely known in the industry.

Brandon Applies for a Job at West Face

11. By e-mail dated March 14, 2014, Brandon advised Thomas Dea, a Partner at West Face ("**Dea**") that, if there was a position available at West Face, he would be interested in working with West Face.

12. Dea subsequently met with Brandon on March 26, 2014. As West Face was currently recruiting for analysts, Dea asked Brandon to provide him with a copy of his resume and some writing samples, so that Dea could circulate it to others at West Face. Dea specifically advised Brandon that Brandon should redact any confidential information from the writing samples if required.

13. Following that initial meeting, Dea arranged for Brandon to meet with several other West Face employees on or about April 11, 2014 and again on or about April 28, 2014.

Brandon's Employment Relationship with West Face

14. Pursuant to the terms of a written offer of employment dated May 26, 2014, West Face offered employment to Brandon as an Associate (the "**West Face Employment Contract**"). Brandon accepted the terms of West Face's offer on May 26, 2014; he started working at West Face on June 23, 2014.

15. At the time that West Face provided Brandon with a written offer of employment, Dea asked Alexander Singh, West Face's General Counsel and Secretary, to speak to Brandon and remind him that he was not under any circumstances to disclose or use any confidential or proprietary information belonging to Catalyst. Mr. Singh conveyed Dea's concerns to Brandon, who confirmed to Mr. Singh that he

would not disclose or use any confidential or proprietary information belonging to Catalyst.

16. As an Associate with West Face, Brandon acts as a generalist working on a variety of investment strategies across a diverse set of industries. His duties include:

(a) Fundamental research and due diligence of investment opportunities, including equities and credits;

(b) Financial modeling;

(c) Deal structuring; and

(d) General support of West Face's Portfolio Managers.

17. Brandon is the most junior member of West Face's investment team. In his position, he does not receive portfolio summaries, is not a member of West Face's investment committee, does not participate in senior management meetings nor does he have the authority to make strategic decisions.

18. The terms of the West Face Employment Contract included a provision whereby Brandon agreed that he would not use any property in the course of his employment with West Face that was the confidential or proprietary information of any other person, company, group or organization.

19. In addition, the West Face Employment Contract included a representation and warranty on behalf of Brandon that his acceptance of West Face's offer of

employment would not result in any breach of any non-solicitation and non-competition agreements. Brandon advised West Face that he had a non-competition covenant with Catalyst, and he provided West Face with a redacted copy of his employment contract with Catalyst (the "**Catalyst Employment Contract**").

20. The Catalyst Employment Contract contained, *inter alia*, a non-competition provision (the "**Non-Competition Clause**") and a non-solicitation provision (the "**Non-Solicitation Clause**") which stated as follows:

> 8. 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 CCGI or the Fund or any direct Associate of CCGI 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 CCGI'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 CCGI;
>
> 9. 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 CCGI or persons who were so employed during the 12 months prior to your ceasing to be an employee of CCGI 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 CCGI or during the 12 months prior to your ceasing to be an employee of CCGI.

21. The Non-Competition Clause and Non-Solicitation Clause are ambiguous and overly broad and, as such, are unenforceable.

West Face Advises Catalyst that Brandon will Abide by His Confidentiality Obligations

22. On May 30, 2014, West Face received a letter from Catalyst's external counsel, Rocco Di Pucchio, expressing concerns over West Face's hire of Brandon. On June 3, 2014, West Face's external counsel, Adrian Miedema, responded to Catalyst's letter on West Face's behalf. In this letter, West Face confirmed that it had impressed upon Brandon that he was not to share or divulge any confidential information that he obtained during his employment with Catalyst.

23. By letter dated June 5, 2014, Brandon's counsel, Jeff Hopkins, advised Catalyst that in response to its concerns, Brandon was willing to confirm in writing that he understood and would abide by the confidentiality provision contained in the Catalyst Employment Contract.

24. In a letter dated June 13, 2014, Mr. Di Pucchio advised that the assurances of West Face and Brandon that Brandon would not share or divulge any of Catalyst's confidential information "did not go far enough".

25. On June 18, 2014, Mr. Miedema attended a conference call with Mr. Di Pucchio and Mr. Hopkins during which Mr. Di Pucchio advised that Catalyst was concerned about a specific transaction for which Catalyst and West Face had each submitted bids (the "**Transaction**").

26. In response to Catalyst's concerns, Mr. Hopkins sent a letter on June 19, 2014 in which Brandon again confirmed that he fully understood and intended to abide by his contractual obligations of confidentiality to Catalyst and further, that he would not divulge any information regarding the Transaction. The letter confirmed that Brandon was willing to confirm these legal obligations in writing, including references to specific areas of concern of Catalyst.

27. Later that afternoon, Mr. Miedema received an email from Mr. Di Pucchio advising that he had been instructed by Catalyst to commence proceedings against West Face and Brandon. Prior to receiving this communication, West Face was already in the process of implementing a confidentiality wall between Brandon and West Face's Investment Team with respect to the Transaction (the "**Confidentiality Wall**").

28. Under the terms of the Confidentiality Wall which was put in place before Brandon started working at West Face on June 23, 2014, Brandon is not permitted to discuss any information that he may have about the Transaction with anyone at West Face, nor can anyone at West Face inquire about or discuss the Transaction with Brandon. Further, West Face's information technology group restricted access to the network for files regarding the Transaction.

29. Mr. Miedema subsequently wrote, by letter dated June 19, 2014, to Mr. Di Pucchio advising that West Face had implemented the Confidentiality Wall and confirming that Brandon had not had, and would not have, any involvement with the Transaction at West Face.

30. Following the commencement of this litigation, West Face conducted a diligent search of its emails to determine whether there was any information of Catalyst disclosed by Brandon. West Face has found only one email from Brandon in which he provided West Face with documents related to Catalyst's business. The documents were provided by email from Brandon to Dea on March 27, 2014, which was at the early stages of the recruitment process, in response to Dea's request for writing samples, as a way of Brandon showing his written communication skills and the type of work he was doing at Catalyst.

31. West Face states that it has not used or relied on any of the documents attached to this email, nor has West Face done any significant review of the documents attached to this email. West Face further states that it was not involved in any of the transactions that were the subject of the documents attached to the email, and as such, had no use for the information contained therein.

Brandon is Placed on an Administrative Leave of Absence Pending the Determination of Catalyst's Motion for Injunctive Relief

31.1 In or around June 2014, Catalyst brought a motion for interim and interlocutory relief seeking, among other things, to block Brandon from continuing to work at West Face.

31.2 On July 16, 2014, the Court heard Catalyst's motion for interim relief. On that date, the parties reached agreement on the terms of a consent Interim Order on an expressly without prejudice basis. Pursuant to the Interim Order, Brandon was to fully comply with the Non-Solicitation Clause and Non-Competition Clause until Catalyst's motion for interlocutory relief was heard or the Interim Order was otherwise varied by further Order of the Court. During this interim period, Catalyst was required to pay Brandon's West Face salary.

31.3 In accordance with the Interim Order, West Face placed Brandon on an administrative leave of absence effective July 16, 2014. As Catalyst's motion for interlocutory relief has not yet been heard, Brandon remains on a leave of absence as of the date of this Amended Amended Statement of Defence, and Catalyst continues to pay Brandon's West Face salary.

West Face has not Received Any Information of Catalyst Related to Wind Mobile or Mobilicity

31.4 West Face specifically denies the allegations contained in paragraphs 34.6, 34.7 and 34.12 of the Amended Amended Statement of Claim. West Face did not solicit, and Brandon did not provide to West Face, any of Catalyst's information in relation to Wind Mobile, Data & Audio-Visual Enterprises Holdings Inc. ("**Holdings**") or its wholly owned subsidiaries, Data & Audio-Visual Enterprises Wireless Inc. ("**Wireless**") and 8440522 Canada Inc. (collectively with Holdings and Wireless, "**Mobilicity**").

31.5 In fact, in the three (3) weeks during which he worked for West Face (June 23, 2014 to July 16, 2014), Brandon did not have any involvement in West Face's activities in relation to Wind Mobile or Mobilicity.

Catalyst Has Not Suffered Any Damages

32. West Face states that Catalyst has not suffered any damages for which West Face is responsible in fact or in law. Further, and in any event, the damages claimed by Catalyst are excessive and remote.

Relief Requested

33. West Face requests that this action be dismissed with costs payable to West Face and Brandon, on a substantial indemnity basis.

~~August 5~~~~October 20, 2014~~December 24, 2014

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Court File No: CV-14-507120

THE CATALYST CAPITAL GROUP INC.
Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AMENDED AMENDED STATEMENT OF DEFENCE

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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

--- This is the Cross-Examination of BRANDON MOYSE on his affidavits sworn July 7, 2014 and July 16, 2014, taken at the offices of Neeson & Associates Court Reporting and Captioning Inc., 141 Adelaide Street West, Suite 1108, Toronto, Ontario, on the 31st day of July, 2014.

CONFIDENTIAL TRANSCRIPT

--- Upon commencing at 10:01 a.m.

BRANDON MOYSE, Affirmed

CROSS-EXAMINATION BY MR. DIPUCCHIO:

1 Q. Good morning, Mr. Moyse. You swore two affidavits in this matter, I'm going to call them the substantive affidavits, dated July 7th and July 16th, 2014; is that correct?

A. Yes.

2 Q. And before you swore those affidavits you had an opportunity to review the contents of them and satisfy yourself that you were being totally honest and truthful in your evidence?

A. Yes.

3 Q. And in addition to those two affidavits that I call the substantive affidavits you've also sworn two other affidavits which contain a listing of relevant documents in your possession, power or control; is that right?

A. I swear to?

4 Q. Yes. An original affidavit of documents and then a supplementary affidavit of documents.

A. Yes.

5 Q. The original affidavit of documents that you swore was dated, or sworn,

rather, on July 22, 2014?

A. Yes. Yes.

Q. And then you swore a supplementary affidavit of documents just before Mr. Riley's examination on July 29, 2014?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And you understood that you were swearing all of these affidavits, but in particular the affidavits of July 7th and 16th, the substantive affidavits, for the purposes of a court proceeding and that they would be read and considered by the judge that was presiding over that proceeding, right?

A. Yes.

Q. And you understood that you were swearing to the truth of what was set out in those affidavits?

A. Mm-hmm. Yes.

Q. And you took your oath seriously when you swore those affidavits, correct?

A. Yes.

Q. And your obligation to tell the truth seriously?

A. Yes.

12 Q. And you take your oath seriously that you've sworn today?

A. Yes.

13 Q. And apart from being completely truthful in the evidence that you gave in your affidavits to the court, you also understood that it would not have been appropriate and certainly wasn't your intention to mislead the court in any way?

A. Of course not.

14 Q. And as an adjunct to that, you would want to be totally transparent and forthcoming with the court when you swore those affidavits?

A. Yes.

15 Q. And did you consider yourself to be completely transparent and forthcoming in those affidavits with the benefit of hindsight now?

A. Yes.

16 Q. Is there anything, before we launch into this cross-examination, that you would want to amplify, or correct, or change in those affidavits?

A. No.

Capital Markets actually looking to acquire controlling interests in distressed companies?

A. No, but we advised those who were.

28 Q. But you weren't looking to acquire --

A. No.

29 Q. -- positions in those companies?

A. No.

30 Q. And so I take it just looking at what your employment history has been over the last several years that you've had, with the position you now have at West Face, you've had four positions in the last four years, right?

A. That's correct.

31 Q. So you would agree with me that there's been some considerable degree of mobility in terms of your career?

A. Yeah, I agree.

32 Q. In other words, you've been able to find positions quite easily over the last four years?

A. Yes.

33 Q. And some of those positions such as the one at Credit Suisse aren't even based in Canada. You've had positions in the U.S.?

were at the direction of senior coverage officers.

57 Q. And then, again, you make a jump from that position directly into another position at Catalyst Capital, right?

A. Mm-hmm. Yes.

58 Q. And this time you describe yourself as a distress debt associate and distress debt analyst, right?

A. That is correct.

59 Q. Okay. And did you in fact hold two positions at Catalyst Capital?

A. At the time I wrote this CV I believed I was in imminent, or would imminently become an associate. That promotion was in fact, or later it became apparent that was just a carrot that was dangled out for about four months.

60 Q. So at the time you wrote this CV, which was when?

A. I don't know the exact date, but February probably of 2014.

61 Q. And so --

A. Yeah, February 2014.

62 Q. So was this one of the embellishments?

A. Yes.

68 Q. And apart from that then I take it the rest of your description of your duties at Catalyst and your accomplishments at Catalyst are accurate?

A. I think so, yes.

69 Q. Now, if you flip the page you've also included what I think has been referred to as a deal sheet which lists two completed transactions, one of which is Homburg Invest Inc. and the other is Advantage Rent-a-car. And are you able to say whether your description of your experience in relation to those two transactions is accurate, or has that been embellished as well by you?

A. It has been embellished.

70 Q. Tell me how it's been embellished.

A. For Homburg I did not build the waterfall model initially, I expanded greatly upon it, but I was not the initial person to create it.

71 Q. And we'll come to that in a second. So what you're telling me is that the memo that we've seen in the course of these proceedings in relation to Homburg wasn't exclusively your work?

A. No, not exclusively.

72 Q. So that memo was contributed to by other people at Catalyst?
A. Yes.
73 Q. Who were those people?
A. I believe Zach Michaud.
74 Q. And who's he?
A. He's a vice-president.
75 Q. So the waterfall model that you've described in this particular document was initially built by Mr. Michaud and then you expanded upon it and contributed to it as well?
A. I believe the waterfall model was initially built from what I've heard by Mr. Michaud, Mr. Horrox and a former associate named Phil Bacal.
76 Q. And these were all people who were at Catalyst at the time?
A. Not at the time I did this.
77 Q. No, no, but at the time the waterfall analysis was being prepared?
A. Yes.
78 Q. And then you subsequently added on to that waterfall analysis and contributed your experience and expertise to it?
A. Under Zach Michaud's direction,

yes.

79 Q. And anything else that you embellished?

A. I didn't necessarily lead the due diligence process.

80 Q. Well, what word would you choose other than led?

A. I think participated would be a fair description.

81 Q. And who did you participate in it with?

A. Mr. Michaud, Mr. De Alba, and a third party advisor named Marvin Budding.

82 Q. Why in your CV did you indicate to your prospective employers that you led the due diligence process?

A. I certainly led certain parts of it, but I didn't direct the due diligence process.

83 Q. I don't think it says you directed it, does it?

A. No.

84 Q. So is the fact that you led the due diligence process an accurate comment?

A. No.

85 Q. So tell me what is the accurate

description?

A. I participated in it.

86 Q. Okay. And so I go back to my question, why did you tell your prospective employers that you led the due diligence process?

A. I was embellishing.

87 Q. For what purpose?

A. I wanted a job.

88 Q. So were you intending to mislead them in that respect?

A. I don't think it was misleading, and they could have asked me about this if they wanted to.

89 Q. And so they would have to ask you in order to get the truth out of you?

A. I think they would know that anybody with only three years of experience was not leading anything.

90 Q. Why, if you told them that? Are we to not believe what you tell us?

A. Sorry. I don't understand what you're asking me.

91 Q. Are we not to believe what you tell us?

A. It wasn't a sworn document.

affidavit. So in paragraph 4 of that affidavit you have given evidence that you commenced employment at Catalyst as an analyst on or around November 1st, 2012. And you've indicated that you did so pursuant to an employment agreement dated October 1st, 2012 which you've appended as Exhibit A.

So if we could just go to -- I think the better one to go to is actually the one that is included in the Catalyst motion record, I apologize, because I think that one is signed. And it's similarly Exhibit A to Mr. Riley's affidavit in the Catalyst record.

And if you flip through it very quickly, I gather there's no issue that this is the employment agreement that you're referring to?

A. Looks like it.

125 Q. And that is in fact your signature that appears at page 41 of the record?

A. It is.

126 Q. And you signed that agreement on October 3, 2012, sir?

A. Yes.

127 Q. And in signing that agreement you indicated that you had reviewed, understood and accepted the terms of the offer, right?

A. Yes.
128 Q. And were those all true statements?
A. Yes.
129 Q. And you also acknowledge that you had had an opportunity to seek and receive --
A. Sorry. I correct my earlier statement. I didn't necessarily understand that's what I said I did.
130 Q. Okay. So is this another occasion when you signed something or said something that wasn't necessarily true?
A. Sure.
131 Q. So you didn't understand the employment agreement is what your evidence is now?
A. I understood most of it.
132 Q. Okay. But parts of it you didn't understand?
A. Certain specifics, no.
133 Q. And did you ask any questions in relation to those parts?
A. Yes.
134 Q. In terms of what?
A. In particular I asked about the 60/40 plan.

135 Q. Yes?

A. I emailed Mr. De Alba some time between October 1st and October 3rd asking, you know, if we could speak about the employment agreement. In particular, I wanted to know about the 60/40 scheme.

136 Q. Okay.

A. I said, you know, it seemed to be a capitalized term, but there were no real details on it. I was curious if he can provide me with more insight into the mechanics of the plan.

137 Q. Okay.

A. Mr. De Alba did not do so. He simply told me it was a carry scheme which I understood. I had a few others questions as well relating to my compensation for example.

138 Q. And did you ask any further questions in relation to the 60/40 scheme after he said to you it was a carry scheme and that you would understand?

A. I did ask how it worked and what the 60/40 meant, and he said sixty points to the deal team, forty points to the firm I believe. I don't remember what other questions I asked, but I wasn't necessarily satisfied with my understanding.

139 Q. And did you follow-up in any way?
A. No, I didn't. He was pretty discouraging about it.
140 Q. And in spite of that you elected to sign the agreement?
A. I wanted a job.
141 Q. All right. Why did you want a job?
A. I wanted to move back to Toronto because my girlfriend didn't want to move to New York. She's from Toronto.
142 Q. All right. And after you joined at Catalyst did you ask anybody about the 60/40 scheme?
A. I had informal discussions with Mr. Michaud, and I also asked Chester Dawes, our CFO, once probably in March 2014.
143 Q. And what do you mean by an informal discussion?
A. We talked about the mechanics generally. Like, if anybody has received money from it, how it works, how the points get allocated.
144 Q. And did you gain any better understanding from Mr. Michaud?

A. Not particularly.

145 Q. What was it that was confusing to you?

A. I didn't understand how the points were allocated. I didn't understand the payment in waterfall that would ultimately result in how many dollars came to me and understand when these dollars would be paid.

146 Q. And were any of those questions answered?

A. No.

147 Q. Okay. Did you set any of this out in the writing to anybody?

A. No.

148 Q. So all of this is oral conversations that you've had with people?

A. Yes.

149 Q. All right. And what about this other conversation you say you had with the CFO?

A. I asked -- following a meeting, a Monday meeting, Mr. Glassman talked about the 60/40 scheme. He advised us that -- or he seemed to be under the impression that we were all receiving regular updates on our accruals in the 60/40 scheme. I didn't speak up at the meeting and say

no, but I know that nobody was receiving these updates. So after the meeting I asked Chester Dawes about my entitlement in the 60/40 scheme.

150 Q. How did you know that nobody was receiving updates?

A. I asked.

151 Q. Did you speak to every single person at Catalyst?

A. I asked the analysts, associates and vice-president. I didn't ask the partners, but I assume they would know their entitlements.

152 Q. So when you say "everybody" you're not actually meaning everybody?

A. No. I suppose that's an embellishment.

153 Q. So who did you speak to?

A. I spoke to Mr. Michaud and Mr. Creighton.

154 Q. All right. And what did they say?

A. They said they didn't have it, and Zach advised I should go talk to Chester.

155 Q. Why would Zach not have gone himself?

A. On my behalf?

156 Q. No. Why did he need you to go --

A. No, no. Just for myself. He didn't -- I assume maybe he had asked Chester himself at some point.

157 Q. And are you able to say whether Zach ever received anything?

A. I don't know, but he said he never had anything on paper.

158 Q. But do you know whether he did or didn't receive anything?

A. No, I don't. I don't.

159 Q. And did you in fact follow-up with Chester?

A. I did.

160 Q. And what happened then?

A. Chester opened a spreadsheet on his computer. I did not view the spreadsheet myself. It was not printed for me. I wasn't given the opportunity to look at it. And he advised me my entitlement was $500,000.

161 Q. So you were advised by the CFO that your entitlement was $500,000?

A. He told me a number, yes.

162 Q. Did you set that out in your affidavit anywhere?

A. No.

163 Q. Any particular reason why you didn't?

A. I don't think it increased my understanding of the 60/40 plan. I wasn't provided with, again, any details on mechanics. Chester didn't know how the points were allocated. I wasn't paid any amounts under the plan. I didn't know when I would be paid any amounts under the plan. Simply being told a number doesn't increase my understanding.

164 Q. Was there some reason that you didn't accept what Chester was saying to you? That your entitlement had accrued to $500,000 by that time?

A. I asked him how it was calculated, he didn't know. I mean he knew the math, but he didn't understand how I got those points. And he wouldn't know when they would be paid.

165 Q. So the CFO of the company said to you, it's your evidence, that he didn't know, despite looking at this spreadsheet, how your points were calculated or how any of this calculation worked?

A. He understood the math. He didn't understand how I received the points, how my

entitlement was determined.

166 Q. Okay. And before I move on from that. So where in your affidavit at paragraph 18 you talk about the 60/40 scheme, you say in response to what Mr. Riley had testified in regards to the amount that had been accrued to you -- and by the way, Mr. Riley's evidence with respect to what had accrued to you is consistent with what you were told by the CFO, right?

A. Yes.

167 Q. So Mr. Riley hasn't embellished anything in his affidavit?

A. No.

168 Q. And when you responded to that and said, during my employment at Catalyst I was never provided with a copy of the plan nor any statements indicating the points I had allegedly accrued, why didn't you say I was told that I had accrued $500,000?

A. I wasn't provided with a statement.

169 Q. But why didn't you go on to actually say what you were provided with?

MR. HOPKINS: Counsel, I don't see why -- the affidavit states what it states.

243 Q. They should be edited out?
A. Okay.
244 Q. Is that fair?
A. Yes.
245 Q. And you say that your contribution was limited to contributing a memo. What kind of memo did you contribute? Just generally.
A. Contributed to a memo. I didn't actually contribute the memo. The memo was not complete when I went on vacation.
246 Q. I apologize. That was my misreading it. So when you say you contributed to a memo, what kind of memo were you contributing to?
A. It would have been an investment memo outlining Wind Mobile from a qualitative and financial perspective. I contributed some charts. I took the information Wind provided in the data room and I essentially transposed those financials into chart form.
247 Q. And in the course of doing that obviously you would have reviewed the other parts of the memo that may have been contributed by others within Catalyst?
A. I don't think so. I don't know. I wasn't involved for very long on the memo.

248 Q. So you never read the memo?
A. No.
249 Q. You just transposed charts into a memo?
A. It was two days before my vacation and I was getting ready to leave.
250 Q. You can't read a memo in two days?
A. I didn't want to. I didn't need to.
251 Q. That's not what I'm asking you.
A. I didn't read it.
252 Q. So all you did was you transposed a chart into a memo?
A. A few charts, yes. I gave them to Loren Creighton to put into the memo.
253 Q. So what's your analysis? When you say you performed an analysis?
A. I guess it wasn't much of an analysis.
254 Q. So this is something else that's not true in your affidavit?
A. I guess when you think of it that way, no, it's not an analysis.
255 Q. What am I thinking of? Is it or isn't it true that performed an analysis?

A. Some people might consider that to be analysis.

256 Q. What is it that you would consider to be an analysis then?

A. Something with original thought.

257 Q. Did you contribute something with original thought?

A. I don't think so.

258 Q. So your use of the word "analysis" there is the wrong word again?

A. I suppose it's the wrong word. Are you my editor?

259 Q. I'm not your editor. I'm trying to figure out what's your truth because it seems to shift. So you didn't perform any analysis in relation to Wind?

A. No.

260 Q. You just transposed a chart?

A. To my memory, yes.

261 Q. Okay. What chart was that?

A. Wind provided their financials, their historical and future financials. So I put that into chart form. So if you had to read a table with their revenue I put that into a bar chart so you can see the visual build of the

revenue.

262 Q. Is that public information? Or private information?

A. It would be private, but provided to most or if not all potential purchasers.

263 Q. But certainly not publicly available?

A. No.

264 Q. So that's part of the confidential information that you're talking about?

A. Yes.

265 Q. Would you have any dispute with the fact that the memo itself was confidential?

A. No.

266 Q. So, in other words, the analysis that was performed by the team at Catalyst, to which you contributed this chart, this bar graph, is confidential?

A. Yes.

267 Q. Now, looking at paragraph 13 of your affidavit. Here you talk about a nutrition company that you say is not public knowledge. And in that case you also drafted an investment memo in December of 2012, right?

A. Correct.

268 Q. And that again would have represented your, in part, possibly with others, your analysis of the investment thesis? Your analysis and investment thesis?

A. There wasn't really an investment thesis. In fact, I believe the memo said we would need substantial information on the company to even have a thesis because the company was private and I did this with only public information, i.e. de minimis information.

269 Q. So you weren't able to form a view, in other words?

A. Exactly.

270 Q. And then you say you had no other involvement on that file until on or about May 14, 2014 when you were provided with a teaser deck from that company's financial advisor. And is this now your receipt of confidential information from that entity?

A. I believe so.

271 Q. Okay. So in December 2012 you prepare an initial memo using publicly available information, and then at some point, a year and a half later, this deal is still -- this potential transaction is still on the table and you're

receiving confidential information about that company? Is that a fair summary?

A. Yes, but nothing happened between 2012 and 2014.

272 Q. It may or may not have, but the fact of the matter is this same opportunity that you were initially investigating in December 2012 is still on the table in some way, shape or form by May 14, 2014?

A. Yes.

273 Q. So just to finish that off, here again was your only role creating a bar chart that you transposed from that financial information?

A. Yeah. It was the day before my vacation. I didn't have much time.

274 Q. So in this one you say I did not perform any analysis, right?

A. Yes.

275 Q. And then in paragraph 15 of your affidavit you talk about valuation methods. And in paragraph 16 you say:

"I learned how to analyze companies as part of my education at the University of Pennsylvania and my previous employment at Credit

actually go check your personal devices before you swore something to the court?

A. I did actually, and I didn't -- I mean, I didn't look in the right folders, apparently.

327 Q. So there were folders that you didn't look at?

A. You know, there's a lot of folders. I looked where -- I didn't find them.

328 Q. Tell me what folders you looked at.

A. I looked on my desk top. I had a Dropbox folder that I thought maybe I would have all my information in. I didn't have anything there.

329 Q. And what folder did you ultimately have to look at to find all the information that subsequently makes its way into your affidavit of documents?

A. Almost all the confidential information was in my downloads folder. The reason it was in my downloads folder was because, as I said, the Catalyst remote access was slow and unreliable and I would frequently email myself files to work on locally at home, and then I would

download them. The copies were retained in the downloads folder. I didn't know that.

330 Q. But you were doing it so frequently, according to you, Mr. Moyse, that how could you not have known that that information was on your personal device?

A. I didn't know. And, I mean, had I known I wouldn't have it anymore.

331 Q. So you didn't make that exhaustive search at the time that you swore your affidavit of July 7th in which you essentially criticize Mr. Riley and Mr. Musters for giving the court unsupported speculation and innuendo?

A. I suppose it wasn't exhaustive enough.

332 Q. And is it possible that your search even today hasn't been exhaustive enough?

A. It's been exhaustive. I believe I've captured all the documents.

333 Q. Can you say that with absolute certainty?

A. I can't say anything with absolute certainty.

334 Q. You go so far as to call Mr. Riley's allegations -- and I take you to paragraph

61 of your affidavit on this point. You say:

"As explained above, Catalyst's allegations of my removal and misuse of confidential information are baseless." (as read)

You go so far as to call Mr. Riley's allegations baseless, right?

A. Yes.

335 Q. And then in paragraph 71 in response to the order that was being requested -- because you understood that one of the orders that was being requested was for a forensic image to be taken of your personal devices, and for that image to be reviewed by an independent solicitor, right?

A. Yes.

336 Q. And in response to that you go so far in paragraph 71 as to say that the court has no basis to order a forensic review, because what was being requested was a fishing expedition only, right?

A. Yes.

337 Q. And the reason you say that, and what you try to tell the court in order to support your position is that Catalyst was unable to provide any actual evidence that you transferred

any confidential information to my personal equipment or accounts, right?

A. That's correct.

338 Q. And that is a false statement, right?

A. No. That's a true statement. Catalyst was unable to provide any actual evidence.

339 Q. So what you're telling the court is they're not able to provide any actual evidence, therefore, I shouldn't have to submit to a forensic analysis of my computer, right? Is that what you're saying?

A. I've been forthcoming with all the documents I have.

340 Q. You were, after we got a court order requiring you to do so. What I'm going to ask you, Mr. Moyse, is why didn't you tell the court that you had those documents in this affidavit?

A. I wasn't aware at the time.

MR. HOPKINS: I think he answered the question, counsel.

BY MR. DIPUCCHIO:

341 Q. So it's just because you weren't aware at the time not having done an exhaustive

search of your computer?

A. Yes.

342 Q. Do you admit now that the concerns that were expressed by Mr. Riley and Mr. Musters that you might have confidential information on your personal computing devices was justified?

A. Not based on the evidence, and they have all the confidential information I had now.

343 Q. I understand that, but do you understand and acknowledge that their concerns as expressed in the original affidavits that you might have transferred confidential information to your personal computing devices was in fact a justified concern?

MR. HOPKINS: Mr. Moyse acknowledges in his affidavit that he did that on a regular basis, the transferring of the files to his personal computer devices due to the system being slow and unreliable. I'm not sure that particular allegation is in dispute.

MR. DIPUCCHIO: No. It is in dispute, because one of the things he said is that they didn't provide any evidence that he had actually transferred any confidential information to his

personal computing devices.

BY MR. DIPUCCHIO:

344 Q. Is it fair to say now that those concerns were justified? In other words, you did have confidential information on your personal computing devices?

A. I did have confidential information on my personal computer devices.

345 Q. But you haven't yet erased those, have you?

A. You've asked me to retain them. I would gladly erase them if I can.

346 Q. But that's what I'm saying. Prior to the motion being brought, and prior to the order being made, there was no attempt by you to erase or dispose of the confidential information that you had retained?

A. Not this confidential information. There was some that I knew I had that I made efforts to delete. I wasn't aware I had these.

347 Q. And when did you make those efforts?

A. Some time between -- I want to say -- I don't know exactly, but prior --

348 Q. Give me a timeframe.

A. March. April.

349 Q. And why were you deleting things in March and April?

A. I didn't think I wanted to stay at Catalyst for much longer and I didn't want to retain any information.

350 Q. So there was information that exist or existed on your computer system that you deleted in March, April, possibly May as well?

A. Possibly. I don't remember exactly.

351 Q. How about June?

A. No.

352 Q. So up until the end of May there's information that you had on your computer system that has possibly been deleted by you?

A. Yes.

353 Q. And do you agree with me that the only way we know, we can know what that information was is by examining your computer system and trying to piece that together now that you've deleted it?

A. I don't see what use that does.

354 Q. I don't care whether you think it's useful. Do you agree with me that that's the only way we can find out what you've deleted?

A. Yeah.

355 Q. Because in your affidavit of documents you haven't been able to provide us with a listing of what you deleted, right?

A. I don't know what I deleted.

356 Q. Other than the May 27th email which you know you deleted.

A. Yes.

357 Q. Sorry. March 27th.

A. I knew what you were saying.

358 Q. March 27th.

When you met with Mr. Riley on May 26th and he indicated to you that they had a concern that you should possibly work at home in order to restrict the amount of confidential information you were obtaining, did you offer to Mr. Riley to return confidential information that you did have?

A. I did not.

359 Q. You didn't even tell him that you had that information, right?

A. I didn't know I had it.

360 Q. You didn't even know it at that time?

A. This information. Yes, I had -- I had other confidential information I suppose.

361 Q. Okay. And did you tell him that you had that information?

A. No. But he -- I mean, they sent me home with my BlackBerry. So they allowed me to continue to receive confidential information.

362 Q. We'll talk about your BlackBerry in a second.

A. Sure.

363 Q. But you didn't tell him that you had that information, nor did you offer to return it to Catalyst?

A. No.

364 Q. And when you said in paragraph 38 that Mr. Riley has provided no evidence that I have used my personal Dropbox account to store Catalyst files, is that again just a statement you made to point out to the court that Catalyst didn't have the evidence to present to the court as opposed to the fact that that was not an accurate statement?

A. It was an accurate statement in that he did not provide any evidence.

365 Q. But it's actually an accurate statement that you did use your personal Dropbox to transfer files?

A. I did.

366 Q. Okay. And, in fact, you admit later on in your affidavit, at least in relation to the Stelco file, that you did use Dropbox to transfer some Stelco documents?

A. Yes.

367 Q. Which you then say you deleted, right?

A. Yes.

368 Q. So Stelco documents would have been some of the documents you say you deleted?

A. Correct.

369 Q. And do you know which documents those were?

A. No, I don't.

370 Q. With respect to those Stelco documents that you say you reviewed, and the investment letters for that matter, after March of 2014 you acknowledge both in relation to the investment letters and in relation to the Stelco documents that you had no need to review either of those categories of documents for any work or duties that you were performing on behalf of Catalyst?

A. I agree with that.

371 Q. And is that true of other

potential mandates as well? In other words, is it possible that during the course of your employment at Catalyst you would have been looking at some other transactions that you weren't technically involved in?

A. I would look at old completed transactions, yes.

372 Q. So it's not necessarily the case that you were only reviewing information on matters that you were actively working on?

A. No, that's not the case.

373 Q. And the Stelco case in particular you say in your affidavit you were reviewing out of curiosity to learn more about the transaction. And that's at a time I take it that you knew you were going to be leaving Catalyst, right?

A. I wanted to leave. I didn't know to where.

374 Q. But you certainly had made your mind up in terms of the fact you were going to be seeking alternative employment?

A. Yes.

375 Q. And why did you have any curiosity about reviewing the Stelco transaction and learning about that transaction?

A. As I said, I routinely reviewed old transactions, Stelco was just one of them.

376 Q. And why at that particular point in time did you find it necessary to review a transaction that we know was many years old?

A. I don't know.

377 Q. You don't have any recollection as to why you had a personal curiosity at that time?

A. I don't know why I would have review Pope and Talbot or Calpine around that time.

378 Q. Did you review those as well?

A. At some point, yes.

379 Q. Did you transfer any documents in relation to those as well?

A. No.

380 Q. Only Stelco?

A. Only Stelco.

381 Q. Did you know at the time that West Face was involved in Stelco?

A. Yes.

382 Q. Would that have been what peaked your curiosity perhaps?

A. It's coincidental.

383 Q. So it didn't?

A. No.

384 Q. That's purely coincidental? Fair?
A. Yes.
385 Q. And one of the things we know you reviewed or at least looked at was an affidavit that was sworn by the principal of West Face in that proceeding, right?
A. I also looked at an affidavit sworn by the principal of Davidson Kempner.
386 Q. Yes. But one of the things you reviewed --
A. Yes.
387 Q. -- was an affidavit that had been sworn by the principal of West Face?
A. Sure.
I also looked at an affidavit sworn by Mr. De Alba.
388 Q. I know.
At paragraph 54 of your affidavit you say that -- let's take a look, first of all, at the email that's being referenced in that paragraph which I believe is at tab D of the Catalyst motion record. So this is page 48 of the record.
And this is an email chain between you and a gentleman by the name of Evan Dryer at Credit Suisse. I take it this is an old business

colleague from Credit Suisse?

A. Yes.

389 Q. And Mr. Dryer forwards to you an article -- I apologize. I guess you had forwarded to him an article in the Globe and Mail about West Face Capital on February 7, 2013. And do you recall why you were doing that?

A. He worked for a special situations group at Credit Suisse, I thought he might find it of interest.

390 Q. Why? Why would he find that of interest?

A. He's mentioned West Face before. He knows I'm from Canada. It's come up in conversation. So I thought he might find this interesting.

391 Q. And he then responds to you and talks about I guess some West Face activity in relation to this SNC-Lavalin situation.

And then you say in your response to him at 12:01 a.m., you say:

"Oh, for sure. Will be interesting to see what will happen. They're very Ackman-like in their high profile hits and misses.

They've been hammered on one activist play we're looking at (though we don't like). Never good when we're looking at something you bought. And we're fighting with them on a different distress name right now." (as read)

Right?

A. Yes.

392 Q. And what is the one activist play that West Face -- that you were aware that West Face was looking at -- sorry. That you were aware that West Face was involved in that Catalyst was looking at?

A. I believe I was referring to Connacher, but we just looked at it and put together an initial memo.

393 Q. All right. And, in fact, West Face was actively involved in that matter?

A. West Face was already in that.

394 Q. Okay. And you say that we're fighting with them on a different distress name right now, but you say that that's not -- in your affidavit you say that that wasn't a reference to Wind?

A. Correct.

395 Q. What was that a reference to?

A. I had no basis to make that statement at the time in the email given I was referring to Mobilicity and I had no involvement or knowledge of Mobilicity at the time. I was just blustering to a friend who might think it was impressive that we were involved in the same deal as West Face.

396 Q. Okay. So you're not -- so was this an untruthful statement?

A. Yes. To my knowledge.

397 Q. All right. But what you were referring to, at least in your mind, was Mobilicity?

A. Yeah. Sure.

398 Q. But you're not denying that West Face and Catalyst were actively looking at similar opportunities in various spaces?

A. Sorry. In this email?

399 Q. No, generally. You're not denying that --

A. They've looked at similar opportunities, yes.

400 Q. Across various industries?

affidavit what I want to know is were you aware that West Face had this March 27th email?

A. I wasn't aware they retained it.

411 Q. Okay. And did you have any discussions with anybody at West Face about the fact that they were going to disclose that email in their motion materials? Or that they might be required to disclose that email in their motion materials?

A. No.

412 Q. Now, you yourself had actually deleted a copy of that March 27th email from your computer system, right?

A. Yes.

413 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 you having sent that email?

A. Upon further reflexion after sending it, yes.

414 Q. And what is it that you thought was wrong about that? That you had disclosed confidential information to West Face?

A. That I had disclosed information

to West Face.

415 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 information that belonged to Catalyst?

A. I agree it's proprietary.

416 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.

417 Q. In other words, it wouldn't be known by third parties?

A. Yes.

418 Q. Now, how long did it take you to come to that realization?

A. That I shouldn't have sent it?

419 Q. Yes.

A. I don't remember exactly.

420 Q. And was it around the time that you came to that realization that you thought you might cover your tracks by deleting it?

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

421 Q. But what I'm trying to get at, was it prior to your deleting that email that you came to the realization that maybe you shouldn't have sent it?

A. Yes.

422 Q. So some time within a week after you sent that email you came to the realization that you ought not to have sent it, and then you made the decision to delete that email?

A. Correct.

423 Q. What you didn't do obviously is you didn't go to Catalyst at the time you came to that realization and tell them that you had made the mistake of sending confidential and proprietary information to one of their competitors?

A. I doubt they would have been very forgiving.

424 Q. They may not have been forgiving, but since you made the mistake --

A. No, I did not.

425 Q. You chose not to try to correct that by going to Catalyst and being up front with

your employer?

A. No.

426 Q. So at paragraph 64 -- I take it we can also agree with each other on this point, that in paragraph 64 where you say that three of the research pieces did not contain any confidential information or information proprietary to Catalyst, that's wrong?

A. I don't agree.

427 Q. So you're saying that those analyses that were performed, those research pieces that were performed were not proprietary to Catalyst?

A. The pieces themselves were. They didn't contain any confidential information.

428 Q. I don't understand the distinction.

A. I mean there's -- in logic a set doesn't contain itself. So the memo can be confidential and not contain any confidential information.

429 Q. So what makes the memo confidential?

A. I'm not really sure actually.

430 Q. Well, maybe I can help you out.

Is it the fact that the work product that you're performing on behalf of your employer shouldn't be shared with a competitor?

A. I agree with that.

431 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.

432 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.

433 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.

434 Q. You do far more than multiply, Mr. Moyse. 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.

435 Q. Right.

Right? It's that level of analysis, that's the work product that's being performed for your employer; you surely understand that.

A. Yes.

436 Q. And that's what makes it confidential.

A. I don't know.

437 Q. Do you disagree with that?

A. I don't know what makes it confidential.

438 Q. Okay. Why do you put "confidential" on the documents? When you're authoring the documents why do you label them confidential?

A. That's part of the template. I've never given it a second thought.

439 Q. Did you tell anybody or ask anybody, Why do we label these things confidential? Or did you have an understanding of what made them confidential?

A. Seemed boiler plate.

440 Q. Would you take any analysis that you're performing or have performed for West Face and disclose it to third parties?

A. No. And I agree that the disclosure of information was wrong regardless of whether I thought it was confidential.

441 Q. So why are you telling the court that the research pieces didn't contain any confidential information or information proprietary to Catalyst if you're now disagreeing that that's the case?

A. The entire piece is proprietary. They don't -- I don't know what makes it confidential. I don't agree that any of the information in it was proprietary.

442 Q. Other than your analysis.

A. The whole of the product, yes.

443 Q. Including your analysis. Right? Which is contained within those pieces.

MR. HOPKINS: I think you have his

answer. His answer was he doesn't know.

BY MR. DIPUCCHIO:

444 Q. And what about the structure or strategy behind a particular deal? Would you consider that to be sensitive or confidential information that belongs to Catalyst?

A. Could be, yes.

445 Q. So in these memos where we see for example, and I'll take you to specific parts of them if you want me to, but where we see for example a recitation of the structure of a deal, or the strategy that was being employed by Catalyst in certain situations, would you agree that those things are confidential information that Catalyst would not want to be widely shared?

A. Yes.

446 Q. And whatever you do say in your affidavit you do draw a distinction, it seems to me at least, between three of the research pieces and then the fourth one, right?

A. Yes.

447 Q. So at least in the case of the fourth one you agree that did contain, even by your definition, confidential and proprietary information in it?

A. Yes.

448 Q. And why? What was the distinction there?

A. The information in it was based on information provided by the company under a non-disclosure agreement that would not have been available to the public.

449 Q. So in that particular case -- let me just understand and break that down. In that particular case you were aware that Catalyst had signed a non-disclosure agreement in order to obtain the information that found its way into that memo?

A. Yes.

450 Q. And in spite of that you actually disclosed that memo to a third party thereby, in effect, causing Catalyst to breach its non-disclosure agreement?

A. Yes.

Just to clarify, I'm not aware what the non-disclosure says, but...

451 Q. You certainly understand at least at minimum that the non-disclosure agreement would not allow that information that was received by Catalyst in confidence to be disclosed to a third

party?

A. It should, yes.

452 Q. And that was -- the fourth case that you're referring to at paragraph 65 is which one?

A. That would be Homburg.

453 Q. Homburg, okay.

Shall we take a break there?

MR. HOPKINS: Sure.

THE DEPONENT: I'm fine.

MR. DIPUCCHIO: I know, but the reporter -- we have to be considerate of the reporter. This is much more difficult for her than it is probably for you as well.

--- Recess at 11:37 a.m.

--- On resuming at 11:53 a.m.

BY MR. DIPUCCHIO:

454 Q. Can we turn up tab I of the Catalyst motion record? This is tab I to the affidavit of Mr. Riley. Page 64 of the record is a letter --

MR. HOPKINS: Sorry. "I" or page 59?

MR. DIPUCCHIO: 64 of the record.

MR. HOPKINS: So tab K.

MR. DIPUCCHIO: I think you have the

wrong record. You're looking at Dentons record.

MR. HOPKINS: Sorry. My apologies.

Yes.

BY MR. DIPUCCHIO:

455 Q. So after you announced to Catalyst that you were going to be resigning your position, approximately a week after that a letter was sent to your counsel and to Mr. Boland at West Face. And do you recall receiving that letter, Mr. Moyse?

A. Through my counsel, yes.

456 Q. And you understood in that letter that, in essence, Catalyst was concerned about two things. Firstly, they were concerned about the fact that you had breached the restrictive covenant in your employment contract, right?

A. That was their position, yes.

457 Q. Their concern?

A. Yes.

458 Q. And secondly they were concerned about the fact that you might have confidential information in your possession, right?

A. Yes.

459 Q. And then presumably your lawyer on your behalf responded to this letter on June 5th. And that's at page 72 of the record. And we've

looked at this letter briefly already. But what he says in regards to confidentiality is at the bottom of the first page of the letter:

"In response to your client's invitation that Mr. Moyse propose terms on which the current situation may be remedied, Mr. Moyse is willing to confirm in writing that he understands and will abide by the confidentiality provision contained in the employment agreement, a proposal which we feel is reasonable in the circumstances." (as read)

So through your counsel you indicated that you were prepared to indicate in writing that you understood and would abide by the confidentiality provision in the agreement, right?

A. Yes.

460 Q. And at this time, June 5th, 2014, when your counsel is writing this letter to my firm, you're still employed by Catalyst. You're still being paid by Catalyst, right?

A. Yes.

461 Q. And in the face of the letter that was sent to your counsel on May 30th, and the

response that was delivered by your counsel on June 5th to that letter, you still made the decision at that time not to disclose to Catalyst that you had sent an email to West Face that contained proprietary and confidential information in it?

A. I did not, that's right.

462 Q. And was there any particular reason why you didn't willingly disclose that at this time?

A. I don't know.

463 Q. You don't know whether there was a reason?

A. I don't have a reason.

464 Q. And, in fact, you believed at this time, when your counsel wrote the response to the letter, you believed at this time that there was no evidence of your having sent that email to West Face because you had deleted it, right?

A. I don't know whether or not Catalyst could have found it.

465 Q. But you yourself thought that you had deleted it.

A. Yes.

466 Q. Well, you knew you had deleted it.

A. Yes.

467 Q. And nor at that time, after May 30th and before your counsel responded on June 5th, nor at that time did you either tell your counsel, or tell anybody at Catalyst that you may have had information on your personal computing devices?

A. I don't remember.

468 Q. You don't remember whether you did or didn't tell anybody at Catalyst?

A. I definitely didn't tell anybody at Catalyst. I don't remember whether or not I told my counsel.

469 Q. Let's not get into that. In any event, that wasn't disclosed in your counsel's letter of June 5th.

A. Correct.

470 Q. Now, you've looked at, I take it, the supplementary affidavits that were filed in this matter by Mr. Riley and Mr. Musters?

A. I have.

471 Q. Let's turn up the affidavit that was sworn by Mr. Musters, the supplementary one. So that's in the supplementary motion record. At tab...

MR. HOPKINS: Tab A?

MR. DIPUCCHIO: Yes. Exactly.

I guess it's attached. I apologize. There isn't a supplementary affidavit of Mr. Musters. It's my mistake. There's a supplementary affidavit of Mr. Riley which attaches a report by Mr. Musters, right? At tab A.

BY MR. DIPUCCHIO:

472 Q. And you reviewed that report?

I'm not suggesting you reviewed it in any degree of detail, but you were aware of that report being filed?

A. I was aware of the report. I don't believe I reviewed it.

473 Q. And in your affidavit, I believe it's your reply affidavit, you acknowledge that you wiped your BlackBerry, right?

A. Yep.

474 Q. And do you have any specific recollection of the date upon which you did that?

A. I believe it would have -- so I probably would have been I want to say between June 18 and June 20th.

475 Q. There's no question, is there, Mr. Moyse, that you chose to wipe your BlackBerry after it became clear through my correspondence with your counsel that there were going to be court

proceedings brought in relation to this matter?

MR. HOPKINS: Well, in terms of court proceeding --

THE DEPONENT: I agree with the timeline. I don't agree there's a logical connection.

BY MR. DIPUCCHIO:

476 Q. Let's forget about logical connections. We'll leave that to somebody else to draw. You acknowledge that you wiped your BlackBerry after you were made aware through my correspondence to your counsel that there were going to be court proceedings initiated?

A. I don't remember exactly, because I don't remember the date of the letter that you sent that indicated there would be court proceedings.

477 Q. Let's look at that. I believe it was --

A. We should get the timing right.

478 Q. Okay. Let's get the timing right. Fair enough. I believe it was June 18th, but let me confirm.

I apologize. It's June 19th. So it's Exhibit N to Mr. Riley's affidavit, page 79. And

you had seen this email when it came through?

A. Yes. It was forwarded to me some time after.

479 Q. Okay. And do you know whether you wiped your BlackBerry after that email?

A. I don't remember.

480 Q. Is it possible you did?

A. I would say it's equally possible I didn't.

481 Q. And if you wiped it prior to that it wouldn't have been much prior to that, right?

A. I agree with that.

482 Q. So it was some time we know from Mr. Musters report after June 17th, right?

A. Yes. I just know it was some time between Wednesday and Friday.

483 Q. And prior to wiping your BlackBerry, I take it you and I can agree that you didn't ask anyone at Catalyst whether you should be wiping your BlackBerry?

A. I didn't think I had to.

484 Q. Well --

A. I did not.

485 Q. Let's just answer the questions.

A. I didn't.

486 Q. And you didn't give it to your counsel as an example, in order to preserve it?

A. No. I didn't think of that.

487 Q. Let's go back to your affidavit of July 7th. We were talking before the break about, in part about this view that you had about the non-competition covenant. I take it that in the course of applying for the job at West Face you had discussions with West Face specifically about your employment contract with Catalyst and in particular the restrictive covenants?

A. Can I answer that?

MR. HOPKINS: I think so.

THE DEPONENT: Yes.

BY MR. DIPUCCHIO:

488 Q. And can you tell me, please, who you spoke to at West Face in regards to that particular issue?

A. I would have advised Mr. Dea, and --

489 Q. Okay. Just to be precise, let's not sue works like, "I would have advised." Tell me who you did advise.

A. I believe Mr. Dea, and definitely Mr. Singh.

a result of your employment at Catalyst at the time?

A. I actually didn't find out through Catalyst. It's moderately well-known.

534 Q. Where did you find out?

A. Several people.

535 Q. Who?

A. Mr. Bacal had hinted at it. I heard from Mark Horrox. Those are two off the top of my head, but it's well-known.

536 Q. And did you discuss with West Face what would happen in the event that legal proceedings were commenced?

A. No.

537 Q. Did West Face offer to indemnify you in respect of any legal fees --

MR. HOPKINS: Don't answer. Sorry. Finish the question.

MR. DIPUCCHIO: Let me finish the question. You're jumping all over that one.

BY MR. DIPUCCHIO:

538 Q. Did West Face offer to indemnify you in respect of your legal fees or any damages that might be awarded against you?

R/F MR. HOPKINS: It's refused.

MR. DIPUCCHIO: On what basis, counsel?

MR. HOPKINS: It's irrelevant.

MR. DIPUCCHIO: It's irrelevant to a case for inducement?

R/F MR. HOPKINS: It's refused.

BY MR. DIPUCCHIO:

539 Q. So just for the record -- and I understand you're refusing it, but for the record in the event there is an indemnification agreement I'm requesting production of it, okay?

MR. HOPKINS: Okay.

MR. DIPUCCHIO: And I understand you're refusing it.

BY MR. DIPUCCHIO:

540 Q. Now, in paragraph 70 of your original affidavit you say that an interlocutory injunction would be devastating to your career and livelihood as it would prevent you from holding gainful employment and would deprive you of the experience you're developing in your still young career.

You're not suggesting that complying with your obligations under the restrictive covenant in your employment agreement would preclude you from any type of employment

A. I don't think so. That's a really broad term. It's an umbrella term for a variety of strategies.

576 Q. But Anson was definitely a firm you would identify in that field?

A. Yes.

577 Q. And how about CPPIB?

A. I would identify them as participating in certain aspects of special situations investing, yes.

578 Q. How about in star AGF?

A. I don't think they would be a special situations firm.

579 Q. And Mackenzie, would you call them a special situations firm?

A. They're involved in certain distressed investments.

580 Q. Would you call them a special situations firm?

A. Not generally.

581 Q. How many firms do you say operate in the special -- almost exclusively in the special situations field?

A. Special situations is a very broad term.

582 Q. And how many firms would you say participate primarily in that field?

A. I can't estimate.

583 Q. Do you have any ballpark?

A. It's got to be hundreds.

584 Q. Hundreds? In Toronto?

A. Not in Toronto.

585 Q. In Toronto I'm talking about, or Ontario.

A. I don't know, at least six or seven.

586 Q. So a handful?

A. Yeah.

587 Q. If I could ask you --

A. Sorry. By operate in, do you mean as their primary line of business?

588 Q. Yes.

A. Yeah. Okay. Six or seven.

589 Q. If I could ask you to turn up the brief that has been provided by West Face.

MR. MITCHELL: Could we go off the record for a minute?

MR. DIPUCCHIO: Absolutely.

--- Off-the-record discussion

BY MR. DIPUCCHIO:

590 Q. So let me ask you to turn to... I apologize, I don't have it clearly noted in my notes.

Okay, yes. So tab 2 of that brief.

A. Mm-hmm.

591 Q. And before I ask you about this particular email that's at the bottom of that first page, you knew Mr. Dea from before you started working at Catalyst, right?

A. Right.

592 Q. How did you know him?

A. I had interviewed with West Face while I was at Credit Suisse looking for employment in Toronto.

593 Q. So prior to joining Catalyst you had interviewed at West Face?

A. Yes.

594 Q. Did they offer you a job at that time?

A. No.

595 Q. And so you had some idea through that application process I gather of what West Face did and the types of transactions it would work on?

A. I didn't actually get a whole lot of insight during that part of the process. I was

actually interviewing with them more as a favour because Tom's friend was my boss at Credit Suisse. But I wasn't given much regard there.

596 Q. So on December 11, 2013 you reach out again to Mr. Dea. And I take it this is just a point of contact you're making at this time?

A. Yep.

597 Q. All right. And you reach out to him and say:

"Hope all is well. It's been a very long while and I meant to reach out much earlier. It is indeed a small space up here, much smaller than I had realized." (as read)

So just stopping there. What were you referring to?

A. Just how everyone in the space is very familiar with each other.

598 Q. When you talk about the space, are you talking about the special situations field?

A. No. I was probably talking about the broader hedge fund industry in Canada.

599 Q. And you say, "I did want to keep in touch" --

A. "Up here" I meant Canada

generally.

600 Q. Okay. You say:

"I did want to keep in touch especially now that I have some more experience and insight." (as read)

So you had I take it gained more experience and insight?

A. Some, yes.

601 Q. Then you say:

"Things are great at Catalyst, but we don't share enough perspective with others which is somewhat unfortunate." (as read)

So, first of all, were things going well for you at Catalyst?

A. No, but I'm not going to say they're terrible and I want to get out. I was planting a seed here to follow up on.

602 Q. So you weren't exactly being upfront with Mr. Dea in terms of what your experience had been at Catalyst?

A. No.

603 Q. And then you say, "We don't share enough perspective with others." Are you saying that the firms don't really talk to each other

Mr. Dea.

A. We had coffee. He ordered soup. We discussed generally my duties at Catalyst and the type of work I did. He talked about the type of work that West Face does and what their potential needs might be, although he wasn't sure at the time if they would need somebody. And that was the extent of our conversation. It lasted probably a half hour, 45 minutes.

622 Q. Did you mention any specific transactions to Mr. Dea?

A. No.

623 Q. None at all?

A. None that I remember.

624 Q. Did Mr. Dea ask you to provide anything to him as a result of that meeting?

A. He asked if I could provide research and writing samples to gauge my writing and research ability. He specifically asked that I do not provide confidential information.

625 Q. Okay. So Mr. Dea made the request to you?

A. Yes.

626 Q. And it was in response to that request that you then sent him the email of March

27th?

A. Correct.

627 Q. And what didn't you understand about Mr. Dea's caution that you say he gave you on March 26th about not sending confidential information?

A. It was clear.

628 Q. And did you take that to heart? Or did you just ignore what Mr. Dea said to you?

A. I took it to heart.

629 Q. And, in fact, when you got back to the office and sent him what you sent him you sent him information that you now acknowledge was confidential?

A. The Homburg information I do acknowledge was confidential, yes.

630 Q. And then if I can ask you to turn up tab 10 of that same brief. And this is a copy of an email, I don't know whether you've seen it or not, that Mr. Dea sent to Mr. Boland, Mr. Griffin and Mr. Fraser at some time after your meeting with him at Aroma. And you'll see a reference to you near the bottom of the page. And it says in reference to you:

"Working at Catalyst currently.

MR. DIPUCCHIO: Yes, we were on tab 13. Were we not? I apologize. Yes, that's at tab 13.

BY MR. DIPUCCHIO:

659 Q. Now, first of all, these memos all have on the header that they're for internal discussion purposes only, right?

A. That's on all of our memos whether or not that's true.

660 Q. You mean you put those on memos that are meant to be distributed to third parties as well?

A. Yes. Actually, this Homburg memo was distributed to third parties.

661 Q. Who was it distributed to?

A. It was distributed to certain prospective investors in the fund.

662 Q. Was that after the -- when did that occur?

A. Some time between -- actually it would have occurred May 2013 because we wrote the memo for that purpose.

663 Q. Okay. So that's the purpose for which the memo was being written?

A. It was written to be distributed to prospective investors.

664 Q. And it's also marked "confidential", right?

A. Yeah. Part of the template. But yes, that's what it says.

665 Q. So that's only a template so far as you're concerned. It means nothing.

A. I never gave it any thought.

666 Q. Okay. Well, when someone marks something "confidential" is that important to you, or not?

A. Generally, yes.

667 Q. And just looking at page 2 of that memo in particular, would you agree with me that -- for example, in the bullet point in the executive summary that talks about Catalyst buy-out values.

A. Mm-hmm.

668 Q. That that is information that is generated for Catalyst's eyes?

A. That was actually public information. That was information made available to the bond holders as well as the monitor's estimates of value.

669 Q. And how about the bullet point that says, "Catalyst believes newco is undervalued" and what follows?

A. I suppose that would be Catalyst's opinion of the situation.

670 Q. Its own internal opinion, right?

A. Yes.

They wouldn't be buying it if they didn't think it was undervalued though.

671 Q. Right. But the actual basis for that conclusion is set out in that paragraph, right?

A. Yes. And I believe it's also set out in the investor letters which are distributed to investors.

672 Q. I understand. But Catalyst decided who to distribute it to, right? Not you.

A. Yes. Yes.

673 Q. And let's just flip forward. I don't want to review this whole thing, but let's flip forward to...

A. It's a gripping read.

674 Q. It is. Page 17.

This whole series of bullet points that talks about the initial Catalyst offer and certain strategy that related to the offer, would you agree with me that that's Catalyst information?

A. Can I just have a second to read

it?

675 Q. Sure.

(Witness reads document)

A. I suppose -- no. I mean, much of this is factual and would have been known by the bond holders to whom the offer was presented. I mean, I don't see anything --

676 Q. So you think this is information that would have been known to third parties --

A. That the monitor released a key report? Yes.

677 Q. -- at the time that this memo was being written?

A. I don't think there's any secret Catalyst was the first fund. I don't think there's any secret that the monitor released a key report. There's no secret that -- you know, obviously Catalyst wanted to establish the position if they made an offer.

I don't think there's any secret as of May 2013 that the initial offer served to continue and open up discussions between Catalyst, because Catalyst ended up being the prospective purchaser. So, no, I don't think any of that information is confidential.

678 Q. But do you understand that this is describing a process to achieve an end result?

A. It's generic.

679 Q. This is generic?

A. Yes. It's a generic process.

680 Q. Okay. So your understanding is that this isn't confidential to anybody. So, in other words, at West Face you're able to produce this information to us as well.

A. Sorry. What do you mean?

681 Q. When you're doing this type of analysis for West Face you would feel free to disclose that information as well?

A. No. I don't agree I would disclose that, but I don't think there's anything confidential or harmful about it.

682 Q. When you say that you would agree that you shouldn't disclose it, isn't that the same thing as saying that therefore I have to maintain confidence in respect to that information? Are we having a war of semantics here?

A. No.

683 Q. So would you agree with me that when you say, I have an obligation not to disclose it, in essence what you're saying is I have an

obligation to keep it confidential?

A. I don't think any of this information is confidential. I don't think any of this information is confidential.

684 Q. So my initial question to you was, so you feel comfortable disclosing this information to third parties?

A. This information, yes. It's outlining facts that are well-known.

685 Q. Now what about under the heading on page 18, Trustee Conflict? Is that all information that you would feel comfortable sharing with a third party?

A. Probably not. It's not very consequential, but no.

686 Q. Forget about whether it's consequential in your mind. That's not for you to decide. Do you agree with me that that's not information that Catalyst would want disclosed to a third party?

A. Some of it probably not.

687 Q. What about at page 21? Do you agree with me that under the heading submission of superior offer and superior offer forces short auction process that there are a number of bullet

points that speak to the strategy that was being employed by Catalyst?

A. Yes.

688 Q. And do you agree with me that disclosure of that strategy would be of concern to Catalyst?

A. Not as of March 2014.

689 Q. But generally speaking.

A. Yes.

690 Q. It would be of concern to Catalyst.

A. If it were to interrupt.

691 Q. It's not only -- Mr. Moyse, surely you understand, it's not only in respect of its ability to interrupt this particular transaction, it's in respect of revealing to a potential competitor what kind of strategy may or may not employ in any given situation.

A. Sure.

692 Q. Do you agree with that?

A. Yes.

693 Q. Similarly on page 22 under the heading Catalyst wins short auction process with multiple creative structuring options, again there, do you agree with me that that's strategic

information that's being provided in this memo?

A. No. This is essentially an advertisement to investors just saying that Catalyst is really creative.

694 Q. So you call that an advertisement?

A. Yes. Remember the purpose of this memo.

695 Q. All right.

A. Also Catalyst was really smart and really creative.

696 Q. And is that something you disagree with?

A. I think they're smart.

697 Q. You don't think they're creative?

A. Not particularly.

698 Q. You seem to have a pretty dim view of Catalyst; is that fair?

A. I mean, I left because I had a dim view of the learning opportunities available to me there.

699 Q. Okay. But you also seem to have a dim view of the firm generally.

A. I think they have a very good track record.

700 Q. Did you have some animus towards

Catalyst before you left?

A. I didn't want to work there anymore, but I think that's clear.

701 Q. But apart from that, did you have any animus? Did you have an intention to harm them on the way out?

A. No. In fact, I was ready to quit even if I didn't have anything.

702 Q. What about the analysis at page 29? The waterfall analysis.

A. Yes.

703 Q. Would you agree with me that this is confidential information?

A. Yes.

704 Q. And then just skipping forward to 46. Would you agree with me that the bullet points under the heading Summary would contain information that would be sensitive and that Catalyst would not want to have shared with third parties?

A. Potentially the last bullet. I think the first three are publicly known or -- yeah, potentially the fourth.

705 Q. Okay. Now, I don't propose to go through each of these memos that were shared with West Face, but would you agree with me that most if

not all of those memos contain some of the same type of information we've just reviewed in the Homburg memo?

A. Some of the memos may contain some of that information.

706 Q. Okay.

A. For example, Arcan Resources has no summary analysis recommendation section. Moreover, Arcan's littered with reference to Catalyst needing more information to develop even a thesis.

707 Q. I'm just trying to come to Arcan with you here.

I'm having trouble finding it.

A. Unfortunately I guess these weren't numbered, right? It's going to be the last one, I think, or second --

MR. MITCHELL: It's the last opportunity.

MR. DIPUCCHIO: I'm just trying to get there.

THE DEPONENT: It's the second one. It's right after Homburg.

BY MR. DIPUCCHIO:

708 Q. I think the easiest way to find it

is page 182 of Dentons record.

And that was the summary that in part you prepared in January of 2014?

A. Yep.

709 Q. And one of the things that's set out in that particular memo on page 1 is an actual investment thesis, right?

A. Not really.

710 Q. Well --

A. It says investment thesis. It then states some publicly available information, and says as the next step Catalyst should engage industry consultants. So it's acknowledging Catalyst doesn't know anything. It doesn't know enough to, you know, have a view yet.

711 Q. But it's performing whatever thesis you're able to perform with the information that you have at that time, right?

A. Right, which is not really a thesis.

712 Q. But there is some information contained there that is a thesis. It may not be a thesis based on all available information but it is a thesis?

A. The thesis is we need more

information.

713 Q. And would you agree with me that whatever is there would be confidential?

A. I don't think any of this is.

714 Q. You don't think any of that information is confidential?

A. All of this is publicly available; the reserves, where the trading comps are, where the debt is trading, where the comps are trading, the cash flow generated. This is all available from the public financials.

715 Q. And what's the blow-down model?

A. It's a model I developed using public financials.

716 Q. Is your conclusion in relation to the blow-down model on Arcan publicly available information? Can I search somewhere and find your conclusion in relation to Arcan?

A. I suppose not.

717 Q. No, not that you suppose not. It's not available, right?

A. No.

718 Q. So that conclusion is the product of your work in relation to this analysis?

A. Yes.

719 Q. And those types of analysis -- we can sit here for days if you want and go through all the memos, but that type of analysis is contained in every single one of the memos you sent over.

A. It's all based on publicly available information.

720 Q. It may or may not, but we know in one case it wasn't. But I don't care what it was based on. Your analysis itself is contained in all of those memos.

A. I don't think my analysis is unique to Catalyst.

721 Q. Is it publicly available?

A. No.

722 Q. And therefore do you accept that it's confidential?

A. I don't know.

723 Q. Do you have some problem defining what's confidential?

A. I don't think I need to define it right now.

724 Q. But do you have some difficulty defining for yourself what is confidential?

A. I know it when I see it.

725 Q. I see. And would you consider these to be confidential?

MR. HOPKINS: I think he's answered the question, counsel.

BY MR. DIPUCCHIO:

726 Q. Should the court rely upon you to determine what's confidential then?

R/F MR. HOPKINS: Don't answer that.

BY MR. DIPUCCHIO:

727 Q. Now, if we go back to the brief of documents from West Face for a moment. At tab 16. There is an email from you to Tony Griffin on April 16, 2014. Who is Tony Griffin?

A. He's a partner at West Face.

728 Q. And it indicates in your email to him that you had met with him I guess on April 15th; is that right?

A. I guess, yes.

729 Q. And then you say in your email to him:

"As discussed, I believe I built a very strong skill set at Catalyst and have had an overall positive experience there." (as read)

Is that again -- do you accept any of that?

A. Again, I'm trying to get a job, I'm going to make myself sound as good as possible.

730 Q. I understand that, but there's no need for you --

A. I disagree with the overall positive experience.

731 Q. Okay. Do you agree that you built a strong skill set at Catalyst?

A. I wouldn't say very strong. I built a skill set.

732 Q. So it wasn't very strong?

A. It needed more development.

733 Q. And then you say:

"However, West Face aligns much better with my interests and longer term goals." (as read)

And then you say meeting everyone yesterday only further solidified that belief. So who did you meet with on April 15th.

A. I believe I met with Tony Griffin, Peter Fraser, Tom Dea, those are all partners, and Yu-Jia Zhu who is a vice-president there.

734 Q. And tell me about your discussion

the contract, or the agreement, employment agreement with West Face. We may have already covered this off, but I just want to --

A. Sure.

MR. HOPKINS: Sorry. Is this in the --

MR. DIPUCCHIO: This would be in the documents that you produced.

MR. HOPKINS: Do you mind sharing the documents?

MR. DIPUCCHIO: I'm going to share it with you as soon as I make sure I have the right one.

BY MR. DIPUCCHIO:

752 Q. Okay. So, what I'm showing is a fairly lengthy email chain that goes back to May 2nd. Actually it goes back to April 24th and the meeting that we just talked about, scheduling the meeting with Mr. Boland. But there's a series of emails that are sent.

And then just to follow-up on an answer that you gave previously where you said that Mr. Dea's information was mistaken in respect of your compensation.

A. Mm-hmm.

753 Q. Do you see that Mr. Dea in the

email of May 5th asks you to send your compensation information to him?

A. I do.

754 Q. And do you acknowledge that what you sent to him was not correct in respect of your current base?

A. No, I don't. My current base at the time was 100.

755 Q. So it had come up from what it was in your employment agreement?

A. Yes. It had been increased 14 months after I commenced work.

756 Q. Okay. Because I don't recall that actually being said by you in your affidavit. As a matter of fact, I think in your affidavit you said at paragraph 17, "At Catalyst I earned a base salary of 90,000."

A. No, that's not correct.

757 Q. So that actually should be 100,000?

A. Correct.

758 Q. And there was some sort of salary increase given to you?

A. After 14 months, yes.

MR. MITCHELL: Could we go off the

2014 at 9:01 p.m. from David Colla to Mr. Moyse.

BY MR. DIPUCCHIO:

790 Q. And finally the last one is an email chain beginning with an email dated May 20, 2014 at 5:13 p.m. from Ms. Sharon Beers at Mackenzie to you, Mr. Moyse. And that's just you telling her essentially that you've been offered another position and were withdrawing from your candidacy at Mackenzie?

A. Yeah, I think so.

791 Q. I'll let you see it in a second. We'll mark that as Exhibit 10. And just confirm for me that that's what that is?

A. Yes. Confirmed.

EXHIBIT NO. 10: Email chain May 20, 2014 at 5:13 p.m. from Sharon Beers to Mr. Moyse.

BY MR. DIPUCCHIO:

792 Q. And just so we have it for the record, I know we've seen it in some correspondence between counsel, but your first official day at West Face was June 23rd, 2014?

A. Yes.

793 Q. And, in fact, you worked at West

Face until the interim injunction order was made in this case on July 16, 2014; is that correct?

A. That's correct.

794 Q. And what exactly did you work on while you were at West Face?

A. Not much. For the first -- I want to say for the first two weeks I didn't have anything to work on.

795 Q. Nothing at all?

A. I did a lot of research on my own, and just read some news, but I wasn't assigned anything. And then in my third week I was assigned to look -- and I don't know if I should name the names.

796 Q. You tell me.

MR. MITCHELL: We're getting into territory -- maybe it would be preferable if you could identify or ask Mr. Moyse whether he worked on any specific engagements of concern.

MR. DIPUCCHIO: I was actually asking him to give me generally what he was working on.

MR. MITCHELL: Okay.

THE DEPONENT: I was looking at one potential public equity investment, a short investment. And I was looking at two potential

pre-IPO investments in private companies, but in a minority, non-influence stake.

BY MR. DIPUCCHIO:

797 Q. Okay. And I don't want you to answer this without giving Mr. Mitchell an opportunity to jump in here, but are you prepared to tell me what those opportunities are?

A. I don't think I should.

MR. MITCHELL: Perhaps what we can do is go off the record. I can confer with my client about whether there's any sensitivity around it. There may not be if they're relatively publicly knows. Is that fair?

MR. DIPUCCHIO: That's fair. And would you let me know whether in your view you consider those to be sensitive? Or your client.

U/T MR. MITCHELL: Yes.

BY MR. DIPUCCHIO:

798 Q. Did you produce any analyses in relation to those potential transactions?

A. I produced some email thoughts on whether we should continue to do more work.

799 Q. Okay. So what I'm going to ask you to produce for me, and I'll tell you why, is I'm going to ask you to produce all of the work

product that you did perform for West Face in the three-week period that you were there.

A. Okay.

MR. MITCHELL: No. Hold on.

MR. DIPUCCHIO: Don't worry. I don't accept that as an undertaking, okay? I won't bind you to that answer, counsel.

THE DEPONENT: I was simply saying "okay" as I'm listening.

BY MR. DIPUCCHIO:

800 Q. So I'm going to ask you to produce that to me. And the reason frankly that I would want it is because I need to test what it is he says he did versus obviously what we're concerned about in terms of the allegations that have been made in this claim. So would you give me -- I don't expect you to answer that question now.

U/A MR. HOPKINS: We'll take it under advisement.

MR. DIPUCCHIO: You folks will give me your position on it?

MR. HOPKINS: We will. We will.

BY MR. DIPUCCHIO:

801 Q. Now, sort of the on-the-fly kind of experience that we have in these

cross-examinations, I wanted to come back to some answers that you gave in regards to Wind Mobile specifically and your involvement in Wind.

A. Sure.

802 Q. And we might want to go off the record here for a second before I do this.

--- Off-the-record discussion

--- Recess at 1:16 p.m.

--- On resuming at 1:54 p.m.

BY MR. DIPUCCHIO:

803 Q. What we've agreed is rather than introducing into the record a fairly large stack of emails with attachments in relation to the Wind matter, Mr. Moyse, we've agreed that I'll ask you some questions and you'll answer those questions instead.

So, first of all, do you acknowledge that when you were with Catalyst you were part of what's known as the deal team for Wind?

A. Yes.

804 Q. And so as part of the deal team on the Wind matter, Mr. Moyse, you would acknowledge having received literally hundreds of emails in relation to that particular transaction?

A. I don't remember the number, but

that sounds reasonable.

805 Q. You were copied on these emails?

A. Sure.

806 Q. And those emails would have included for example due diligence agendas?

A. Yes, I believe so.

807 Q. And reports of due diligence?

A. I believe so.

808 Q. And as well draft share purchase agreements?

A. That one I would have to see. I don't remember that one.

809 Q. But it's possible you would have received a draft of the share purchase agreement as well?

A. Yes.

810 Q. Now, as a final matter, and then we can wrap up for today, can you just turn up your second affidavit, the affidavit of July 16th?

We've talked about your BlackBerry device. And what I'm interested in is in paragraphs 6 and 7 you talk again about emails that Mr. Riley had attached as part of his second affidavit. And what you say is that all of the emails that Mr. Riley had attached to his affidavit

were sent for work-related purposes, and that it's unsurprising that Catalyst found evidence that I forwarded documents that I was working on to my personal email account as I am sure they would find similar evidence from many other Catalyst employees.

Now, at the time that you swore this affidavit, July 16, 2014, were you aware at this time that you had 800-some-odd Catalyst documents on your personal computer?

A. I wasn't.

811 Q. So when you swore this affidavit you didn't include any of that information in this affidavit because you say you weren't aware of the fact that you had those documents?

A. I wasn't aware, no.

MR. DIPUCCHIO: Okay. Subject to any questions that may arise out of the answers to undertakings and under advisements, those are my questions for you today, Mr. Moyse. Thank you.

THE DEPONENT: Thanks.

---Whereupon the proceedings adjourned at 2:08 p.m.

271 Q. Right? So if you had typed in "How to delete files", that would have been, presumably, a Google search as well?

A. I didn't type that.

272 Q. Right. But would that have been a Google search? You would have likely used Google for that?

A. If I had searched for that.

273 Q. Right. And you say you didn't type that?

A. Right.

274 Q. But we will never know that, because you deleted your browsing history, right?

MR. CENTA: Objection. That contains in it the very thing he wouldn't agree with, because he doesn't know if typing things into Google search engine would have been saved in the browsing history.

BY MR. DiPUCCHIO:

275 Q. Okay. So what about what would have happened once you type things into Google? So, for example, you type in "How to delete a browsing history", right?

A. Yes.

276 Q. Does that take you to a website?

A. It takes me to a page of hits,

search hits.

277 Q. And then what do you do with search hits? Does the search hits give you any information?

A. Sometimes there's information.

278 Q. Right in the search hits?

A. Sometimes there's a brief summary, yeah.

279 Q. Okay. Did you access websites?

A. Probably did, but I do not remember what I accessed.

280 Q. Okay. Well, how did you figure out how to do things?

A. I search for it and I read -- I would have read what was available to me.

281 Q. Likely on websites?

A. Likely.

282 Q. Okay. And the history of the websites that you visited that day or those days, do you have any understanding of whether those would have been retained through your browsing history?

A. They probably would have been.

283 Q. Right. And all of those have been deleted by you?

A. I don't know.

284 Q. You don't know?

A. I don't know. I don't know if they have been deleted.

285 Q. Do you think they still exist?

A. I don't know.

286 Q. Did you use software to try to delete them?

A. I tried to delete them, yes.

287 Q. Okay. So you made an attempt to delete those?

A. Yes.

288 Q. And if your attempt was successful, as we think it was, we now don't have any history?

A. No.

289 Q. Right. So what you may have been doing over the course of -- and what was it, one day, multiple days? How many times did you do these searches?

A. I don't remember.

290 Q. Okay. So whatever you may have been doing over the course of however many days you were doing it now that you can't recall, we will never know. Right?

A. I don't know. I don't know if you can find my browser history.

291 Q. Okay. But let's assume for the

moment that, whatever you did, you were successful at doing.

A. Okay.

292 Q. All right? Which was your goal, right?

A. It was my goal to delete my Internet browsing history.

293 Q. Your goal was to be successful in deleting your browsing history, right?

A. Yes.

294 Q. So you say. So if you were successful, then you will agree with me we have no way now of verifying what it was you were doing over the course of the day or multiple days that you were doing this research, right?

A. Right.

295 Q. And also, 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?

A. I don't know what the browser history shows when you access Dropbox.

296 Q. Okay. And we will never know that now, will we?

A. I access my Dropbox through a

variety of other means.

297 Q. Okay. But we will never know that now, will we?

A. I thought -- no, we will not know what I accessed through my browser.

298 Q. Because what you deleted when you deleted your browsing history wasn't selective, was it?

A. No.

299 Q. You deleted your entire browsing history. Or you attempted to delete your entire browsing history, right?

A. Yes.

300 Q. And you made the determination on your own, Mr. Moyse, that your browsing history was irrelevant to this proceeding?

A. It was clear to me that my personal Internet browsing history was not relevant.

301 Q. Well, it may have been clear to you, but you made that determination yourself, right?

A. Yes.

302 Q. You certainly didn't tell your counsel you were going to do it?

A. I did not.

303 Q. Right. And you didn't tell us, that's for sure.

A. No.

304 Q. Just let me review the events of April -- sorry, July 16th with you, because that was the date upon which the order was made by Justice Firestone, right?

A. Right.

305 Q. And certainly you recall being there that morning, right, Mr. Moyse?

A. I was there.

306 Q. Okay. And you were there with your counsel, right?

A. Yes.

307 Q. And do you remember that court started at 10 a.m. that day?

A. Sounds right.

308 Q. And there were some submissions initially, and then Justice Firestone took a break to read some materials. Do you remember that?

A. I do.

309 Q. Okay. And do you remember that, after Mr. Justice Firestone took a break to review some materials, he returned. Do you remember that?

A. I do.

310 Q. And then there was another break while there were dates being discussed for the

interlocutory motion. Do you recall all of that?

A. There were a lot of breaks.

311 Q. Okay. And around 11:30 or so, do you remember the parties meeting in the hallway to discuss the terms of the interim -- the terms upon which the interim motion could be resolved on consent? Do you remember that?

A. I don't remember the time, but --

312 Q. You remember discussions in the hallway?

A. Yes.

313 Q. And all of those discussions ultimately led to the interim order that was made by Justice Firestone, right?

A. Yes.

314 Q. And that all took place, I take it you will agree with me, between 10 a.m. and 1 p.m. on July 16th?

A. Sure.

315 Q. And before the motion commenced, or before ten o'clock on July 16th, you knew what the motion was all about, right?

A. Yes.

316 Q. So you knew that Catalyst was looking to have the Court order that a forensic image

be made of your personal devices?

A. Yes.

317 Q. Including your computer?

A. Yes.

318 Q. And you knew as a result of that that one of the potential outcomes of the motion would be that a forensic image would be taken of your devices, right?

A. Yes.

319 Q. And you also knew that the relief -- part of the relief that Catalyst was seeking on its motion was for the appointment of an ISS?

A. Yes.

320 Q. And what you understood from that, I take it, that -- was that that meant that someone independent could possibly review this forensic image that was being taken from your computer?

A. I knew that somebody would review it. I wasn't sure of the process or protocol.

321 Q. Okay. You never had any understanding of what an ISS was?

A. No.

322 Q. That's not something you discussed with your counsel?

A. No.

323 Q. Okay. And you say in your affidavit in April of this year -- I'll take you to the portion of it -- that you were aware -- this is paragraph 37 -- you were aware for a number of days before the court appearance on July 16th that it was possible that your personal computer would have to be turned over to be reviewed for documents relevant to this matter, right?

A. Yes.

324 Q. So that was something you knew well before we appeared in court on July 16th, right?

A. Yes.

325 Q. And I take it the fact that you were aware of this a number of days prior to the Court appearance led to the concern you had which you subsequently describe: That personal information might be captured in this process?

A. Yes.

326 Q. And, sir, would you agree with me that, notwithstanding this concern that was in the back of your mind for a number of days prior to July 16th leading up to our appearance before Justice Firestone, you never articulated that concern to anybody?

A. I did not.

327 Q. Nor did you articulate to anybody

in the days leading up to July 16th or, indeed, on the morning of July 16th while we were all there in court before Justice Firestone, that you had purchased software two times that would deal with this concern that you allegedly had?

A. I did not, because didn't think that my personal Internet browsing history was in any way relevant.

328 Q. Okay. But you were concerned about it, right?

A. Yes.

329 Q. All right. Despite the fact that you say you were concerned about it to the point where you actually purchased two pieces of software to deal with it, you never articulated that concern to anybody?

A. I did not.

330 Q. You didn't even articulate it to your own counsel, right?

A. I did not.

331 Q. You didn't articulate it to us while we were having discussions with respect to the order, right?

A. I did not.

332 Q. And you certainly didn't articulate it to the Court?

A. I did not.

333 Q. And one of the pieces of software that you purchased, the Advanced System Optimizer, you purchased the very morning that we appeared in court, right?

A. Yes.

334 Q. And you say that that piece of software you were purchasing because you wanted to improve the performance of your computer?

A. Yes.

335 Q. And it was entirely coincidental that you purchased that piece of software the very morning we appeared in court where we were discussing a potential order to have your computer forensically imaged. Is that what you're telling the Court?

A. I don't know if you want to call it a coincidence.

336 Q. What do you mean you don't know whether I want to call it coincidence? Is it a coincidence?

A. In the sense that two separate things happened, yes.

337 Q. Was it the only reason you purchased that software, to optimize your system?

A. Yes.

338 Q. And that was just purely coincidental that the day you are appearing in court on this very matter where you were concerned that a forensic image might be taken of your computer that the only thing you were thinking about that morning was that you had to buy software to optimize the performance of your computer?

A. I don't know if that's the only thing I was thinking that morning.

339 Q. But it was so important to you to optimize the performance of your computer on the morning that you were appearing in court that you had to actually go out and buy software for that purpose?

A. It was easy to buy the software.

340 Q. Is that -- is that something you do on the morning that you appear in court?

A. I don't know. I don't know. I don't regularly appear in court.

341 Q. Well, that's my point. I would have taken as a fact that someone who doesn't regularly appear in court would have been more concerned about what was happening in court that day than about purchasing tools to optimize his computer performance.

A. I don't know.

342 Q. So that's all coincidental is what

you are saying to the Court in this?

MR. CENTA: Counsel, he has given you his answer on that.

BY MR. DiPUCCHIO:

343 Q. Okay. What was it that you were concerned about, your computer was running slowly?

A. It was.

344 Q. All right. Well, what were you concerned about from a performance perspective?

A. It was running slowly.

345 Q. All right. And that's why you purchased this software?

A. Yes.

346 Q. Okay. And when it was -- since you were so concerned about the performance of your computer on the morning of July 16th, so concerned that you purchased this software the day you're appearing in court, why didn't you optimize your performance of your system?

A. Sorry, I don't know what you mean.

347 Q. Why didn't you subsequently optimize the performance of your system on July 16th?

A. I bought the program.

348 Q. Okay. But it was so important for you to buy this program the very morning you're

appearing in court. Why didn't you optimize the performance of your system on July 16th?

A. I didn't have time.

349 Q. You didn't have time?

A. Before I went to court.

350 Q. No, but at any point on July 16th?

A. I don't know.

351 Q. Did you ever optimize your system?

A. Yes.

352 Q. When?

A. I don't remember for sure.

353 Q. Well, when? Was it before you turned your computer over to your counsel?

A. I don't remember.

354 Q. You have no memory of that?

A. I know that I used the tool several times, so I can't remember when, specifically.

355 Q. You can't assist the Court with whether that happened during that five-day window?

A. I don't remember.

356 Q. And this order -- well, first of all, at paragraph 40, you say:

"I was also concerned that the irrelevant information on the images would somehow become part of the public

record through this litigation. At that point, it was not clear to me what would happen to the images."

Right?

A. Yes.

357 Q. Do you see that?

A. Yes.

358 Q. You're saying that it wasn't clear to you what would happen to the images notwithstanding that you understood that the process that was being proposed was an ISS process?

A. I -- sorry, can you repeat the question.

359 Q. Yes. You are saying in your affidavit that it was not clear to you what would happen to the images, which would include irrelevant personal information, right?

A. Yes.

360 Q. Notwithstanding that you knew at the time that what was being proposed was an ISS?

A. I knew the word "ISS". I didn't know what any of that would entail.

361 Q. And you are saying you never had any conversations with your counsel that would have assisted you in your understanding?

A. I tried to, but they didn't -- weren't able to provide me with any answers.

362 Q. Okay.

MR. CENTA: Counsel, please go off the record for a second.

MR. DiPUCCHIO: Yes.

-- OFF THE RECORD --

BY MR. DiPUCCHIO:

363 Q. So you understood, Mr. Moyse, I take it, that the simple taking of the forensic image didn't mean that Catalyst had access to the forensic image?

A. I wasn't sure how or who would take the image.

364 Q. Okay. Well, you read Mr. --

A. Sorry.

365 Q. Go ahead.

A. Somebody had taken the image; I wasn't sure what would happen to it afterwards.

366 Q. All right. And I think you just told me that you tried to seek information from your counsel relevant to the question of the ISS, right, or the process that would be followed, if you want to put it more broadly?

A. Yes, yes.

367 Q. And you didn't get that information?

A. They were not sure how the process would unfold.

MR. DiPUCCHIO: Okay. So because I think, in fairness, the affidavit has put your client's state of mind in issue, Counsel, during this period of time, I am going to ask for the communications between Mr. Moyse and his counsel -- looking for a time frame that we can limit this to, but certainly before the date that he actually brought his computer in for the purpose of forensic imaging relevant to this question of the relief that was being sought on the motion.

U/A MR. CENTA: I don't think my client has put his state of mind in issue in a way that he's relying on the legal advice that he received. We will take it under advisement.

MR. DiPUCCHIO: Okay. I will wait for your position on it.

MR. CENTA: Yes.

MR. DiPUCCHIO: My position on it is that obviously he has said in his affidavit that he was concerned about certain things or wasn't aware of certain things, so to the point -- to the extent he says that in his affidavit, I'm saying he put his state

of mind in issue.

BY MR. DiPUCCHIO:

368 Q. And, Mr. Moyse, you've read, as you say, Mr. Justice Firestone's order very carefully, right?

A. I did.

369 Q. So you understood that that order required you to turn over your personal devices to your counsel?

A. Yes.

370 Q. And you understood, I take it, from the very terms of that order that your counsel was to hold the forensic image in trust?

A. Yes.

371 Q. Sorry, I'm just looking here.

A. I don't know if it's in trust.

372 Q. Sorry. Just going to look at it here. Yes. Do you see paragraph 7 of the order, page 109 of the record?

A. Yes.

373 Q. Right?

A. I do.

374 Q. Okay. So they were to hold that forensic image in trust, right?

A. Yes.

375 Q. Your own counsel?
A. Yes.
376 Q. So you understood, I take it, that that forensic image, by the terms of Mr. Justice Firestone's order, was not going to be provided to Catalyst at that time?
A. Not at that time.
377 Q. Right. It was to be held in trust by your counsel, right?
A. Yes.
378 Q. And whatever happened to it would be the subject of some future order, potentially, right?
A. Yes.
379 Q. And whatever concerns you may have had with respect to personal information could have been dealt with in some future order?
A. I don't know.
380 Q. You don't know that?
A. I -- I don't know.
381 Q. Okay. And you never bothered to ask your counsel that question?
A. I did not.
382 Q. And what you did instead, Mr. Moyse, was you made a unilateral decision not to

time that it was being imaged, right?

A. Yes.

406 Q. Okay. And prior to having the image taken on the morning of July -- whatever it was -- 21st, I guess, you never told your counsel or the expert who was taking the forensic image of your device that you had altered your personal device? Just answer the question. Did you ever tell your counsel --

A. I did not tell them -- I did not tell them that I deleted my personal Internet browsing history.

407 Q. And if it was an innocent act, Mr. Moyse, why wouldn't you have told them?

A. Because it didn't occur to me that -- I did not believe at all that that was relevant in any way to this litigation.

408 Q. Right. So why wouldn't you have had an open discussion with your counsel and the expert to say, just so you know, I've altered this device by taking off materials that weren't relevant, in my opinion?

MR. CENTA: Objection. You have asked the question about what he said. I don't think you can ask him why he didn't tell his lawyer something.

MR. DiPUCCHIO: I can't ask him why he

would have taken a certain action or not taken --

MR. CENTA: You are asking for a privileged answer.

MR. DiPUCCHIO: Oh, okay, sorry. You are claiming privilege over this part of it?

MR. CENTA: Yes.

MR. DiPUCCHIO: Okay. Well, again, I'm going to extend my questions to this area, as you know --

MR. CENTA: I understand.

MR. DiPUCCHIO: -- and I understand you are taking it under advisement.

U/A

MR. CENTA: Yes.

BY MR. DiPUCCHIO:

409 Q. And, Mr. Moyse, when you swore an affidavit of documents, do you recall swearing an affidavit of documents that listed out the documents that were on your personal device?

A. Yes.

410 Q. That affidavit was sworn the day after you took your personal devices to your counsel for the purposes of the taking of the forensic image, right?

A. Yes.

411 Q. And nobody, I take it, had a list

of what existed on your computer prior to July 22nd?

A. No.

412 Q. Now, you say in your affidavit that what you deleted was your browsing history only, and specifically, you say that the concern at that time was that there was some embarrassing information in that browsing history; is that fair?

A. Personally embarrassing, yes.

413 Q. And what is the embarrassing information? It wasn't clear to me what it was.

A. It would have been certain of the activities I use my browser for, such as adult entertainment websites.

414 Q. Is that the embarrassing part of it?

A. It's personally embarrassing, yes.

415 Q. Is the gambling website the part -- embarrassing as well?

A. No, not so embarrassing.

416 Q. Well, because it was mentioned in your affidavit.

A. It was mentioned as one of the uses, but I say that the adult entertainment websites were personally embarrassing.

417 Q. Okay. And is that what motivated

you to delete your browsing history, the adult entertainment websites?

A. Yes.

418 Q. Which ones were you visiting?

A. I don't know.

419 Q. You don't remember?

A. Certain websites.

420 Q. Which ones?

A. Do you want a listing?

421 Q. Yes. Give me one, two, three.

A. Red Tube.

422 Q. Red Tube?

A. Sure.

423 Q. Anything else? You're thinking long and hard about this.

A. Well, it is personally embarrassing still.

424 Q. Right. But you can't tell me off the top of your head?

A. XTube would be another.

425 Q. Okay. Anything else?

A. There are several. I can't remember exactly what I visit. There's not a --

426 Q. All right.

A. -- list.

427 Q. And it's this reference to Red Tube and XTube in your browsing history that was so embarrassing to you that you felt you had to delete those prior to giving your device over to your counsel?

A. I'm telling you, I can't remember exactly what I visited.

428 Q. Okay. Is there anything that was embarrassing?

A. No.

429 Q. Only your visit to those websites and whatever other websites?

A. Yes.

430 Q. Was any of it illegal?

A. No.

431 Q. And you say in your affidavit that, prior to your actually deleting what you say you deleted, you had done some researching. We have discussed some of that, right?

A. Yes.

432 Q. And do you remember the date on which you actually did the deletions? Was it just before you delivered your computer?

A. I don't remember for sure. I'd have to double-check, but I don't remember for sure.

433 Q. And the web searches you say you

did, you actually -- you must have done some, what, fairly comprehensive research on how to delete your web browsing history?

A. I don't remember how comprehensive it was.

434 Q. All right. And whatever web research you did pointed you to deleting your registry?

A. It pointed me towards using a registry cleaner.

435 Q. Okay. So tell me what it is you learned through your research.

A. I learned that it was my belief that simply clearing your Internet browsing history through the browsing tool is not sufficient, and one should clear the history and then run a registry cleaner.

436 Q. So you could have, I take it, used the tool that was built within your browser to clear your browsing history? That was an option available?

A. But I don't know if that was sufficient for permanent deletion.

437 Q. No, I'm saying to you you were aware that there was a tool within your browser itself that allowed you to delete browsing history, right?

A. Yes.

438 Q. Okay. And what you were trying to do was find out whether use of that tool would have been sufficient to hide your browsing history from the expert that was going to be taking the forensic image?

A. Correct.

439 Q. Okay. So as a result of the concern about whether that could withstand a forensic examination, you then went ahead and did some further Internet research?

A. Sorry, whether what could withstand a forensic investigation?

440 Q. Simply using the built-in tool?

A. I was searching for a way to make sure that my Internet browsing history was deleted.

441 Q. Right. And I guess I'm just trying to understand how this all happened.

A. Okay.

442 Q. You knew at the time that you could delete your browsing history through a built-in tool in your browser?

A. Yes.

443 Q. But I take it you had a concern at the time that simply using that tool would not have been sufficient to hide that from whomever was taking the forensic image of your drive?

A. I was curious whether or not it would be sufficient.

444 Q. Okay. So you were curious whether that would be sufficient?

A. Yes.

445 Q. Did you actually delete your browsing history before you did the research?

A. Sorry, what do you mean before I --

446 Q. Did you delete your browser history and then determine, well, I wonder if that is going to be enough; I'd better figure that out?

A. I didn't determine whether or not it would be enough.

447 Q. Okay.

A. I don't know how one goes about recovering browser history.

448 Q. All right. But bear with me while I try to work through this, okay?

A. Okay.

449 Q. Did you delete your browser history and then figure out is that enough or did you go ahead and do this research before you took any steps whatsoever?

A. No, I did -- I went ahead and did the research.

450 Q. Before you took any steps?
A. Yes.
451 Q. Okay. So before you did the research, your browser history was still there, intact?
A. I don't know.
452 Q. You didn't delete it? You didn't take any steps to delete it?
A. I didn't delete it as a means to testing this, no.
453 Q. Okay. So then you do this research. Tell me what you find in the research.
A. I can't remember exactly, but whatever it was pointed me in the direction of using the registry cleaner.
454 Q. Okay. Then there must have been further research you did with respect to which registry cleaner you should buy.
A. Yes.
455 Q. All right. And do you remember that at all?
A. No.
456 Q. Okay. And how did you come to decide on the registry cleaner that you did buy?
A. I don't remember.
457 Q. Okay. And we know through the

report of the ISS that you ultimately purchased a registry cleaner?

A. Yes.

458 Q. And that happened on July 12th?

A. Yes.

459 Q. And notwithstanding that you had purchased a registry cleaner on July 12th, you didn't go ahead and use it on July 12th, did you?

A. I don't remember. If they are saying I didn't, then I didn't, but I don't remember.

460 Q. You don't remember?

A. No.

461 Q. You don't remember having used the registry cleaner prior to appearing in court on the 16th, do you?

A. I don't remember, no.

462 Q. And after you bought this registry cleaner -- I think we have already covered this, but you certainly didn't inform anybody that you had bought a registry cleaner?

A. No.

463 Q. Is it possible that you didn't use the registry cleaner on July 12th because you were awaiting the outcome of the motion on the 16th?

A. I don't know.

464 Q. And then the morning -- and we have covered this as well. But then on the morning of July 16th, you download Advanced System Optimizer?

A. Yes.

465 Q. And that's the software that, I take it, you understand includes the secure delete function?

A. I understand that now.

466 Q. Well, you understood it at some point after you bought the Advanced System Optimizer, right? Not just now, you understood it at some point after you bought the software?

A. Yeah, but I don't -- I didn't remember until I was told I had used it -- or clicked on it, rather.

467 Q. Right. Because you say in your affidavit that you spent some time reviewing the tools that were available under Advanced System Optimizer, right?

A. I don't know how much time. It was probably just clicking on tabs. It was not much time.

468 Q. Okay. But do you remember when that happened?

A. I don't.

469 Q. Do you remember when you would have

taken an interest in Advanced System Optimizer? The functionality of it?

A. I do not remember, but I am told it is on July 20th is when I opened the program.

470 Q. Okay. That, you have been told as a result of the affidavits that have been filed by the experts in this proceeding?

A. Yes.

471 Q. Okay. But you don't have a recollection of that?

A. Not exactly the time or date, but I -- I know I opened it.

472 Q. Okay. So was this another coincidence, that you just happened to be noodling around the various functions of Advanced System Optimizer the day before you were scheduled to go to your lawyer's office to turn over your computer?

A. I don't know. It's a coincidence.

473 Q. It is a coincidence, is what you're saying. It wasn't related at all to the fact that you were visiting your lawyer the next day. That's your evidence?

A. No, it was not.

474 Q. It was not related?

A. No.

475 Q. And when you were noodling around the functionality of Advanced System Optimizer, because we know on the morning of July 16th you were concerned enough about the performance of your system that you purchased the software, you say, and when you finally started to noodle around in the program itself to determine its functionality on July 20th, you still didn't optimize your system on July 20th?

A. I don't -- I don't remember.

476 Q. You don't remember? Whether you optimized your system on July 20?

A. Like I said, I used the tool several times. I don't remember the exact times and dates I would have used the tool.

477 Q. Okay. You could have used the tool after you got the computer back?

A. Yes, and I have.

478 Q. And you have?

A. Yes.

479 Q. But you don't recall whether you optimized your system during the period between July 16th and July 20th?

A. I don't recall.

480 Q. Okay. And is there some reason why you would be fiddling around to determine the

functionality of the program on July 20th and then determine that you are not going to use the program?

A. I don't -- I don't know.

481 Q. You don't know?

A. No.

482 Q. And you know now, Mr. Moyse, that there is a secure delete folder that exists on the forensic image that was created of your drive, right?

A. Yes.

483 Q. And in your affidavit, you state that you have no explanation for why that folder exists, right?

A. I do not.

MR. CENTA: Counsel, I see it's 11:25.

MR. DiPUCCHIO: Do you want to take a break?

MR. CENTA: Can you keep an eye out for a good time?

MR. DiPUCCHIO: Yes, that's fine.

-- RECESS AT 11:25 --

-- RESUMING AT 11:38 --

BY MR. DiPUCCHIO:

484 Q. Mr. Moyse, just a few more questions on this issue of the deletion of what you say was the browsing history on your computer.

Do you recall, Mr. Moyse, that prior to this time frame -- we're talking now the July 16th to July 21st time frame -- do you recall there being some concern about the fact that you had wiped your BlackBerry?

A. That was a concern Catalyst had raised.

485 Q. Right. And that was a concern Catalyst had raised when it became obvious to them that you had deleted your BlackBerry prior to turning it back in to Catalyst, right?

A. Yes.

486 Q. And that was the subject of evidence both in Mr. Riley's affidavit and in your affidavits prior to July 16th. Do you remember that?

A. Yes.

487 Q. So you were aware as of July 16th that deleting material from your devices was creating some concern on the part of Catalyst to the point where it had been raised in the motion?

A. I thought Catalyst's concern was because it was a Catalyst device.

488 Q. Okay. But you were aware that having deleted material from one of your devices had concern in this very proceeding prior to July 16th?

A. Yes.

489 Q. And let me just recap, if I could, some of the evidence that you have given thus far.

So, Mr. Moyse, you acknowledge and have acknowledged I think that sending the March 27th e-mail with the investment memos to Mr. Dea was a mistake on your part?

A. I do.

490 Q. And you also acknowledge I think in your affidavit of April 15th -- is it April 15th? April 2nd, I apologize -- of this year, that you deleted that e-mail once you sent it. You acknowledged it earlier, but you acknowledge it again in your affidavit in April, right?

A. Yes.

491 Q. And you acknowledge that your having deleted that e-mail was a mistake? You have some issue with acknowledging it's a mistake or are you just simply trying to confirm that you said that in your affidavit?

A. Can you just point me to it?

492 Q. Sure. I can point you to it.

MR. CENTA: It's the last sentence in paragraph 30, I think, Counsel.

BY MR. DiPUCCHIO:

493 Q. You are probably right. Yes, it is. Page 10.

A. Yes.

494 Q. Okay. So now having read it, do you acknowledge that it was a mistake?

A. Yes.

495 Q. Okay. And you and I have also just talked about your having wiped your BlackBerry device, right, that was issued by Catalyst to you?

A. Yes.

496 Q. Do you acknowledge that that created concerns?

A. I do.

497 Q. Do you acknowledge that perhaps it would have been wise for you not to have done that?

A. I don't know what would have happened.

498 Q. Okay. But do you acknowledge that it perhaps would have been wise for you not to have done that?

A. There may have been another way to deal with it.

499 Q. Okay. A better way than simply wiping the entire thing and then returning it to

Catalyst?

A. I don't know what would have happened, but there may have been another way.

500 Q. All right. And you and I, I think, can agree that you've acknowledged that you made a mistake in paragraph 71 of your original affidavit where you indicated that there was no reason to believe that any confidential information had been transferred from your Catalyst computer to your personal device, right?

A. Yes.

501 Q. That was a mistake, right?

A. I realized later I was mistaken, yes.

502 Q. Yes. That was a mistake?

A. Yes.

503 Q. And would you acknowledge now that it was perhaps a mistake for you not to have mentioned the fact that you had done work for West Face on Arcan?

A. I was researching a situation on my own in preparation for if I was asked to do work on it.

504 Q. Do you acknowledge, now that I'm giving you the opportunity to acknowledge it, that it was perhaps a mistake for you not to have mentioned that in your affidavit material?

A. I could have mentioned it.

505 Q. And was it a mistake for you not to have done so?

A. I don't know. I could have -- there could have been a way to address it.

506 Q. Okay. And apart from mentioning it in your affidavit, do you acknowledge, perhaps, that it was a mistake in judgement on your part to have even done anything in relation to Arcan while you were at West Face?

A. I don't -- I didn't view the situation in which Arcan was involved to have any bearing on the work I had done at Catalyst.

507 Q. And Mr. Singh apparently disagreed with you?

R/F MR. CENTA: Objection.

BY MR. DiPUCCHIO:

508 Q. Well, do you know whether Mr. Singh --

MR. CENTA: You're asking for speculation about what was in Mr. Singh's mind as opposed to what Mr. Singh told him on a particular day in the context of the litigation that was unfolding with your client and West Face.

MR. DiPUCCHIO: All right. Let me ask

it a different way, Counsel.

MR. CENTA: Sure.

BY MR. DiPUCCHIO:

509 Q. Mr. Singh, at the very least, told you to stop working on that?

A. He did.

510 Q. The very day he found out that you were working on it?

A. Yes.

511 Q. Do you acknowledge that it -- well, your affidavit, I gather, doesn't acknowledge that you made any mistake whatsoever in having altered the state of your computer prior to turning it over to your counsel?

A. It does not say that in the affidavit.

512 Q. Right. So you have no remorse in terms of having deleted something from your computer prior to turning it over to your counsel?

A. I was very careful with how I maintained my computer following the order.

513 Q. Right. So when I --

A. And I was confident that what I was deleting was personal history not relevant to the litigation.

514 Q. And, therefore, you have absolutely no remorse in terms of having done so?

A. It would make this matter less difficult, but I don't believe what I did was wrong.

515 Q. Do you acknowledge it was a mistake in judgement?

A. It -- I could have addressed it another way.

516 Q. By being up front about it?

A. Maybe. I don't know.

517 Q. And articulating to the Court that you had a legitimate concern in your mind?

A. That would be one thing I could have done.

518 Q. Right. You could have been up front with the Court, right?

A. I don't know if that would have been the first thing I would have done.

519 Q. Well, but that's one of the alternatives that was available to you was to have been up front with the Court?

A. Yes, I could have done that.

520 Q. Right. And do you acknowledge that it was a mistake for you not to have done that?

A. I don't believe what I did was

wrong in terms of deleting my personal Internet browsing history.

521 Q. Okay. So what you are saying -- and I just want to have your evidence for this, okay? So what you are saying is, at this point in time, you do not have any remorse for what you did between the period of July 16th and July 21st?

A. I'm sorry that I turned a personal issue into a complicated legal one.

522 Q. For everybody? Right? Because, had you dealt with it up front, we wouldn't be facing this issue right now?

A. I don't know. I don't know what would have happened.

523 Q. So what you did was you simply made your own decision to delete something, and you never offered anybody the opportunity to make any submissions to the Court in relation to that, right? You simply took matters into your own hand?

A. Yes. I was confident what I was doing was not contrary to the order.

524 Q. And did you also unilaterally determine that you could wait five days before turning over your computer?

A. I don't remember.

Cross-Examination of Brandon Moyse, May 11, 2015
Undertakings, Under Advisements and Refusals

No.	Pg.	Q.	Undertaking / Under Advisement	Question	Answer
1	35	173	Undertaking	To advise whether Mr. Moyse's counsel refused to produce copies of the work Mr. Moyse had done at West Face.	Mr. Moyse's counsel took this question under advisement on Mr. Moyse's July 31, 2014 cross-examination. Mr. Moyse's counsel did not subsequently answer this question; however, Catalyst's counsel did not follow up on this request. In any event, West Face offered to produce such documents through the Independent Supervising Solicitor in March, 2015, but Catalyst did not accept this offer.
2	68	368	Under Advisement	To provide communications between Mr. Moyse and his counsel before the date that he brought his computer into his counsel's office for the purpose of forensic imaging, relevant to this question of the relief that was being sought on the motion.	Refused. These communications are privileged. Mr. Moyse has not put his state of mind during these privileged communications in issue.
3	75	410	Under Advisement	To advise why Mr. Moyse wouldn't have had an open discussion with his counsel and the forensic expert to alert them that he had altered his computer by taking materials that weren't relevant off of it.	Refused. The scope of Mr. Moyse's discussions with his counsel are privileged.
4	96	535	Under Advisement	To advise when Mr. Moyse got his home phone.	Mr. Moyse got his home phone line in November, 2013.

No.	Pg.	Q.	Undertaking / Under Advisement	Question	Answer
5	100	561	Under Advisement	To provide detailed copies of Mr. Moyse's cell phone billings from the period of March 1, 2014 to present.	Between March, 2014 and October, 2014, Mr. Moyse's cell phone billings only show the calls he placed and received when he was outside of the Rogers coverage area. None of the calls Mr. Moyse made during this period were made to West Face personnel. Mr. Moyse's detailed cell phone billings from November, 2014-present reflect two calls he made to West Face personnel: 1) Feb 10, 2015, 14:41 to 416-479-7330 (business number for Supriya Kapoor, Chief Compliance Officer at West Face), length of call 2 mins: Mr. Moyse's call to Ms. Kapoor was in order to seek clearance on a trade he had placed. 2) April 23, 2015, 17:57 to 416-303-8980, cell number for Peter Brimm (departed employee), length of call 7 mins: Mr. Moyse's call to Mr. Brimm on April 23, 2015, was for personal reasons following Mr. Brimm's departure from West Face. Redacted copies of the bills for February, 2015 and April, 2015 are attached at **Tab A**.
6	102	565	Under Advisement	To advise whether there is an agreement that exists between Mr.	There is no agreement between Mr. Moyse and West Face in relation to Mr. Moyse's role

No.	Pg.	Q.	Undertaking / Under Advisement	Question	Answer
				Moyse and West Face right now in relation to Mr. Moyse's role at West Face.	at West Face.
7	102	566	Under Advisement	To produce any agreement that exists between Mr. Moyse and West Face right now in relation to Mr. Moyse's role at West Face.	There is no agreement between Mr. Moyse and West Face in relation to Mr. Moyse's role at West Face.
8	103	569	Under Advisement	To advise whether there is an indemnity agreement that exists between West Face and Mr. Moyse with respect to his legal fees in this matter.	West Face has reimbursed Mr. Moyse for his legal fees to date in this matter. However, there is no indemnity agreement.
9	103	570	Under Advisement	To produce any indemnity agreement that exists between West Face and Mr. Moyse with respect to his legal fees in this matter.	There is no indemnity agreement between West Face and Mr. Moyse with respect to his legal fees in this matter.
10	114	643	Under Advisement	To advise whether Mr. Moyse still has a copy of the email from Mr. Moyse responding to Mr. Dea's request for the Cerberus entity that Callidus was modeled after.	Mr. Moyse has reviewed his records and does not have a copy of this email.

is outside the scope of this report, but ...

93 Q. I'm asking you general questions about forensic IT research.

A. Okay. Yes.

94 Q. If the browser disables the logging, that's applicable to all the web browsing activity that's being logged?

A. I believe so, yes.

95 Q. So so long as the history is being recorded, it's your understanding that that record would also include a record of Google searches being conducted?

A. It should.

96 Q. And you understand that if a user deletes their web history, then they are deleting the record of those searches?

A. Can you repeat that question.

97 Q. If a user deletes their web history, they are deleting the record of their searching activity?

A. Yes.

98 Q. And you understand that if a user is accessing Dropbox, the online storage service, through their web browser, then the web history would record that activity, correct?

A. Yes.

99 Q. And the web history would record not only the fact that they accessed Dropbox, it would also record what Dropbox folders they were accessing?

A. That would be -- commonly, that would be the case.

100 Q. Yes. And it would record the files that the user viewed in Dropbox if they are using their web browser to view those files?

A. That may or may not be the case. I'm not a hundred percent sure.

101 Q. You are not sure about that?

A. Yes.

102 Q. Okay. Would you agree with me that, by deleting the web history, the user would also be deleting the record of their activity of accessing Dropbox?

A. Generally, yes.

103 Q. How would it not also delete that activity?

A. Once again, I haven't done -- in this particular case, I didn't do any analysis on Dropbox, so I'm just making -- I'm answering all these questioned based on my general knowledge.

104 Q. Exactly. I'm only asking for your

general knowledge, not based on your review of Mr. Moyse's hard drive, but, generally speaking, the deletion of the web history also deletes the record of activity of using Dropbox through a web browser? That's correct?

A. Yes.

105 Q. If a user is accessing gmail or Hotmail through their web browser, the web history log would record that activity, correct?

A. Yes, it should, yes.

106 Q. And, to your knowledge, when it records the user accessing gmail or Hotmail, it also records what e-mail messages the user views?

A. That may not be always the case.

107 Q. When would it not be the case?

A. I don't have any specific, but from my experience --

108 Q. Yes.

A. -- sometimes it's pretty inconsistent what people can -- what Internet history can show in terms of web-based e-mail can access.

109 Q. But in some cases, it can show the e-mail messages that are being viewed in the web browser?

A. It can and cannot. Once again,

it's not consistent.

110 Q. But it can show the --

A. As a possibility, yes.

111 Q. Thank you. You agree with me that, by deleting the web history, the user's also deleting the record of their activity; that whatever has been recorded in the web history for gmail or Hotmail, that activity has been deleted when the web history is deleted?

A. That's correct.

112 Q. Now, if you can turn to the second affidavit sworn by Martin Musters, and that is the April 30th affidavit in the supplementary motion record. It's at tab 2 of the record. Your counsel is going to show it to you.

And you reviewed this affidavit prior to swearing your second affidavit, correct?

A. Yes, correct, yes.

113 Q. And at paragraph 3 through to paragraph 5, Mr. Musters' evidence is that cleaning up the registry on a computer does not help a user delete their web history. Do you want to take a moment and review those paragraphs?

A. No, I see that.

114 Q. You are familiar with that evidence

207 Q. And you agree with me that a user who takes those steps -- you don't disagree with the steps that Mr. Musters says he took and the data -- it had that cause and effect on the Secure Delete?

A. I believe so. I did not replicate his exercise, but I believe -- I have no -- yeah, I have no reason to doubt what he said.

208 Q. Okay. Let me just -- so you didn't attempt to replicate what Mr. Musters did? You did not attempt to do that?

A. No.

209 Q. But you have no reason to doubt the accuracy of what he says he did?

A. If for -- yes.

MR. WINTON: Let's go off the record for one second.

-- OFF THE RECORD --

BY MR. WINTON:

210 Q. Now, let's talk about the registry for a second, because, as I understand the evidence from your second affidavit, you were suggesting in this second affidavit sworn May 12th, 2015, that you concluded Mr. Moyse had not used the Registry Editor to delete data from the registry on his computer, correct? That's what you concluded here?

A. We found no evidence, yes.

211 Q. That's right. So you found no evidence that he had used the Registry Editor?

A. That's right.

212 Q. And to support this conclusion that there was no evidence, you refer to the fact that the metadata for the Registry Editor showed the system default dates, correct?

A. Yes.

213 Q. And after swearing this affidavit, you had an opportunity to review the third affidavit from Mr. Musters?

A. That's correct, yes.

214 Q. The affidavit of Mr. Musters sworn yesterday, May 13th, explains how the metadata for the Registry Editor, by default, is not updated in Windows operating systems, correct?

A. That's correct, yes.

215 Q. You know that to be the case yourself?

A. Now I do.

216 Q. You didn't know that before you swore your affidavit?

A. It did not occur to me at that time.

217 Q. It did not occur to you at the time?

A. That's correct.

218 Q. Was it a fact -- now that it's been brought to your attention, is that a fact that you may have known prior to swearing your affidavit and may have just forgotten?

A. Exactly. I may have known and it's just at that particular point in time it didn't occur to me.

219 Q. Okay.

A. Yes. We failed to run a comparative analysis, which we -- if we were have given the time to run a -- conduct a comparative analysis, we would have used a better example of why we believe Mr. Moyse did not use the Registry Editor program.

220 Q. Okay. In your affidavit, you rely on the metadata and the absence of change in the metadata, correct?

A. Can you repeat that.

221 Q. In your affidavit, this second affidavit of yours --

A. Yes.

222 Q. -- you are referring to the absence of the metadata? The lack of change to the metadata?

A. That's correct.

223 Q. But do you agree with the information in Mr. Musters' affidavit that that information is not probative, positive or negative, as to whether the Registry Editor was, in fact, used?

A. I agree.

224 Q. So now if we go back to your first affidavit.

A. Yes.

225 Q. Do you agree with me that the absence of a Secure Delete log and the absence of any record of activity in the system summary is not conclusive as to whether or not a user ran Secure Delete on Mr. Moyse's computer to delete files or folders?

A. It's not conclusive to show -- can you repeat that statement, please.

226 Q. Sure. It's a bit of a double negative --

A. Yes.

227 Q. -- but the point is it's not conclusive to support the conclusion you reach at 20(b), which is that the computer was not used to delete files or folders.

A. No. I still stand by 20(b). I

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

FACTUM OF THE DEFENDANT/RESPONDING PARTY, WEST FACE CAPITAL INC.
(Interlocutory Motion Returnable As Soon As It Can Be Heard)

EXHIBIT No. 1
ON THE EXAMINATION OF
Anthony Griffin IN
Catalyst V Moyse etal.
HELD ON May 8/15
NEESON & ASSOCIATES COURT REPORTING
& CAPTIONING INC. TORONTO, ONT.

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Lawyers for the Defendant/Responding Party,
Brandon Moyse

PART I: OVERVIEW

1. This case is about Brandon Moyse – a 26 year-old junior financial analyst with approximately 4 years of experience in the financial services industry – who, in March 2014, in response to a prospective employer's request for writing samples, emailed 4 memos containing business information belonging to his then employer. It was a "rookie mistake", albeit one that Brandon regrets and agrees was wrong.

2. This email was sent approximately 5 months ago and has not resulted in any harm to Brandon's former employer, The Catalyst Capital Group Inc. ("**Catalyst**"). Notwithstanding these facts, none of which are contested, Catalyst now seeks the extraordinary remedy of an injunction to stop Brandon from working at his new job at West Face Capital Inc. ("**West Face**") as well as an order for a forensic inspection of the computers and media devices owned by Brandon.

3. Prior to Brandon starting with West Face, Brandon and West Face took a number of steps to ensure that any confidential information of Catalyst that Brandon may possess was not divulged to West Face. West Face reminded Brandon of his confidentiality obligations, which he acknowledged and agreed to abide by, and West Face implemented a confidentiality wall with respect to one particular transaction in which both West Face and Catalyst are engaged. Unfortunately, these numerous steps taken by West Face did not go far enough for Catalyst, which remains intent on blocking Brandon from the labour market and preventing him from earning a living in his chosen vocation.

4. In its Factum, Catalyst overstates, and, in several instances, takes the evidence out of context. The Courts have repeatedly ruled that non-competition covenants are *prima facie* unenforceable as restraints of trade that are contrary to public policy. Moreover, if

the non-competition covenant in this case were upheld, Brandon would be prevented from working in the financial services industry, as well as many other industries, anywhere in Ontario.

5. Similarly, there is no reason to grant Catalyst's extraordinary request for a forensic inspection of the computers and media devices owned by Brandon. It is uncontroverted that West Face has not used the business information which it received from Brandon, nor is there any evidence to indicate that Catalyst has lost business or suffered any other harm. The email that Brandon sent to West Face in March 2014 as a writing sample represents the only disclosure by Brandon to West Face of business information belonging to Catalyst.

6. Together with Brandon, West Face asks that this motion be dismissed. Catalyst does not have a strong *prima facie* case for the enforcement of the restrictive covenant; there is no evidence of irreparable harm suffered by Catalyst; and the balance of convenience clearly favours allowing Brandon to continue his career at West Face.

7. Accordingly, Catalyst's motion should be dismissed with costs payable to West Face and Brandon on a substantial indemnity basis.

PART II: THE FACTS

The Parties

8. Catalyst is an independent investment firm focused on making investments in distressed and undervalued Canadian entities for control or influence.

> **Affidavit of James A. Riley, sworn June 26, 2014 ("Riley's June Affidavit"), para. 2, Motion Record of the Moving Party, Tab 2.**

9. Brandon is a 26 year old resident of the City of Toronto. He was employed by Catalyst as an Analyst for less than 2 years, from October 2012 until June 2014.

Affidavit of Thomas Dea, sworn July 7, 2014 ("Dea Affidavit"), para. 24, West Face's Motion Record, Tab 1.

10. West Face is an investment manager based in Toronto that has been in business since 2006. It manages a number of funds and accounts covering a broad range of investments. It has assets under management of over $2.5 billion.

Dea Affidavit, paras. 1 and 2, West Face's Motion Record, Tab 1.

11. West Face has two principal groups of funds: the Long-Term Opportunities Fund (the "**LTOF**") and the Alternative Credit Fund (the "**ACF**"). The LTOF, which is West Face's inaugural fund, has a broad investment mandate which is principally focused on making minority investments in public common equity strategies and publicly traded debt opportunities primarily related to companies located in North America.

Dea Affidavit, para. 7, West Face's Motion Record, Tab 1.

12. The investment mandate of the ACF, which was launched in December 2013, is to make investments in illiquid private debt with terms greater than 2 years (up to 7 years) with the expectation of holding each investment until its maturity. Investments in the ACF are not intended to seek a controlling interest or a position of influence in the company. By contrast, because the LTOF allows investors in the fund to sell their investment on a quarterly basis, West Face must overwhelmingly pursue investments that can be liquidated on an orderly basis if necessary, and as such it pursues only short-term investment strategies.

Dea Affidavit, paras. 8 and 9, West Face's Motion Record, Tab 1.

Comparison of West Face and Catalyst

13. West Face's primary investment strategy has a different focus from Catalyst. Catalyst is focused on control or influence-based "distressed investments" (i.e.

investment opportunities where a company is considered to be under-managed, under-valued or poorly capitalized). Generally, this means that Catalyst seeks to control or influence the management of the companies it is investing in, to increase the value of the company by influencing/changing its management or operations.

Dea Affidavit, para. 10, West Face's Motion Record, Tab 1.

14. During the aftermath of the credit crisis from 2008 to 2009, West Face made a number of "distressed investments" in public debt securities. However, since that time, credit availability has improved materially and, as a result, the number of opportunities that can be considered "distressed investments" has declined significantly such that there are very few opportunities available to pursue this type of strategy.

Dea Affidavit, para. 12, West Face's Motion Record, Tab 1.

15. The relatively small number of investment opportunities in this field, particularly when confined to Canada, also has the result that the investment opportunities that are available are widely known in the industry. As a result of these factors, over the last few years, West Face has focused less and less on making distressed investments, although it is not out of this market entirely.

Dea Affidavit, paras. 12 and 13, West Face's Motion Record, Tab 1.

Transcript of Cross-Examination of Thomas Dea held on July 31, 2014 ("Dea Transcript"), Answer to Question 75, page 24, Schedule C.

16. Ultimately, West Face tends to focus on publicly traded securities while Catalyst, as a private equity firm, seeks to make controlling investments, resulting in very different arrangements with its investors. The capital held by Catalyst can also be retained, typically for very long periods of up to 10 years or more, which is often required because the companies are often not listed on public exchanges.

Dea Affidavit, para. 14, West Face's Motion Record, Tab 1.

17. Further, while it is common for private equity firms like Catalyst to become involved with a target company's management, West Face generally does not become involved with the management of target companies.

Dea Affidavit, para. 15, West Face's Motion Record, Tab 1.

18. As such, while West Face and Catalyst do compete in certain respects, their primary business focuses are different, as they concentrate on different investment opportunities and seek to take different levels of control of the companies in which they seek to invest. Where West Face and Catalyst have been involved in the same investment target, Catalyst has been a very small participant, presumably because of its restricted investment mandate.

Dea Affidavit, para. 16, West Face's Motion Record, Tab 1.

Offer of Employment from Catalyst

19. On or about October 1, 2012, Catalyst presented Brandon with a written Employment Contract (the "**Catalyst Employment Contract**").

Riley's June Affidavit, para. 14, Motion Record of the Moving Party, Tab 2.

20. The Catalyst Employment Contract contained, *inter alia*, a confidentiality provision and a non-solicitation provision (the "**Non-Solicitation Clause**"). It also contained a non-competition provision (the "**Non-Competition Clause**"), which provided as follows:

> 8. 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 CCGI or the Fund or any direct Associate of CCGI 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 CCGI'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 CCGI;
>
> **Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.**

Offer of Employment from West Face

21. Pursuant to the terms of a written offer of employment dated May 26, 2014, West Face offered employment to Brandon as an Associate. Brandon accepted the terms of West Face's offer on May 26, 2014 (the "**West Face Employment Contract**") and started working at his new job on June 23, 2014. Contrary to the assertion at paragraph 22 of Catalyst's Factum, the West Face Employment Contract signed by Brandon does not include a non-competition covenant which survives termination of his employment. On its face, the non-competition covenant, found at paragraph 9.01(a), applies only during employment. Only covenants (b) and (c), pertaining to the solicitation of West Face's contacts and employees, survive termination of employment. In any event the non-competition provisions of the West Face Employment Contract, and any other contracts West Face has with its employees, are irrelevant to this dispute; the issue before this Court is the terms of the employment contract between Brandon and Catalyst.

> **Dea Affidavit, para. 23, Exhibit "B", West Face's Motion Record, Tab 1, 1B.**

22. Brandon only has 4 years of experience in the financial services industry, only one of which was spent working at a firm that makes investments as a principal as its primary function. West Face hired Brandon as an Associate to act as a generalist working on a variety of investment strategies across a diverse set of industries. His duties include:

(a) Fundamental research and due diligence of investment opportunities, including equities and credits;

(b) Financial modeling;

(c) Deal structuring; and

(d) General support of West Face's Portfolio Managers.

Dea Affidavit, para. 24, West Face's Motion Record, Tab 1.

23. Brandon is the most junior member of West Face's investment team. In his position, Brandon does not receive portfolio summaries, is not a member of the company's investment committee, does not participate in senior management meetings nor does he have the authority to make any strategic decisions.

Dea Affidavit, para. 24, West Face's Motion Record, Tab 1.

24. Under the terms of the West Face Employment Contract, Brandon agreed that he would not use any property in the course of his employment with West Face that was confidential or proprietary information of any other person, company, group or organization. In order to underscore the importance of this obligation, Alexander Singh, West Face's General Counsel and Secretary, spoke to Brandon on May 22, 2014 to remind him that he was not under any circumstances to disclose or use any confidential or proprietary information belonging to Catalyst.

Dea Affidavit, paras. 26, 31, West Face's Motion Record, Tab 1.

Affidavit of Alexander Singh, sworn July 7, 2014 ("Singh Affidavit"), para. 4, West Face's Motion Record, Tab 2.

25. In addition, Brandon represented and warranted that his acceptance of West Face's offer of employment would not result in any breach of any non-solicitation and non-competition agreements. With respect to this particular representation, Brandon told West Face that he had a non-competition covenant with Catalyst. He subsequently provided West Face with a redacted copy of the Catalyst Employment Contract.

Dea Affidavit, para. 27, West Face's Motion Record, Tab 1.

26. Upon West Face's review of the Catalyst Employment Contract, West Face concluded that the Non-Competition Clause and the Non-Solicitation Clause were unenforceable, and as such Brandon could accept employment with West Face.

Dea Affidavit, para. 28, West Face's Motion Record, Tab 1.

West Face Advises Catalyst that Brandon will Abide by his Confidentiality Obligations

27. On May 30, 2014, West Face received a letter from Catalyst's counsel expressing concerns over West Face's hire of Brandon. As outlined herein, prior to receiving this letter, West Face had reminded Brandon not to disclose any confidential or proprietary information belonging to Catalyst. Accordingly, West Face, through its counsel, confirmed to Catalyst in writing on June 3, 2014 that it had impressed upon Brandon that he was not to share or divulge any confidential information that he obtained during his employment with Catalyst.

Dea Affidavit, paras. 33 and 34, West Face's Motion Record, Tab 1.
Singh Affidavit, para. 4, West Face's Motion Record, Tab 2.

28. For his part, Brandon's counsel also wrote to Catalyst, and advised that Brandon was willing to confirm in writing that he understood and would abide by the confidentiality provision contained in the Catalyst Employment Agreement.

Dea Affidavit, para. 35, West Face's Motion Record, Tab 1.

29. In a letter dated June 13, 2014, Catalyst's counsel advised that the assurances of West Face and Brandon that Brandon would not share or divulge any of Catalyst's confidential information "did not go far enough". In particular, through its counsel, Catalyst advised West Face and Brandon that it was concerned about a specific transaction for which Catalyst and West Face had each submitted bids (the "**Transaction**").

Dea Affidavit, paras. 36, 37, West Face's Motion Record, Tab 1.

30. In response, Brandon again confirmed to Catalyst that he fully understood and intended to abide by his contractual obligations of confidentiality to Catalyst and further, that he would not divulge any information regarding the Transaction. Brandon further advised that he was willing to confirm these legal obligations in writing, including references to specific areas of concern of Catalyst.

Dea Affidavit, para. 38, West Face's Motion Record, Tab 1.

31. In addition, prior to the commencement of this litigation and prior to Brandon's start date with West Face, West Face implemented a confidentiality wall between Brandon and the rest of West Face with respect to the Transaction (the "**Confidentiality Wall**"). Under the terms of the Confidentiality Wall, Brandon is not permitted to discuss any information that he may have about the Transaction with anyone at West Face, nor can anyone at West Face inquire about or discuss the Transaction with Brandon.

Dea Affidavit, paras. 39, 40 and 41, West Face's Motion Record, Tab 1.

32. Contrary to paragraphs 8, 54, 55 and 88 of Catalyst's Factum, the Confidentiality Wall was designed in a sophisticated manner in order to ensure Brandon did not work on the Transaction, and contained three components:

(a) Brandon and the Investment Team were formally notified of the existence of the Confidentiality Wall by email;

(b) Thomas Dea, a Partner at West Face ("**Dea**"), made a verbal announcement to the investment professionals advising them of the existence of the Confidentiality Wall; and

(c) West Face placed restrictions on its network to ensure that Brandon does not have access to files regarding the Transaction.

Dea Affidavit, paras. 39, 40 and 41, West Face's Motion Record, Tab 1.

Dea Transcript, Answers to Questions 371-373, pages 85-86, Schedule C.

Response to Undertaking, Dea Transcript, Answer to Question 433, page 98, Schedule C.

33. Catalyst was advised that the Confidentiality Wall had been implemented with respect to the Transaction by letter dated June 19, 2014, prior to the institution of legal proceedings and prior to Brandon commencing employment at West Face. West Face also confirmed to Catalyst at that time that Brandon would not have any involvement in the Transaction while at West Face.

Riley's June Affidavit, Exhibit "O", Catalyst's Motion Record, Tab 2O.

34. In paragraphs 8, 54, 55 and 88 of Catalyst's Factum, Catalyst criticizes West Face because (1) not all West Face employees were informed of the existence of the Confidentiality Wall; (2) West Face has refused to state what consequences would follow a breach of the Confidentiality Wall; and (3) the Confidentiality Wall only applies to one of two companies that make up the "Telecom Situation". These criticisms are disingenuous, for the following reasons:

(a) Non-Investment Team members (those who were not informed of the Confidentiality Wall) were not involved with the Transaction, and generally would not access investment files. As such, there was no reason to advise them of the Confidentiality Wall;

(b) As Brandon was the individual being "walled", it was only necessary to advise him, and those he worked with or would likely receive information/instructions from, as to the existence of the Confidentiality Wall;

(c) There could be a range of consequences as a result of a breach of a Confidentiality Wall, depending on the circumstances;

(d) Catalyst has acknowledged that after being informed of the Confidentiality Wall, it made no attempts to seek clarification from West Face regarding the Confidentiality Wall, nor did Catalyst request that West Face make any changes to the Confidentiality Wall, notwithstanding that it was clear from West Face's correspondence that the Confidentiality Wall applied to a single transaction; and

(e) Catalyst has no evidence that West Face or Brandon have breached the terms of the Confidentiality Wall since it has been put in place.

Transcript of Cross-Examination of James A. Riley held on July 29, 2014 ("Riley Transcript"), Answers to Questions 756-761, pages 213-215, Schedule C.

Riley's June Affidavit, Exhibit "O", Catalyst's Motion Record, Tab 2 O.

Dea Transcript, Answer to Question 436, page 99, Schedule C.

35. Since the commencement of this litigation, West Face has taken steps to preserve all documents relevant to the matters at issue. In addition, West Face has conducted a diligent search of its emails to determine whether there was any information of Catalyst disclosed by Brandon. West Face has found only one email from Brandon in which he provided West Face with documents related to Catalyst's business. The documents were provided by email from Brandon to Dea on March 27, 2014, which was at the early stages of the recruitment process, as writing samples so that Brandon could demonstrate his written communication skills and the types of work he was doing at Catalyst.

Dea Affidavit, para. 42, West Face's Motion Record, Tab 1.

36. Paragraph 26 of Catalyst's Factum is incorrect. While there is no dispute that Dea requested samples of Moyse's work to assess his suitability for employment, when Dea requested the writing samples, Dea specifically advised Brandon that he could redact any sensitive information. Dea did so to protect Catalyst's confidential information.

Dea Transcript, Answers to Questions 289-292, pages 68-70, Schedule C.

Transcript of Cross-Examination of Brandon Moyse held on July 31, 2014 ("Moyse Transcript"), Answer to Question 624, page 132, Schedule C.

37. West Face has not done any significant review of the documents attached to this email, and reviewed them only to assess Brandon's writing style and thus his suitability for employment with West Face. Based on the review of the documents that was done,

West Face concluded that the information contained in the documents was primarily a recitation of public information, and contained a pedestrian analysis.

Dea Transcript, Answers to Questions 311 and 312, pages 73 and 74, Schedule C.

38. Contrary to paragraph 31 of Catalyst's Factum, West Face did **not** distribute the information "throughout the firm". West Face disclosed the information to only four individuals within West Face, all of whom were involved in the hiring process, on the understanding that they would maintain it as confidential. This was done because although West Face recognized that it was inappropriate of Brandon to provide the information, West Face did not consider the information disclosed by Brandon as particularly sensitive or damaging to Catalyst. West Face considered it as a "rooky error" [*sic*], and cautioned Brandon that he should not do this in future.

Dea Transcript, Answers to Questions 313-336, pages 74-79, Schedule C.

39. West Face was not involved in any of the transactions that were the subject of the documents attached to the email, and as such had no use for the information contained therein. It is uncontroverted that West Face has not used or relied on any of the documents attached to the email. After receiving the documents, West Face advised Brandon that it takes matters of confidentiality very seriously and that if he wished to work at West Face he was not to provide West Face with any further information related to Catalyst's business. Brandon has not made any further disclosures in this regard.

Dea Transcript, Answers to Questions 345 and 346, page 81, Schedule C.
Dea Affidavit, paras. 31, 32 and 43, West Face's Motion Record, Tab 1.
Singh Affidavit, para. 4, West Face's Motion Record, Tab 2.

40. Contrary to the allegation at paragraph 30 of Catalyst's Factum, the affidavits of documents Moyse swore pursuant to the July 16, 2014 Interim Order of Justice Firestone

do not reveal "very damning facts" which demonstrate that Moyse or West Face disregarded Catalyst's proprietary interest in its confidential information. To the contrary, the affidavits of documents Moyse swore pursuant to the Interim Order do not reveal **any** evidence involving West Face. In fact, since the documents contained in these affidavits of documents specifically did not contain anything involving West Face, West Face agreed not to seek production of the documents listed in the affidavits of documents, in order to assist Catalyst in preserving and protecting any confidential information that could be contained therein. Moreover, Moyse confirmed that the documents contained in those affidavits of documents were documents he downloaded in the course of his employment with Catalyst in order to perform work for Catalyst, and that he had not even been aware that they existed on his computer until the legal proceedings, much less made any use of that information. As such, there was no "damning evidence" revealed by Moyse's Affidavits of Documents.

Moyse Transcript, Answer to Questions 327-330, pages 71-72, Schedule C.

41. The Interim Order itself was on consent of all the parties and on an expressly without prejudice basis. Under the terms of the Interim Order, it was not to be voluntarily disclosed by the parties, and the court hearing the interlocutory motion is not to consider or draw any inferences from the terms of the Interim Order.

PART III: THE ISSUES AND THE LAW

42. The issues on this motion are as follows:

(a) Does Catalyst meet the test for the granting of an interlocutory injunction?

(b) Should a forensic investigator be appointed to examine Brandon's electronic devices?

Catalyst has not met the Test for an Interlocutory Injunction

43. The Court may grant an interlocutory injunction "where it appears to a judge of the Court to be just or convenient to do so".

***Courts of Justice Act*, R.S.O. 1990 c. C. 43, s. 101.**

44. The three-part test for an interim or interlocutory injunction is well-known. The moving party must establish that:

(a) There is a serious issue to be tried;

(b) The moving party would suffer irreparable harm if an injunction was not granted; and

(c) The balance of convenience favours granting the injunction.

RJR-MacDonald Inc. v. Canada, **1194 CarswellQue 120 (S.C.C.), ["*RJR-MacDonald*"] at paras. 35, 82-85 West Face's Book of Authorities, Tab 1.**

45. Where the result of the injunction will in effect amount to a final determination of the action or where the motion involves a restrictive covenant in the context of employment, the first step of this test is modified to become more stringent. This is particularly important where the injunction sought is intended to place restrictions on a person's ability to engage in his/her chosen vocation and earn a living. In such cases, the moving party must show that it has a strong *prima facie* case, not simply that there is a serious issue to be tried.

***RJR-MacDonald*, *supra*, at paras. 49-51; West Face's Book of Authorities, Tab 1.**

***Kohler Canada Co. v. Porter*, 2002 CarswellOnt 2009, (Sup. Ct. J.) ["*Kohler*"] at paras. 14-19 West Face's Book of Authorities, Tab 2.**

***Jet Print Inc. v. Cohen*, 1999 CarswellOnt 2357 (Sup. Ct. J.) at para. 11, West Face's Book of Authorities, Tab 3.**

46. West Face respectfully submits that Catalyst has not established any elements of the test: it has not established a strong *prima facie* case, or that it will suffer irreparable harm, or that the balance of convenience favours granting the injunction.

1. Catalyst Has Not Established a Strong *Prima Facie* Case

The Non-Competition Clause and Non-Solicitation Clause are not Enforceable

47. Canadian Courts consider non-competition covenants in employment contracts to be "in restraint of trade" and therefore *prima facie* void and unenforceable. This view will prevail unless the party seeking to rely on the restrictive covenants can establish that the restrictive covenants are reasonable using the following three-part test:

(a) The employer has a proprietary interest entitled to protection;

(b) The clause is reasonable in terms of duration as well as geographic and business scope; and

(c) The restraint is reasonable in terms of the public interest.

> ***J.G. Collins Insurance Agencies Ltd. v. Elsley Estate,* 1978 CarswellOnt 1235 (S.C.C.) ["*Elsley*"] at para. 19, West Face's Book of Authorities, Tab 4.**

48. Before a determination of reasonableness can be made, however, the terms of the restrictive covenant must be unambiguous. An ambiguous restrictive covenant will be *prima facie* unenforceable. Similarly, the Court will not read down an unreasonable covenant to what would be considered reasonable. To be enforceable, a restrictive covenant must be no wider than reasonably required to afford adequate protection to the employer.

> ***KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, 2009 CarswellBC 79 ["*Shafron*"] at paras. 17, 27; 36-42, West Face's Book of Authorities, Tab 5.**

A. <u>The Non-Competition Clause is Ambiguous</u>

49. The Non-Competition Clause does not define the nature of Catalyst's business nor does it define the term "Fund" anywhere amongst its terms. As a result, the Non-Competition Clause is ambiguous, as it is impossible to determine whether, by accepting employment with West Face, Brandon has engaged in a business or undertaking of the

same "type" as Catalyst or the "Fund". West Face submits that the clause fails on the basis of ambiguity.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.
Riley Transcript, Answers to Questions 487-491, pages 135-136, Schedule C.

B. The Non-Competition Clause is Overly Broad

50. In the alternative and in any event, West Face submits that the business and geographic scope of the Non-Competition Clause are too broad, making the clause unreasonable and therefore unenforceable. West Face further submits that the duration of the restrictive covenant is longer than is necessary to protect Catalyst's legitimate business interests.

(i) *The Scope of the Restricted Business is too Broad*

51. The Non-Competition Clause purports to prohibit Brandon from engaging in any business or undertaking of the type conducted by Catalyst or the "Fund" or any direct "Associate" (as that term is defined by the Ontario *Business Corporations Act*) of Catalyst anywhere in Canada.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

52. The *Business Corporations Act* defines "Associate" as:

> "associate", where used to indicate a relationship with any person, means,
>
> (a) any body corporate of which the person beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights attached to all voting securities of the body corporate for the time being outstanding,
>
> (b) any partner of that person,
>
> (c) any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,
>
> (d) any relative of the person, including the person's spouse, where the relative has the same home as the person, or

(e) any relative of the spouse of the person where the relative has the same home as the person.

***Business Corporations Act*, R.S.O. 1990, c. B. 16, s. 1.**

53. Catalyst has identified that at the time of Brandon's departure, Catalyst had seven (7) associates, being the following:

(a) Geneba Properties N.V., a European real estate company;

(b) Advantage Rent a Car, a car rental business;

(c) Sonar Entertainment Inc., a television series, mini-series, and made-for-TV movie production company;

(d) Natural Markets Restaurant Corporation, a retail food and restaurant company;

(e) Callidus Capital Corporation, a specialty asset-backed lender;

(f) Therapure Biopharma Inc., a contract manufacturer and developer of biological drugs; and

(g) Gateway Casinos & Entertainment Inc. ("**Gateway Casinos**"), a gambling company.

Reply Affidavit of James Riley sworn July 28, 2014 at para. 14.

54. The determination of whether an entity is an "Associate" cannot be determined by information on Catalyst's website, and as such Brandon would have to ask Catalyst for a list of "Associates" in order to know whether any particular entity is an "Associate" as of the date of his resignation.

Riley Transcript, Answers to Questions 558-559, page 153, Schedule C.

55. Given the nature of the Non-Competition Clause, Brandon is prohibited from working in any business operated by any of the Associates in Canada, regardless of whether he had any involvement with them while at Catalyst. Brandon is therefore blocked not only from the financial services industry, but also from working in the retail food, restaurant, gaming and biological drug industries – all of which are completely unrelated to Catalyst's operations.

Riley Transcript, Answers to Questions 591-600 and 687; pages 165-167 and 194-195, Schedule C.

56. Further, the Non-Competition Clause seeks to restrain Brandon from engaging in a business within Ontario that Catalyst or an Associate is pursuing elsewhere in the country, but which Catalyst or an Associate may not be pursuing in Ontario at all. For example, although Gateway Casinos only operates in British Columbia and Alberta, the Non-Competition Clause would prevent Brandon from working in the gaming industry in Ontario. West Face submits that such a restriction is excessive. Indeed, on cross-examination Catalyst's Chief Operating Officer, James Riley, was unable to identify any business interest in restricting Brandon from working for a business located only in Ontario when the business that Catalyst is pursuing is not located or operating in Ontario.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

Riley Transcript, Answers to Questions 692-704, pages 196-201, Schedule C.

57. Moreover, the Non-Competition Clause would not restrict Brandon from working in the car rental business, a business Brandon spent an estimated 50% of his time working on for Catalyst from January to April 2014, but would restrict him from working in other businesses (such as the gaming business), notwithstanding that he did no work for Catalyst in that industry at all.

Riley Transcript, Answers to Questions 686 and 705-708; pages 194 and 201-202, Schedule C.

(ii) *The Geographic Scope of the Non-Competition Clause is too Broad*

58. The Non-Competition Clause purports to restrict Brandon from competition anywhere "within Ontario".

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

59. Catalyst does not have any offices outside of Toronto. Brandon was at all times during his employment employed in Catalyst's offices in Toronto.

60. The geographic scope of the Non-Competition Clause is too broad. In the context of Brandon's location of employment, the offices of Catalyst and the overall context of Brandon's employment, a province-wide geographic scope goes far beyond what is reasonable.

61. Indeed, Mr. Riley admits that the non-competition covenant "...is designed to restrict an analyst's ability to directly compete against Catalyst *within the limited geographic area of Toronto...*" [emphasis added] and that Catalyst's "... immediate competitors are primarily based in Toronto".

Riley's June Affidavit, para. 33, Motion Record of the Moving Party, Tab 2.

62. Given Mr. Riley's admission that the Non-Competition Clause should only operate in respect of Toronto and that Catalyst only requires protection within Toronto, there is no basis for a restrictive covenant that spans the entire province of Ontario.

63. At paragraph 75 of its Factum, Catalyst seeks to justify the geographic restriction of Ontario on the basis that the "Greater Toronto Area" is not a legally enforceable geographic area. There is no evidence to support that Mr. Riley intended to refer to "Greater Toronto Area", and indeed, despite filing two supplementary affidavits (July 14, 2014 and July 28, 2014), at no time did Mr. Riley seek to correct this fundamental point.

64. In any event, however, even if Mr. Riley did intend "Greater Toronto Area", the Non-Competition Clause would still fail as being overly broad geographically. If Catalyst only required protection in the "Greater Toronto Area", there were many options

open to it to draft a clause to protect only this limited geographic scope. Referencing all of Ontario when only the Greater Toronto Area was required is excessively broad.

65. As such, the Non-Competition Clause is overly broad in respect of the geographic restriction it purports to impose, and is invalid on this basis.

(iii) *The Duration of the Non-Competition Clause is too Lengthy*

66. A non-competition covenant must be for a limited duration, and should only be as long as is reasonably necessary to protect the employer's legitimate business interests.

67. The Non-Competition Clause states that it lasts for a period of six months if Brandon leaves of his own volition or is dismissed for cause, but only three months under "any other circumstances". The only other type of termination contemplated by the Catalyst Employment Contract is a termination initiated by Catalyst without cause.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

68. The Non-Competition Clause therefore establishes different periods during which Brandon is restricted from competing. If Brandon resigns or is terminated for cause (i.e. misconduct), he is restricted from competing for six months. If Brandon is terminated without cause (i.e. in the absence of serious misconduct), he is restricted for only three months.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

69. The Catalyst Employment Contract required Brandon to give, and Brandon did in fact give, thirty (30) days' advance notice of resignation.

Riley's June Affidavit, para. 29, Motion Record of the Moving Party, Tab 2.

70. The Catalyst Employment Contract provided that in the event of a termination without cause, the only "working notice" that Catalyst was required to provide was that

amount of working notice required by the *Employment Standards Act, 2000.* The working notice required by the *Employment Standards Act, 2000* varies from zero to eight weeks, depending on length of service. In Brandon's case, given his length of service, Catalyst would only have been required/entitled to give two weeks of advance working notice of termination pursuant to the *Employment Standards Act, 2000.*

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

***Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 57.**

71. West Face submits that by establishing different periods of post-employment restrictions, the Non-Competition Clause seeks to "punish" Brandon, rather than protect Catalyst's legitimate business interests: if Brandon's departure is considered by Catalyst to be for reasons that are "bad" (because Brandon has chosen to resign or because his employment is terminated for just cause i.e. his own misconduct), Brandon is restricted for six months; if Brandon's departure is considered by Catalyst to be for reasons that are "not bad" (because Brandon has been terminated in the absence of just cause), Brandon is only restricted for three months.

72. West Face submits that on its face, the Non-Competition Clause in respect of resignation or termination for cause is unduly lengthy. The Non-Competition Clause recognizes that Catalyst only requires three months of protection from competition by Brandon. As such, in circumstances where the Non-Competition Clause requires the longer period (six months), it is void, given that Catalyst in fact only requires three months in order to protect its legitimate business interests.

(iv) *The Non-Competition Clause is Void as Unnecessary/Against Public Policy*

73. Regardless of reasonableness, Courts will not enforce a non-competition covenant where a non-solicitation covenant would adequately protect the employer. A properly drafted non-solicitation clause is adequate to protect the interests of the employer in employer/employee situations involving employees, such as Brandon, who were not managers, directors or key employees.

> *Elsley, supra*, **at para. 19, West Face's Book of Authorities, Tab 4.**
> *Lyons v. Multari*, **2000 CarswellOnt 3186 (C.A.) at para. 33, West Face's Book of Authorities at Tab 6.**
> *H.L. Staebler Co. v. Allan,* **2008 ONCA 576, 2008 CarswellOnt 4650 at para. 55, West Face's Book of Authorities at Tab 7.**

74. That said, the Non-Solicitation Clause in the Catalyst Employment Contract is unenforceable as it purports to prohibit Brandon from soliciting equity or other forms of capital for any entity "...managed, advised and/or sponsored by any of the protected entities" regardless of whether Brandon actually had any contact or relationship with the particular entity during the course of his employment. Such clauses have repeatedly been struck down by the Courts as being unreasonable and overbroad. Ultimately, if enforced, the Non-Competition Clause and the Non-Solicitation Clause would prevent Brandon from earning a livelihood in his chosen vocation anywhere in Ontario. Such a result is directly counter to the public interest which "...favours the granting of freedom to individuals to pursue economic advantage through mobility in employment."

> ***Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344, 2011 CarswellOnt 2856, West Face's Book of Authorities, Tab 8.**
> ***Phoenix Restorations Ltd. v. Brownlee*, 2010 BCSC 1749, 2010 CarswellBC 3372, West Face's Book of Authorities, Tab 9.**

***Barton Insurance Brokers Ltd. v. Irwin*, 1999 BCCA 73, 1999 CarswellBC 190 at para 39, West Face's Book of Authorities, Tab 10.**

75. At paragraphs 91 and 92 of Catalyst's Factum, Catalyst seems to suggest that the Non-Competition Clause is enforceable because of the alleged breach of confidentiality. No authority is submitted for this proposition. It is submitted that the assertion is flawed in law: an alleged breach of confidentiality cannot be the basis on which to enforce a non-competition provision that is otherwise overly broad. A non-competition provision is only enforceable if, as drafted, it is reasonable. The allegation of a breach of confidentiality cannot make an overly broad non-competition provision enforceable. As set out herein, the Non-Competition Clause is overly broad, and is unenforceable.

76. As Catalyst does not have a strong *prima facie* case that the restrictive covenants in the Catalyst Employment Contract are enforceable, its motion must fail.

The Breach of Confidence Claim Cannot Succeed

77. In order to establish a breach of confidence, the moving party must establish:

(a) The information has a quality of confidence about it;

(b) The information was imparted in circumstances importing an obligation of confidence; and

(c) There was unauthorized use of that information to the detriment of the party communicating it.

***Boehmer Box LP v. Ellis Packaging Limited et al.*, 2007 CarswellOnt 2726 (Sup. Ct. J.) at para. 62, West Face's Book of Authorities, Tab 11.**

78. In this case, the only disclosure of Catalyst's information occurred in the early days of Brandon's hiring process with West Face when he attached certain documents to an email that was sent to Dea. These documents were created based on publicly available information. Moreover, the small size of the Canadian investment market ensures that any possible investment options are widely known amongst the industry. Accordingly,

while there may be a quality of confidence about such documents, West Face submits that such quality is limited.

Dea Affidavit, para. 12, Exhibit "L", West Face's Motion Record, Tab 1, 1L.

79. However, West Face submits that Catalyst is unable to demonstrate that there has been, or likely will be, an unauthorized use of the information to its detriment. The purpose of disclosing these documents was not to give West Face any form of competitive advantage; rather, the intention was to demonstrate Brandon's writing ability and his business experience. Further, it is uncontroverted that West Face has not used or relied on any of the documents attached to the email, nor has West Face done any significant review of the documents. Moreover, West Face is not even involved in any of the transactions that were the subject of the documents attached to the email.

Dea Affidavit, para. 43, West Face's Motion Record, Tab 1.
Dea Transcript, Answers to Questions 345 and 346, page 81, Schedule C.

80. In addition, after receiving these documents and before Brandon commenced employment with West Face, West Face cautioned Brandon against providing West Face with any further information related to Catalyst's business. Brandon has not made any further disclosures of any of Catalyst's information.

Dea Affidavit, para. 43, West Face's Motion Record, Tab 1.
Singh Affidavit, para. 4, West Face's Motion Record, Tab 2.

81. In light of the above, West Face submits that Catalyst cannot satisfy the first branch of the test for injunctive relief with respect to its breach of confidence claim since there is no evidence that the information disclosed to West Face will be misused resulting in harm to Catalyst.

2. Catalyst Will Not Suffer Irreparable Harm Without an Injunction

82. In examining whether Catalyst would suffer irreparable harm, the harm must be clear and not speculative and, most importantly, the harm cannot be quantified in monetary terms. In this case, the irreparable harm claimed by Catalyst is purely speculative. Furthermore, West Face has instructed Brandon not to divulge any confidential information learned at Catalyst.

> ***RJR-Macdonald, supra*, at para. 64, West Face's Book of Authorities, Tab 1.**
>
> ***Barton-Reid Canada Ltd.* v. *Alfresh Beverages Canada Corp.*, 2002 CarswellOnt 3653 (Sup. Ct. J.) at para. 18, West Face's Book of Authorities, Tab 12.**

83. Catalyst has not established a temporary or permanent loss of clients nor has it established that it has suffered any harm with respect to the Transaction because of Brandon's actions.

> **Riley Transcript, Answers to Questions 152-155, pages 44-45, Schedule C.**

84. Evidence of irreparable harm must be clear. The Ontario Superior Court of Justice has refused to find irreparable harm where the evidence upon which the injunction was brought was speculative, stating:

> Trapeze contends that knowledge of its confidential information would provide an invaluable unfair competitive edge in the sales and bidding process and in ongoing service components of its business. Mr. Bacchus asserts that given the nature of the business, misuse of confidential information by these former Trapeze employees is inevitable. I am not persuaded that that assertion is anything more than speculation.
>
> Trapeze relies upon statements in cases to the effect that irreparable harm has been found to exist where there is evidence that the plaintiff will lose market share if an injunction is not granted. However, this too is speculative.
>
> ***Trapeze Software Inc. v. Bryan*, 2007 CarswellOnt 364 (Sup. Ct. J.) ["*Trapeze*"] at paras. 53-54, West Face's Book of Authorities, Tab 13.**

85. Further in the Ontario Superior Court of Justice's recent decision in *FPH Group Inc. v. Gocher*, Justice Goodman ruled that notwithstanding that the employee had

disclosed pricing and customer information that the employee's former employer considered to be confidential, the employer had failed in its bid for injunctive relief since there was no evidence that it had suffered a loss due to this disclosure.

> It is true that courts have granted injunctions in the appropriate case where former employees have taken a copy of customer lists or other proprietary information from their former employer, However, FPH has not adduced any evidence to suggest that there is a threat to the survival of its business or any evidence that it has lost sales or market share. Further, in this case, I do not have any reliable evidence to suggest that lost sales or market share cannot be quantified and compensated in damages. A difficult or complex calculation does not equate to irreparable harm and the court should not grant an injunction where the alleged damages are capable of being quantified.
>
> ***FPH Group Inc. v. Gocher*, 2014 ONSC 2481, 2014 CarswellOnt 5582 at para. 56, West Face's Book of Authorities, Tab 14.**

86. Like the employers in *Trapeze* and *FPH Group Inc.*, Catalyst has not demonstrated any harm to its business whatsoever since Brandon's departure, let alone irreparable harm. As a result, its motion must fail.

87. At paragraph 100 of its Factum, Catalyst alleges that Dea's evidence was that "once a special situation is compromised, it is impossible to determine the extent of the loss suffered and mere damages cannot compensate for a loss that will carry on indefinitely into the future". That was not Dea's evidence. In fact, Dea's evidence was that the question was speculative, and as such he was unable to answer the question.

> **Dea Transcript, Answers to Questions 215-224, pages 53-55, Schedule C.**

3. The Balance of Convenience Does Not Favour Granting an Injunction

88. In assessing the balance of convenience, Courts determine which of the two parties will suffer the greater harm from the granting or refusal of the interlocutory injunction.

***RJR-Macdonald*, *supra*, at para. 62, West Face's Book of Authorities, Tab 1.**

89. Where an employee was not employed at an executive level, the Ontario Superior Court of Justice has held that the harm to the individual if the injunction was granted is far greater than the impact on the company.

***Kohler*, *supra*, at para. 66, West Face's Book of Authorities, Tab 2.**

90. Brandon was not a highly paid executive or even a managerial employee with Catalyst.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

91. If the Non-Competition Clause is enforced against Brandon, based on the wording of the covenant he will not be able to work for West Face for six months. Contrary to the assertion of Catalyst in its submissions, this would mean that Brandon would be unable to work for, and therefore would not be paid by, West Face for the duration of the restrictive period.

Dea Affidavit, Exhibit "C", West Face's Motion Record, Tab 1C.

92. Brandon would have significant difficulty finding any employment that would not fall within the scope of the Non-Competition Clause. Enforcement of this restrictive covenant would be a serious financial hardship upon him.

93. West Face therefore submits that the balance of convenience favours dismissing the injunction motion.

There is No Basis for the Appointment of a Forensic Investigator

94. In its Factum, Catalyst seeks an order that Brandon turn over the forensic images of his personal electronic devices to be reviewed by an independent supervising solicitor

("**ISS**"). The remainder of West Face's submissions address the issue of the forced disclosure of all of Brandon's personal information.

Moving Party's Factum, paras. 82(d), 82(e).

95. There is no reason for this Court to order that Brandon turn over the forensic image or appoint a forensic investigator or ISS to review the forensic images. An order requiring Brandon to turn over the forensic images is overly broad and represents a significant intrusion upon Brandon's privacy. Before such an extreme order is made requiring a party to lay themselves bare before a third party, disclosing what would clearly be a great deal of private and personal information, the Court should be satisfied that the party would not otherwise comply with his obligations pursuant to the *Rules of Civil Procedure*, which already require that a party produce all relevant documents.

96. Ultimately, Catalyst's request is a disguised form of an Anton Piller order. Such an order is not appropriate in the circumstances. The purpose of an Anton Piller order is "...limited to ensuring that unscrupulous defendants are not able to circumvent the courts' processes by, on being forewarned, making relevant evidence disappear."

> ***Factor Gas Liquids Inc. v. Jean*, 2010 ONSC 2454, 2010 CarswellOnt 5056 (Sup. Ct. J. (Div. Ct.)) ["*Factor Gas Liquids Inc.*"] at para. 32, West Face's Book of Authorities, Tab 15.**

97. Moreover, as Sharpe J.A. notes in his text, *Injunctions and Specific Performance*, the extraordinary nature of this type of remedy requires strong evidence that a party intends to flout his or her responsibilities:

> It is one thing to justify a significant invasion of the defendant's privacy where there is strong evidence of an intent to flout the ordinary process and effectively deprive the plaintiff of rights but quite another to grant such drastic relief where there is no more than possibility that the defendant might destroy evidence which might assist the plaintiff in making out his or her case.

> A plaintiff who has been wronged is entitled to a remedy but not at all costs. Other competing values come into play. Even a wrongdoer is entitled to certain basic protection and it is difficult to justify giving the plaintiff liberty to rummage into the defendant's private affairs unless there is compelling evidence that the defendant is bent on flouting the process of the court by refusing to abide by the ordinary procedure of discovery.
>
> **Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 2013) at ¶2.1230, West Face's Book of Authorities, Tab 16.**

98. There is no evidence that Brandon has not been forthcoming in the course of this litigation. To the contrary, at the earliest opportunity at the outset of this litigation, disclosure has been made of all of the information Brandon sent to West Face (which consisted solely of an email sent in March 2014).

Dea Affidavit, para. 42, West Face's Motion Record, Tab 1.

99. Similarly, in accordance with the Interim Order (by consent), Brandon conducted an exhaustive search of his computer, and provided Catalyst with all of the documents that he was reasonably able to locate. Brandon confirmed that the documents contained in those affidavits of documents were documents he downloaded in the course of his employment with Catalyst in order to perform work for Catalyst, and that he had not even been aware that they existed on his computer until the legal proceedings, much less did he make any use of that information.

Moyse Transcript, Answer to Questions 327-330, pages 71-72, Schedule C.

100. There is no evidence that Brandon will not comply with his obligations to preserve all relevant documents that are in his power, possession or control.

101. Notwithstanding the above, Catalyst's motion in this regard must fail because it cannot demonstrate any serious damage – actual or potential – arising from Brandon's limited disclosure of Catalyst's information. As the Court has previously noted

"[w]rongful activity that does not result in a serious damage claim, actual or potential, cannot justify the issuance of an intrusive order of this nature".

***Factor Gas Liquids Inc., supra*, at para. 39, West Face's Book of Authorities, Tab 15.**

102. Save and except for Brandon's single emailed disclosure of documents belonging to Catalyst during the early stages of his hiring process with West Face, he has not disclosed any other documents or information belonging to Catalyst. Moreover, with respect to the documents that were disclosed to West Face, the purpose of such disclosure was not to reveal confidential information, but rather to demonstrate Brandon's writing ability and scope of experience. West Face is not involved in those transactions, and has not used or relied on these documents. There has been no harm to Catalyst nor is there a risk of any harm. Accordingly the appointment of a forensic investigator is disproportionate and unnecessary.

Dea Affidavit, para. 43, West Face's Motion Record, Tab 1.

PART IV – ORDER REQUESTED

103. West Face requests an Order dismissing the Plaintiff's motion, with costs on a substantial indemnity basis, plus applicable taxes.

Date: August 5, 2014 **ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

Dentons Canada LLP.

Jeff Mitchell/Andy Pushalik
Dentons Canada LLP
Lawyers for the Defendant/Responding Party,
West Face Capital Inc.

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 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 "T" referred to in the Affidavit of James A. Riley sworn February 17, 2015

Commissioner for Taking Affidavits (or as may be)

ANDREW WINTON

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

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 containcd 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
HIl 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

Stockwoods LLP
Barristers
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140, Toronto Dominion Centre
Toronto, Ontario M5K 1H1

per **Brendan Van Niejenhuis** LSUC#: 46752J
Tel: 416-593-2487
Fax: 416-593-9345

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

Stockwoods LLP
Barristers
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140, Toronto Dominion Centre
Toronto, Ontario M5K 1H1

Brendan Van Niejenhuis LSUC#: 46752J
Tel: 416-593-2487
Fax: 416-593-9345

Independent Supervising Solicitor

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

THE CATALYST CONSULTING GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

364

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF MARTIN MUSTERS
(sworn February 15, 2015)

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8

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rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

This is Exhibit "A" referred to in the
Affidavit of Martin Musters,
sworn the 15th day of February, 2015.

Andrew Winton
A Commissioner for taking Affidavits

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 June 26, 2012)

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.

Expertise

2. CFI specializes in the preservation and analysis of digital evidence to assist in criminal, civil, or labour relations investigations. In particular, CFI specializes in the retrieval of data from hard drives, servers, laptops, cell phones, PDA's and other devices, even when the user has deleted or otherwise removed (or attempted to remove) the data.

3. As the Director of Forensics at CFI, I have overseen and conducted computer forensic investigations regarding litigation, including forensic searches for confidential information. I have also been involved with law enforcement investigations, corporate investigations and data and password recovery projects.

4. I have extensive experience in information technology and computer forensics and have been involved in the field since 1979. I have received numerous professional certifications in the field of computer and electronic forensics. I am:

(a) a Certified Information Systems Security Professional (CISSP);

(b) a Certified Fraud Examiner (CFE);

(c) a Certified Information Systems Auditor (CISA);

(d) a Certified Protection Professional (CPP);

(e) a Certified Stenographic Examiner;

(f) trained in the use of Encase Forensic Software; and

(g) certified in Advanced Cell Phone Forensics.

5. I have written numerous articles and spoken at numerous conferences in the field of computer forensics. I have also been certified as an expert witness in the field of electronic forensics by the Ontario Superior Court of Justice and the Ontario Court of Justice. A copy of my detailed *curriculum vitae* is attached as Exhibit "A" to my affidavit.

Investigation

6. 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, 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.

7. As the investigator assigned to this matter, I conducted the examination of the Desktop Computer. As such, I have knowledge of the matters contained in this affidavit, which I am swearing to provide information to the Court, and for no other purpose.

8. I was able to determine from my review of the forensic image that Moyse had personal accounts with "Box" and "Dropbox", two Internet-based file-storage services (together, the "Cloud Services"), and that he accessed the Cloud Services using the Desktop Computer. Attached as Exhibit "B" is a list of the Internet Uniform Resource Locators ("URLs") for the Cloud Services that Moyse accessed from the Desktop Computer.

9. The Cloud Services are file-hosting services that offer cloud storage, file synchronization, personal cloud, and client software. They allow users to create a special folder on each of their computers, which they then synchronize so that it appears to be the same folder (with the same contents) regardless of which computer is used to view it. Files placed in this folder also are accessible through a website and mobile phone applications.

10. It is difficult to trace the use of Cloud Services to copy information from a hard drive. Unlike the copying of a file to a USB drive, which leaves a record of the file transfer activity on the hard drive, uploading documents to a Cloud Service such as Dropbox does not leave a similar record. Cloud Services can be used as a sophisticated way to copy large amounts of data in a relatively brief period of time.

11. I was also able to determine from my analysis of the Desktop Computer that Moyse accessed specific files on specific dates.

12. On March 28, 2014, over an eleven-minute period, Moyse accessed a series of files from an "Investors Letters" directory. Attached as Exhibit "C" is a table listing the files accessed by Moyse between 6:28 and 6:39 p.m. on March 28, 2014.

13. On April 25, 2014, over a seventy-minute period, Moyse accessed several files which contain the word "Stelco" in the file directory or in the filename. Attached as Exhibit "D" is a table listing the files accessed by Moyse between 2:36 and 3:47 on April 25, 2014.

14. On May 13, 2014, over a sixty-one-minute period, Moyse accessed several files through his Dropbox account which had the name "Masonite" in the filename. Attached as Exhibit "E" is a table listing the files accessed by Moyse from his Dropbox account between 6:59 and 8:00 p.m. on May 13, 2014.

15. Also on May 13, 2014, over a twenty-four-minute period, Moyse accessed several files from a "2014 Potential Investment" directory. Attached as Exhibit "F" is a redacted table listing the files accessed by Moyse between 8:39 and 9:03 p.m. on May 13, 2014. I am informed by James Riley, Catalyst's Chief Operating Officer, that the redactions to this table are necessary in order to maintain confidentiality concerning a potential investment that Catalyst is studying.

16. On May 26, 2014, at 12:31 p.m., Moyse accessed a document entitled "14-05-26 Notes" from a directory entitled "Monday Meeting", as shown on the table attached as Exhibit "G".

17. In my experience, Moyse's conduct of accessing several files from the same directory over brief period of time, as described above, is consistent with transferring files to a Cloud Service. It is my opinion that, based on the pattern of conduct described above, Moyse was very likely transferring the documents he reviewed on March 28, April 25 and May 13 from Catalyst's computers to his Dropbox or Box accounts, although I cannot say so definitively at this time.

18. I cannot conclusively determine whether Catalyst's files were transferred by Moyse to the Cloud Services and then from the Cloud Services onto any other computer or electronic device, such as an iPad, without access to those computers and/or devices that potentially had the files transferred to them.

19. Attached as Exhibit "H" 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 June 26, 2014

Commissioner for Taking Affidavits, etc.

MARTIN MUSTERS

THE CATALYST CONSULTING GROUP INC. -and- BRANDON MOYSE and WEST FACE CAPITAL INC.
Plaintiff Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF MARTIN MUSTERS
(sworn June 26, 2014)

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Fax: (416) 598-3730

Lawyers for the Plaintiff

This is Exhibit "B" referred to in the
Affidavit of Martin Musters,
sworn the 15th day of February, 2015.

Andrew Winton
A Commissioner for taking Affidavits

MR. MARTIN MUSTERS, B. MATH CISSP, CFE, CISA, PI

1011 Upper Middle Road East, Suite 1431
Oakville, Ontario
L6H 5Z9
Cell: 647 302-0067
Email: MMUSTERS@COMPUTERFORENSICS.CA

OBJECTIVE

To provide professional services in the field of computer forensics.

EXPERIENCE

COMPUTER FORENSICS INCORPORATED (CFI)

Director of Forensics Jan 2003-present

- Analyze and investigate all types of computer related fraud
- Consultant for various police agencies with respect to electronic crimes
- Expert Witness Testimony in all courts of law

NCI (NET CYCLOPS)

Director of Forensics June 2006-October 2010

- Direct all aspects of the Forensics division, which includes Business Continuity and Disaster Recovery
- Physical Security Assessments (Completed assessments for all of the Ministry of Health buildings)
- Provide Expert Witness Testimony (Declared an expert by the Ontario Court of Justice)
- Corporate Investigations
- Police Investigations
- Anton Piller Orders
- Advanced File/Data Recovery

BRUCE POWER

Corporate IT Security Officer May 2001 – June 2006

Bruce Power was formed when British Energy bought the Bruce Nuclear Power Development from Ontario Power Generation. Responsible for all aspects of IT Security for Bruce Power.

- Canadian Security Intelligence Service (CSIS) Clearance Level 2 – Secret
- Work with CSIS to establish clearance for all individuals entering "Protected Areas"
- Conduct Internal Employee Investigations.
- Member of the Code of Conduct investigation team
- Internal and external security awareness programs
- Establish corporate security framework
- Develop Security Policy
- Audit other departments for Security Policy Compliance
- Develop Internet, Computer Usage and Email policies
- Develop Network Standards for Security
- Installed ISS Real Secure Version 7.0 with Site Protector (13 Network Probes, 30 Server Probes)
- Installed Fusion and ISS Scanner modules

ONTARIO POWER GENERATION

Manager, Applications Transition Jan 2000-April 2001

Managed the transition of Applications from Ontario Power Generation (OPG) to Bruce Power. This involved breaking apart from OPG over 350 applications. Worked with New Horizon Solutions, now Cap Gemini, to provide common services for our larger applications (Passport, SAP).

ONTARIO POWER GENERATION

Manager, Customer Support Services Bruce Site, July 1995 –Dec 1999

Looked after all aspects of Customer Support Services at the Bruce Site,

- Managed Help Desk for 4000 Users
- Break/fix for 3000 p/c's
- Managed Computer Inventory
- Managed Procurement for all Computer related hardware/software

EXPERIENCE ...CONTINUED

ONTARIO POWER GENERATION
Programmer/Analyst Sept 1990-June 1995
Programmer/Analyst developing department based solutions for:

- Payroll
- Human Resources
- Finance
- Inventory Management and Procurement

GREY BRUCE REGIONAL HEALTH CENTRE.
Programmer/Analyst August 1986-August 1990
Major responsibilities of this role were:

- Support of Baxter Online Health Care System

BLACKWOOD HODGE
Director of Information Systems April 1984-July 1986
Major responsibilities of this role were:

- Managed Data Center, AS400 and Univac 90/60
- Responsible for all Applications Development
- Managed Budget

TEMPO COMPUTER SERVICES
Director, Product Development June 1980-Mar 1984
In this role I was responsible for the development of the companies software program (TRACS) an Online Order Entry, Inventory Control, Purchasing, Accounts Receivable and General Ledger Package. My duties included Managing the development of the package and tailoring the application to suit customers located in North America and Australia. There was extensive travel involved.

Sperry Univac
Technical Support Engineer May 1979-June 1980
In this role I assisted in pre-sales in closing deals
I was also contracted out as a consultant for services sold.
Hardware was Univac 9020, Univac 9030, Univac 9040, Univac 9060

POST SECONDARY EDUCATION

UNIVERSITY OF WATERLOO
Waterloo, Ontario
Bachelor of Mathematics and Computer Science (Honours), 1979 with minor in Business Administration

CERTIFICATIONS/ASSOCIATIONS

- Associate Member of the Canadian Association of Chiefs of Police
- Certified Fraud Examiner (CFE)
- Certified Information Systems Security Professional (CISSP)
- Certified Information Systems Security Auditor (CISA)
- Certified Protection Professional (CPP)
- Certified in Steganographic Analysis
- Certified in Advanced Cell Phone Forensics
- Member of the High Tech Crime Consortium (HTCC)
- Licensed Private Investigator in the Province of Ontario

EXPERT

- R. v. Agil, Khumane by the Ontario Superior Court, June 2012, Participation in a Criminal Organization. Declared an Expert in Computer Forensics
- R. v. Prazeres by the Ontario Court of Justice in April 2008. Police officer charged with public mischief, conspiracy to prosecute a person for an alleged offence, fabrication of evidence and breach of trust. Declared an Expert in Computer Forensics

- R. v. Rogers by the Superior Court of Justice in March 2009. First Degree Murder x 2. Declared an Expert in Cell Phone Forensics and Call Detail Records
- R. v. Young Offender by the Superior Court of Justice in April 2009. Sexual Interference of a child under 14, Forcible Confinement and Sexual assault. Declared an Expert in Computer Forensics and Cell Phone Forensics.
- R. v. Brzezinski by the Superior Court of Justice. Possession of Child Pornography. Declared an Expert in Computer Forensics in September of 2009.

SPEAKING ENGAGEMENTS

- ACFE Certified Fraud Examiners Conference held in Toronto Sept 29, 2010
- ASIS Best Practices Seminar Toronto, Ontario May 22, 2008
- Forensec Conference Regina, Saskatchewan Sept 17-18, 2008
- Canadian Technical Security Conference – Toronto May 16, 2007
- Association of Certified Fraud Examiners 13th Annual Conference in Toronto – May 2007 (Speaker)
- Golden Horseshoe homicide investigators conference (GHHIA) May 2006 (Speaker)
- Niagara International Fraud Conference May 2006 (Speaker)

PUBLISHED BOOKS

- ACFE Computer Fraud Case Studies by Joseph T. Wells – Contributing Author

PUBLISHED ARTICLES

- Steganography – Today's risk to your organization published Dec 2007
- Trends in Digital Forensics published Nov 2006
- Cell Phone Forensics published Feb. 2006
- The Trojan Horse Defense published Dec. 2005
- Preserving Digital Evidence published Sept. 2005
- Benford's Law and Fraud Detection published June 2005
- It Wasn't Me published May 2005
- Cyber Terrorism - Is it a Real Threat published Feb. 2005

TECHNICAL EDUCATION

EnCase – Advanced – April 2004

EnCase – Intermediate – October 2003

CSI (Computer Security Institute Conference) – Chicago May 2003

CISSP COMMON BODY OF KNOWLEDGE INSTRUCTOR ORIENTATION SEMINAR
International Information Systems Security Certification Consortium, Inc. (ISC2), Dec 2001

CISSP COMMON BODY OF KNOWLEDGE SEMINAR
International Information Systems Security Certification Consortium, Inc. (ISC2), Nov 2001
Sponsored by ISSA, Toronto Chapter

ISS REAL SECURE VERSION 6
Toronto, Ontario Dec 2001

INTERNATIONAL SECURITY FORMUM COMFERENCE
Toronto, Ontario Oct 2001

CHECK POINT VPN-1/FIREWALL-1 MANAGEMENT 1
Toronto, Ontario June 2001

CHECK POINT VPN-1/FIREWALL-1 MANAGEMENT 2
Toronto, Ontario June 2001

WINDOWS NT CORE TECHNOLOGIES
Toronto, Ontario Sept 1997

ADVANCED PL/SQL

Toronto, Ontario Feb 1996

ORACLE DATA MODELING AND RELATIONAL DATABASE DESIGN
Toronto, Ontario Oct 1995

UNIX ADMINISTRATION AND TROUBLESHOOTING
TORONTO, ONTARIO MAR 1994

INTRODUCTION TO UNIX
Toronto, Ontario Sept 1993

Business and Technical Education ...*continued*

TECHNICAL SKILLS

- Extensive knowledge of the following operating systems and applications:
- Windows 98, Windows NT v3.51, 4.0 , Windows 2000, Windows XP, Vista
- Active Directory
- Windows 2003
- Novell NetWare 3.X
- Windows 3.1, Windows 95
- ISS Real Secure
- Entrust, PGP
- Encase
- ISS Scanner
- Nmap
- Cybercop

This is Exhibit "C" referred to in the
Affidavit of Martin Musters,
sworn the 15th day of February, 2015.

Andrew Winton
A Commissioner for taking Affidavits

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

DOCUMENT REVIEW PROTOCOL

Purpose:

To determine whether forensic images (the "Images") obtained from the personal electronic devices of the defendant Brandon Moyse ("Moyse") contain or contained The Catalyst Capital Group Inc.'s ("Catalyst's") confidential information (the "Catalyst Confidential Information").

To determine, if possible, what use was made of the Catalyst Confidential Information.

To ensure that the abovementioned tasks (the "Review") are completed and a report is delivered to counsel for Catalyst and Moyse (the "Report") by January 30, 2015.

To ensure that the Review is conducted in a manner that,

a) protects Moyse's confidential information from being accessed by Catalyst or its counsel or their agents;

b) protects Catalyst's confidential information from being accessed by West Face Capital Inc. ("West Face") or its counsel or their agents;

c) protects West Face's confidential information from being accessed by Catalyst or its counsel or their agents; and

c) maintains solicitor-client privilege (collectively, the "Restrictions").

Protocol:

1. Stockwoods LLP shall be appointed as an Independent Supervising Solicitor ("ISS") no later than December 15, 2014.

2. The costs of the ISS (including all fees and disbursements incurred by the ISS) shall be borne by Catalyst, subject to potential recovery in the cause.

3. The ISS shall,

   a. be provided with copies of all pleadings and motion materials for Catalyst's motion heard October 27, 2014;

   b. act as an independent officer of the Court; and

   c. be at liberty, if necessary, to seek directions from the Court in regards to carrying out its mandate.

4. The ISS shall be instructed, in conjunction with a forensic expert to be retained by the ISS (the "Expert"), to carry out the Review subject to the Restrictions, and to prepare and to deliver the Report to counsel for Catalyst and Moyse by January 30, 2015. The ISS shall determine the identity of the Expert to be retained, but the Expert shall not be Computer Forensics Investigations Inc.

5. All communications to or from the ISS shall be conducted in writing, with copies of the correspondence to counsel for Moyse and Catalyst, or by way of a conference call with counsel for Moyse and Catalyst. Following each conference call, the ISS shall prepare a written summary of the conference call. All written communications shall be retained until the within matter is fully disposed of, including all appeals.

6. The ISS and/or the Expert may consult with Catalyst and/or its counsel in writing regarding search terms or other criteria to be used by the ISS and/or the Expert to identify the Catalyst Confidential Information. Catalyst shall submit any proposed search terms to counsel for Moyse and to the ISS. Moyse shall have five (5) business days to respond to the proposed terms for the purpose of objecting to the inclusion of any of the proposed terms. If Moyse does

so object, the ISS will decide, at its sole discretion, whether to use a proposed search term as part of its review of the Images.

7. Subject to further order of the court or the consent of Catalyst, Catalyst's proposed search terms will not be communicated to West Face or its counsel.

8. In order to ensure that the Restrictions are maintained and subject to further order of the court or the agreement of the parties, the ISS and the Expert shall not provide Catalyst or its counsel with access to the Images or any work product generated during the Review.

9. The Report shall,

   a. identify whether the Images contain or contained the Catalyst Confidential Information and, if possible, provide particulars of where on the Images the Catalyst 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 e-mails sent or received containing or referring to the Catalyst Confidential Information, provide the following particulars:

      i. Who authored the e-mail;

      ii. To whom the email was sent, copied and/or blind copied;

      iii. The date and time when the e-mail was sent;

      iv. The subject line of the e-mail;

      v. Whether the e-mail 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 e-mail, redacting any information that the ISS deems to be Moyse's confidential information or subject to solicitor-client privilege; and

      vii. If the email was deleted, when the email was deleted.

10. The ISS shall disclose a draft Report (which will not include the information set out in paragraph 9(b)(vi)) to Catalyst and Moyse. Within ten (10) business days of receiving the draft Report, Moyse may object to the inclusion of a document or documents referred to in the draft Report.

    a. If Moyse does so object, he should set out the basis for his objection. If the ISS determines that an objection is justified, it will segregate the documents to which Moyse objected and remove information concerning those documents from the final report.

    b. Any document to which Moyse does not object to being included in the draft Report may be included in a final Report. The final Report will include the information set out in paragraph 9(b)(vi).

11. Both Moyse and Catalyst shall be provided with any documents referred to in the final Report. If Catalyst believes that a document has been improperly excluded from the final Report, it may bring a motion for production of that document.

12. West Face shall not be provided with a copy of the draft Report, the final report, or the documents referred to in the draft or final Reports, subject to further order of the court or the consent of Catalyst. However, if the ISS finds in its report that any Catalyst Confidential Information was transferred to West Face, that portion of the report will be provided to counsel for West Face, with appropriate redactions to protect the Catalyst Confidential Information, subject to West Face's right to seek an order from the court for further production of the Report.

[The rest of this page is intentionally left blank]

13. The parties agree that this process shall be completed by January 30, 2015.

THE FOREGOING IS AGREED TO BY THE PARTIES AND THEIR COUNSEL

DATED AT TORONTO, ONTARIO this 12th day of December, 2014

LAX O'SULLIVAN SCOTT LISUS LLP

Lawyers for the Plaintiff

GROSMAN, GROSMAN AND GALE LLP

Lawyers for Brandon Moyse

DENTONS CANADA LLP

Dentons Canada LLP

Lawyers for West Face Capital Inc.

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

DOCUMENT REVIEW PROTOCOL

LAX O'SULLIVAN SCOTT LISUS LLP
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Fax: (416) 598-3730

Lawyers for the Plaintiff

This is Exhibit "E" referred to in the
Affidavit of Martin Musters,
sworn the 15th day of February, 2015.

Andrew Winton
A Commissioner for taking Affidavits

Introducing Advanced System Optimizer 3

The most comprehensive, powerful and smartest system optimizer now includes -

- Smart PC Care to fine tune your PC in single click
- Disk Defrag to optimize hard disk for best performance
- Game Optimizer for faster gaming experience
- Driver Updater to update out dated and required drivers
- Undelete to recover accidently deleted data and files

"The Best Optimizer"
- cnet CNET

Compatible with -
Windows 8 / 7/ Vista and XP (Both 32 and 64 bit)

Download Now | Purchase Now
for ~~$49.95~~ $39.95

New to Advanced System Optimizer? Find out why you need it

Advanced System Optimizer Version 2 was launched in the year 2004. Its tremendous success and feedbacks of more than 1 million users have really made the version 3 of Advanced System Optimizer state of the art product. It includes the most comprehensive set of utilities which will keep your PC running smooth, clean and error free.

Upgrade for existing users
Click here to upgrade from ASO v2 for just $18.95

Highlights of Advanced System Optimizer 3

Smart PC Care(New)

Smart PC Care feature of Advanced System Optimize at carrying out multiple tasks with ease. Several tasks file cleaning, registry cleaning, disk defragmentation etc. can be accomplished through a single click. This not only saves time but also makes the process of performing multiple tasks a breeze.

Read More ▸

Game Optimizer(New)

Game Optimizer provides you with a private virtual desktop that's completely free of distractions – no music, no instant messaging, no other apps running except for your game. What's more, Game Optimizer actually reallocates system memory, guaranteeing that your game will have plenty of resources, and ensuring that your gaming session will be free from plummeting frame rates, stuttering audio, and all of those other annoyances!

Read More ▸

Driver Updater(New)

View Demo

Driver Updater takes all of the tedious work out of keeping your system's drivers up to date! By scanning your system, Driver Updater is able to automatically download and install the latest updates for all of the drivers for all of your components. Of course, you'll be presented with a summary of all of your outdated drivers before Driver Updater goes to work – just select those that you want to update, and click!

Read More ▸

System Protector(New)

View Demo

System Protector continually monitors the processes that are running on your PC for evidence of spyware-related activity. Using artificial intelligence, System Protector is capable of identifying, detecting, and cleaning malicious threats quickly and efficiently before they have an opportunity to do their dirty work.

Read More ▸

PC Fixer(New)

PC Fixer scan your system, and it will present you with an easy-to-read summary list of common issues that negatively impact system performance and your user experience. The PC Fixer job list is sorted by category for your easy review - just click on a category like 'Control Panel' to see PC Fixer's recommended list of action items. Plus, if you're looking to fix or optimize a specific area, like your display settings, PC Fixer lets you search for specific items by keyword!

Read More ▸

Disk Optimizer(New)

View Demo

Disk Optimizer solves the problem of data fragmentation, bringing a renewed level of responsiveness to your applications and reducing the time it takes for your computer to boot! With Disk Optimizer, all of the fragments of data are rearranged back to a sequential order on your hard drive, greatly improving data access times. Whenever you're experiencing sluggish application response times, slow boot and restart cycles, and a general decline in system performance, it's time for Disk Optimizer!

Read More ▸

Undelete(New)

Undelete scans your entire system for deleted files and folders, giving you the opportunity to recover them as if they never left! Hard drives, partitions, external devices, even CD and DVD drives can be scanned for recoverable files by Undelete. You even have your choice of scan – just the Master File Table, for a quick scan, or a deeper scan which performs a sector-by-sector scan of the hard drive for file signatures.

Read More ▸

Registry Cleaner

View Demo

Registry Cleaner finds and removes unnecessary and invalid entries in your Windows registry, reducing system response time and minimizing the risk of problems when installing new software applications. By ensuring that your registry contains only those entries that are necessary to support currently installed hardware and software items, Registry Cleaner reduces the likelihood of data corruption due to conflicting registry entries.

Read More ▸

Registry Optimizer

View Demo

Registry Optimizer builds a fresh copy of the Windows registry using information contained in your existing registry. In doing so, Registry Optimizer supercharges your system's performance by removing fragmentation, gaps, and deleted registry entries. The result is a cleaner, leaner registry that takes up less disk space and consumes fewer memory resources.

Read More ▸

System Cleaner

View Demo

System Cleaner is specifically designed to identify these junk files that threaten to destabilize your system and compromise your identity. With System and Disk Cleaner, you are assured of the complete removal of these files, which are often missed by other utilities available in the market!

Read More ▸

Disk Explorer

The Disk Explorer utility features a Windows Explorer-style interface that displays all of the available drives on your system on the left, and all of the folders contained in the selected drive on the right. With the intuitive pie chart graphic, you'll be able to see, at a glance, what types of files take up the most space on your disk. Have you ever wondered how much of your disk space is taken up by music files? With Disk Explorer, this is no longer a mystery! Want to clean up your drive and free up some space? Disk Explorer provides you with a handy list of the 100 largest files on the drive.

Read More ▸

Uninstall Manager

Uninstall Manager is the easy way to review and uninstall applications from your system! With Uninstall Manager, you'll be provided with a complete list of all of the programs that are installed on the system, their descriptions, file sizes, and date installed. It's all the information that you need to make an informed decision whether to keep or remove a program.

Read More ▸

Memory Optimizer

Memory Optimizer resolves the most common causes of system crashes and application freezes! Memory Optimizer's colorful and intuitive memory graph shows you, at a glance, your total

Privacy Protector

View Demo

Privacy Protector addresses this issue head-on! With Privacy Protector, your confidential information, including all traces of your usage history, is completely and securely erased from

memory, available memory, used memory, and the resources that are used by the system cache. By constantly monitoring your system, Memory Optimizer is able to reclaim valuable memory resources, making them available for your applications and ensuring the continued health of your operating system. Applications will perk up, running faster and with greater stability. You can even specify how much memory Memory Optimizer should reclaim each time it runs, tailoring the memory allocation process to the way that you work!

Read More

Secure Delete

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.

Read More

Disk Tools(New)

Disk Tools performs diagnostic tests on your hard drive, informing you of any problem sectors and attempting to salvage any readable data that it finds in those bad sectors. Think about it - you may just think that you've lost an important file to a bad sector, but with Disk Tools, you may still be able to get it back!

Read More

Duplicate Files Remover

Duplicate Files Remover thoroughly searches your hard disk and removes all duplicate files from your system, freeing up valuable disk space and increasing the efficiency of your file system.

Read More

your machine. Not only does Privacy Protector minimize the risk of identity theft, it also improves your system performance by removing files that take up disk space and consume resources.

Read More

Secure Encryptor

Secure Encryptor allows you to encrypt your programs into a format that's unreadable to anyone who doesn't have the decryption password! With Secure Encryptor, you don't even have to worry if someone copies your most important files – in their encrypted form, they are all but useless.

Read More

System & Security Advisor

System and Security Advisor is a unique tool that quickly scans your computer and provides you with helpful tips to improve your experience. With a single click, you'll be able to improve your system's performance by identifying the system settings that consume the most resources. The utility will also make recommendations on how to improve your system's security.

Read More

Startup Manager

Startup Manager is your key to effortlessly managing Windows Start-Up programs. Using the intuitive Explorer-like interface, just add the applications that you want to load when Windows boots, or review your existing Start-Up items to see if any can be removed. If you aren't sure about a specific item, you can also use Startup Manager to temporarily disable it to see the affect on your system. Startup Manager displays helpful descriptions of each of the items in your Start-Up programs list.

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Our Top Products

Advanced System Optimizer
An all in one PC tuneup suite

RegClean Pro
Software to optimize the registry

Advanced Driver Updater
Update, backup and restore drivers

Advanced System Protector
Anti-malware and spyware protection

Disk Speedup
Clean junk files, remove fragments from disk drives

Support

Top Support Queries
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Blog 387

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Introducing Advanced System Optimizer 3

The most comprehensive, powerful and smartest system optimizer now includes -

- Smart PC Care to fine tune your PC in single click
- Disk Defrag to optimize hard disk for best performance
- Game Optimizer for faster gaming experience
- Driver Updater to update out dated and required drivers
- Undelete to recover accidently deleted data and files

"The Best Optimizer"
– cnet CNET

Compatible with -
Windows 8 / 7/ Vista and XP (Both 32 and 64 bit)

Download Now | Purchase Now
for ~~$49.95~~ $39.95

ASO

Secure Delete

A dependable tool to delete files and folders securely

- Deletes files and folders using a method designed by the US Department of Defense
- Keeps the privacy and security of your system intact
- Securely deletes the contents of your Recycle Bin
- Produces a summary report showing how many items were deleted

Upgrade for existing users
Click here to upgrade from ASO v2 for just $18.95

Compatible with -
Windows 7 / 8 / Vista and XP
(both 32 and 64 bit compatible)

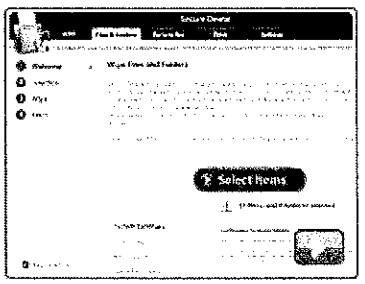
Did you know that whenever you delete a file or folder from your system using the 'Delete' key or Recycle Bin, that item isn't permanently removed? In fact, it's quite an easy process to recover deleted files and folders using widely available data recovery utilities, leaving you open to identity theft, 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.

When the deletion process has completed, Secure Delete provides you with a clear summary report that shows you how many items were deleted, and how much disk space was freed as a result of the deletion.

Key Benefits:

- Maintains privacy and data security even in the face of data recovery tools
- Guarantees complete, permanent removal of deleted items



View Screenshot

This is Exhibit "F" referred to in the
Affidavit of Martin Musters,
sworn the 15th day of February, 2015.

Andrew Winton
A Commissioner for taking Affidavits

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

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Martin Musters. I live in Oakville, in the Province of Ontario.

2. I have been engaged by or on behalf of The Catalyst Capital Group Inc. to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

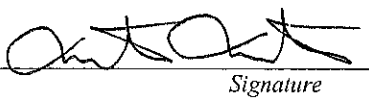
   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the Court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date February 15, 2015



Signature

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

392

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ACKNOWLEDGMENT OF EXPERT'S DUTY

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Tel: (416) 644-5342
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Fax: (416) 598-3730

Lawyers for the Plaintiff

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.

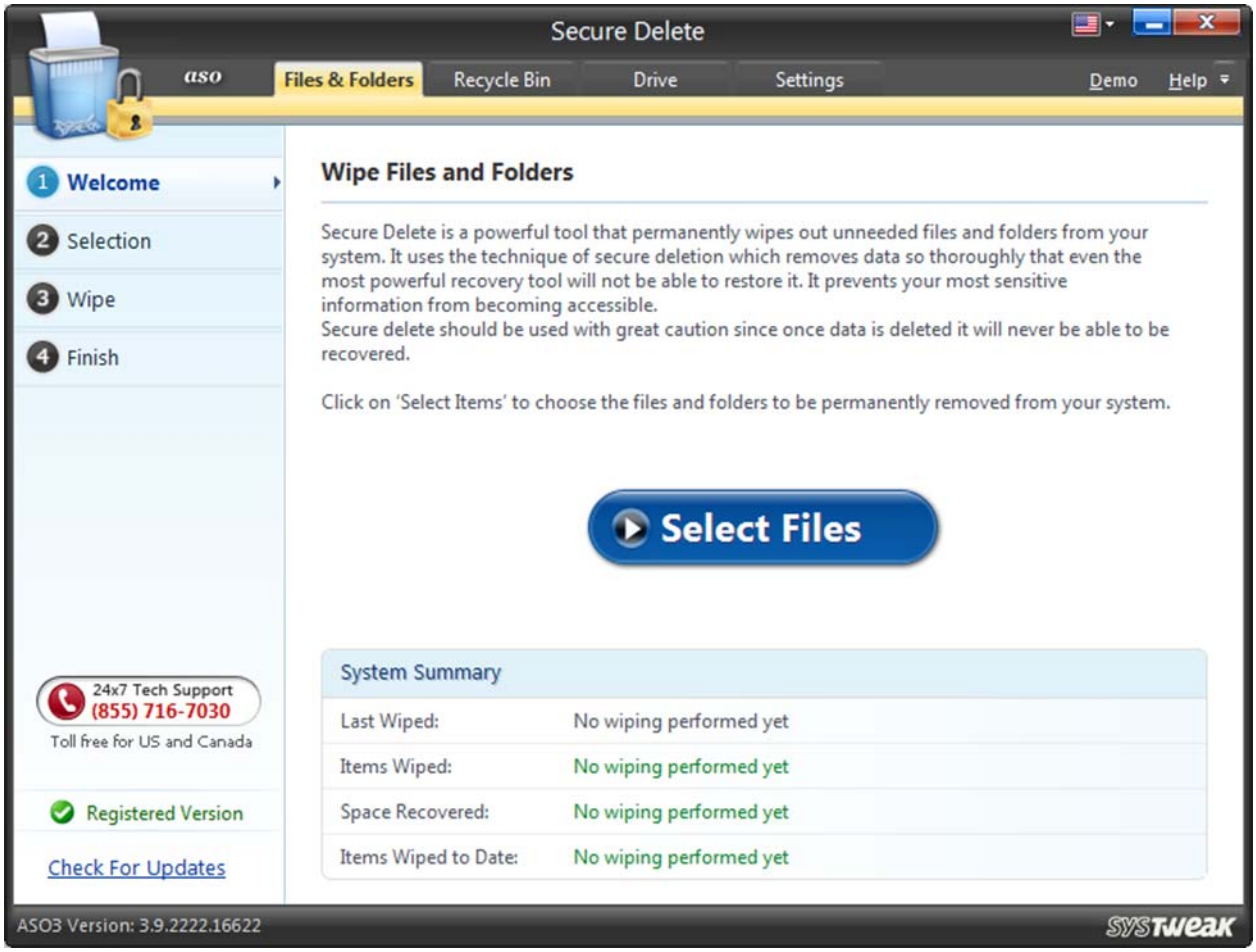
7. Lo's conclusion is based on the absence of a Secure Delete Log in the registry and a screenshot of the Secure Delete system summary for Moyse's computer.

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.

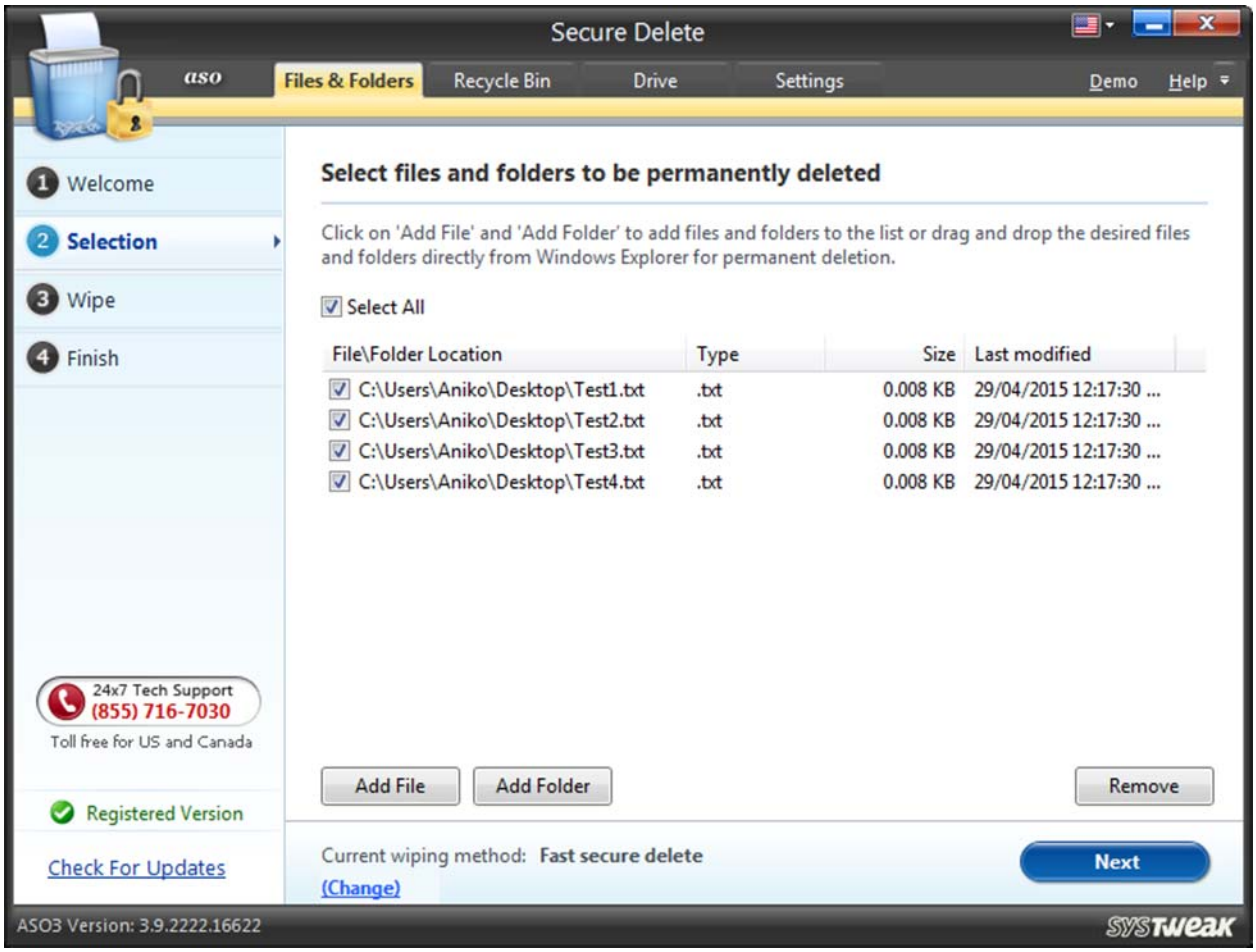
10. To demonstrate how easy it is to "reset" Secure Delete, I conducted a test on a computer on which I used Secure Delete to delete test files and then reset the Secure Delete system summary by deleting the Secure Delete Log from the computer's registry.

11. In my test, I began by opening the Secure Delete tool, as shown in the following screenshot:

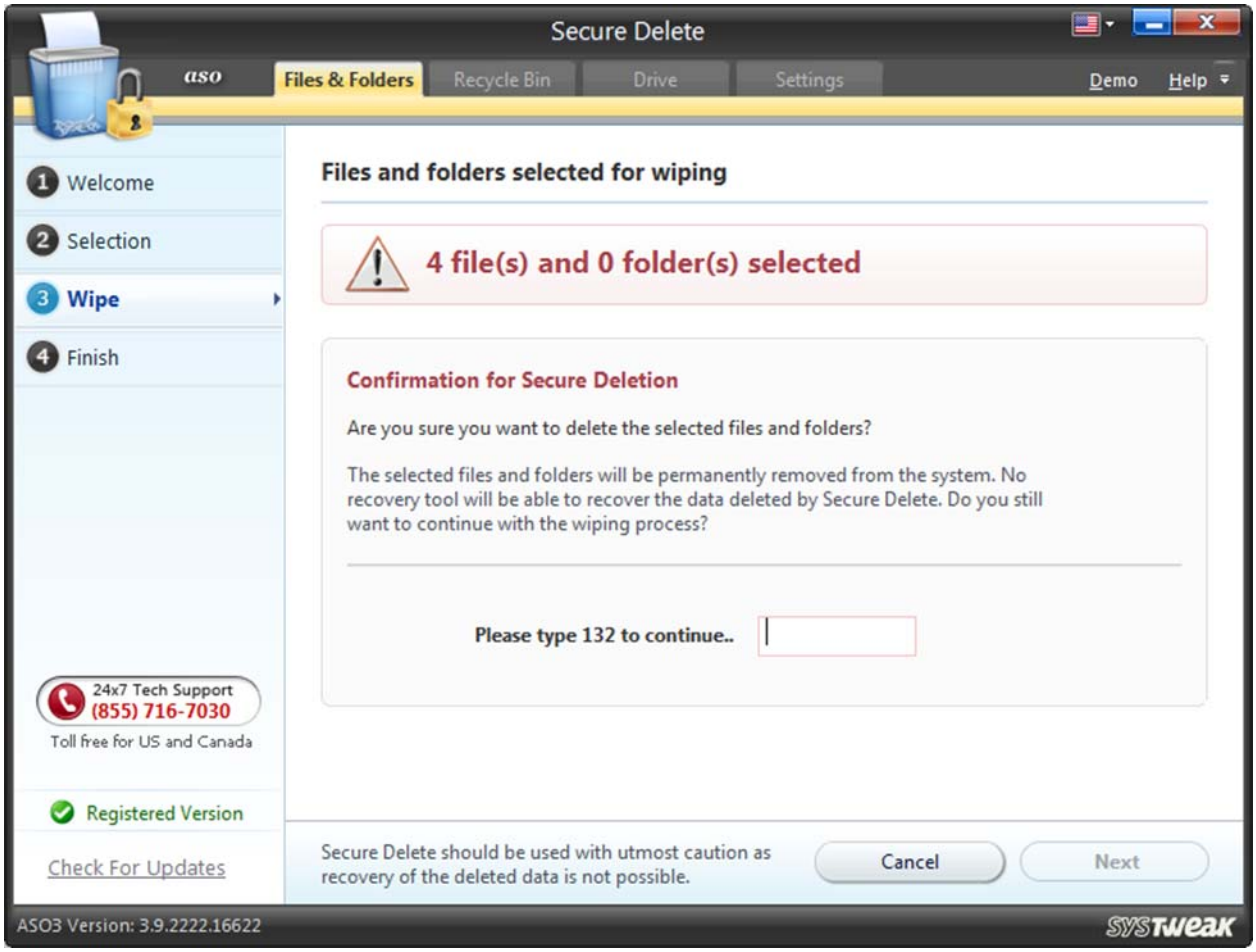


12. This screenshot shows what the Secure Delete system summary looks like before the program has been run.

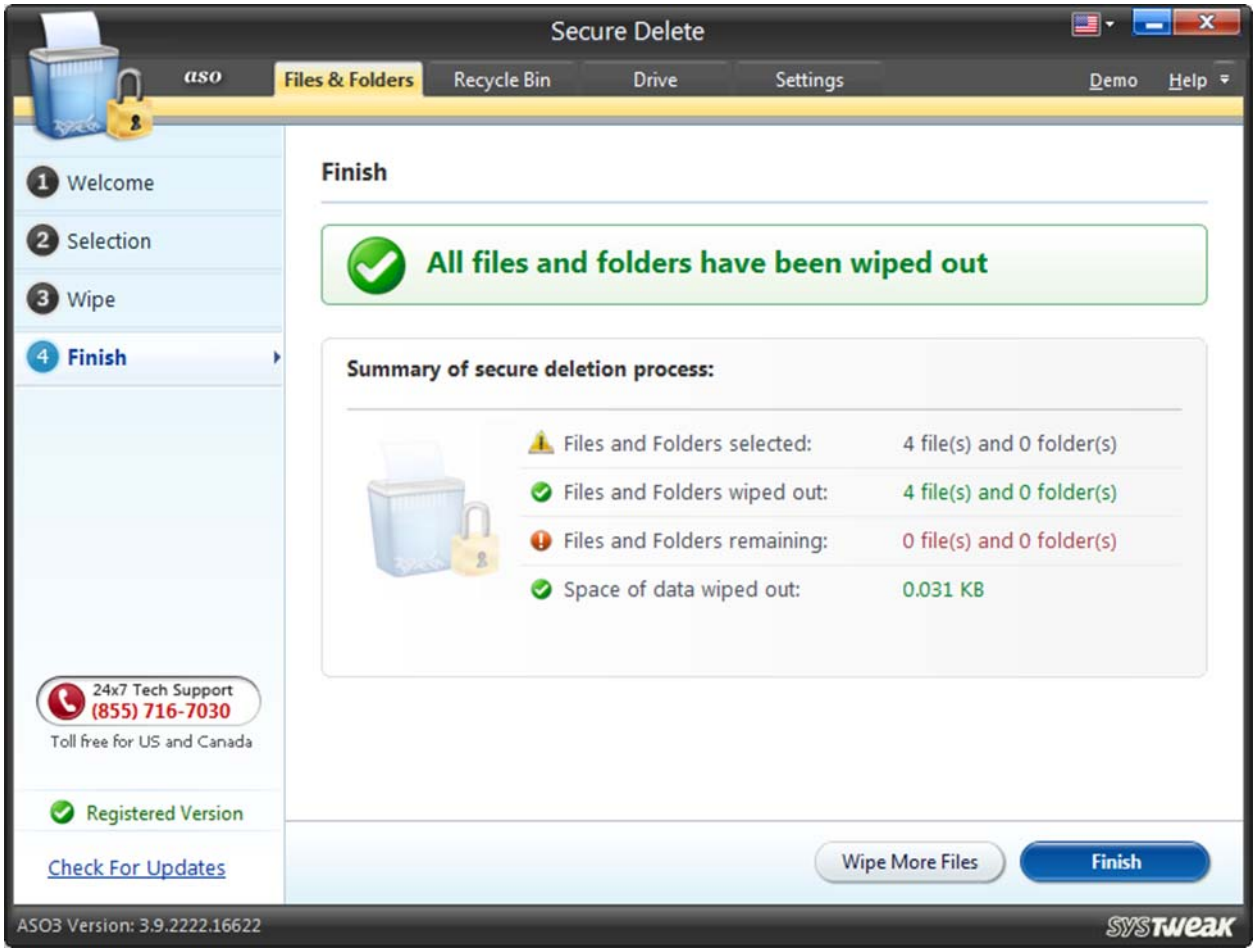
13. Next, I added four documents to the list of documents that I wanted to delete using the Secure Delete tool:



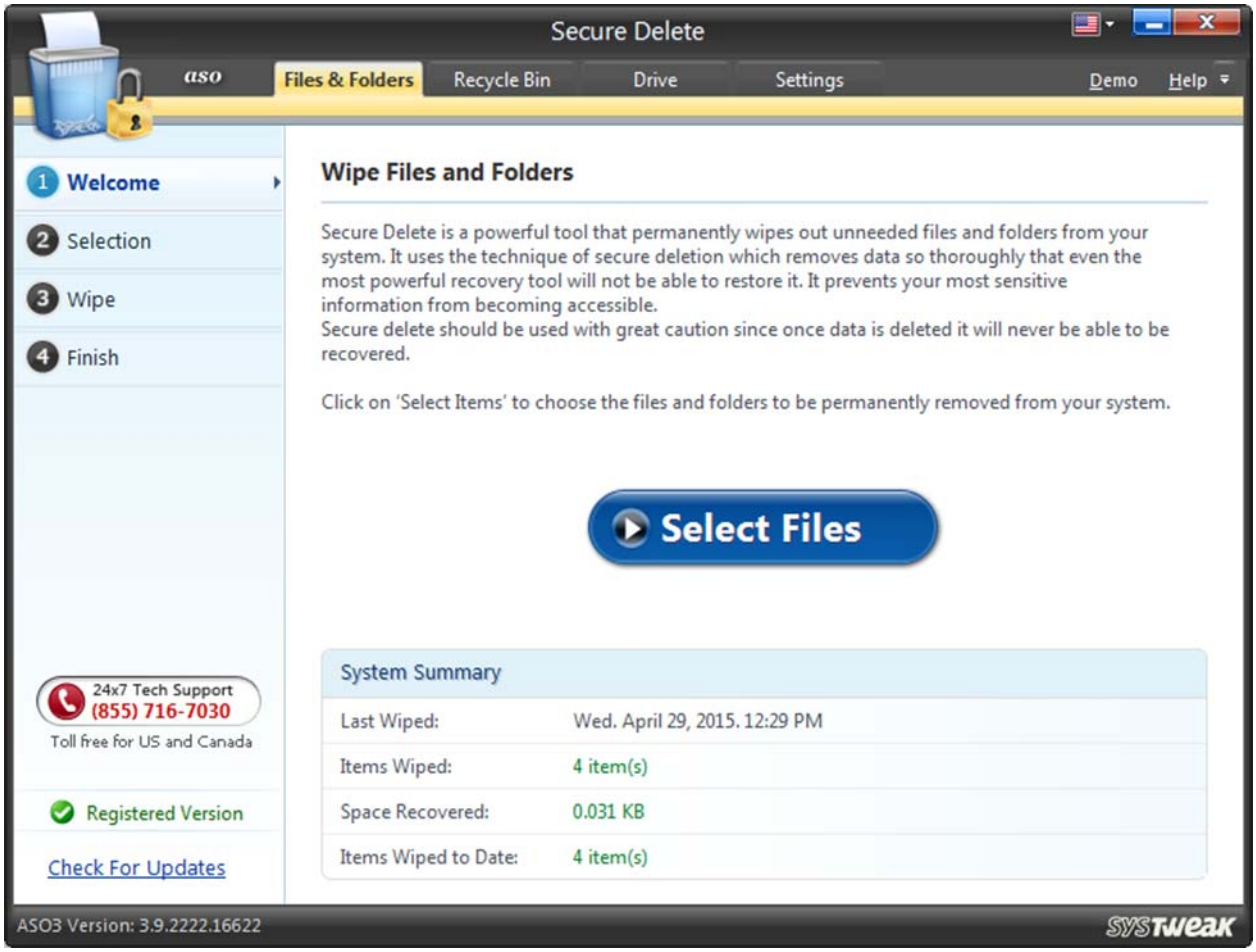
14. After clicking on the “Next” button in the bottom-right corner, the program asked me to confirm that I wanted to permanently delete the files:



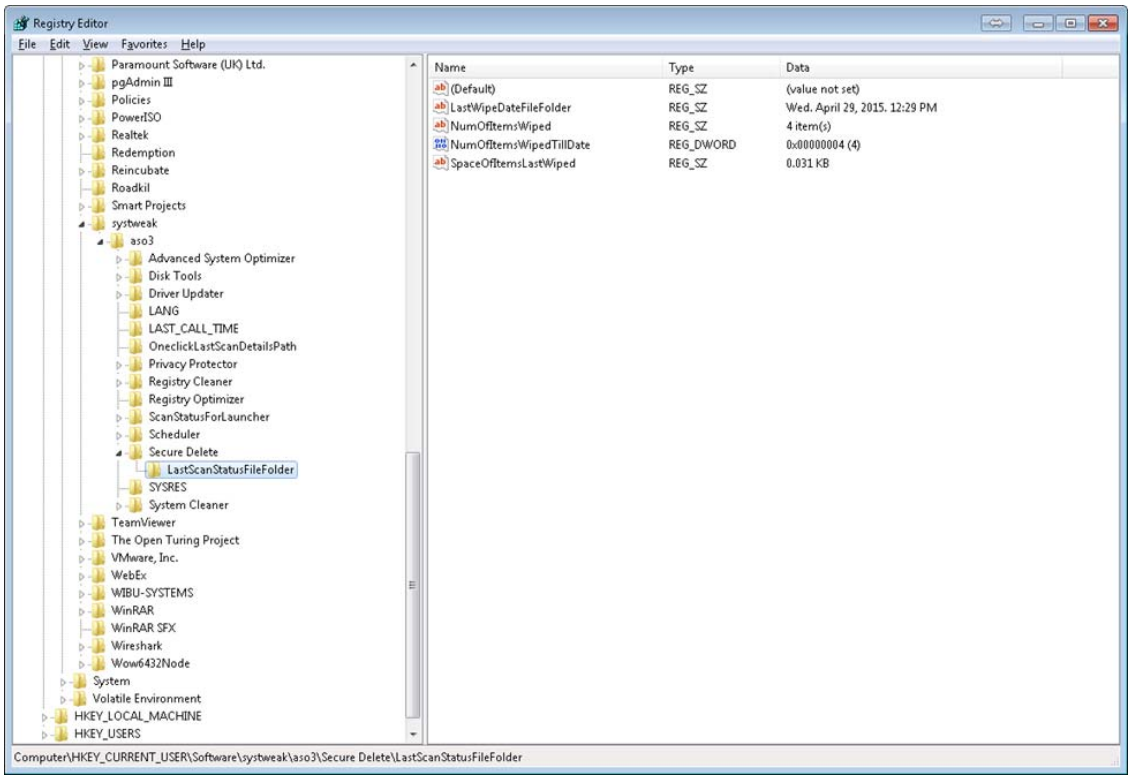
15. The user has to type “132” into the dialogue box and click “Next” to permanently delete the files. After doing so, the confirms the user’s activity:

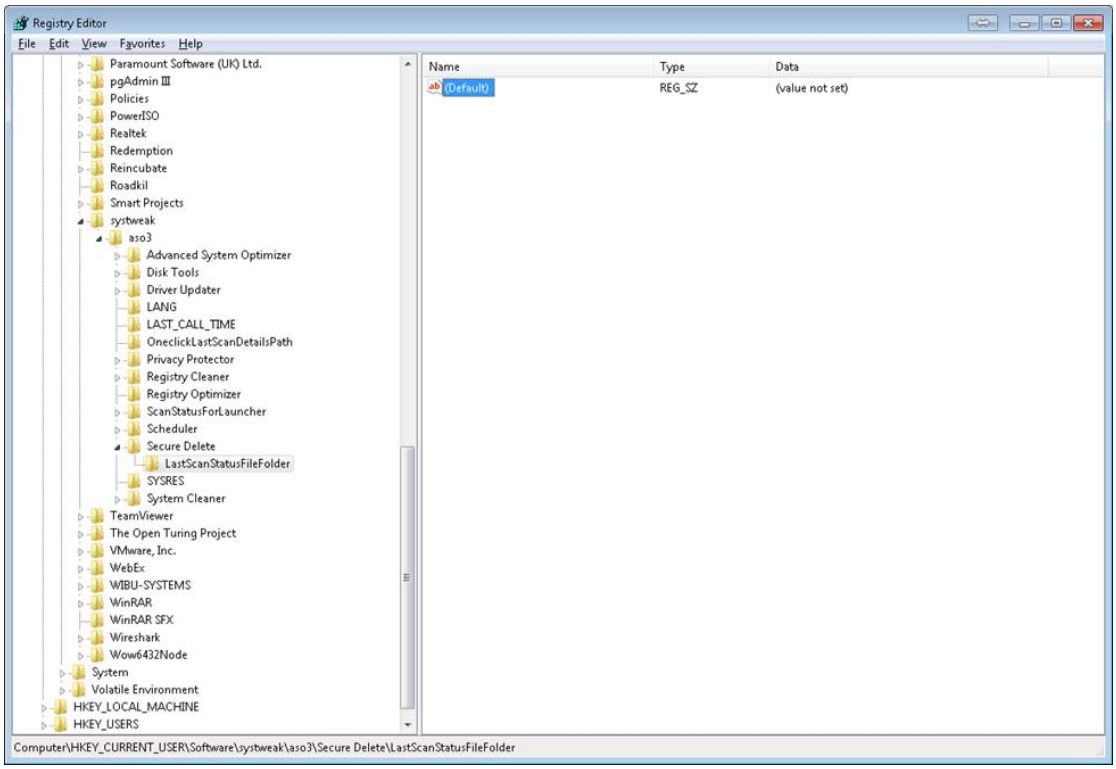


16. Clicking on “Finish” brings the user back to the start page, this time with the system summary updated to reflect the recent deletion activity:

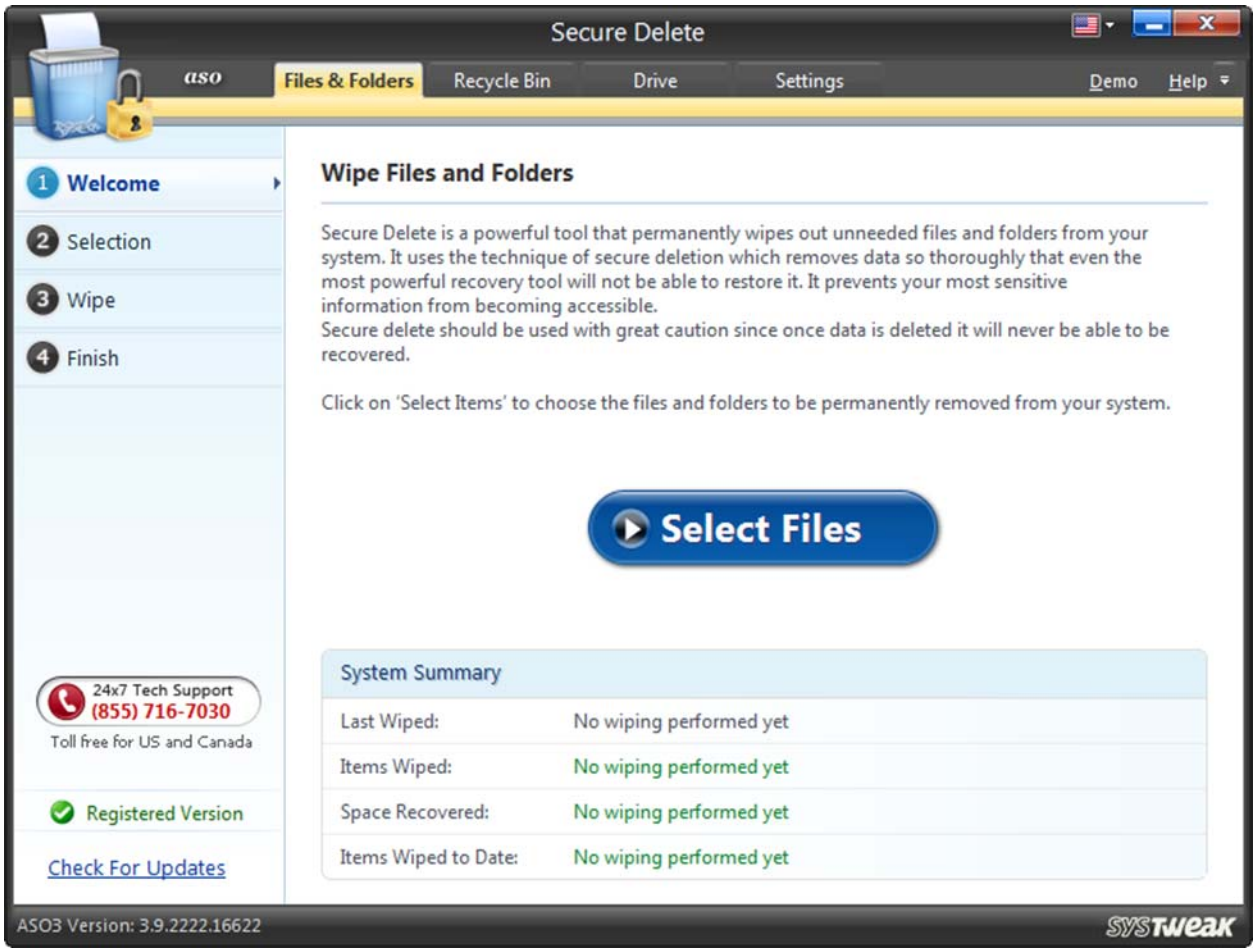


17. As shown above, the system summary recorded the fact that I had deleted four files from the test computer. In order to "reset" this summary, I opened the Registry Editor, selected the Secure Delete folder, and deleted its contents, as shown in the following two screenshots:


Registry Editor
File Edit View Favorites Help
Paramount Software (UK) Ltd.
pgAdmin III
Policies
PowerISO
Realtek
Redemption
Reincubate
Roadkil
Smart Projects
systweak
aso3
Advanced System Optimizer
Disk Tools
Driver Updater
LANG
LAST_CALL_TIME
OneclickLastScanDetailsPath
Privacy Protector
Registry Cleaner
Registry Optimizer
ScanStatusForLauncher
Scheduler
Secure Delete
LastScanStatusFileFolder
SYSRES
System Cleaner
TeamViewer
The Open Turing Project
VMware, Inc.
WebEx
WIBU-SYSTEMS
WinRAR
WinRAR SFX
Wireshark
Wow6432Node
System
Volatile Environment
HKEY_LOCAL_MACHINE
HKEY_USERS
Name
Type
Data
(Default)
REG_SZ
(value not set)
LastWipeDateFileFolder
REG_SZ
Wed. April 29, 2015. 12:29 PM
NumOfItemsWiped
REG_SZ
4 item(s)
NumOfItemsWipedTillDate
REG_DWORD
0x00000004 (4)
SpaceOfItemsLastWiped
REG_SZ
0.031 KB
Computer\HKEY_CURRENT_USER\Software\systweak\aso3\Secure Delete\LastScanStatusFileFolder


Registry Editor
File Edit View Favorites Help
Paramount Software (UK) Ltd.
pgAdmin III
Policies
PowerISO
Realtek
Redemption
Reincubate
Roadkil
Smart Projects
systweak
aso3
Advanced System Optimizer
Disk Tools
Driver Updater
LANG
LAST_CALL_TIME
OneclickLastScanDetailsPath
Privacy Protector
Registry Cleaner
Registry Optimizer
ScanStatusForLauncher
Scheduler
Secure Delete
LastScanStatusFileFolder
SYSRES
System Cleaner
TeamViewer
The Open Turing Project
VMware, Inc.
WebEx
WIBU-SYSTEMS
WinRAR
WinRAR SFX
Wireshark
Wow6432Node
System
Volatile Environment
HKEY_LOCAL_MACHINE
HKEY_USERS
Name
Type
Data
(Default)
REG_SZ
(value not set)
Computer\HKEY_CURRENT_USER\Software\systweak\aso3\Secure Delete\LastScanStatusFileFolder

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

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 May 13, 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 and April 30, 2015. Since the swearing of my April 30, 2015 affidavit, I have reviewed the affidavit of Kevin Lo ("Lo") affirmed on May 12, 2015. This affidavit is sworn in reply to that affidavit.

Windows does not Update the Metadata for the Registry Editor

3. In his affidavit, Lo concludes that there is no evidence that Brandon Moyse ("Moyse") took any steps with respect to his computer's registry using the Registry Editor in the way described in my affidavit of April 30, 2015.

4. Lo's suggestion that there is "no evidence" that Moyse took steps with respect to his computer's registry using the Registry Editor is based on the faulty assumption that if Moyse

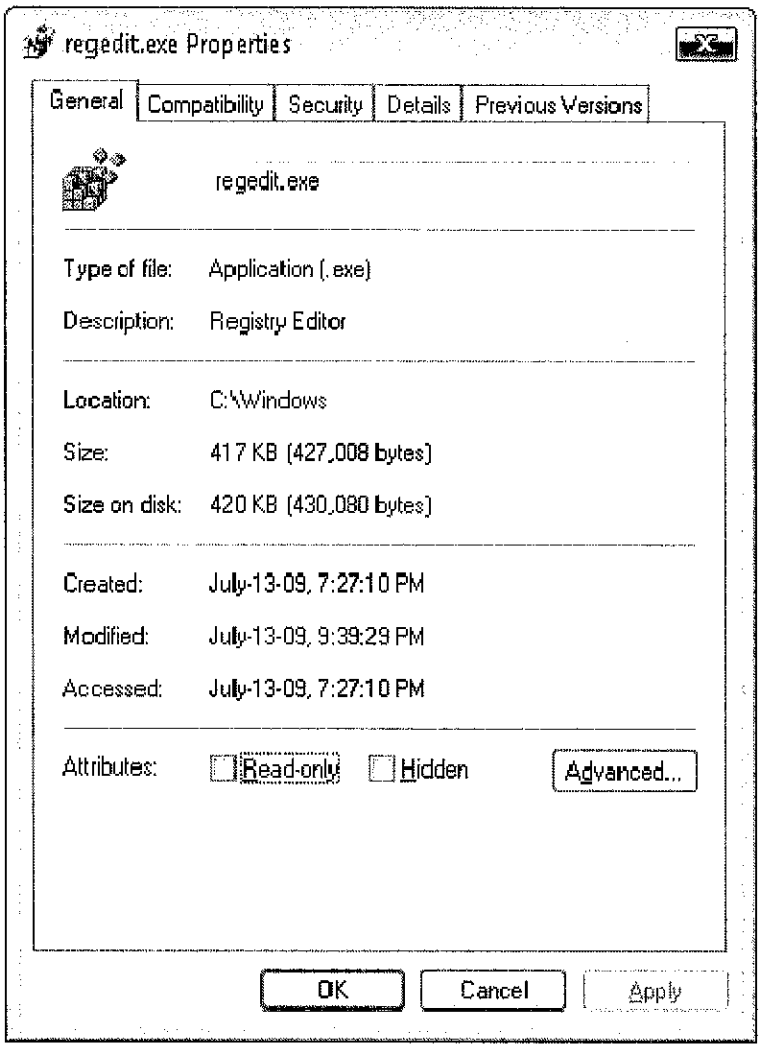
had used the Registry Editor, there would be some evidence in the form suggested by Lo. That is incorrect.

5. As every forensic expert knows, by default, every Windows operating system since the release of Windows Vista in January 2007, including Windows 7 and Windows 8, does not update the "last accessed" date (i.e., the metadata) for the Registry Editor program when it is launched and used.

6. Instead, by default, any computer running the Windows 7 operating system will have the same factory default date for the Registry Editor – July 13, 2009 – for the created, modified and accessed data, whether the user runs the Registry Editor subsequently or not.

7. For example, as explained in my April 30, 2015 affidavit, I reset the Secure Delete log by opening the Registry Editor to edit the registry data for the Secure Delete application.

8. Even though I used the Registry Editor on one of my computers prior to swearing my April 30, 2015 affidavit, as shown in the screenshot on the next page, the "last accessed" date for the Registry Editor on my computer still shows the factory default date – July 13, 2009:



9. I am surprised that Lo would suggest that the presence of the factory default metadata for the Registry Editor on Moyse's computer is demonstrative of Moyse's failure to use the Registry Editor. That suggestion is plainly wrong.

10. Moreover, the fact that by default Windows no longer updates the last access date (metadata) for the Registry Editor when it is launched and used is well known within the forensic IT industry – it has been the topic of much debate and discussion by forensic investigators since 2007.

11. I am familiar with Lo's work and experience in the forensic IT industry. Based on my experience and knowledge of Lo, I believe that Lo knows, or at least ought to know, that the Registry Editor metadata does not change when the Registry Editor is used to manually alter a computer's registry and that to suggest otherwise is potentially misleading.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on May 13, 2015

Commissioner for Taking Affidavits, etc.

Daniel Naymark

MARTIN MUSTERS

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 BRANDON MOYSE
AFFIRMED APRIL 2 , 2015

I, Brandon Moyse, of the City of Toronto, SOLEMNLY AFFIRM AS FOLLOWS:

1. I am a defendant in this action and a respondent in this motion, and, as such, have knowledge of the matters set out in this affidavit. To the extent that my knowledge is based on information and belief, I identify the source of such information and believe the information to be true.

2. I am 27 years of age. I was born and raised in Montreal, Quebec, and earned a Bachelor of Arts in Mathematics from the University of Pennsylvania. Prior to working for Catalyst, I was employed at Credit Suisse in New York and RBC Capital Markets in Toronto as a junior banker on their respective Debt Capital Markets desks.

3. I previously affirmed affidavits in this proceeding dated July 4, 2014, July 16, 2014 and October 10, 2014. A copy of each of those affidavits is attached as **Exhibits "A", "B"**

and **"C"** to this affidavit. In this affidavit, I will repeat some of the evidence from those affidavits to provide context and for completeness.

4. I have reviewed the final report of the Independent Supervising Solicitor dated February 17, 2015, amended March 13, 2015 (the "ISS Report") as well as an earlier draft of that report, a supplementary report of the Independent Supervising Solicitor dated March 30, 2015, and Catalyst's motion materials including the affidavit of Martin Musters, sworn February 15, 2015 (the "Musters Affidavit"), and the affidavit of James Riley, sworn February 18, 2015 (the "Riley Affidavit"), along with the exhibits to those affidavits. The ISS Report was amended on March 13, 2015. I attach a copy of the amended ISS Report as **Exhibit "D"**.

5. I incorporate all my evidence contained in Exhibits A, B, and C to this affidavit by reference, except for the following. In my affidavit sworn July 4, 2014, I suggested at paragraph 71 that my personal computer equipment did not contain any information confidential to Catalyst. Mr. Riley alleges, at paragraph 30 of the Riley Affidavit, that I made that statement in order to deceive the court. I never intended to deceive the court. I believed that statement to be true at the time I swore the affidavit, but I later learned that it was inaccurate. I have since disclosed that information in my affidavit of documents sworn July 22, 2014, and supplementary affidavit of documents sworn July 29, 2014.

A. Background – my junior role at Catalyst

6. I commenced employment at Catalyst as an analyst on or around November 1, 2012, pursuant to a written employment agreement (the "Employment Agreement"),

dated October 1, 2012. The Employment Agreement is attached as **Exhibit "E"** to this affidavit.

7. Analysts are the lowest level professionals at Catalyst. The hierarchy at Catalyst for the majority of time that I was employed there was as follows: three Partners, two Vice Presidents and a total of three Associates and Analysts. While I was employed at Catalyst, all potential and actual investments were sourced at the Partner level. Analysts were not actively encouraged to generate ideas for the firm and their thoughts and recommendations were routinely disregarded. Furthermore, as an analyst, I had no direct input into investment decisions or strategy, but was instead assigned specific research projects by the Partners.

8. As an analyst at Catalyst, I performed financial and qualitative research both on potential investment opportunities which were almost exclusively suggested by the partners, and companies already owned by Catalyst. A job description for my position is attached as **Exhibit "F"** to this affidavit. As part of my research of potential investment opportunities, I would normally review publicly available information, such as financial statements, and analyze the company's potential value to Catalyst. From time to time, I would also meet with management groups of various companies as part of my due diligence activities.

9. While at the beginning of my employment with Catalyst I was more involved with researching potential investments, during the last six months of my employment I was focused almost entirely on performing operating reviews of Catalyst-owned companies. As such, I had very little knowledge of Catalyst's then-current prospective investments.

10. Given the junior nature of my position, I had very little knowledge of Catalyst's potential investments and its strategy for those investments. While I regularly attended Catalyst's "Monday meetings", those meetings did not contain the in-depth confidential strategy discussions that Mr. Riley implies in his affidavit. Instead, they were normally a very low level update on primarily existing Catalyst projects. I understand that to the extent strategy discussions took place, they primarily took place at Partners-only meetings, which I did not attend. It was clear to me that higher-level discussions were taking place which I was not privy to as an analyst: Catalyst's partners would frequently discuss conversations or correspondence which had occurred without providing others at the meeting with any context. They would also frequently break off after the meetings to discuss matters behind closed doors.

11. The Riley Affidavit significantly overstates my knowledge and the importance of my role at Catalyst. As I will explain in more detail below, it particularly overstates the significance of my involvement in Catalyst's work on the potential acquisition of Wind Mobile ("Wind").

B. My minimal involvement with the Wind file

12. I have carefully reviewed the allegations in the Riley Affidavit with respect to my involvement in Catalyst's work on the potential purchase of Wind. I do not believe that Mr. Riley has fairly or accurately depicted my involvement on that file.

13. The statement at paragraph 16 of the Riley Affidavit that I worked "extensively" on the Wind file is not accurate.

14. My involvement on the Wind file was limited to a period of approximately three weeks, which led up to the date of my resignation on May 24, 2014. For the first few days, I attended an introductory due diligence meeting and helped work on the initial draft of the investment memorandum, which was still not complete at the time of my resignation. For the last ten days of that three week period, from May 16, 2014, to May 25, 2014, I was on vacation in Southeast Asia and had almost no direct involvement on the file. I believe I continued to be copied on emails, and on one occasion looked at a preliminary model, which was not complete in terms of scenario analysis and business drivers, and gave cursory comments on it to Zach Michaud, a Vice President at Catalyst.

15. I gave Catalyst official notice of my resignation from Catalyst while I was abroad, on the second-to-last day of my vacation. When I returned to Toronto, Catalyst told me to stay home for the balance of my notice period (approximately 4 weeks). I did so, and did no Catalyst work during that period. To the best of my recollection, I did not even attempt to log on to the Catalyst system during that period, though I understand from material filed in court in this proceeding that Catalyst did not remove my access to its system.

16. During the period before my vacation (less than two weeks), my work on the Wind file consisted largely of initial due diligence. My work did not involve any deal structuring analysis, scenario analysis, or late-stage negotiations. To my knowledge, Catalyst did not yet even have a working model of Wind or a complete investment memorandum when I resigned on May 24, 2014. Catalyst had not yet, to my knowledge, decided on the structure, price, regulatory risk mitigation, and given the status of Catalyst's diligence at the time, they could not have ascertained or resolved those issues.

17. Contrary to the evidence at paragraph 17 of the Riley Affidavit, I do not recall analyzing regulatory risk during my brief period of time working on the Wind file. The team consisted of myself, Zach Michaud (Vice President) and Lorne Creighton (Analyst). Catalyst had also hired external advisors to assist with the work and diligence, including building the financial model for Wind. Catalyst's team focused on filing the investment memorandum, and reviewing the external advisors' work.

18. The junior employees, including me, spent those early days learning about Wind, primarily by reviewing information made available by the company through a dataroom. The only regulatory risk related to Wind of which I was aware, was whether or not the federal government would allow a new wireless entrant to sell its spectrum and/or be purchased by an incumbent. I learned about this regulatory issue through the extensive media coverage it received in both the general and business news. I did not do any analysis on that subject or any other regulatory issues facing Wind, and if anyone at Catalyst did such an analysis before I left, I was not informed of and was not aware of it.

19. Approximately one to two months before I briefly worked on the Wind file, I had limited involvement in another project which touched on the Canadian telecom landscape. In preparation for two meetings which Catalyst had with Industry Canada in early 2014, I transposed handwritten notes given to me by Catalyst partners into a PowerPoint presentation which was later presented to Industry Canada. I immediately destroyed all copies of my notes and the files, as instructed by Catalyst partners. I did not attend the meetings and do not know the outcome or tone of those discussions. I had no further involvement in that matter.

20. At paragraph 19 of the Riley Affidavit, he suggests that by hiring me, West Face might have learned of Catalyst's interest in purchasing Wind and would then "scoop the opportunity." The opportunity to purchase Wind was not unique or exclusive to Catalyst, but was being made available to a wide range of potential buyers by Wind's investment bankers. I did not alert anybody at West Face to the fact that Catalyst had been considering a purchase of Wind. In fact, following my resignation from Catalyst and before I started at West Face, Gabriel de Alba, a Partner at Catalyst, advised me that Catalyst "may view" West Face as a competitor because it has in the past been involved in some deals in which Catalyst also had an interest. Mr. de Alba also included Wind in this characterization. This was how I first learned that West Face could be interested in Wind, though I have no way of verifying the accuracy of Mr. de Alba's statements in this respect.

21. At paragraph 25(c), the Riley Affidavit quotes the June 26, 2014, affidavit of Martin Musters to note that on the evening of May 13, 2014, I accessed several files relating to Project Turbine between 8:39 p.m. and 9:03 p.m., and that "this was an insufficient amount of time for Moyse to read the documents." Mr. Musters' apparent insinuation is that I was copying Catalyst files for delivery to West Face. This insinuation is false.

22. At the time, I was one of three Catalyst employees working on the Wind transaction under Mr. de Alba's direction. I was helping to create a chart for an investment memorandum and quickly opened files to see whether or not they contained basic information that I needed for the chart. Given that Catalyst had only been invited into the Wind data room several days earlier, and that there were hundreds of documents in the data room, I did not know what each document contained and needed to do a very quick and cursory review of many documents to determine which documents, if any, contained

useful information for my purposes. All of the documents I reviewed were derived from the data room, and the charts I was working on were also derived from documents available in the data room.

23. At paragraphs 44 to 47 Mr. Riley describes the negotiations between Catalyst and Vimpelcom Ltd. for the purchase of Wind in July and August 2014. He states that "the only point over which the parties could not agree was regulatory risk". He goes on to note that the consortium led by West Face ultimately purchased Wind on the same terms as Catalyst had proposed, "with the one exception that the Consortium waived the regulatory conditions Catalyst had been seeking." He concludes from this that I may have "communicated Catalyst's Confidential Information concerning its negotiation plans and concerns to West Face." This is not true. I made no such communication, nor could I have done so.

24. In fact, the negotiations described by Mr. Riley occurred in July and August 2014, a full 2-3 months after my departure from Catalyst. I was not, and could not have been, privy to any information about those negotiations or about any points on which Catalyst and Vimpelcom did not agree. Moreover, as described above, any information that I had access to prior to my departure from Catalyst was extremely preliminary. If anyone at Catalyst had begun to develop negotiation plans by the time of my departure, which would surprise me given the preliminary stage of our work, I was not included in any discussions, nor did I ever see any documents concerning such plans, including drafts.

25. On June 19, 2014, before I started at West Face, I received a copy of a memorandum from Supriya Kapoor, West Face's Chief Compliance Officer, advising me

that a confidentiality wall had been established with respect to Wind under which I was not permitted to discuss any information I had regarding Wind with others at West Face, or to take any active steps regarding Wind. I attach a copy of this memorandum as **Exhibit "G"** to my affidavit. I complied with the instructions in the memorandum.

26. In addition, Alex Singh, West Face's General Counsel and Secretary, advised me that West Face was concerned about the Catalyst memos I had provided to Mr. Dea.

27. He also reminded me of my confidentiality obligations to Catalyst, and the importance of respecting those obligations.

C. My compliance with the undertaking and the Firestone Order

28. Following my resignation from Catalyst and the announcement of my intention to begin working for West Face, Catalyst commenced this action against me and West Face, seeking a variety of relief including injunctive relief. Catalyst expressed concern that, among other things, I would transfer confidential Catalyst information to my new employer.

29. In the course of my recruitment by West Face, I sent an email to West Face, which attached four company research pieces that I created at Catalyst, some of which were marked as confidential. I intended only to provide West Face with examples of my written work and my research abilities. Providing these documents to West Face was a mistake. I should not have done so.

30. Upon further reflection, I came to the realization that I should not have sent the email to West Face within days of doing so, and I made the decision to delete it from my

email account. I recognize now that deleting the sent item was not the appropriate way of addressing my mistake.

31. I understand and respect the obligation to preserve the confidentiality of my former employer's information. West Face has also been absolutely clear with me about the importance of respecting and abiding by that confidentiality obligation.

32. In connection with Catalyst's initial motion for interim relief, I am aware that the parties attended Motion Scheduling Court on June 30, 2014. Although I was not in attendance on that date, and my counsel did not attend, I am aware that Andy Pushalik, West Face's counsel, entered into an undertaking on behalf of West Face and me. I attach a copy of the undertaking as **Exhibit "H"**. That undertaking provided as follows:

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

33. I was advised of that undertaking by my counsel, and I understood and complied with it. I preserved the status quo with respect to any relevant documents in my power, possession or control.

34. On July 16, 2014, the parties consented to an order, which was signed by Mr. Justice Firestone (the "Firestone Order"). I attach a copy of the Firestone Order as **Exhibit "I".** It included a number of terms with respect to each of the parties, including the following terms relevant to me:

> 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 [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] 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. (emphasis added.)

35. I understood the terms of the Firestone Order and complied with them in full.

36. Further to the Firestone Order, I agreed to deliver my personal electronic devices, including my computer, to my counsel on Monday July 21, 2014, which was 5 days after the order was issued. I understand that on July 17, 2014, counsel were discussing the terms of the forensic imaging, and that Monday July 21, 2014, was the earliest date on which the image could be made.

37. I understood that, pursuant to the Firestone Order, a forensic image would be created of my computer's hard drive for the purpose of determining what, if any, documents I had in my possession that related to Catalyst or to the issues raised in Catalyst's lawsuit. I had been aware for a number of days before the court appearance on July 16, 2014, that it was possible that my personal computer would have to be turned over to be reviewed for documents relevant to this matter.

38. I was not concerned that my devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit: I had good, reasonable explanations for every Catalyst-related document that would be found on my computer, set out in this affidavit, and in any event intended to disclose all such documents in my affidavit of documents, as required under the Firestone Order.

39. I was, however, concerned that an image of my computer hard drive would capture not only the Catalyst documents in my possession, which I agreed were relevant to this proceeding and which I would preserve in any event, but also a raft of irrelevant personal information. In particular, I was troubled that Catalyst would have access to my personal Internet browsing history, which was not relevant to the matters in dispute in this litigation but would be embarrassing to have reviewed by others. I use the Internet on my personal computer for, among other things, recreational online gambling, online gaming, and adult entertainment websites. I was particularly concerned that my personal internet browser history would show that I had accessed adult entertainment websites.

40. I was also concerned that the irrelevant information on the images would somehow become part of the public record through this litigation. At that point it was not clear to me

what would happen to the images, which would include this irrelevant personal information. The parties had not agreed to appoint an Independent Supervising Solicitor, nor had a Document Review Protocol been implemented to prevent Catalyst from accessing such irrelevant information and to ensure that it did not end up in the public record.

41. I therefore decided that, prior to delivering my computer to my counsel, I would attempt to delete my Internet browsing history from my computer. I did not and do not believe that there was anything improper about my doing so – neither the undertaking nor the Firestone Order required me to maintain my computer "as is" for the 5 days before I was to deliver the computer or to preserve clearly irrelevant files. The focus of both the undertaking and the Firestone Order was to maintain and preserve documents relevant to this action. If the undertaking or the Firestone Order had required me to maintain the computer "as is", I would not have used it at all prior to the image being taken.

42. Though I am comfortable using my computer and other devices on an everyday basis, I do not have a great deal of advanced knowledge about computers. However, I 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. I did some Internet searches on how to ensure a complete deletion of my Internet browsing history, and many websites said that cleaning the registry following the deletion of the Internet history would accomplish this.

43. I then did some further online research for "registry cleaning" products, and ultimately purchased two software products from a company called "Systweak". A print-out of Systweak's home page (www.systweak.com) is attached as **Exhibit "J"** to this affidavit. The website lists two of its "top products", called "RegCleanPro" and "Advanced System Optimizer". The website describes the "Advanced System Optimizer" product as an "all in one PC tuneup suite," and describes the "RegCleanPro" product as "Software to optimize the registry."

44. I decided to purchase "RegCleanPro" on July 12, 2014 for the purpose of deleting my Internet browser history, out of my concerns about my irrelevant Internet search history becoming part of a public record.

45. Four days later, on July 16, 2014, I purchased "Advanced System Optimizer" from the same company, "Systweak". My intention was to use this program to improve my system's functionality, and it seemed to provide a full suite of optimization products. Both "Advanced System Optimizer" and "RegCleanPro" were relatively inexpensive (approximately $30-$40 each).

46. On July 20, 2014, the day before I was to deliver my computer to my counsel, I opened both software products on my computer and looked into how each operated. To the best of my recollection, I ended up running the "RegCleanPro" software to clean up the computer registry after I deleted my Internet browser history.

47. As described above, I certainly loaded the "Advanced System Optimizer" software onto my computer and investigated what products it offered and what the use of those products would entail. I do not have an explanation for the ISS's finding that a folder

called "Secure Delete" existed on my hard drive. I am certain that I did not run the "Secure Delete" product included in the "Advanced System Optimizer" suite of products, and I can say with absolute certainty that I did not use that product or any other to delete any Catalyst documents or anything else from my computer that could have been relevant to this litigation. Since my computer was returned to me after the image was taken, I have used "Advanced System Optimizer" a number of times to clean up my computer and optimize its functioning.

48. I understood and respected my obligations under the undertaking and the Firestone Order. I took my obligations under each very seriously, and never intended to breach either.

49. On July 21, 2014, I delivered my personal electronic devices to my counsel's office, as scheduled. I understand that an image was then taken of those devices.

D. "Callidus" Documents

50. The Riley Affidavit makes much of the fact that there were 132 hits on my personal computer for the term "Callidus".

51. Although I cannot say with certainty what the 132 hits reflect, I note that they likely comprise a much smaller number of documents, given that a single document could include multiple hits of a particular word. My computer included numerous documents that referenced Callidus, including LinkedIn update emails, news stories about the Callidus IPO and subsequent public earnings releases, and Catalyst investor letters which mentioned Callidus. I understand Catalyst's primary concern is that I provided West Face with specifics of Callidus's loan book; however, the investor letters did not contain

specifics of Callidus's loan book, and Mr. Riley's evidence on cross-examination on previous affidavits in this proceeding is that the investor letters were not provided to investors under a non-disclosure agreement. I do not believe I ever had any confidential documents concerning Callidus in my possession.

52. Mr. Riley is almost entirely correct in stating, at paragraph 56 of the Riley Affidavit, that I "had no involvement with the operations of Callidus". A few months prior to my departure from Catalyst, I emailed Lorne Morein, a Callidus employee, for information on a company named Discovery Air, that had received loan funds from Callidus at some point in the past, but whose relationship with Callidus was terminated in 2012, to my understanding. Mr. Morein sent me Callidus's credit memo on Discovery Air, which was no more recent than 2012. The credit memo was, at most, a few pages long. I did not retain a copy of the memo.

53. As this example demonstrates, I did not have any access to the Callidus file system. I shared no information about Callidus with West Face because I had no such information. The ISS reported, at paragraph 37 of its report, that application of Catalyst's requested second set of search terms, which were specifically targeted at locating any Callidus-related documents on my computer, resulted in the identification of a total of "five non-duplicative, unique files", "none of [which] bear any relevance to Moyse's employment with Catalyst, nor do they contain any confidential information."

54. Mr. Riley stated, at paragraph 62 of the Riley Affidavit, that "any document in Moyse's possession that was responsive to the additional search terms by its nature very likely contained Catalyst's confidential information." Mr. Riley has not disclosed "the

additional search terms" to the court, and the search terms were redacted from the correspondence in which Catalyst made its request to the ISS. Having seen the unredacted ISS Report, and having reviewed the fourteen search terms, I believe it would be obvious to anybody that a number of those terms could readily appear in benign fashion in documents completely unrelated to Catalyst. In particular, without specifically revealing any of the search terms, I will note that one of the terms is a man's common first name, and several of the terms are common words that are frequently used in a non-Catalyst/Callidus (or even business) context.

55. Catalyst subsequently requested that the ISS do further analysis and provide a supplementary report addressing a number of issues, including the question of the application of Catalyst's "additional search terms". I consented to the ISS doing so.

56. On March 30, 2015, the ISS delivered its supplementary report, a copy of which is attached as **Exhibit "K"** to this affidavit. At Catalyst's request, we have redacted the search terms in paragraph 8 of the report.

E. Additional Responses to the Riley Affidavit

57. At paragraph 25 of the Riley Affidavit, Mr. Riley summarizes certain of Mr. Musters' findings in connection with his analysis of my workplace computer. Although I addressed these issues in my earlier affidavit, I think my responses bear repeating here.

58. With respect to the specific allegations, I note as follows:

(a) Regarding paragraph 25(a): At the time I reviewed old Catalyst investor letters, I was intending to leave Catalyst and looked over investor letters to

look for potentially negative statements made by Mr. Glassman about employees who left the firm. The reason I skimmed the documents quickly was because the personnel updates were always at the end of the letters, so I skipped to the bottom of each letter to check whether it contained any relevant information for my search. Mr. Riley also notes many of the letters that I reviewed concerned Catalyst's Stelco investment. I believe that investment was consummated and exited in 2008, and the company no longer exists.

(b) Regarding paragraph 25(b): I frequently reviewed old transaction files out of personal curiosity, and in order to enhance my education in the business. It was for this reason that I opened several files pertaining to Catalyst's investment in Stelco. However, due to the complete lack of context I found them very complex and did not take the time to try to understand them.

(c) Regarding paragraph 25(c): I have dealt with the allegation that I accessed several files relating to Project Turbine (i.e., the potential purchase of Wind) above, at paragraph 22. I downloaded those documents while doing the work described above, and all of the documents were derived from the Wind data room.

(d) Regarding paragraph 25(d): The Box accounts in question were established either by Catalyst or by Catalyst portfolio companies, with full knowledge of Catalyst, for the purpose of information-sharing. These accounts were not personal to me. The Dropbox account was personal.

Although I used the Dropbox account while employed by Catalyst, as noted above, the ISS Report confirmed that my Dropbox account contained no Catalyst confidential information following my departure from Catalyst.

(e) Regarding paragraph 25(e): Analysts at Catalyst were expected to work extremely long hours, including from home and while out of the office. Catalyst's remote access system, which Mr. Riley refers to, was very poor quality, particularly when travelling. By the end of 2013 and through the balance of my employment, I was frequently travelling 3-5 days a week. It was generally more efficient, when working outside the office, to email documents to myself and work locally. This was a common practice among Catalyst employees. Moreover, this was my approach to working outside of the office throughout my entire tenure at Catalyst; it was not something I started doing once I determined to resign my employment with Catalyst.

59. In response to the allegation at paragraph 26 of the Riley Affidavit, it is true that I "wiped" the data from my Blackberry prior to returning it to Catalyst. My Blackberry contained photographs and text messages of a personal and private nature, and I thought it was completely reasonable to take steps to ensure that they would not be accessible to the next user of the company-issued Blackberry. The only email address associated with the Blackberry was my Catalyst email address, and Catalyst had full access to those emails on its server.

60. Mr. Riley states, at paragraph 30 of the Riley Affidavit, that I apparently intended to deceive the Court when I stated that there was no basis to search my personal computer.

At the time I made that statement, I did not realize that I had all the documents that I did on my personal computer. I typically set up work folders on my computer to organize my work, and I had deleted all those folders and the documents therein when I left Catalyst but before any preservation order was made in the course of these proceedings. I was unaware that the original copies remained in the "My Documents" and "Downloads" folders (which is where the original documents were stored before being copied into the work folders). As noted in the ISS Report, virtually all the documents on my computer that contained Catalyst information were ultimately located in these folders.

61. At paragraph 43 of the Riley Affidavit, Mr. Riley notes my "admission" on cross-examination that I did not do any work for my first two weeks at West Face, and concludes from that that "West Face did not require Moyse's services in June/July 2014."

62. In my experience, it is not at all uncommon for new employees to have little or no work in their first couple of weeks at a new employer. In my experience, that time is frequently spent getting up to speed, getting accounts set up, reading background materials, and so on. I specifically recall that when I interviewed with Catalyst in 2012, Mr. de Alba suggested that although I had technically spent 8 months at RBC in my previous job, I could not really claim to have done 8 months' worth of work since, in his words, "you don't do anything your first month anyways."

63. Mr. Riley also failed to note my evidence that, by my third week with West Face, I began to be assigned work, including performing an analysis of "one potential public equity investment" as well as "two potential pre-IPO private investments in private companies." The relevant excerpt of my cross-examination transcript is attached as

Exhibit "L" to this affidavit. Mr. Riley's statement that West Face did not require my services in June and July is an unfair extrapolation from a two-week period, given that I began working with West Face a week before the Canada Day holiday, and that I was largely up and running by my third week.

F. My Activities Since the Firestone Order

64. I ceased working at West Face as of July 16, 2014, the date of the Firestone Order. Catalyst was obliged to pay my salary until December 22, 2014, further to the Firestone Order and the order of Justice Lederer on November 10, 2014. In fact, throughout that period I was paid directly by West Face, and I understand that Catalyst reimbursed West Face for those amounts. However, I do not know the specifics of how those reimbursements were effected. West Face has been paying my salary since December 23, 2014, though I have not been working.

65. I will continue to abide by the orders which have been made against me in the course of this litigation, and will comply with any future orders made against me.

66. I make this affidavit in opposition to Catalyst's motion for an order finding me in contempt of court, and requiring me to cover the costs of the ISS Report, and for no other purpose.

AFFIRMED BEFORE ME at the City of Toronto, in the Province of Ontario on April 2, 2015

Commissioner for Taking Affidavits
(or as may be)

Denise Cooney
LSUC # 64358R

Brandon Moyse

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 KEVIN LO
AFFIRMED APRIL 2, 2015

I, Kevin Lo, of the City of Toronto, SOLEMLY AFFIRM AS FOLLOWS:

1. I am a managing director with Froese Forensic Partners LLP ("**FFP**"). FFP was engaged by Paliare Roland Rosenberg Rothstein LLP ("**Counsel**"), on behalf of Mr. Brandon Moyse ("**Moyse**"), to provide our professional services in relation to this matter. A copy of my curriculum vitae is attached as **Exhibit "A"** to this affidavit. I attach a signed Acknowledgment of Expert's Duty, which I signed prior to swearing this affidavit, as **Exhibit "B"**.

2. As a result of the work done by FFP in this engagement, I have knowledge of the matters set out in this affidavit. To the extent that my knowledge is based on information and belief, I identify the source of such information and believe the information to be true.

3. I worked directly on the matters described in this affidavit. I was assisted throughout the process by my colleague Barry Kuang, a managing consultant with FFP.

4. For the purpose of our review and obtaining an understanding of the matter, we were provided with the report of the Independent Solicitor Supervisor ("**ISS**"), dated February 17, 2015, and the affidavits/reports of Marty Musters ("**Musters**") at Computer Forensics Inc., who I understand to be the forensic expert retained by the Catalyst Capital Group Inc., the plaintiff in this matter.

5. We understand that Digital Evidence International Inc. ("**DEI**") was retained by the ISS to assist with the collection, analysis, and reporting of the relevant electronically stored information ("**ESI**").

6. FFP was provided with the forensic images of relevant devices belonging to Moyse (i.e., desktop computer and mobile devices) for the purpose of our analysis.

The "Secure Delete" Issue

7. In its report, the ISS noted that Moyse apparently purchased two software products in July 2014: one called "RegClean Pro" and the other called "Advanced System Optimizer 3" ("**ASO**"), both of which are created by Systweak Software.

8. The ISS also noted the existence of a folder called "Secure Delete" on Moyse's computer. A program called "Secure Delete" is one of many programs packaged into the ASO product, which can be described as a "software suite". The ISS reported as follows with respect to the folder, at paragraph 45 of its report:

> 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.

9. The ISS ultimately reached the following conclusion with respect to the existence of the "Secure Delete" folder on Moyse's computer, at paragraph 48 of its report:

> ...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.

10. In his affidavit of February 15, 2015, Musters concluded that the existence of a "Secure Delete" folder would indicate that someone had executed Secure Delete and that files and folders were deleted as a result:

(a) "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." [para. 12]

(b) "Based on my own experience using this 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 this software, there is no other explanation as to why a "Secure Delete" folder would be created on Moyse's personal computer on that date." [para. 13]

11. Counsel asked FFP to conduct our own independent analysis and to provide an opinion on the conclusions Musters and the ISS reached with respect to the "Secure Delete" folder on Moyse's computer.

12. As part of our independent analysis, FFP purchased and installed the ASO and RegClean Pro software on a Microsoft Windows computer ("**Test Computer**").

13. We launched Secure Delete on the Test Computer. We observed that a folder named "Secure Delete" was created in the following file path: *\Users\Brandon Moyse\AppData\Roaming\Systweak\ASO3\Secure Delete*, as soon as we launched Secure Delete. In other words, the Secure Delete folder was created as soon as we clicked Secure Delete on the ASO menu, but before it was used for any other purpose. Therefore, contrary to the statement at paragraph 12 of Musters' affidavit, simply launching Secure Delete creates a "Secure Delete" folder. We did not have to take any other step, including deleting a file, in order to create a "Secure Delete" folder.

14. Next, we attempted to determine whether we could reach any conclusions as to whether or not Moyse used Secure Delete to delete any files from his computer.

15. In order to do so, we used Secure Delete on the Test Computer to delete a number of files. As we deleted the files, we observed that Secure Delete created a "log" which maintained records of the files deleted (the "Secure Delete Log"). A copy of the Secure Delete Log generated by our use of Secure Delete on the Test Computer is attached as

Exhibit "C" to this affidavit. The Secure Delete Log was located in the user registry at the following location:

\HKEY_CURRENT_USER\Software\Systweak\aso3\Secure Delete

The Secure Delete Log records the following information when Secure Delete is used to delete one or more files:

(a) NumOfItemsWiped

(b) NumOfItemsWipedTillDate

(c) LastWipeDateFileFolder

(d) SpaceOfItemsLastWiped

(e) FileFolderWipeStatusLine1

(f) FileFolderWipeStatusLine2

(g) WipeSettingMethod

16. We then analyzed the forensic image of Moyse's computer. As an initial matter, we confirmed the finding from the ISS's report that a "Secure Delete" folder existed on Moyse's original computer. Moyse's computer has a "Secure Delete" folder in the same location as the Test Computer, that is:

\Users\Brandon Moyse\AppData\Roaming\Systweak\ASO3\Secure Delete

We were also able to confirm the ISS's report that the "Secure Delete" folder appears to have been created on Moyse's computer on July 20, 2014 at approximately 08:09 p.m.

17. We then searched Moyse's computer for the existence of a Secure Delete Log, which we would have expected to see if someone had in fact used Secure Delete to delete any files from Moyse's computer.

18. Based on our review, no Secure Delete Log exists on Moyse's computer. Attached as **Exhibit "D"** to this affidavit is a screenshot of the "System Summary" from Moyse's computer which confirms that Secure Delete was not used to delete any files from Moyse's computer. As described below, we ran additional tests and we were not able to use RegClean Pro to delete the Secure Delete Log.

19. Therefore, contrary to Musters' conclusion, we found no evidence that a user used Secure Delete to delete any files or folders from Moyse's computer.

20. Our observations and analysis with respect to the Secure Delete issue can therefore be summarized as follows:

(a) someone using Moyse's computer clicked on the "Secure Delete" program on July 20, 2014 at approximately 8:09 p.m., resulting in the creation of a "Secure Delete" folder on that computer; and

(b) the "Secure Delete" program on Moyse's computer was not used to delete any files or folders from that computer.

Use of the "RegClean Pro" Software

21. Counsel also asked us to attempt to determine whether the "RegClean Pro" program was ever run on Moyse's computer.

22. Again, the first step of our analysis involved performing a simulation by running the RegClean Pro software on the Test Computer, and recording our observations.

23. We observed that when the RegClean Pro program is run, a log is created in the user registry at the following location:

\HKEY_CURRENT_USER\Software\systweak\RegClean Pro

It appears that some of the notable program activities that are captured by that log are as follows:

(a) StrLastScan

(b) StrLastScanResults

(c) StrLastOptimizeTime

(d) StrLatestRegDefrag

(e) StrLastestRestorePoint

24. We then applied this information to the analysis of Moyse's computer. We located a log that recorded that someone ran the RegClean Pro product on Moyse's computer. It appears that RegClean Pro "optimized" the registry on Moyse's computer on July 12, 2014, and that it performed a scan on July 20, 2014. A copy of the log confirming the use

of the RegClean Pro product on Moyse's computer is attached as **Exhibit "E"** to this affidavit.

Use of ReqClean Pro to delete Secure Delete's Registry

25. Counsel also asked us to determine whether it was possible to use RegClean Pro to delete the Secure Delete Log. As described above, the Secure Delete Log is located in the computer's registry.

26. In order to determine whether it was possible to delete a Secure Delete log, we first deleted a number of files on the Test Computer using Secure Delete. We then ran all possible scan options from RegClean Pro. RegClean Pro identified a number of "registry errors", which did not include the Secure Delete Log. We instructed the program to "Fix Issues". We then checked the Secure Delete Log and found it had not been deleted.

27. We repeated the tests using a clone copy of Moyse's computer image. We again found that RegClean Pro did not delete Secure Delete's registry logs.

AFFIRMED BEFORE ME at the City of Toronto, in the Province of Ontario on April 2, 2015

Commissioner for Taking Affidavits
(or as may be)

Kevin Lo

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process serving and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.

This is Exhibit "A" referred to in the Affidavit of Kevin Lo affirmed April 2, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process serving and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.

FROESE FORENSIC partners ltd.
The Financial Investigators

Kevin Lo, Managing Director, Froese Forensic Partners

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Toronto, Ontario, M5J 2H7 CANADA
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BIO/SUMMARY

Mr. Lo is a Managing Director in the digital forensic practice, specializing in eDiscovery and digital forensics. Prior to joining Froese Forensic Partners, Mr. Lo served as Director of the electronic discovery practice for LECG Canada.

Kevin is a Certified Information Security Professional (CISSP), Certified Computer Examiner (CCE), Certified Forensic Investigator (CFI), Project Management Professional (PMP) and an EnCase Certified Examiner (EnCE). He has published a number of articles and given interviews to media outlets regarding computer security and electronic discovery. Mr. Lo has presented and participated regularly in various professional, technical, and industry conferences and meetings in the area of forensics. He is currently a part-time instructor at a post-secondary institution teaching a course on the subject of digital forensics, as part of a post-graduate forensic accounting program.

Mr. Lo is serving as the 1st Vice President for the Toronto Chinese Business Association (TCBA), Festival Chair of the Toronto International Dragon Boat Festival, and the Immediate Past President of the Ontario Chapter of High Technology Crime Investigators Association (HTCIA). He has provided expert testimony in both civil courts and with respect to an Ontario Security Commission hearing.

EDUCATION

Bachelor of Science, University of Western Ontario, 1995
Information Technology Management, Ryerson University, 2000
i2 Analyst Notebook Training, Canadian Police College, 2002
EnCase Intermediate Analysis & Reporting, Guidance Software, 2003
EnCase Advanced Computer Forensics, Guidance Software, 2004
Certified Computer Examiner (CCE) Boot camp, 2005
AccessData Boot Camp, 2005
Security Course: "Hacker Techniques, Exploits and Incident Handling", SANS Chicago, 2007

CONSULTING EXPERIENCE

- Led the electronic data acquisition procedures on a number of civil search orders (Anton Pillar) engagements. Responsibilities included coordination of simultaneous data acquisition on multiple locations, analysis and data extraction.

- Performed overseas data preservation and collection in relation to a number of Section 337 investigations (Intellectual Property Infringement) by the U.S. International Trade Commission.
- Managed a number of document scanning projects where large quantity of paper documents were scanned by specialized document management system and the process involved optical character recognition (OCR). This process allowed the investigators to quickly search through and call up specific documents in an efficient manner.
- Participated in an engagement where electronic surveillance (computer activity logging) and video surveillance were conducted. This was done to support allegation of employee wrongdoings in an internal investigation.
- Handling of non-computer data, such as video and audio, for investigative purpose.
- Acted as a third party inspector under court order to preserve and extract electronic data.
- Advised client (in-house counsel) on conducting investigation of employee's inappropriate behaviors.
- Performed "insider-trading" type investigations for major Canadian banks: preservation and analysis of electronic data including email communications, to determine any wrongdoings.
- Assisted in electronic data preservation for a number of Fortune 500 corporations in response to SEC inquiry of Stock Options Back-dating probes.
- Performed engagements where knowledge of the Chinese language was required (ability to read, write and speak Cantonese and some level of Mandarin).

OTHER POSITIONS HELD

- LECG Canada, Director-Electronic Discovery Practice (EDP), 2004 - 2009
- Grant Thornton LLP, Manager-IT Forensic Specialist, Forensic Accounting & Investigative Services, (FAIS), 1999 - 2004

PROFESSIONAL MEMBERSHIPS AND ASSOCIATIONS

- Project Management Professional, (PMP), 2011
- Director, Toronto Chinese Business Association (TCBA), since 2010
- Certified Forensic Investigator (CFI) and member of the Association of Certified Forensic Investigators of Canada (ACFI)
- Member of Sedona Canada: Working Group 7
- President, High Technology Crime Investigation Association (HTCIA), Ontario Chapter, 2008 and 2009
- First Vice President, High Technology Crime Investigation Association (HTCIA), Ontario Chapter, 2007
- Second Vice President, High Technology Crime Investigation Association (HTCIA), Ontario Chapter, 2006
- Certified Computer Examiner, (CCE), since 2006
- Member of International Society of Forensic Computer Examiners, (ISFCF), since 2006
- EnCase Certified Examiner, (EnCE), since 2004
- Certified Information System Security Professional, (CISSP), since 2000
- Member of High Technology Crime Investigation Association (HTCIA), since 2001

FROESE FORENSIC partners

PUBLICATIONS

"E-discovery challenges in China – Cultural differences can complicate negotiations", The Lawyers Weekly, April 16, 2010
"Securities Procedures for all Devices Help Keep Firms' Files Safe-Wireless technology can leave data vulnerable", Law Times, May 14, 2007
"Computer Forensics is key to acquiring & preserving electronic evidence", The Lawyers Weekly, April 4, 2003
"Why your office needs a electronic data shredder", The Lawyers Weekly, January 9, 2004
"Electronic Shredding: How do you do it? What do you need?", The Lawyers Weekly, March 12, 2004
"How to protect your mobile data?", The Lawyers Weekly, November 6, 2004

SELECT SPEAKING ENGAGEMENTS

- Global China Connections, "Digital Forensics & eDiscovery", GCC Canadian Convention 2013, January 2013
- Canadian Institute, "Appropriate Use of Online Tools & Social Media in Investigations", Conducting Internal Investigations, October 2012
- Canadian Anti-Money Laundering Institute, "Enhancing KYC & Due Diligence Requirements via Open Sourced Resources", Money Laundering in Canada 2012, October 2012
- Association of Certified Fraud Examiners, "Losing Control: How Fraudster Can Control Your Information", ACFI Annual Fraud Conference, May 2012
- Ryerson University, "Digital Forensics", Guest Lecturer, April 2012
- Federated Press, "Workshop: The Next Generation of eDiscovery–Computer Forensics & Technologies", 6th E-Discovery Course, March 2012
- Association of Certified Fraud Examiners, "Computer Fraud: A New Perspective", ACFI Conference 2011, May 2011
- Federated Press, "The Future of Technology-Related Crime", Preventing Data Breach & Misuse Course, January 2011
- Osgoode Hall Law School, "Collection & processing of Electronic Information Demystified", The Osgoode Short Course in Obtaining, Producing and Presenting Electronic Evidence 2011, January 2011
- Freedom of Information Police Network – Ontario Association of Chiefs of Police, "Issue & Problem with Social Media", October 2010
- Canadian Health Care Anti-Fraud Association, "Inexpensive Technologies for Fraud Investigators", Annual Conference, September 2010
- Association of Certified Fraud Examiners, "Workshop: Inexpensive Technologies for the Fraud Investigators Tool Box" and "Losing Control – How fraudsters can control your information", ACFI Conference 2010, May 2010
- Federated Press, "Workshop: Computer Forensics & Technology for eDiscovery", 4th E-Discovery Course, March 2010
- Toronto Chinese Business Association, "Cautionary Tale: Technology in Business", Monthly Networking Event, January 2010
- The Canadian Institute, "Identifying & Overcoming IT Security & Control Challenges in Social Media", Managing Social Media, Toronto ON, October 2009
- Human Resources Professional Association, "IT Forensic Investigations", 11th Annual HR Conference, Cobourg ON, October 2009

- Federation of Security Professionals, "Digital Forensics: the Past, Present & Future of Cybercrime", FSP Spring Seminar, Toronto ON, May 2009
- Association of Certified Fraud Examiners, "Re-Using & Recycling Old Frauds into High-Tech", 11th Annual Fraud Conference, Toronto ON, May 2009
- Federated Press, "Latest Technology & Forensic Investigation", E-Discovery Course, Toronto ON, March 2009

This is Exhibit "B" referred to in the Affidavit of Kevin Lo affirmed April 2, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process serving and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.

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

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is Kevin Lo. I live in the City of Toronto.

2. I have been engaged by or on behalf of the defendant Brandon Moyse to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

   (a) to provide opinion evidence that is fair, objective and non-partisan;

   (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

   (c) to provide such additional assistance as the Court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date April 2nd, 2015

Signature

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure.*

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

ACKNOWLEDGEMENT OF EXPERT'S DUTY

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Tel: 416.646.4314
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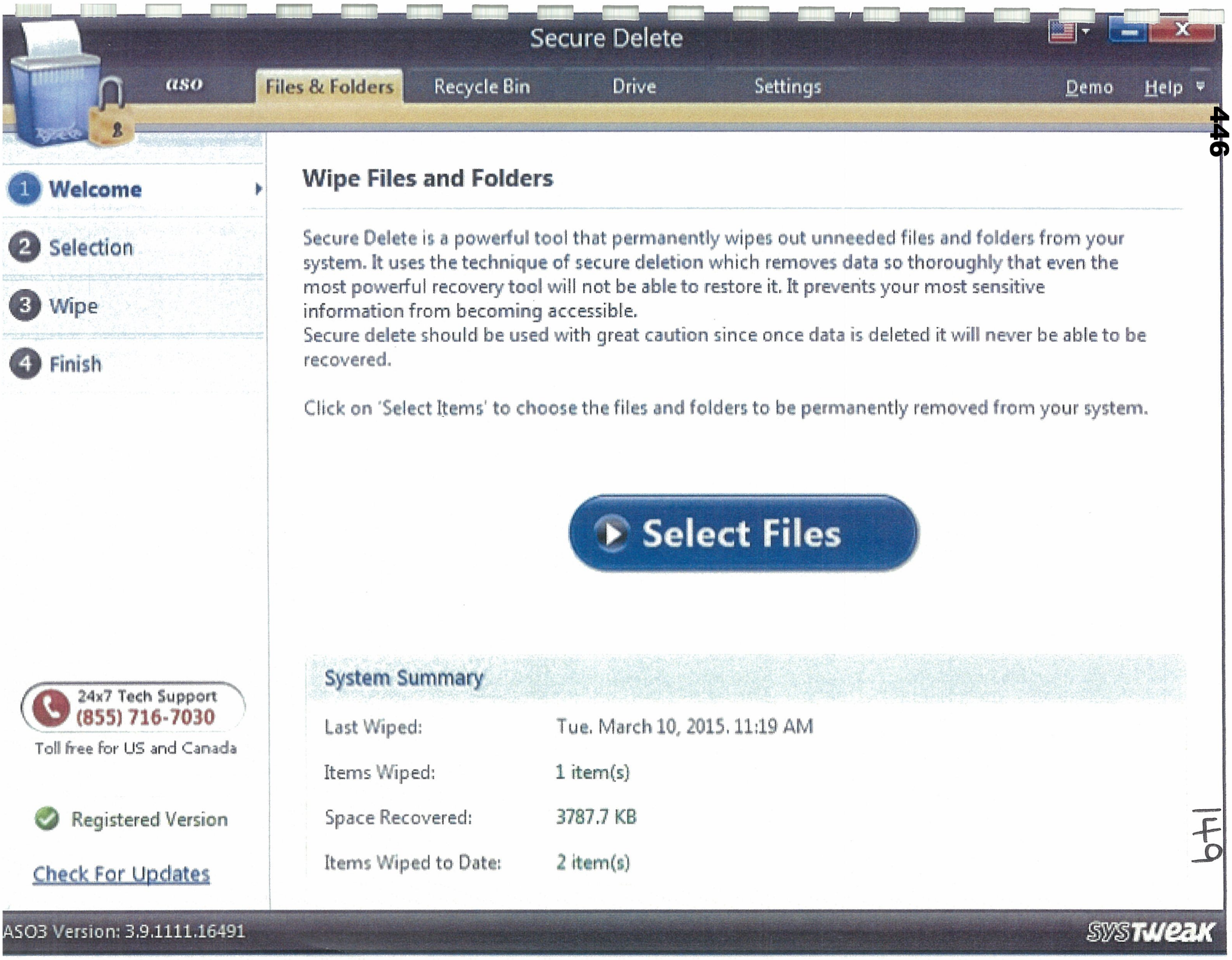
Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com

Lawyers for the Defendant, Brandon Moyse

This is Exhibit "C" referred to in the Affidavit of Kevin Lo affirmed April 2, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process serving and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.


Secure Delete
aso
Files & Folders
Recycle Bin
Drive
Settings
Demo
Help
1 Welcome
2 Selection
3 Wipe
4 Finish
Wipe Files and Folders
Secure Delete is a powerful tool that permanently wipes out unneeded files and folders from your system. It uses the technique of secure deletion which removes data so thoroughly that even the most powerful recovery tool will not be able to restore it. It prevents your most sensitive information from becoming accessible.
Secure delete should be used with great caution since once data is deleted it will never be able to be recovered.
Click on 'Select Items' to choose the files and folders to be permanently removed from your system.
Select Files
System Summary
Last Wiped: Tue. March 10, 2015. 11:19 AM
Items Wiped: 1 item(s)
Space Recovered: 3787.7 KB
Items Wiped to Date: 2 item(s)
24x7 Tech Support
(855) 716-7030
Toll free for US and Canada
Registered Version
Check For Updates
ASO3 Version: 3.9.1111.16491
SYSTweak

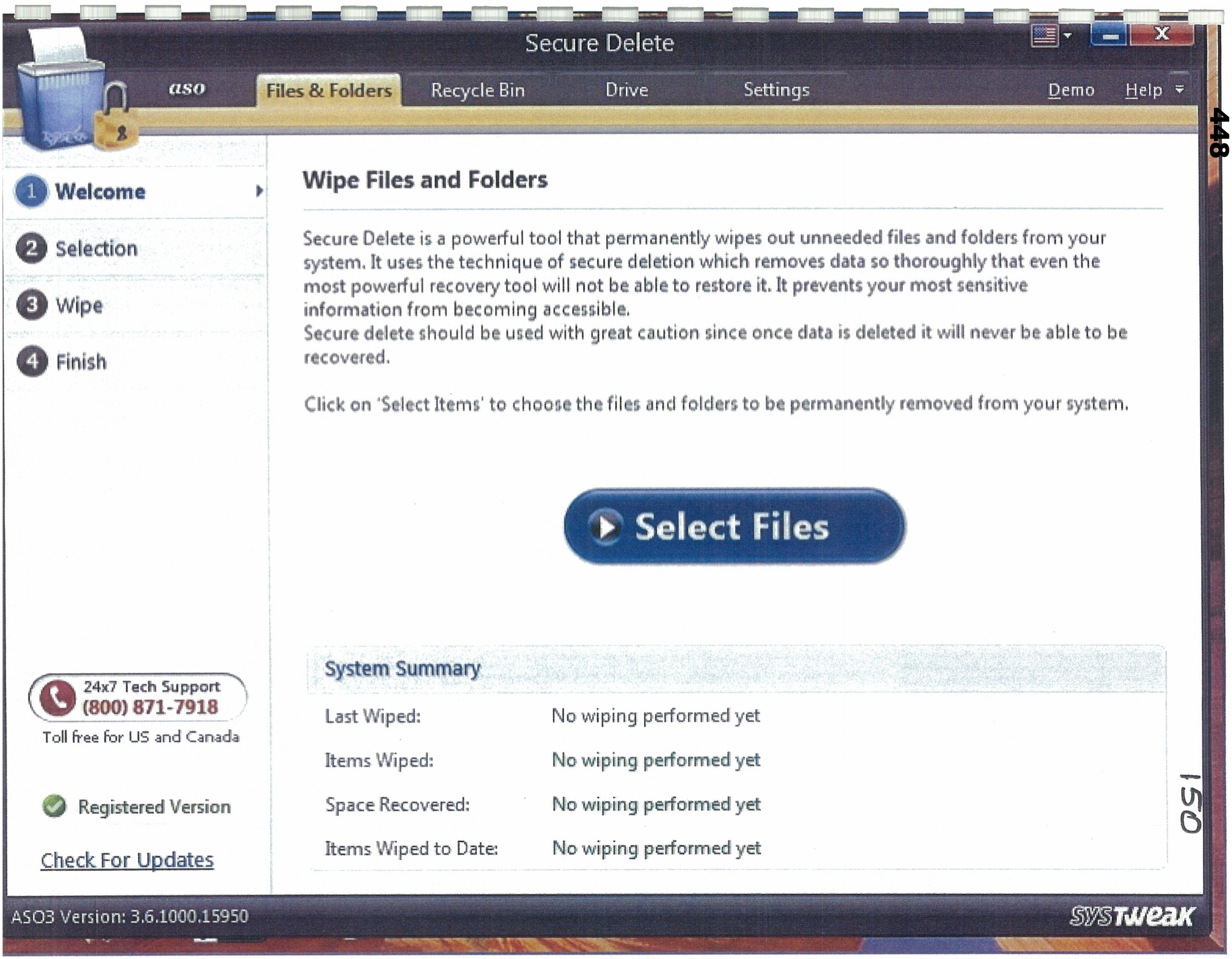
446

47

This is Exhibit "D" referred to in the Affidavit of Kevin Lo affirmed April 2, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vacutik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process serving and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.


Secure Delete
aso
Files & Folders
Recycle Bin
Drive
Settings
Demo
Help
1 Welcome
2 Selection
3 Wipe
4 Finish
Wipe Files and Folders
Secure Delete is a powerful tool that permanently wipes out unneeded files and folders from your system. It uses the technique of secure deletion which removes data so thoroughly that even the most powerful recovery tool will not be able to restore it. It prevents your most sensitive information from becoming accessible.
Secure delete should be used with great caution since once data is deleted it will never be able to be recovered.
Click on 'Select Items' to choose the files and folders to be permanently removed from your system.
Select Files
System Summary
Last Wiped: No wiping performed yet
Items Wiped: No wiping performed yet
Space Recovered: No wiping performed yet
Items Wiped to Date: No wiping performed yet
24x7 Tech Support
(800) 871-7918
Toll free for US and Canada
Registered Version
Check For Updates
ASO3 Version: 3.6.1000.15950
SYSTweak

This is Exhibit "E" referred to in the Affidavit of Kevin Lo affirmed April 2, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process serving and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.

RegClean Pro

PRRCC-578\HA-T04054\D\Users\Brandon Moyse\NTUSER.DAT\NTRegistry\CMI-CreateHive{D43B12B8-09B5-40DB-B4F6-F6DFEB78DAEC}\Software\systweak\RegClean Pro\Version 6.1\StrLastOptimizeTime

7/12/2014 9:02:19 AM

PRRCC-578\HA-T04054\D\Users\Brandon Moyse\NTUSER.DAT\NTRegistry\CMI-CreateHive{D43B12B8-09B5-40DB-B4F6-F6DFEB78DAEC}\Software\systweak\RegClean Pro\Version 6.1\StrLatestRestorePoint

Sun, July 20, 2014, 08:11 PM (Partial)

PRRCC-578\HA-T04054\D\Users\Brandon Moyse\NTUSER.DAT\NTRegistry\CMI-CreateHive{D43B12B8-09B5-40DB-B4F6-F6DFEB78DAEC}\Software\systweak\RegClean Pro\Version 6.1\StrLastScan

Sun, July 20, 2014, 08:11 PM

PRRCC-578\HA-T04054\D\Users\Brandon Moyse\NTUSER.DAT\NTRegistry\CMI-CreateHive{D43B12B8-09B5-40DB-B4F6-F6DFEB78DAEC}\Software\systweak\RegClean Pro\Version 6.1\StrLatestRegDefrag

Sat, July 12, 2014, 09:02 AM

PRRCC-578\HA-T04054\D\Users\Brandon Moyse\NTUSER.DAT\NTRegistry\CMI-CreateHive{D43B12B8-09B5-40DB-B4F6-F6DFEB78DAEC}\Software\systweak\RegClean Pro\Version 6.1\StrLastScanResults

23

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 KEVIN LO
AFFIRMED MAY 12, 2015

I, Kevin Lo, of the City of Toronto, SOLEMLY AFFIRM AS FOLLOWS:

1. I am a managing director with Froese Forensic Partners LLP ("**FFP**"). FFP was engaged by Paliare Roland Rosenberg Rothstein LLP ("**Counsel**"), on behalf of Mr. Brandon Moyse ("**Moyse**"), to provide our professional services in relation to this matter.

2. I have previously affirmed an affidavit in this matter, dated April 2, 2015. Defined terms used in this affidavit have the same meaning as in my April 2, 2015 affidavit.

3. Since affirming my affidavit on April 2, 2015, I have reviewed the reply affidavit of Martin Musters ("**Musters**") sworn April 30, 2015.

4. Musters states at paragraph 9 of his April 30 affidavit that Moyse "could very easily have deleted the Secure Delete Log after he deleted folders or files from his computer."

5. At paragraphs 6-19 of this affidavit, Musters describes a process whereby Moyse could have deleted a Secure Delete log by using the "Registry Editor" to select a Secure Delete folder and delete its contents.

6. Registry Editor is a built-in tool included on all Windows systems which allows users to view and change the settings in the system registry. Registry Editor is not related to "Systweak", the company which sells the "RegCleanPro" and "Advanced System Optimizer" programs which were found on Moyse's computer.

7. Based on our review of Moyse's computer, Moyse has never run Registry Editor on his computer. The metadata associated with the Registry Editor indicates a creation date and last accessed date of July 13, 2009. I attach a screenshot of the metadata associated with the Registry Editor on Moyse's computer as **Exhibit "A"**.

8. Our analysis showed that the Windows Operating System was installed on January 22, 2012. I attach a screenshot showing the Operating System installation date on Moyse's computer as **Exhibit "B"**.

9. These dates indicate the Registry Editor took on a "factory default" date (July 13, 2009) that preceded the installation date of the Operating System (January 22, 2012). Thus the Registry Editor was never used on Moyse's computer after the installation on January 22, 2012.

10. There is therefore no evidence that Moyse ever took any steps with respect to his computer's registry using the Registry Editor in the way Musters describes in his affidavit of April 30, 2015.

AFFIRMED BEFORE ME at the City of Toronto, in the Province of Ontario on May 12, 2015

Commissioner for Taking Affidavits
(or as may be)

Kevin Lo

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario for Froese Forensic Partners Ltd., limited to process service and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.

Court File No. CV-14-507120

454

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

AFFIDAVIT OF KEVIN LO
AFFIRMED MAY 12, 2015

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Lawyers for the Defendant, Brandon Moyse

This is Exhibit "A" referred to in the Affidavit of Kevin Lo affirmed May 12, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vacufik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process servi... and documents required pursuant to the Private Securi... Investigative Services Act, 2005 only. Expires March 14, 2016.

6

	Name	Last Accessed	File Created	Last Written	Entry Modified	File Type
1	regedit.exe	07/13/09 07:27:10PM	07/13/09 07:27:10PM	07/13/09 09:39:29PM	11/29/11 09:54:54AM	Windows Executable

This is Exhibit "B" referred to in the Affidavit of Kevin Lo affirmed May 12, 2015

Commissioner for Taking Affidavits (or as may be)

Ainsley Claire Vaculik, a Commissioner, etc., Province of Ontario, for Froese Forensic Partners Ltd., limited to process servers and documents required pursuant to the Private Security and Investigative Services Act, 2005 only. Expires March 14, 2016.

8.


Key Properties
Last Written Time
7/17/2014 17:57:47 UTC
OS Install Date (UTC)
Sun Jan 22 21:53:02 2012
OS Install Date (Local)
Sun Jan 22 16:53:02 2012

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 ANTHONY GRIFFIN
(sworn March 7, 2015)

I, Anthony Griffin, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am one of four Partners of the Defendant/Responding Party West Face Capital Inc., a privately-held Toronto-based investment management firm with assets under management of approximately $2.2 billion.[1] I have been a Partner of West Face since the Fall of 2006, shortly after West Face was founded. I was the Partner who initially had primary responsibility for the WIND transaction (discussed below), and continued to be involved throughout the transaction. I was also the Partner with primary responsibility for West Face's research regarding Callidus Capital Corporation. As such, I have personal knowledge of the information set out in this Affidavit, except

[1] Unless otherwise indicated, all dollar figures are in Canadian dollars.

where such knowledge is based on information from others, in which case I have stated the source of the information and believe it to be true.

2. I am swearing this Affidavit in response to the motion by the Plaintiff/Moving Party The Catalyst Capital Group Inc., seeking two forms of relief against West Face. First, Catalyst seeks an injunction restraining West Face from participating in the management and/or strategic direction of WIND Mobile Corp., a company in which West Face has invested more than $150 million and in which funds controlled by West Face hold a 35.42% equity interest. Catalyst specifically seeks to enjoin West Face from participating in the advanced wireless services spectrum auction (the "**AWS-3 auction**")[2] that was recently conducted by Industry Canada. Second, Catalyst seeks an order authorizing an Independent Supervising Solicitor (an "**ISS**") to attend West Face's premises and create a forensic image of all of West Face's electronic devices, for the stated purpose of identifying whether West Face has misused any confidential information belonging to Catalyst.

3. Catalyst alleges that West Face misused confidential information disclosed to West Face by the Defendant/Responding Party Brandon Moyse. Mr. Moyse was a former junior employee of Catalyst who worked at West Face as a junior member of West Face's investment team for a three and a half week period in June and July 2014. On this motion, Catalyst alleges that Mr. Moyse disclosed, and that West Face has

[2] The AWS-3 auction is the auction of spectrum licenses for Advanced Wireless Services in the bands 1755-1780 MHz and 2155-2180 MHz (AWS-3). This is not to be confused with the auction of spectrum licenses for Broadband Radio Services (BRS) in the 2500-2690 MHz Band.

misused or will misuse, confidential information belonging to Catalyst and relating to three subjects:

(a) the acquisition of WIND in September 2014 by a syndicate of investors that included West Face;

(b) the AWS-3 auction recently conducted by Industry Canada, in which WIND participated; and

(c) Callidus, a publicly-traded company owned 59.5% by Catalyst, and in particular the identity of companies to which Callidus has lent money.

4. None of these allegations is true. Catalyst has not identified any confidential Catalyst information in any way related to WIND, the AWS-3 auction, or Callidus that has been disclosed to West Face by Mr. Moyse. Further, as described below, the ISS appointed pursuant to a previous order of the court has conducted a review of Mr. Moyse's electronic devices, and found no evidence that Mr. Moyse disclosed to West Face any Catalyst confidential information in any way related to WIND, the AWS-3 auction, or Callidus.

Overview

5. West Face's interest in WIND dates back to at least November 2009, almost five years before Mr. Moyse joined West Face as a junior associate, and almost three full years before he was employed by Catalyst. Critically, the necessary deal elements for a successful bid to acquire WIND, including price, were not confidential to any particular bidder. Rather, VimpelCom Ltd. (WIND's principal equity-holder who controlled the sale process) and its financial advisor, UBS Investment Bank, had made it clear to all

interested purchasers, including West Face, that VimpelCom required an enterprise value of $300 million and a transaction structure that minimized the regulatory risks that could prevent or delay closing.

6. Before Mr. Moyse joined West Face on June 23, 2014, West Face had already engaged in negotiations with VimpelCom to acquire WIND, had formulated a strategy to acquire WIND in concert with others, and had assembled the majority of the critical deal components that ultimately allowed it to participate successfully in the acquisition of WIND:

(a) we had been in contact with Anthony Lacavera and Tennenbaum Capital Partners, both of which would ultimately form critical parts of the successful investor syndicate that acquired WIND as described below;

(b) we had accepted VimpelCom's demand for an enterprise value in the range of $300 million for WIND; and

(c) we knew from our communications with VimpelCom's financial advisor UBS that VimpelCom wanted to sell its entire interest in WIND quickly, while minimizing risk of regulatory approval.

7. Tennenbaum and Mr. Lacavera ultimately proved critical in assisting West Face and its partners to structure a transaction that was satisfactory to VimpelCom.

8. Mr. Moyse worked at West Face as a junior associate for three and a half weeks, from June 23, 2014 to July 16, 2014. Before he even arrived at the firm, West Face implemented a confidentiality wall to ensure that Mr. Moyse did not disclose any confidential Catalyst information he may have possessed to West Face relating to WIND or the AWS-3 auction.

9. Specifically with respect to WIND, during the short period in which Mr. Moyse worked for West Face, West Face was pursuing the WIND transaction with another strategic partner that ultimately declined to participate. In other words, while Mr. Moyse was at West Face, we were pursuing what proved to be a dead end, and even so, Mr. Moyse had no involvement in those negotiations.

10. On July 16, 2014, Mr. Moyse agreed to an interim consent order (the "**July 16 Consent Order**") precluding him from working at West Face. At that time, Mr. Moyse was immediately placed on indefinite leave by West Face. Since then, Mr. Moyse has performed no work for West Face and has had no involvement in any investment analysis or decision-making at West Face.

11. One week after Mr. Moyse was placed on leave by West Face, Greg Boland, West Face's CEO, was informed by UBS that VimpelCom had granted another party (which we now know to be Catalyst) exclusive rights to negotiate a binding agreement to acquire WIND. By that time, Mr. Moyse was on leave from West Face, and West Face was shut out from negotiations. However, Catalyst failed to reach a definitive agreement with VimpelCom to acquire WIND during its exclusivity window, which expired on August 18, 2014. As described below, Catalyst's failure to do so was entirely its own doing, and was in no way attributable to West Face, Mr. Moyse, or any alleged disclosure of confidential information.

12. After Catalyst's exclusivity period expired on August 18, 2014, West Face and its partners, including Tennenbaum and Mr. Lacavera, moved swiftly to conclude a deal with VimpelCom. West Face had been working on-and-off with those partners for

months before Mr. Moyse ever joined West Face, and Mr. Moyse had already been on indefinite leave from West Face for over one month by that point. The first phase of the WIND transaction closed on September 16, 2014, less than one month later, on a basis consistent with the previously disclosed deal parameters demanded by VimpelCom and UBS.

13. Mr. Moyse remains on indefinite leave from West Face today, and therefore was on leave for the entire period of the negotiation and consummation of the WIND transaction. No members of West Face's WIND deal team communicated at all with him about WIND during this period, and he played no role whatsoever in the WIND transaction.

14. Not content with this result, Catalyst has now attacked West Face on multiple fronts. It makes a bald allegation that the WIND acquisition was achieved as a result of West Face obtaining and misusing unspecified confidential information belonging to Catalyst. It has alleged that West Face misused further unspecified confidential Catalyst information on WIND's behalf in the AWS-3 auction, an allegation that would now appear to be not only incorrect but also moot, as WIND has been reported to have been the only bidder on spectrum set aside for new entrants in Ontario, Alberta and British Columbia, based on comments made by the Honourable James Moore, Federal Minister of Industry. Catalyst has also alleged that West Face misused unspecified confidential information of Catalyst relating to its subsidiary Callidus.

15. Catalyst makes these allegations in the face of the ISS's conclusion that there is no evidence on Mr. Moyse's electronic devices that he disclosed Catalyst confidential

information to West Face concerning WIND, the AWS-3 auction, or Callidus. Dissatisfied with that result, Catalyst now also attacks the conclusions of the ISS.

16. To repeat, none of Catalyst's allegations about misuse of confidential information is true. In fact, Catalyst has not and cannot specify what confidential WIND, AWS-3 auction, or Callidus information Mr. Moyse is alleged to have disclosed to West Face, let alone how that information could have given West Face an advantage.

17. West Face, WIND, and WIND's other investors will be seriously damaged if West Face is enjoined from participating in the management and/or strategic direction of WIND and its affiliates and related parties, and particularly in respect of the AWS-3 auction. Spectrum auctions only occur infrequently when deemed appropriate by Federal authorities. West Face currently has two nominees to WIND's ten member board of directors, and plays an important role in providing strategic advice, direction and support to WIND, as it continues to challenge Canada's three incumbent national wireless service providers. Furthermore, as an investment manager, West Face has a fiduciary duty to manage its investments, including WIND, in the best interests of its many third-party investors. As the owner of 35% of WIND's equity, West Face is the natural lead investor for the current syndicate of investors of WIND. Enjoining West Face from participating in the management and/or strategic direction of WIND would prevent West Face from fulfilling this duty, and would harm West Face and its investors.

18. Granting the requested injunction would also interfere with Industry Canada's stated policy of encouraging the growth and viability of a fourth national wireless service provider (and WIND is currently the only solvent national challenger to the three

incumbent national wireless providers). Wireless spectrum is the lifeblood of a wireless business like WIND, and it is essential that West Face, as the largest equityholder of WIND, be able to participate in that process.

19. Catalyst alleges in paragraph 90 of James Riley's Affidavit that West Face might harm "Catalyst's contingent interest in Wind". While there is no basis for Catalyst's claim that it is the beneficial owner of West Face's interest in WIND, to the extent that Catalyst now claims a constructive trust over West Face's interest in WIND, Catalyst's and West Face's interests are aligned. West Face has managed and will continue to manage its investment in WIND to maximize shareholder value.

20. Catalyst also appears to be trying to weaken WIND and disadvantage West Face by disseminating its allegations on this motion against West Face through the media. A National Post article dated November 24, 2014 quotes from Catalyst's Statement of Claim and quotes unnamed "people familiar with the sales process" for WIND, and based on my discussions with West Face's WIND deal team, none of them spoke to the media.[3] As explained in more detail below, Catalyst even appears to have arranged for the court file (which it claimed on the earlier motions included its confidential information) to be unsealed and open for public view so that third parties, including the media, could review its allegations on this motion in order to disseminate them against West Face more broadly. Further, Catalyst has repeated its allegations in this motion to investors in West Face managed funds and others who do business with West Face,

[3] A copy of the National Post article dated November 24, 2014 is attached as Exhibit "**1**".

and encouraged them to withdraw their investments from investment funds managed by West Face and cease doing business with West Face.

About West Face

21. West Face is a Toronto-based investment management firm. It was founded in 2006. West Face employs 38 staff in Toronto (including two part-time employees), and manages a number of investment funds and accounts covering a broad range of investment strategies. West Face currently manages approximately $2.2 billion in assets on behalf of third parties that have invested in funds managed by West Face.

22. West Face is led by its Chief Executive Officer, Greg Boland, along with three other Partners: Peter Fraser, Thomas Dea, and me. The four Partners have, on average, over twenty years of experience in the financial industry and draw on a deep network of strong relationships to provide a unique pipeline of investment opportunities.

23. As part of its business, West Face monitors and researches potential investments for the funds that it manages, including potential investments in privately-owned entities like WIND and publicly-traded entities like Callidus.

Background to the WIND Transaction

WIND and the Regulatory Environment

24. WIND is a Canadian wireless telecommunications provider that was originally formed in 2008 pursuant to a joint venture between two parties: (1) AAL Corp., which was the holding company of Mr. Lacavera and the owner of Globalive Communications

Corporation, a Canadian telecommunications provider; and (2) Orascom Telecom Holding S.A.E., a large Egyptian multi-national telecommunications company.

25. Due to regulatory restrictions on foreign ownership of Canadian telecommunications operators that existed at the time, AAL held a majority of the voting interests in WIND even though Orascom held a majority of the total equity interests. In 2008, WIND paid $442 million for the rights to use a portion of wireless spectrum for a wireless telecommunications service in an auction held by Industry Canada. In December 2009, WIND commenced operations, providing mobile data and voice services in the Greater Toronto and Hamilton Area in Ontario, and in Calgary, Alberta.

26. Since that time, WIND has expanded into Ottawa and parts of southern Ontario, as well as Edmonton, Alberta, and Vancouver, Abbotsford, and Whistler, British Columbia. As of December 2014, WIND is Canada's fourth largest mobile operator, and the only solvent national challenger to the three incumbent national wireless companies (Rogers, Bell and Telus).

27. In 2011, VimpelCom acquired the majority shareholder of Orascom, giving VimpelCom a controlling interest in Orascom and, indirectly, Orascom's investment in WIND. VimpelCom is a publicly-traded mobile telephone operator headquartered in the Netherlands. Orascom and VimpelCom have also loaned significant funds to WIND to fund spectrum acquisitions, the build-out of WIND's network, and general operating needs. Through the combination of its debt, equity, and voting interests in WIND, VimpelCom effectively controlled WIND's access to capital, a significant control lever

given WIND's early stage of development, the capital requirements of the wireless industry, and the competitive nature of that industry.

28. Notwithstanding 2012 amendments that loosened certain restrictions on foreign control of smaller telecommunications service providers like WIND, foreign ownership of the wireless industry in Canada remains heavily regulated. Indeed, regulatory concerns had already prevented VimpelCom from carrying out a reorganization in 2013. VimpelCom therefore had experience with the challenges in Canada of regulatory approval for changes in ownership of WIND, and we at West Face knew that minimizing or eliminating any such risk would be crucial to a successful bid for VimpelCom's interests in WIND.

West Face Attempts to Acquire WIND Beginning in 2013

29. West Face and its partners have a long-standing interest and expertise in the telecom sector. Among other things, West Face or predecessor companies had previously invested in U.S. and Canadian telecom companies including Lightsquared, Clear Wire, TerreStar Corp., Cleveland Unlimited, Broadview Communications, DBSD N.A. (successor to ICO Global), Cogeco, Microcell Communications, and Rogers Communications. I believe that we would be a natural source of financing or investment for a telecom company like WIND.

30. I am informed by Tom Dea that West Face first explored making investments in debt securities of WIND in 2009. West Face met with the principals of WIND and their investment bankers Genuity Capital, entered into a non-disclosure agreement, received

a management presentation, and presented a term sheet to WIND's ownership.[4] Ultimately, West Face's offer was not acceptable. WIND solicited West Face's interest in alternative financing, but West Face was not interested and discussions went no further.

31. On November 4, 2013, I received a telephone call from Mr. Lacavera. I understand that Mr. Lacavera had received my name from Bruce MacDonald, a contact of Mr. Boland's at RBC. Mr. Lacavera advised that VimpelCom was interested in selling its debt and equity interests in WIND and in arranging for the repayment of WIND's third party debt. Following this conversation and subsequent conversations with VimpelCom's agent UBS, West Face delivered an expression of interest to VimpelCom and AAL.[5] On December 7, 2013, West Face entered into a confidentiality agreement with VimpelCom and Orascom (by then known as Global Telecom Holdings S.A.E.) to obtain access to VimpelCom's virtual data room and conduct financial due diligence on WIND.

32. Shortly after entering into the confidentiality agreement with VimpelCom and Orascom, West Face received access to the data room and then participated in a management presentation from WIND on December 18, 2013. By April 2014, discussions between West Face and VimpelCom had progressed to the point that West Face retained counsel and began to prepare term sheets for a transaction involving WIND. In late April 2014, West Face originally proposed a combination of debt

[4] A copy of the now-expired non-disclosure agreement with Globalive dated November 4, 2009 is attached as Exhibit "**2**". A presentation by Globalive dated December 24, 2009 is attached as Exhibit "**3**".

[5] A copy of West Face's expression of interest dated November 8, 2013 is attached as Exhibit "**4**".

refinancing and equity investment that would allow VimpelCom to retain minority ownership of WIND. However, on May 1, 2014, West Face was advised by Jonathan Herbst or Francois Turgeon of UBS that VimpelCom was interested only in an outright sale of VimpelCom's debt and equity interests in WIND.

33. From this point forward, it was clear that the three essential deal elements for a successful bid to acquire WIND were as follows:

(a) a deal that could close quickly, without material representations and warranties by the vendor;

(b) a purchase price targeting an enterprise value of $300 million; and

(c) a transaction structure that allowed for the full exit of VimpelCom without any risk related to regulatory approval.[6]

34. On May 4, 2014, West Face sent VimpelCom a revised term sheet to address VimpelCom's required deal terms. This term sheet included a purchase of 100% of WIND's equity, based on the enterprise value that had been communicated to interested parties by VimpelCom and its agents. After accounting for the repayment or refinancing of approximately $160 million owed to WIND's third party lenders, VimpelCom would receive approximately $140 million for its debt and equity interests. This offer was, in fact, slightly higher than the price that West Face's investor group would ultimately pay, and the offer had been made to VimpelCom almost two months before Mr. Moyse began working at West Face.

[6] VimpelCom's $300 million asking price was common knowledge to the interested parties and, indeed, had even been referred to by the press in the Summer of 2014. For example, see the July 31, 2014 article from the Globe and Mail attached as Exhibit "**5**".

35. VimpelCom did not accept West Face's offer for a variety of different reasons unrelated to price, but indicated that it was willing to negotiate further. To this end, West Face requested that its counsel, Davies Ward Phillips & Vineberg LLP, also be given access to VimpelCom's virtual data room in order to conduct legal due diligence. Also around this early May time period, West Face hired a U.S. telecom consulting firm to advise West Face regarding WIND's business.

36. By June 12, 2014, and before Mr. Moyse joined West Face, West Face was considering two possible options for financing a transaction to acquire WIND:

(a) raising $100 million in debt through an investment bank, $100 million of senior equity contributed by West Face, and $100 million of subordinate equity from Mr. Lacavera and other investors with whom he had relationships; or

(b) joining a syndicate led by Tennenbaum, which at that time also included two other prominent U.S. private equity firms that did not ultimately participate in the purchase of WIND (the "**Tennenbaum Syndicate**").

37. While neither of these options ultimately resulted in a deal for WIND, the combination of relationships with Tennenbaum and Mr. Lacavera, the strategies to meet the conditions for a successful acquisition imposed by VimpelCom, the outlines of the agreements developed, and the significant due diligence conducted by that date, including the engagement of a third party consultant, all proved critical in completing the transaction several months later. Notably, all of this was accomplished before Mr. Moyse even started working at West Face and without any involvement by or information from him.

38. After considering its options, West Face determined that it did not, at that time, want to become a fourth member of the Tennenbaum Syndicate and instead, on June 19, 2014, decided to make another proposal to VimpelCom for the acquisition of 100% of WIND's equity based on an enterprise value of $311 million. During the period of June 20 to 22, 2014, West Face prepared a share purchase agreement for delivery to VimpelCom's financial advisor, UBS, and a list of outstanding legal due diligence items following its initial review. I emailed the draft agreement and supplemental due diligence request list to Francois Turgeon of UBS on the morning of Monday, June 23, 2014.[7]

Mr. Moyse's Hiring By West Face

39. In the meantime, I am informed by Mr. Dea that Mr. Moyse had contacted West Face in January 2014 seeking employment in response to a West Face press release announcing the launch of its Alternative Credit Fund. The communication between Mr. Moyse and West Face was initiated by Mr. Moyse and not by West Face. West Face happened to need a junior associate at the time of Mr. Moyse's contact because a previous potential hire had chosen to pursue a different opportunity. Mr. Dea met with Mr. Moyse in March 2014, reviewed his résumé, and checked Mr. Moyse's references (with respect to Catalyst, Mr. Dea spoke only to former Catalyst employees).

40. Contrary to paragraph (h) of Catalyst's Amended Notice of Motion, Mr. Dea has advised me, and I believe, that Mr. Dea did not ask Mr. Moyse to send "samples of his work at Catalyst". Rather, Mr. Dea asked Mr. Moyse to provide him with some writing

[7] A copy of this email, and Mr. Turgeon's response, is attached as Exhibit "**6**".

samples to demonstrate his written communication skills, and instructed him to redact any confidential information as necessary. Mr. Dea's request for writing samples from Mr. Moyse was not out of the ordinary and is a hiring practice that West Face has made use of in the past. Confidentiality is a common concern in the finance industry and Mr. Dea assumed that Mr. Moyse would not breach any confidentiality obligations.

41. I did not play a significant role in Mr. Moyse's hiring, and primarily left the matter in Mr. Dea's hands. I understand from Mr. Dea that the particular writing samples that Mr. Moyse provided did not play a material role in his hiring. Rather, Mr. Dea relied on Mr. Moyse's academic background in advanced mathematics, his demonstrated ambition and hard work, and a strong reference from a former employer of Mr. Moyse who was a friend of Mr. Dea.

42. West Face verbally offered Mr. Moyse a position as a junior associate, which Mr. Moyse verbally accepted on or around May 19, 2014. Mr. Moyse notified Catalyst that he was resigning on or around May 24, 2014. On May 28, 2014, Mr. Moyse told us that he had non-competition and confidentiality covenants with Catalyst, and gave us a redacted copy of his employment contract with Catalyst.[8] On May 30, 2014, counsel to Catalyst wrote to counsel to West Face and Mr. Moyse objecting to Mr. Moyse's new position at West Face.

[8] A copy of Mr. Moyse's redacted Catalyst employment contract is attached as Exhibit "**7**", and a copy of his West Face employment contract is attached as Exhibit "**8**".

West Face Implements a Confidentiality Wall in Response to Catalyst Complaints

43. During the course of communications between counsel in advance of Mr. Moyse starting to work for West Face, counsel to Catalyst (Lax O'Sullivan Scott Lisus LLP) advised counsel to West Face (Dentons Canada LLP) that Catalyst was particularly concerned about Mr. Moyse's work on a "telecom deal". As set out in Dentons' letter dated June 19, 2014 to Lax O'Sullivan, West Face had implemented a confidentiality wall as set out in a memo dated June 19, 2014.[9] Pursuant to this confidentiality wall: (1) Mr. Moyse was forbidden from communicating with anyone at West Face about the ongoing WIND negotiations, and vice versa; and (2) West Face's IT group restricted access to all WIND-related documents so that Mr. Moyse could not access them.[10]

44. There was no need to restrict West Face's WIND deal team members from accessing any documents created by Mr. Moyse while at West Face because he had been clearly instructed that he would have no involvement with WIND-related matters and would thus not be creating any WIND-related documents. Such a restriction would have prevented WIND deal team members from accessing work done by Mr. Moyse on subjects entirely unrelated to WIND. Further, and with no disrespect to Mr. Moyse, at no time did I consider seeking his views on WIND-related matters. We had been deeply engaged in the matter since 2013, he was a junior associate, and, because he had just

[9] A copy of Dentons' June 19, 2014 letter is attached as Exhibit "**9**". A copy of West Face's confidentiality wall memo dated June 19, 2014 is attached as Exhibit "**10**".

[10] A copy of an email from West Face's Chief Compliance Officer, Supriya Kapoor, to Mr. Moyse enclosing the confidentiality memo is attached as Exhibit "**11**". A copy of an email from West Face's Head of Technology, Chap Chau, dated June 20, 2014, confirming that Mr. Moyse had been excluded from the computer directory containing WIND-related documents is attached as Exhibit "**12**".

been hired, he had no track record on which I could assess his competence for an important and high profile matter such as WIND, even in the absence of the confidentiality wall.

45. The confidentiality wall memo was circulated to everyone at West Face who was working on the WIND transaction and others, namely:

(a) Greg Boland – Partner, Chief Executive Officer, and Co-Chief Investment Officer

(b) Peter Fraser – Partner and Co-Chief Investment Officer

(c) Thomas Dea – Partner

(d) Tony Griffin – Partner

(e) Yu-Jia Zhu – Vice-President

(f) John Maynard – Chief Operating Officer and Chief Financial Officer

(g) Stephen Miller – Chief Financial Officer, Funds

(h) Nora Nestor – Tax Controller

(i) Alex Singh – General Counsel and Secretary

46. In addition to the confidentiality memo, I am informed by Mr. Dea that he verbally informed the entire investment team at West Face that Mr. Moyse was not to be told anything about the WIND transaction. Further, once Mr. Moyse began working, the West Face WIND deal team only met in private, behind closed doors, and away from the trading floor area where Mr. Moyse sat.

47. To the best of my knowledge, neither Mr. Moyse nor anyone else at West Face has breached these confidentiality obligations as they relate to WIND.

No Disclosure by Mr. Moyse of WIND-related Information

48. As described above, Mr. Dea did receive, and circulate to the other West Face Partners and Yu-Jia Zhu,[11] writing samples from Mr. Moyse attached to an email dated March 27, 2014, which were marked as "Confidential" and "For Internal Discussion Purposes Only". As I mentioned previously, reviewing a potential employee's writing samples was not an unusual hiring practice at West Face.

49. In hindsight, it was a mistake for Mr. Dea to forward the March 27, 2014 email and it was a mistake for me and the other recipients to not immediately delete it. However, I am informed by Mr. Dea, Mr. Boland, Mr. Fraser and Mr. Zhu that none of them paid much attention to the contents of the writing samples. Mr. Dea scanned them, but did not find them noteworthy. Mr. Zhu read the memos, but recalled that they just summarized public information and did not provide any novel insight into the companies addressed in the writing samples. Mr. Boland does not recall even opening the writing samples, as he deferred the hiring decision of a junior associate to Mr. Dea. I believe I opened one of the attachments relating to a company called Homburg. Mr. Fraser has informed me that while he recalls opening the attachments, he only recalls that one was related to a company called Homburg. I do not recall opening the other attachments. In any event, none of the attachments related to WIND, the AWS-3 auction, the wireless telecommunications sector, or Callidus.

[11] Mr. Zhu has been involved in prior recruiting of analysts and associates.

50. I ultimately deleted my copy of the March 27, 2014 email in response to instructions I received from West Face's counsel, Andy Pushalik of Dentons. So did the other recipients of the email. The copy of the March 27, 2014 email has been provided to me for the purpose of swearing this Affidavit.[12] I understand that Catalyst no longer treats the contents of the March 27, 2014 email as confidential since, as described in more detail below, Catalyst appears to have requested or at least consented to the court staff unsealing the court file where a copy of the email and its attachments had been filed as Exhibit "L" of Mr. Dea's July 7, 2014 Affidavit.[13]

No Use of Catalyst Information Disclosed

51. West Face did not and has not used or relied on any of the writing samples attached to the March 27, 2014 email, other than to evaluate Mr. Moyse's job application. Moreover, I am advised by Mr. Singh, West Face's in-house counsel at the time, that prior to Mr. Moyse commencing work, Mr. Singh conveyed to Mr. Moyse that West Face takes matters of confidentiality very seriously and that, if Mr. Moyse wished to work at West Face, he was not to provide West Face with any information related to Catalyst's business. To the best of my knowledge, Mr. Moyse has not made any further disclosures of any of Catalyst's information.

52. Of the four writing samples, only one – concerning Arcan Resources Ltd. – addressed a company that was being followed by West Face and ultimately became the

12 A copy of the March 27, 2014 email, including its attachments, is attached as Exhibit "**13**".

13 Indeed, in his email of March 27, 2014, Mr. Moyse explicitly stated that the writing samples regarding NSI, Rona, and Arcan Resources were based solely on public information. In addition, I note that, by March 27, 2014, Catalyst's interest in Homburg was public knowledge due to Catalyst's involvement in Homburg's CCAA proceedings.

subject of a transaction by West Face. That transaction was directed by me and was independent of Mr. Moyse's analysis for Catalyst. I had been following Arcan for several years and, at my direction, West Face had taken a position in two different series of Arcan's unsecured debentures between September 2012 and July 2013. While West Face had exited those positions by March 2014, I was already familiar with Arcan's business and financial circumstances long before Mr. Moyse's employment at West Face.

53. On June 23, 2014 (Mr. Moyse's first day as an employee of West Face) at 4:22 p.m., Arcan announced a strategic transaction with Aspenleaf Energy Limited pursuant to which Aspenleaf and Arcan would complete a plan of arrangement.[14] I concluded that the debentureholders should be able to negotiate a better deal for themselves than had been proposed under the plan of arrangement, and that if they could do so, the debentures would rise in value.

54. At 10:41 p.m. that evening, either forgetting or never having noticed that Mr. Moyse had provided Mr. Dea with a writing sample relating to Arcan from his time at Catalyst, I set out my analysis of Arcan in an email to Mr. Moyse.[15] Because he had just started at West Face that day and likely had little or no work, I thought he could get involved in the Arcan transaction if my investment proposal was approved. The next day, on my recommendation, West Face made an investment in Arcan's unsecured debentures, and continued to build that position over the next several days.

[14] A copy of the press release announcing the deal is attached as Exhibit "**14**".

[15] A copy of this email is attached as Exhibit "**15**".

55. While I sent Mr. Moyse my analysis, he never gave me information or analysis about Arcan of which I was not already aware. I now understand that at some time between June 24 and 26, 2014, Mr. Moyse performed a financial analysis of Arcan's proposed deal with Aspenleaf and summarized Arcan's financials. He did not do so at my request, and I was not at the time provided with a copy of his analysis nor was I informed of its contents. I am informed by Mr. Singh and believe that in or around that time, Mr. Singh asked Mr. Moyse what he was working on, and when Mr. Moyse advised that he was performing a financial analysis of Arcan's proposed deal, Mr. Singh determined that Mr. Moyse's work was on a company that he had analyzed while at Catalyst, and told him to stop all work on the project, which he did. I only learned of Mr. Moyse's analysis in preparing this Affidavit.

56. In summary, the Arcan opportunity arose from a new transaction that was not announced until after Mr. Moyse had left Catalyst. West Face's decision to invest was based on my analysis of this new transaction and not on any work Mr. Moyse had performed at Catalyst or at West Face.

57. As it turned out, West Face lost money on the investment it made in Arcan debentures during this period. In short, West Face has derived no advantage from trading in Arcan's debentures, let alone from any of Mr. Moyse's analysis, which I never saw nor used.

Mr. Moyse's Brief Period of Employment at West Face

58. As set out above, Mr. Moyse began working at West Face on June 23, 2014, and approximately three and a half weeks later he was put on indefinite leave. Mr. Moyse

has not done any work for West Face since then. He has remained on a leave of absence due to these proceedings.

59. During his brief period of active employment with West Face, Mr. Moyse was the most junior member of West Face's investment team (other than West Face's summer intern, Alex Goston). As such, he was not informed of the positions held by West Face funds, was not a member of West Face's investment committee, and did not participate in senior management meetings or have the authority to make any investment decisions.

60. Much of Mr. Moyse's three and a half week period at West Face was spent in orientation and training in order to acclimatize him to the West Face working environment. Based on my recollection of Mr. Moyse's time at West Face and the work I asked him to do for me during this period, as well as on conversations with the other West Face Partners, I believe that during his brief time at West Face, Mr. Moyse's work was limited to performing some preliminary analyses on several potential investments that have nothing to do with WIND, the AWS-3 auction, or Callidus. In that regard, I have set out my knowledge and information of the work Mr. Moyse performed while at West Face in Appendix "A".

61. During his three and a half weeks at West Face, Mr. Moyse kept a physical notebook in which he took handwritten notes during meetings and phone calls. This notebook includes notes on a number of West Face projects or potential deals. I have reviewed a copy of Mr. Moyse's notebook and to the best of my knowledge, it contains

no confidential information belonging to Catalyst. Rather, it relates entirely to either public information, or information that was generated internally at West Face.[16]

62. In addition, together with our responding motion materials, West Face intends to deliver to counsel to Catalyst a USB drive containing all non-privileged emails found on West Face's email server that were sent to or from (including by way of "cc" and "bcc") Mr. Moyse's West Face email address or his known personal email addresses. These emails will be redacted only where necessary as a result of: (a) West Face's confidential information; and (b) personal confidential information belonging to Mr. Moyse such as banking passwords and other private information. West Face is also willing to produce to the ISS a USB drive containing documents created, modified or accessed by Mr. Moyse that can be retrieved from his West Face computer or West Face's computer servers, so that the ISS may determine whether they contain any information relating to WIND, the AWS-3 auction, or Callidus.

63. For the purposes of this motion, more important than the work Mr. Moyse did do while at West Face is the work he did not do. Mr. Moyse did not work on anything related to WIND (which was subject to a confidentiality wall as described above), the AWS-3 auction, or Callidus. Indeed, as described below, the AWS-3 auction was not even commenced until January 2015, some five months after Mr. Moyse was placed on indefinite leave.

[16] Copies of the pages from Mr. Moyse's notebook are attached as Exhibit "**16**". West Face confidential information in the notebook has been redacted, none of which relates to WIND, the AWS-3 auction, or Calllidus.

The Preservation of Mr. Moyse's Records

64. Catalyst ultimately commenced this action on June 25, 2014. Immediately upon commencing the action, Catalyst brought a motion seeking to enforce the restrictive covenants in Mr. Moyse's contract, including the non-competition provision and the confidentiality provision.

65. Under the terms of the July 16 Consent Order, Mr. Moyse was placed on indefinite leave and was denied all access to West Face's facilities. His computer access was terminated and his physical access cards were taken back from him on July 16, 2014. His work station was not re-assigned to any other person. Based on my discussions with West Face personnel, since July 16, no one at West Face has had any communications with Mr. Moyse, other than in respect of human resources matters and in response to personal trading approvals sought by Mr. Moyse from West Face's compliance department. I also understand that non-material emails were sent to Mr. Moyse's West Face email address, to which Mr. Moyse no longer had access, as part of mass emails to West Face employees or subsets thereof (for example, emails regarding fire drills, compliance training, daily market updates sent by West Face summer intern Alex Goston, the office holiday party, etc.)

66. Mr. Moyse and West Face also consented to an order 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 that relate to any of the other matters raised in this action, except as otherwise agreed to by Catalyst. Mr. Moyse agreed to turn over his personal computer and electronic devices

to his legal counsel so that a professional forensic firm agreed by the parties could create images of the data stored on the devices. The images were to be held in trust by Mr. Moyse's counsel pending the outcome of the interlocutory motion.

67. Given the allegations regarding breach of confidence made on the motion, the court file in the matter was also sealed (at Catalyst's request) pending the outcome of the interlocutory relief motion.

Mr. Moyse Played No Role in WIND Negotiations While at West Face

68. At the time that Mr. Moyse joined West Face, West Face was in fact beginning to explore a joint bid for WIND with a potential strategic partner. I am informed by West Face Partner Peter Fraser and believe that West Face made initial contact with this potential strategic partner through a pre-existing relationship with a board member of that company. West Face pursued this option throughout the three and a half weeks that Mr. Moyse was working at West Face, without any input from or discussion with Mr. Moyse.

69. Negotiations with this company continued through to July 18, 2014, two days after Mr. Moyse stopped working for West Face. On that day, the company advised West Face that it was withdrawing from the transaction for a number of reasons, including regulatory concerns, differences of opinion on the proposed business plan, timing of the transaction, and lack of board support. This demonstrated again the challenging regulatory environment in which the WIND negotiations were occurring.

70. In summary, during the time Mr. Moyse was at West Face, we had pursued what turned out to be a dead end, and we were no closer to a WIND transaction than when he joined the firm. Even so, and as described above, Mr. Moyse had no involvement in this or any other aspect of the potential WIND transaction as pursued by West Face.

Catalyst Wins the Right to Negotiate Exclusively with VimpelCom

71. At this time, West Face explored alternative financing options, including by reviving its former discussions with the Tennenbaum Syndicate, as well as discussions with other potential partners. As described above, West Face's discussions with Tennenbaum had pre-dated Mr. Moyse's employment at West Face. Before discussions with Tennenbaum could advance however, on July 23, 2014 (a week after Mr. Moyse went on leave), I learned from Mr. Boland that VimpelCom had granted another bidder an exclusive negotiating period to conclude a binding agreement for the acquisition of WIND. Mr. Riley has now disclosed in paragraph 44 of his February 18, 2015 Affidavit that Catalyst was the other bidder in question. This period of exclusivity was extended several times, ultimately to August 18, 2014.

72. During the period of exclusivity, VimpelCom was forbidden to, and in fact did not, negotiate with West Face. While we continued to work on refining our proposal, we could not receive any feedback from VimpelCom or its advisors nor could we receive any further information from WIND management as to whether our proposals would be satisfactory to VimpelCom. We had no insight into the status of Catalyst's negotiations and no ability to influence the outcome of these negotiations.

73. Ultimately, and despite having the benefit of an exclusive negotiating period, Catalyst was not able to conclude a deal with VimpelCom. Catalyst's period of exclusivity expired on August 18, 2014. Based on paragraph 45 of Mr. Riley's February 18, 2015 Affidavit, I understand that an inability to address VimpelCom's regulatory concerns of the kind I have already discussed, and which were widely known to all bidders from late 2013, was the reason Catalyst was unable to proceed. As described above, the wireless industry is a heavily regulated one in which Industry Canada exercises significant regulatory discretion. As will be described below, West Face and its fellow syndicate members were able to develop a structure that materially reduced or eliminated the regulatory risk to VimpelCom. Mr. Moyse had nothing to do with the development of this structure or how it was implemented. As noted above, he had been on indefinite leave from West Face since July 16, 2014. Further, and also as described above, West Face had the pieces of what ultimately became the winning bid long before Mr. Moyse began working at West Face on June 23, 2014.

74. On February 20, 2015, West Face's counsel Jeff Mitchell (of Dentons) wrote to Catalyst's counsel requesting that Catalyst produce the documentation substantiating Mr. Riley's assertion at paragraph 46 of his Affidavit that Catalyst and VimpelCom had been able to negotiate the terms of the potential sale of WIND to Catalyst subject to one exception. Mr. Mitchell reiterated this request in an email and letter sent February 26, 2015. That day, Catalyst counsel Andrew Winton (of Lax O'Sullivan) communicated Catalyst's refusal to produce the documents relating to its negotiations with VimpelCom

on the basis that such documents are not relevant to Catalyst's motion. Mr. Mitchell responded to Mr. Winton's letter on February 27, 2015.[17]

New Investor Syndicate Reaches Agreement to Acquire WIND

75. By early August 2014, Tennenbaum, West Face and LG Capital Investors (collectively, the "**New Syndicate**") began work on a proposal that would avoid the need for regulatory approval prior to the full exit of VimpelCom by leaving AAL in place as the majority owner of the voting shares of WIND, with the New Syndicate providing a majority of the financing to buy out VimpelCom. The New Syndicate would take non-voting shares and thereby largely assume the regulatory risk itself. WIND's existing third party debt would be refinanced by another investment firm with which Tennenbaum had a relationship.

76. The risk of this approach to the new investors was that AAL would have full voting control of WIND until regulatory approval was obtained, despite only contributing approximately 25% of the equity funding for the transaction. While AAL would commit to support a post-closing reorganization that would allow the New Syndicate members to acquire their proportionate shares of the voting interests in WIND, the reorganization would require regulatory approval. If that approval was denied, the members of the New Syndicate would have been required to remain in a non-voting equity position.

77. The advantage of this two-stage approach was to meet VimpelCom's need for a transaction that carried no regulatory risk to VimpelCom and that permitted VimpelCom

[17] Copies of these pieces of correspondence are attached as Exhibits "**17**", "**18**", "**19**" and "**20**".

to receive its consideration immediately upon signing of the purchase agreement, rather than waiting until after regulatory approval had been obtained. These advantages were only possible with the participation of AAL. West Face's relationships with AAL and Mr. Lacavera went back to at least November 2009, and had been more recently rekindled through my conversation with Mr. Lacavera on November 4, 2013, not from anything Mr. Moyse did or said. The New Syndicate submitted this proposal to VimpelCom on August 7, 2014, though we learned at that time that VimpelCom would not consider the proposal while it was engaged in exclusive negotiations.

78. However, also on August 7, 2014, AAL advised the New Syndicate that it had entered into a support agreement with VimpelCom and was required to cease discussions with the New Syndicate.[18] The deal remained in Catalyst's hands at that time, and we believed that our chances of proceeding with the transaction were essentially nil.

79. The exclusivity period expired on August 18, 2014, and the New Syndicate moved quickly to get a deal done. On August 21, 2014, VimpelCom agreed with West Face that it would not enter into another exclusivity arrangement with any party until August 25, 2014. West Face's understanding was that the New Syndicate needed to present an acceptable deal structure by that time if it wanted to be considered for exclusive negotiations on that date.

80. On August 23, 2014, West Face's counsel delivered a revised proposal on behalf of the New Syndicate that addressed certain concerns raised by VimpelCom with the

[18] A copy of Mr. Lacavera's email to this effect is attached as Exhibit "**21**".

transaction structure in the New Syndicate's proposal from August 7, 2014. On August 25, 2014, West Face's counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter on behalf of the New Syndicate, AAL and two other investors who would be co-investing with AAL.[19] VimpelCom thereafter granted exclusive negotiating rights to the New Syndicate, and further negotiations continued. In particular, VimpelCom remained concerned that, notwithstanding the proposed two-stage transaction, Industry Canada would take the position that approval was required for the first stage. To alleviate VimpelCom's concerns, the New Syndicate gave a representation that no regulatory approval was required to close the first phase of the transaction (whereby VimpelCom would be paid), and also agreed to indemnify VimpelCom in the event this representation was wrong. Ultimately a definitive purchase agreement was signed and the transaction closed on September 16, 2014.[20]

Events Subsequent to the July 16 Consent Order

81. The interlocutory motion was ultimately heard on October 27, 2014 by Mr. Justice Lederer. The court issued its decision on November 10, 2014 (the "**November Decision**"), granting an interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left employment with Catalyst), and directing the ISS to review the image of Mr. Moyse's personal electronic devices.

19 A copy of this letter is attached as Exhibit "**22**".

20 A copy of a press release announcing the deal is attached as Exhibit "**23**".

82. Following the November Decision, the parties negotiated and agreed to a protocol pursuant to which Mr. Moyse's forensic images were to be reviewed by the ISS. The protocol was signed by the parties on or about December 12, 2014 (the "**ISS Protocol**").[21]

83. As indicated in the ISS Protocol, West Face was not involved in the process leading up to the preparation of the ISS report. The only time that West Face was to become involved was if the ISS found in its report that Catalyst's confidential information was transferred to West Face, in which case West Face was entitled to disclosure of that portion of the report, and was entitled to seek further orders from the court for further productions of the report.

84. The ISS Protocol contemplated that a draft report would be prepared by the ISS, for comment by Mr. Moyse. Before receiving even a draft report from the ISS, on January 13, 2015, Catalyst served the original Notice of Motion for this motion. At that time, the motion was based on the number of "hits" resulting from the very general search terms that Catalyst had put forward.

85. On February 6, 2015, we received a copy of Catalyst's Amended Notice of Motion in which it alleges that Mr. Moyse has acted in contempt of the July 16 Consent Order. West Face had no involvement in the imaging of Mr. Moyse's hard drive or his use of his home and personal devices, and until reading the allegations contained in Catalyst's Amended Notice of Motion, had no information or knowledge of the assertions being made against him.

[21] A copy of the ISS Protocol is attached as Exhibit "**24**".

86. On February 10, 2015, after it had served its motion materials, Catalyst's counsel provided a redacted version of the draft ISS report to our counsel. It appears from the draft ISS report that Catalyst's assertion that there were an "unexplainably large number of 'hits'" referenced in its Amended Notice of Motion and stated as the basis for the claim of misuse of confidential information is not accurate. In fact, it appears from the ISS report that the ISS advised Catalyst as early as December 16, 2014 that the ISS was concerned that Catalyst's list of proposed search terms "might generate an excessively large number of 'hits'", because the keywords were insufficiently distinctive and as such might return large volumes of irrelevant or duplicative data.[22]

87. The final ISS report was issued on February 17, 2015.[23] The ISS reviewed Mr. Moyse's hard drive, his smartphone and his iPad. The ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face concerning WIND, the AWS-3 auction, or Callidus. The only evidence that the ISS found that Mr. Moyse had provided any kind of "confidential information" to West Face was an email in which Mr. Moyse provided West Face with his Catalyst employment contract, referred to in paragraph 42 of the ISS report. The ISS report also acknowledged at paragraph 43 that Mr. Moyse had previously sworn that he sent an email to West Face on March 27, 2014 (referred to above). Both of these transmissions occurred before Mr. Moyse was employed by West Face, were disclosed on the prior injunction motion, and they do not include any information about WIND, the AWS-3 auction or Callidus.

[22] A copy of the redacted version of the draft ISS report is attached as Exhibit "**25**".

[23] A copy of the final ISS report is attached as Exhibit "**26**".

No Access to or Misuse of Catalyst Confidential Information in Spectrum Auction

88. In or around January 2014, Industry Canada announced that it would hold the AWS-3 auction in 2015. In December 2014, WIND announced that it planned to bid in the AWS-3 auction, and in addition would consider the purchase of spectrum from other companies that had excess capacity.

89. Industry Canada indicated that a significant portion of the spectrum put up for auction would be reserved for smaller wireless providers, such as WIND, rather than the existing major wireless providers (Rogers, Bell and Telus). As such, the AWS-3 auction represented a significant opportunity for WIND to increase its presence in the Canadian marketplace, and missing this opportunity would have caused an unrecoverable loss in competitive position.

90. On February 5, 2015, Industry Canada released the initial list of qualified bidders that had provided the $65 million entry deposit for the AWS-3 auction. The qualified bidders were as follows:

(a) Bell Mobility Inc.;

(b) Bragg Communications Inc.;

(c) Mobilicity;[24]

(d) MTS Inc.;

[24] While Catalyst is a creditor of Mobilicity, it cannot and does not control or otherwise make management decisions for Mobilicity. In fact, a recent endorsement in Mobilicity's CCAA proceedings explicitly notes that Catalyst's counsel expressed concern about being excluded from the process that led to additional debtor-in-possession financing by Mobilicity's ad hoc group of lenders – a group that excludes Catalyst. A copy of this endorsement is attached as Exhibit "**27**".

(e) Rogers Communications Partnership;

(f) Saskatchewan Telecom;

(g) TBay Tel;

(h) Telus; and

(i) WIND Mobile.

91. In the result, it has been reported that WIND was the only bidder for spectrum set aside for new entrants in Ontario, Alberta, and British Columbia, and was able to obtain this AWS-3 spectrum for the reserve price set by Industry Canada. Any Catalyst strategy or confidential information therefore could not have been relevant since WIND apparently did not, in the result, have to compete with any other bidder.[25]

92. Neither West Face nor any of its Partners or employees have accessed or used any confidential Catalyst information in relation to WIND's participation in the AWS-3 auction. The draft AWS-3 auction rules, which were necessary for developing an auction strategy, were only released on July 28, 2014. The final rules were released on December 18, 2014, and the auction itself commenced in January 2015. Mr. Moyse tendered his resignation to Catalyst on May 16, 2014, and was placed on indefinite leave with no business contact with anyone at West Face on July 16, 2014. Therefore he was not at either Catalyst or West Face when the draft rules came out, let alone many months later when the final rules were released and the auction began.

[25] A copy of the results of the AWS-3 auction from Industry Canada's website, and an article from the *Globe and Mail* reporting on these results, are attached as Exhibits "**28**" and "**29**" respectively.

93. Moreover, during the brief period that he worked in West Face's offices, Mr. Moyse had no involvement in the AWS-3 auction for the very simple reason that West Face did not yet own any interest in WIND. There was no point in developing a strategy for the spectrum auction until the WIND acquisition was complete, which did not happen until months after Mr. Moyse's departure on paid leave.

Harm to West Face From Injunctive Relief Sought

94. Catalyst seeks an injunction prohibiting West Face, or any entity related to West Face, from participating in the "management and/or strategic direction" of WIND, including specifically with respect to the AWS-3 auction. This relief would harm both West Face and WIND.

95. As the largest investor in WIND, West Face offers strategic advice and direction to WIND. In addition, West Face designates two of the ten seats on the board of directors of WIND. Greg Boland, West Face's CEO, currently sits on the board. West Face's other nominee is Peter Rhamey, a telecommunications consultant. As the appointee of two board members and the single largest shareholder, West Face plays an important role in WIND's governance and strategic direction.

96. To use the words of Catalyst's Mr. Riley in paragraph 4 of his Affidavit filed in Mobilicity's CCAA proceedings, the AWS-3 auction was a "unique, one-time, extremely valuable opportunity".[26] Given the limited opportunities to participate in a Canadian

[26] A copy of this Affidavit is attached as Exhibit "**30**".

spectrum auction, enjoining West Face from providing strategic direction to WIND could interfere with WIND's ability to compete in the Canadian wireless industry.

97. The unique opportunity presented by the AWS-3 auction means that interfering with West Face's participation poses a particularly imminent threat to WIND. WIND cannot effectively build and improve its business without additional spectrum. Moreover, anything that weakens WIND will strengthen its competitors, irrevocably interfering with the dynamics of future competition. Industry Canada's has emphasized the need for a fourth wireless service provider to compete in Canada, and WIND is currently the leading national contender for that role.[27] If WIND's ability to participate in a spectrum auction were interfered with, it could irreparably harm WIND's ability to fulfil that role.

98. West Face will be damaged immeasurably by being enjoined from managing a company into which we have invested a significant amount of the capital from our investment funds. In the case of WIND, West Face is not a passive investor. A significant amount of the value that West Face provides in respect of this particular investment is its active consultation in respect of the strategic decisions to be made by WIND. Granting the requested injunction could impair West Face's ability to deliver this value to the third party investors that have invested funds in the investment vehicles managed by West Face.

[27] A screen-shot of Industry Canada's "Canada Wireless Policy" webpage emphasizing "more choice" for Canadian wireless services is attached as Exhibit "**31**".

99. Mr. Riley alleges at paragraph 90 of his February 18, 2015 Affidavit that Catalyst's contingent interest in WIND must be protected from West Face. West Face denies any such contingent interest. In any event, even assuming that Catalyst had a contingent interest, both parties' interests would be aligned – West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do.

Callidus Capital Corporation

100. Callidus is a publicly traded company. It went public in April 2014 following an initial public offering. Catalyst (directly and/or through funds managed by Catalyst) owns approximately 59.5% of Callidus' outstanding common shares.[28] Until its IPO, Callidus' loan book had been 100% funded by Catalyst through a participating debenture.[29]

101. Callidus is a niche lender to distressed, and typically private, borrowers. It advertises itself as a "specialty debt fund that provides capital on a bridge basis to meet the financing requirements of companies that cannot access traditional lending sources".[30]

102. According to its IPO prospectus, Callidus' loans are "generally structured as demand, first lien (senior secured) facilities, on a fully collateralized basis",[31] and

[28] A copy of a Callidus press release dated December 23, 2014 disclosing Catalyst's interest in Callidus is attached as Exhibit "**32**".

[29] This information is set out on page 5 of Callidus' IPO prospectus dated April 15, 2014 (the "**IPO Prospectus**"), a copy of which is attached as Exhibit "**33**". IPO Prospectus, p. 5.

[30] A copy of the "About Callidus" page of Callidus' public website is attached as Exhibit "**34**".

[31] IPO Prospectus, p. 1.

generally range in size from $5 to $50 million (with its largest loan commitment being approximately $75 million).[32] Unlike conventional lenders, however, Callidus' credit facilities have few, if any, financial covenants. In that regard, Callidus' IPO prospectus provided that Callidus' loans have "limited or no covenants",[33] and virtually every one of Callidus' press releases in 2014 contained the following passage:

> [Callidus] specializes in innovative and creative financing solutions **for companies that are unable to obtain adequate financing from conventional lending institutions**. Unlike conventional lending institutions who demand a long list of covenants and make credit-decisions based on cash flow and projections, **Callidus credit facilities have few, if any, covenants** and are based on the value of the company's assets, its enterprise value and borrowing needs.[34] (emphases added)

103. Based on Callidus' public disclosure, West Face understood that the typical Callidus borrower had limited to no access to capital markets or traditional lending institutions. West Face understood this to be the reason why Callidus has been able to lend at gross yields of approximately 20%.[35] Historically, based on my experience, loans to such risky borrowers at such high rates of interest suffer a relatively high rate of default and, sometimes, impairment of principal.

32 IPO Prospectus, p. 2.

33 IPO Prospectus, p. 1.

34 See, for example, Callidus' press releases dated May 14, August 14, November 6, November 24, and December 23, 2014, copies of which are attached as Exhibits "**35**" to "**39**".

35 See, for example, IPO Prospectus, pp. 1, 4, 21, 24, 28.

The Questionable Premium Trading Value of Callidus' Shares

104. For its April 2014 IPO, Callidus offered its shares to the public at a price of $14.00 per share. At that time, Callidus' shares began trading on the Toronto Stock Exchange.

105. Almost immediately after its IPO, Callidus' shares began to rise in market value and, by the Fall of 2014, were trading at a significant premium to their IPO price. Even more significantly, Callidus' shares were trading at a substantial premium to their book value based on the assets and liabilities reported in Callidus' financial statements. For example, as at September 30, 2014, Callidus' share price was $22. As at that date, Callidus' most recently released financial statements[36] reported shareholders' equity (a common measure of book value) of $381 million and 48.69 million shares outstanding, resulting in a book value of $7.83 per share. The quoted share price of $21.65 therefore represented a ratio between market price and book value, or P/B multiple, of 2.81.

106. In other words, Callidus' shares were trading at more than twice their value if one were simply to take the book value disclosed in Callidus' financial statements. It appeared to me that this gap between book value and market value meant that the market perceived intangible value in Callidus' continuing ability to generate high yield loans that would not default. It therefore made sense to examine whether publicly-available information was consistent with Callidus being able to do so.

[36] Being Callidus' second quarter financial statements for the three and six months ended June 30, 2014 and June 30, 2013, which are attached as Exhibit "**40**".

107. Throughout 2014, Callidus disclosed tremendous growth in its loan portfolio. For example:

(a) on May 14, 2014, Callidus disclosed in a press release that, as at May 8, 2014, it had: (i) gross loans receivable of $480 million, with an aggregate committed amount of $588 million; and (ii) 22 loan commitments, with an average loan amount funded of $21 million. In the same press release, Callidus also disclosed that in the first quarter of 2014 (ended March 31, 2014), it had gross yields (*i.e.*, interest rate received before accounting for any losses) of 20.4% and an Adjusted EBITDA[37] margin of 79%;[38]

(b) on August 14, 2014, Callidus disclosed in a press release that, as at August 13, 2014, it had: (i) gross loans receivable of $605 million, with an aggregate committed amount of $755 million; and (ii) 26 loan commitments, with an average loan amount funded of $23 million. In the same press release, Callidus also disclosed that in the second quarter of 2014 (ended June 30, 2014), it had gross yields of 20.8%, and an Adjusted EBITDA margin of 79.4%;[39]

(c) on November 6, 2014, Callidus disclosed in a press release that as at November 4, 2014, it had: (i) gross loans receivable of $684 million, with an aggregate committed amount of $856 million; and (ii) 30 loan commitments, with an average loan amount funded of $23 million. In the same press release, Callidus also disclosed that in the third quarter of 2014 (ended September 30, 2014), it had gross yields of 20.0%, and an Adjusted EBITDA margin of 80.4%;[40] and

37 Earnings Before Interest, Taxes, Depreciation and Amortization, a common measure of cash flow.

38 See Callidus' press release dated May 14, 2014, a copy of which is attached as Exhibit "**35**".

39 See Callidus' press release dated August 14, 2014, a copy of which is attached as Exhibit "**36**".

40 See Callidus' press release dated November 6, 2014, a copy of which is attached as Exhibit "**37**".

(d) On February 17, 2015, Callidus disclosed in a press release that as at January 31, 2015, it had gross loans receivable of $893 million, with an aggregate committed amount of $1.1 billion. In contrast to previous press releases, Callidus did not provide an update on its number of loan commitments, average loan amount, gross yields or Adjusted EBITDA margin.[41]

108. To put the growth of Callidus' loan book even more starkly, Callidus stated in a press release that as of December 31, 2013 it had $381 million of gross loans receivables.[42] A little over one year later, as of January 31, 2015, Callidus has claimed that its gross loan commitments totalled $1.1 billion, with $893 million advanced and outstanding.[43] This represents an increase of $512 million (134%) from December 31, 2013.

109. Looking further back, both Callidus' gross loans receivables and EBITDA had more than quadrupled since 2011, based on statements made in its public disclosure.[44] Yet Callidus had disclosed gross yields averaging more than 20% throughout this tremendous growth period.

110. In addition to these objective performance metrics, Callidus claimed in its IPO prospectus not to have "realized losses on principal on Callidus-originated loans".[45] Callidus went even further in its November 24, 2014 press release, in which it stated

41 See Callidus press release dated February 17, 2015, a copy of which is attached as Exhibit "**41**".

42 See Callidus' press release dated November 24, 2014, a copy of which is attached as Exhibit "**38**".

43 See Callidus press release dated February 17, 2015, a copy of which is attached as Exhibit "**41**".

44 In 2011, Callidus' gross loans receivable were approximately $154 million and its EBITDA was approximately $14.7 million. See IPO Prospectus, p. 37.

45 IPO Prospectus, p. 1.

that "no loans in Callidus' loan portfolio are non-performing and there have been no realized loan losses" over the period from December 31, 2013 to November 24, 2014.[46] Similarly, in a conference call with investors on November 7, 2014 regarding Callidus' third quarter results, Mr. Glassman, Callidus' Executive Chairman and CEO, stated:

> So IFRS is a bit annoying. Technically, under IFRS, you have to allocate the [loan loss] 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 up a separate watch list, which is the stuff 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 nonperforming**…[47] (emphasis added)

111. In other words, Callidus claimed that it was rapidly adding extremely high-yield loans without suffering any defaults, or indeed any non-performance. Based on my experience with high-yield borrowers, Callidus' disclosure seemed too good to be true, and attracted our attention for a deeper review of Callidus (and in fact, as set out below, this was our view even before Mr. Glassman made the above-quoted statements).

112. As at November 25, 2014, Callidus' shares were trading at $21.60 per share, yet the average analyst target price for Callidus' shares was $28.89 per share, and 7 out of 7 analysts following Callidus recommended buying Callidus shares. Moreover, these same analysts predicted earnings-per-share ("**EPS**") growth of 100% through 2016.[48] Based on our review of Callidus' publicly disclosed financial information as summarized

[46] A copy of Callidus' November 24, 2014 press release is attached as Exhibit "**38**".

[47] A copy of the transcript from Callidus' November 7, 2014 call with investors is attached as Exhibit "**42**".

[48] Screen-shots from Bloomberg showing analysts' target price and predictions of Callidus' growth are attached as Exhibit "**43**".

above, we believed that the investing community was excessively optimistic and this created an investment opportunity for West Face that was worth investigating further.

The Impetus Behind West Face's Research into Callidus

113. West Face had been monitoring Callidus' trading since its IPO. By September 2014, West Face's view was that the valuation at which the company was trading appeared to be exceedingly optimistic. Indeed, Callidus' trading multiples[49] appeared to be much higher than those of what West Face viewed as Callidus' most highly comparable businesses – even those businesses with stronger origination channels, higher levels of portfolio diversification, longer portfolio durations, and lower risk of material loan impairments than Callidus.[50] Moreover, these comparable businesses generally provide investors with attractive dividend yields, whereas Callidus had publicly disclosed its intention to not declare or pay dividends in the foreseeable future.[51]

114. While Callidus had consistently disclosed successful objective performance measures of its loan portfolio (such as the tremendous growth of its gross loans receivable, consistently high gross yields and Adjusted EBITDA, etc.), a review of Callidus' public disclosure (including its IPO prospectus) provided limited information about the actual composition of Callidus' loan portfolio.

49 For example, the P/B multiple discussed above.

50 In West Face's view, the most closely comparable companies to Callidus are U.S. business development companies, such as American Capital, Apollo Investment Corporation, and Ares Capital Corporation. In some ways, Callidus may also be compared to specialty finance companies such as Accord Financial, Carfinco, and Chesswood Group Limited.

51 IPO Prospectus, at pp. 56.

115. For example, readers of Callidus' public disclosure had little information about the identities of Callidus' borrowers or the terms of the loans extended by Callidus. Callidus also did not report on the performance of individual borrowers, the degree to which the loan book or specific loans were over-collateralized by assets, or whether interest service payments were being met out of cash flow or by added funding draws under the Callidus facilities. Furthermore, because Callidus' loans have limited to no financial covenants, the quality of the assets against which Callidus' loans are secured is crucial to the strength of their loan book. By calling itself an "asset-based lender", Callidus was essentially representing that its loans were collateralized by its borrowers' most liquid assets (for example, accounts receivable and inventory).[52] However, there was also little disclosure about exactly what collateral was backing Callidus' loans.

116. As a result of this dearth of information, investors had very little information on which to base an assessment of the risks associated with Callidus' business or loan portfolio. To put Callidus' lack of disclosure in perspective, U.S. business development companies ("**BDCs**") (arguably Callidus' closest comparables) typically disclose, on a quarterly basis and for each of their loans outstanding: the name and industry of the borrower, interest rate, maturity date, book value, and estimated fair value of the investment.[53]

[52] See Callidus' IPO Prospectus, p. 31.

[53] Samples of U.S. BDC disclosures are attached as Exhibit "**44**" and "**45**".

117. For these reasons, West Face questioned the premium trading value of Callidus' shares following the IPO. West Face decided to investigate why Callidus' shares were trading at such a premium and, more importantly, whether this premium was justified.

118. West Face believed that a detailed review of Callidus' business might illuminate whether its shares warranted such a high valuation by market analysts and in the public trading markets. That said, based on its experience in the industry, West Face was skeptical that this premium was warranted. Accordingly, another Partner at West Face, Peter Fraser, a Co-Chief Investment Officer of West Face along with our CEO Greg Boland, made the decision in October 2014 to begin short selling Callidus' shares on the basis of his (and West Face's) belief that Callidus' share price would decline due to what we perceived as its excessive valuation. After deciding to take a short position in Callidus, West Face pursued more detailed research into Callidus in order to determine whether to increase or reduce its short position. To be clear, the research was commenced and performed solely for investment purposes based on what we perceived to be unsustainable claims about tremendous high-yield loans growth without any material losses. West Face has previously done this kind of research on many potential investment targets.

119. West Face's first step in its research was to try to understand as much as possible of the specific composition of Callidus' loan book through public sources of information. More precisely, West Face sought to learn, through publicly available resources:

(a) who were the borrowers to whom Callidus had extended credit?

(b) what were the typical terms on which Callidus was lending (for example, commitment size, term to maturity, interest rates, covenants, etc.)?

(c) what collateral was backing the Callidus loans?

(d) how were the businesses of the borrowers performing, and specifically, were there any signs of problems or non-performance amongst these borrowers? and

(e) were the loans rolling off at their stated initial maturity dates, or rolling over at the same or different rates of interest?

120. I was the Partner at West Face tasked with primary responsibility over West Face's research into Callidus, the conclusions of which are summarized in a PowerPoint document (the "**Callidus Analysis**").[54] All of the analysis in the Callidus Analysis is based on facts that West Face obtained from publicly available information.

West Face's Research into Callidus

121. Callidus' IPO prospectus served as the starting point for West Face's research. The prospectus stated that, as at December 31, 2013, Callidus' loan book consisted of 19 loans. The prospectus summarized these loans in a chart showing the industry of the borrower, the origination date of the loan, the amount of the facility, and the amount drawn on that facility. Notably, this chart did not indicate the names of Callidus' end borrowers – instead it simply referred to them as "Company A", "Company B", etc.[55]

[54] A copy of the Callidus Analysis is attached as Exhibit "**46**".

[55] A copy of this chart is attached as Exhibit "**47**".

122. We then resorted to other public sources of information to determine whether we could identify Callidus' end borrowers, and whether we could match those borrowers to the loans disclosed by Callidus in the IPO prospectus. While some of our research tools were proprietary and confidential to West Face, they all relied on public sources of information. Some were as simple as Google and Bloomberg. Others included searches of government records, public websites and promotional materials. The precise sources searched are as follows:

(a) the website of the Office of the Superintendent of Bankruptcy Canada, and in particular the CCAA records list (a list of all companies that have been granted protection under the CCAA since September 18, 2009);[56]

(b) websites of major Canadian and U.S. law firms who represented Callidus or one of its borrowers in a transaction and mentioned a transaction involving Callidus by name;

(c) websites of various accounting and advisory firms who typically serve as monitors or trustees in bankruptcy;

(d) the case dockets of ongoing bankruptcy proceedings; and

(e) public registries of security interest registrations maintained by various government agencies in Canada and the United States.

123. West Face's research methodology was based on its own internal methods, but none of it was based on confidential information of Callidus or anyone else.

124. As a result of our extensive research, we believe that we have been able to identify a total of 40 end borrowers of loans made by Callidus, 14 of which we

[56] <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html>.

understand are still outstanding, and nine of which we believe match the loans disclosed by Callidus in its IPO prospectus. I have summarized West Face's research, and in particular the public sources of information about Callidus' loans, in Appendix "B".

125. As one can see from the Appendix, while West Face identified 40 suspected loans made by Callidus, we have only very limited information with respect to most of these loans. Indeed, for many of the loans, West Face's knowledge is limited to the name of the borrower only and the existence of some type of security agreement or interest (there are also likely dozens of loans that West Face was not able to identify).

126. On the other hand, for a few of the loans identified by West Face, West Face was able to obtain more detailed information. Of these, six were of particular interest: those being the loans to Xchange Technology, Arthon Industries, Leader Energy, North American Tungsten, Esco Marine, and Deepak International. Notwithstanding Callidus' representations that it had yet to suffer a loss of principal and that, in November 2014, none of its loans were non-performing, West Face found public information about these loans that raises significant concerns about the ability of the borrowers to ultimately repay their debts to Callidus.

127. The circumstances surrounding each of these six loans are set out in Appendix "C" of my Affidavit. In brief, however, these loans appear to be non-performing and/or insufficiently collateralized, and it appears very unlikely that they will be repaid in full. In aggregate, these six loans comprise 17.7% of Callidus' loan book as at February 11, 2015, and West Face estimates that, as of that date, Callidus could have had an impairment on these loans of up to $70 million, and definitely greater than zero.

128. Finally, West Face's research into Callidus had nothing to do with Mr. Moyse. As the Partner responsible for our Callidus research, I had no communications of any kind with Mr. Moyse about Callidus, and to the best of my knowledge, neither did anyone else at West Face. I am informed by Andrew Carlson of Davies Ward Phillips & Vineberg LLP, counsel to West Face, and believe that a search for the term "Callidus" in any of the over 1,000 emails sent or received by Mr. Moyse at his West Face email address retrieved only one email message.[57] As one can see, this email was sent by Alex Goston, a summer intern at West Face, to a number of individuals at West Face, including Mr. Moyse, on the day Mr. Moyse ceased working at West Face (July 16, 2014), and the only reference to Callidus in that email was public information about Callidus' market capitalization and stock price movement. The only reason why Callidus happened to be referenced in Mr. Goston's email is because, as part of his responsibilities as West Face's summer intern, Mr. Goston was tasked with sending out a daily email summarizing daily financial market news, including the top and bottom five performing North American stocks (in terms of price movement). Callidus happened to be one of the best performing stocks on that day.

Unsealing of Court File and Attacks on West Face and its Principals

129. As part of the July 16, 2014 Consent Order, the court file in this matter was ordered to be sealed until the conclusion of the injunction application. In fact, to the best of my knowledge the court file remained sealed following the conclusion of the injunction application on November 10, 2014. West Face never took any steps to

[57] A copy of this email is attached as Exhibit "**48**".

unseal the court file. However, I am informed by Ben Iscoe of Dentons, counsel to West Face, and believe that the index to the court file indicates that the court file was subsequently unsealed in January 2015, with reference to a Mr. Andrew Winton. Mr. Winton is one of Catalyst's external lawyers.[58]

130. Soon after the unsealing of the court file, a series of newspaper articles began to appear in the *National Post* and the *Globe and Mail* quoting from Catalyst's Notice of Motion and repeating the allegations to which I have responded in this Affidavit.[59] Neither West Face nor its counsel advised the media of the unsealing of the court file, suggested the media consult the court file, or otherwise instigated this newspaper coverage of the litigation. Instead, I am informed by Jeff Mitchell of Dentons, counsel to West Face, and believe that West Face received inquiries from the press about Catalyst's motion, and responded as indicated in the articles. Specifically, West Face denied the allegations and stated its belief that the relief had been sought against West Face for an improper purpose.

131. On February 9, 2015, counsel to Catalyst Rocco Di Pucchio (of Lax O'Sullivan) wrote to our counsel Mr. Mitchell (of Dentons) alleging that our counsel's quoted comments in the press denying Catalyst's most recent allegations, and stating our belief that the motion had been intended to harm West Face, were false and defamatory. Mr.

[58] A copy of the court index is attached as Exhibit "**49**".

[59] Copies of these articles are attached as Exhibit "**50**".

Di Pucchio demanded an apology and retraction in relation to a newspaper article principally devoted to repeating Catalyst's allegations against West Face.[60]

132. Interference with the business of West Face, and not protection of confidential information, appears to be Catalyst's goal in bringing this motion. My belief about the motivation behind Catalyst's motion has been reinforced by my understanding from conversations that Greg Boland has had with other financial market participants that Newton Glassman of Catalyst has been repeatedly attacking the character and reputation of West Face and its principals. Mr. Glassman has stated that the Partners of West Face are untrustworthy and lack integrity, that investors should withdraw their investments from our funds, and on at least one occasion has directed individuals to review the court file in order to read Catalyst's Notice of Motion.

Catalyst's Demand to Image all West Face Devices

133. In its Amended Notice of Motion, Catalyst seeks an order allowing it to image all of West Face's electronic devices for inspection and review by the ISS. I am informed by Chap Chau, West Face's director of IT, that there are 122 distinct corporate-owned devices and likely in excess of 50 personally-owned devices used by West Face personnel. Accordingly, if granted, Catalyst's requested order would require the imaging of over 172 different devices, including desktop computers, laptop computers, computer servers, and both company-owned and employee-owned phones and tablets.

[60] A copy of Mr. Di Pucchio's letter is attached as Exhibit "**51**". Our counsel's reply is attached as Exhibit "**52**".

Conclusion

134. Mr. Moyse only worked at West Face for approximately three and a half weeks, from June 23, 2014 until July 16, 2014, and played a very limited role at the firm. He played no role in West Face's actions with respect to WIND, the AWS-3 auction, or Callidus. In fact, West Face's interest in WIND pre-dated Mr. Moyse's arrival by five years, to November 2009, and West Face was thoroughly engaged in a potential WIND transaction before Mr. Moyse's arrival at West Face. The deal that West Face was pursuing during the time Mr. Moyse worked for West Face ultimately proved to be a dead end, and following Mr. Moyse's departure Catalyst had several weeks of exclusive negotiations with VimpelCom for the purpose of reaching an agreement to acquire WIND. Mr. Moyse could have had nothing to do with West Face's strategy for the AWS-3 spectrum auction, since the New Syndicate did not even acquire WIND until several months after Mr. Moyse's departure and Mr. Moyse has not been involved in West Face's business since July 16, 2014. West Face's research into Callidus arose not because of any input from Mr. Moyse, but because Callidus' rapid escalation in stock price and claims about an unimpaired loan book attracted, and ultimately could not withstand, West Face's scrutiny.

135. During Mr. Moyse's brief employment as a junior associate, West Face was aware of the dispute between Catalyst, Mr. Moyse, and West Face, and took steps to ensure that Mr. Moyse did not have any involvement in any files in which Catalyst was known to be involved, including WIND and Callidus. West Face did not access or use any confidential information belonging to Catalyst of any kind, including without limitation information relating to WIND, the AWS-3 auction, and/or Callidus.

136. I make this Affidavit in response to Catalyst's motion for an injunction and for no other purpose.

SWORN before me at the City of Toronto in the Province of Ontario this 7th day of March, 2015

Commissioner for Taking Affidavits, etc. ANDREW CARLSON

ANTHONY GRIFFIN

APPENDIX "A"

1. Based on my recollection of Mr. Moyse's time at West Face and the work I asked him to do for me, on conversations with the other West Face Partners, and a review of Mr. Moyse's emails by counsel to West Face, I believe that during his brief time at West Face, Mr. Moyse's work was limited to keeping West Face's "deal pipeline" document updated and performing preliminary analyses about potential investment opportunities. Based on a review of Mr. Moyse's West Face emails, I am advised by Andrew Carlson (of Davies), counsel to West Face, and believe that Mr. Moyse worked on the following matters while at West Face:

(a) Arcan Resources, discussed above;

(b) Unicaja, a Spanish savings bank providing retail banking services;

(c) NCSG Crane & Heavy Haul Corporation ("**Northern Crane**"), a privately held Canadian-domiciled rental and services company providing mobile cranes, tractors, trailers, a line of hydraulic platform trailers, and specialty cranes;

(d) CCC Investment Banking, a Canadian investment bank exploring financing options for an oil and gas services company whose name was not provided to West Face;

(e) Covenant Surgical Partners, a privately-held owner and operator of surgery centers based in Nashville, Tennessee;

(f) The Peregrine Trust (also referred to as the "**Buffalo Mine**" matter), a trust domiciled in British Columbia seeking a bridge loan for perfecting rights in an above-ground feed stock of gold, silver, and platinum group metals.

(g) Seven Generations Energy, a privately held Canadian-domiciled oil and gas exploration and production company;

(h) TransOcean, a publicly-traded provider of offshore contract drilling services for energy companies with a market capitalization of over US$15 billion; and

(i) Canadian International Oil Corp. ("**CIOC**"), another privately held Canadian-domiciled oil and gas exploration and production company.

2. As set out in the body of my Affidavit, West Face intends to deliver Mr. Moyse's West Face emails to counsel to Catalyst. That said, I will provide here a brief summary of Mr. Moyse's work on each of the foregoing matters.

3. I described Mr. Moyse's work on Arcan in the body of my Affidavit.

4. In regard to Mr. Moyse's work on Unicaja, on his first day at West Face, I invited him to join me on a conference call regarding an offering of Unicaja shares. Mr. Moyse participated on that conference call, and the following day, he emailed me his thoughts on the offering.

5. Mr. Moyse's work on Northern Crane began on or around Monday, July 7, 2014. At the time, Northern Crane was seeking financing through a secured credit facility. I sent an email to Mr. Moyse asking him to get the details on the transaction. That same day, Mr. Moyse provided to me a summary of the transaction, along with various reference materials, and an indicative term sheet.

6. Mr. Moyse's work with respect to CCC Investment Banking also began on or around Monday, July 7, 2014. On that day, Mr. Dea asked Mr. Moyse to call the Vice

President of CCC Investment Banking on his behalf to learn more about the proposed deal. A few hours later, Mr. Moyse provided Mr. Dea with his summary and analysis on CCC Investment Banking's proposal for financing an oil and gas services company.

7. Mr. Moyse' work on Covenant began on or around Tuesday, July 8, 2014. Mr. Dea emailed Mr. Moyse and asked him to look into a debt offering being made by the company. That same day, Mr. Moyse provided Mr. Dea with his analysis on the Covenant debt offering by reply email.

8. Mr. Moyse's work on the Buffalo Mine also began on or around Tuesday, July 8, 2014. Mr. Dea asked Mr. Moyse to retrieve some basic information on the project. On Thursday, July 10, 2014, Mr. Moyse provided Mr. Dea with a summary of the Buffalo Mine Project. As part of his work on this matter, Mr. Moyse was asked by representatives of the Buffalo Mine to create an account with Box.com, a company that provides online file storage and sharing services, in order to access the documents relevant to this project.[61]

9. Mr. Moyse's work on Seven Generations began on or around Thursday, July 10, 2014. Mr. Moyse was asked to track down the company's offering documents with respect to a debt offering it had made in 2013, and to prepare an analysis of comparable companies in the oil and gas sector, which he did. I used some of the information gathered by Mr. Moyse to prepare a term sheet with respect to a possible debt investment in Seven Generations by West Face.

[61] Copies of Mr. Moyse's emails relating to his Box.com account are attached as Exhibit "**53**".

10. Mr. Moyse's work with respect to TransOcean began on or around Monday July 14, 2014, two days before he stopped working at West Face. On that day Mr. Dea sent an email to Mr. Moyse asking him to start a new project looking at a short position of TransOcean. Among other things, Mr. Dea asked Mr. Moyse to review quarterly reports, presentations, and conference calls of major oil companies for certain indications of risk in the industry, as well as certain information on TransOcean itself.

11. Mr. Moyse's work on CIOC began on or around July 15, 2014. I wanted Mr. Moyse to perform a side-by-side comparison to Seven Generations. I do not believe Mr. Moyse performed any substantial work on this file prior to his departure.

12. As described in the body of my Affidavit, during his three and a half weeks at West Face, Mr. Moyse kept a physical notebook in which he took handwritten notes during meetings and phone calls. This notebook includes notes on the Arcan, Unicaja, Covenant, and Seven Generations files discussed above, as well as notes of various other West Face projects or potential deals that were part of West Face's deal "pipeline".[62] I do not believe Mr. Moyse performed any material work on any of those other projects.

[62] Copies of the pages from Mr. Moyse's notebook were previously attached as Exhibit "**16**".

APPENDIX "B"

13. The following is a summary of the 40 Callidus end borrowers / loans that West Face identified using publicly available resources, together with the public information that West Face relied upon in identifying each loan:

1. *Loan to DEP Distribution Exclusive Ltée*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with DEP Distribution Exclusive Ltée, a wholesale seller of CDs and audio/video cassettes and related products, on or around December 11, 2007.[63]

2. *Loan to Total Security Management Services Inc.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Total Security Management, a company providing protective/security services and training, on or around June 2, 2008.[64] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in Total Security Management, and that the document pursuant to which this interest was obtained was executed on or around April 21, 2008.[65]

3. *Loan to Entertainment World Holdings Inc.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Entertainment World Holdings, a seller of vending machines, on or around May 5, 2008.[66]

4. *Loan to TPS Sports Group Corporation*: West Face learned of Callidus' loan to TPS Sports Group by searching on the public website Globe24h

63 A print-out from CIPO's website showing this information is attached as Exhibit "**54**".

64 A print-out from CIPO's website showing this information is attached as Exhibit "**55**".

65 A print-out from the USPTO's website showing this information is attached as Exhibit "**56**".

66 A print-out from CIPO's website showing this information is attached as Exhibit "**57**".

CaseLaw,[67] a website that advertises itself as the largest database of Canadian case law. Specifically, through searches of this website, West Face retrieved the case of *Asset Engineering LP v. Pagotto*, which expressly refers to the loan by Callidus.[68]

5. *Loan to Satpanth Capital Inc. (formerly Bedford Furniture Industries Inc.)*: Through Google site searches of CIPO's website, West Face learned that Callidus registered two security agreements with bed/mattress company Satpanth Capital, the first on or around January 9, 2009, and the second on or around July 21, 2011. The CIPO website also indicated that Callidus assigned its security to another company on October 5, 2011.[69] Based on information from Bloomberg, West Face understands that Satpanth Capital is now doing business as King Koil Sleep Products.[70]

6. *Loan to Magnussen International Corp.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Magnussen International, a home furniture company, on or around April 22, 2009.[71] The CIPO website also indicates that TD Bank registered a security agreement with Magnussen International on or around June 3, 2010. Given that this was evidence that Magnussen had obtained a loan from a more conventional lender, West Face concluded that the company's loan from Callidus had been refinanced on or around that date;

7. *Loan to Blockbuster Canada Co.*: West Face learned of Callidus' loan to Blockbuster Canada through the public disclosure of its parent company, Blockbuster Inc. Specifically, through searches of the SEC's EDGAR

67 <http://caselaw.canada.globe24h.com>.

68 A copy of this case is attached as Exhibit "**58**".

69 A print-out from CIPO's website showing this information is attached as Exhibit "**59**".

70 A print-out from Bloomberg showing this information is attached as Exhibit "**60**".

71 A print-out from CIPO's website showing this information is attached as Exhibit "**61**".

database, West Face retrieved a copy of Blockbuster Inc.'s Form 8-K dated May 14, 2009 setting out the key information about Callidus' loans. This disclosure stated that, on May 8, 2009, Blockbuster Canada had signed a credit facility with Callidus, which provided for a single advance non-revolving loan of $25 million, and a single advance non-revolving loan of up to $10 million.[72] West Face also retrieved a copy of Blockbuster Inc.'s Form 8-K dated October 5, 2009, which stated that, on October 1, 2009, the company had issued a series of senior secured notes and used the net proceeds to repay what West Face understood to be the Callidus facilities.[73]

8. *Loan to Great Slave Helicopters Ltd. (a subsidiary of the Discovery Air group of companies)*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Great Slave Helicopters Ltd., a charter helicopter company, on or around May 27, 2009.[74] In financial statements released shortly before Callidus registered its security interest with CIPO, Great Slave Helicopter's parent company, Discovery Air, announced that on April 9, 2009, it had obtained a new credit facility consisting of a demand operating line of credit to a maximum of $15 million, with increased availability of up to $25 million during the company's peak operating period. The company also disclosed that this facility bore an interest rate of 18%, had an initial term of 14 months, and was secured by first and second charges over certain accounts receivable and inventories.[75] That Callidus was the lender of this loan was essentially confirmed through a press release made by Discovery Air dated August 1, 2012. The press release announced that

72 A copy of Blockbuster Inc.'s Form 8-K dated May 14, 2009 is attached as Exhibit "**62**".

73 An excerpt from Blockbuster Inc.'s Form 8-K dated October 1, 2009 is attached as Exhibit "**63**".

74 A print-out from CIPO's website showing this information is attached as Exhibit "**64**".

75 An excerpt from Discovery Air's financial statements dated April 30, 2009 are attached as Exhibit "**65**".

Discover Air had secured a new facility of up to $25 million with CIBC, which "replace[d] Discovery Air's demand operating facility with Callidus Capital Corporation".[76]

9. *Loan to Active Control Technology Inc.*: West Face learned of Callidus' loan to Active Control Technology, a mining services company, through the company's press releases. Specifically, on June 17, 2009, Active Control Technology, issued a press release on the CNW newswire website,[77] announcing, among other things, that it had signed a term sheet with Callidus for a revolving credit facility of up to $2,250,000.[78]

10. *Loan to Infinity Rubber Technology Group Inc.*: West Face learned of Callidus' loan to rubber manufacturer Infinity Rubber through at least two public sources:

    (i) One, a press release dated January 27, 2012 published on Bloomberg. Among other things, this press release described the history of an ongoing strike of United Steelworkers union members at Infinity Rubber's manufacturing plant in Toronto. The press release stated that Infinity Rubber's initial acquisition of the plant from Biltrite (which occurred during a CCAA process) "was financed with a high-interest mortgage from Callidus Capital Corporation, a company specializing in high-risk loans for those who can't get bank credit";[79] and

    (ii) Two, a press release dated March 8, 2012 published on the United Steelworkers website,[80] which also referred to the ongoing strike.

76 A copy of this press release is attached as Exhibit "**66**".

77 <www.newswire.ca>.

78 A copy of this press release is attached as Exhibit "**67**".

79 A copy of this press release is attached as Exhibit "**68**".

80 <www.usw.ca>.

Among other things, this press release referred to a refinancing by BMO that had enabled the company to "repay an 18% loan it had previously negotiated with Callidus Corporation Inc. [*sic*]".[81]

11. *Loan to Synergex Corp.*: West Face learned of Callidus' loan to Synergex through two public sources. First, in a press release dated September 9, 2009, Synergex announced that it had executed a term sheet with Callidus for a $20 million credit facility.[82] Second, an article dated July 14, 2010 published on the RTT News website[83] stated that Synergex's subsidiary, Synergex Logistics Corp., had opened a new credit facility in the amount of $3 million after having "paid out its asset based lender, Callidus Capital Corp."[84] West Face also learned through a Synergex press release dated January 3, 2012 and published on the Market Wired website[85] that certain other Synergex subsidiaries had made an assignment in bankruptcy.[86]

12. *Loan to Encore Sales (formerly UWG Global Inc.)*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Encore Sales (then UWG Global Inc.) on or around May 12, 2008.[87] West Face learned many more details about this loan through the orders made and materials filed in Encore Sales' bankruptcy proceedings. These materials were (and remain) available to download from the public website of Farber Financial Group.[88] Among other details, these materials, and in particular the First Report of the

81 A copy of this press release is attached as Exhibit "**69**".

82 A copy of this press release is attached as Exhibit "**70**".

83 <www.rttnews.com>

84 A copy of this article is attached as Exhibit "**71**".

85 <www.marketwired.com>

86 A copy of this press release is attached as Exhibit "**72**".

87 A print-out from CIPO's website showing this information is attached as Exhibit "**73**".

88 <http://www.farberfinancial.com/insolvency-engagements/bid/213397/Encore-Sales>. A screen-shot of this website is attached as Exhibit "**74**".

Proposal Trustee dated September 30, 2011, stated that: (i) Callidus was Encore Sales' principal secured creditor pursuant to a loan agreement dated December 15, 2009, and (ii) on August 3, 2011, Callidus made demand for payment of the outstanding indebtedness in the amount of approximately $16 million.[89]

13. *Loan to Roadtrek Motorhomes Inc.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Roadtrek Motorhomes Inc., a designer and manufacturer of motorhomes, on or around April 26, 2010, and that this security agreement was removed on or around June 29, 2011.[90] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in Roadtrek, and that the document pursuant to which this interest was obtained was executed on or around December 29, 2009.[91] West Face also learned through a press release published by the Gowlings law firm on April 15, 2011 that Roadtrek had completed a recapitalization transaction that involved the establishment of two credit facilities.[92]

14. *Loan to Educator Supplies Ltd.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Educator Supplies Ltd., on or around August 13, 2010.[93]

15. *Loan to Terrace Bay Pulp Inc.*: West Face learned of Callidus' loan to Terrace Bay through the following public sources of information:

89 An excerpt from this report is attached as Exhibit "**75**".

90 A print-out from CIPO's website showing this information is attached as Exhibit "**76**".

91 A print-out from the USPTO's website showing this information is attached as Exhibit "**77**".

92 A copy of this press release is attached as Exhibit "**78**".

93 A print-out from CIPO's website showing this information is attached as Exhibit "**79**".

(i) First, West Face learned of the loan through a press release dated September 24, 2010 published on the website of the Aird & Berlis law firm. This press release stated, in part, that Aird & Berlis had represented Callidus in a $30 million loan to Terrace Bay, which had been in CCAA proceedings since March 2009, and that the financing closed on September 15, 2010;[94] and

(ii) Second, knowing that Terrace Bay had been involved in CCAA proceedings in 2009, West Face was able to locate the webpage maintained by Terrace Bay's court-appointed monitor, Ernst & Young Inc. ("**EY**"), regarding Terrace Bay's CCAA proceedings.[95] This webpage contained links to copies of all of the orders made and materials filed in Terrace Bay's 2009 CCAA proceedings, as well as all of the orders made and materials filed in Terrace Bay's subsequent 2012 CCAA proceedings. These materials were (and remain) available to download from EY's public website.

16. *Loan to T. Litzen Sports Limited (formerly Performance Sports, Inc.)*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with sports equipment company T. Litzen Sports Limited on or around November 18, 2010, and later assigned this agreement to another company on or around July 6, 2011.[96] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in T. Litzen Sports, and that the document pursuant to which this interest was obtained was executed on or around September 29, 2010. The website also indicated that Callidus later

94 A copy of this press release is attached as Exhibit "**80**".

95 <http://documentcentre.eycan.com/Pages/Main.aspx?SID=102>. A screen-shot of this website showing all of the documents available to download is attached as Exhibit "**81**".

96 A print-out from CIPO's website showing this information is attached as Exhibit "**82**".

assigned this security interest through a document executed on or around April 15, 2011.[97]

17. *Loan to Tabi International Corporation*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Tabi, a retail women's clothing store chain, on or around January 19, 2011.[98] West Face learned further details of Callidus' loan to Tabi through the materials filed in connection with Tabi's bankruptcy. These materials were (and remain) available to download from the public website of Farber Financial Group.[99] Among other details of the loan, the First Report of the Proposal Trustee and Proposed Receiver dated February 17, 2011 stated that Callidus "advanced to Tabi a demand loan in a maximum amount of $5,000,000" pursuant to a loan agreement dated October 4, 2010.[100]

18. *Loan to Pon Bicycle I B.V.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with the then-current owner of Cervelo brand bicycles (now Pon Bicycle) on or around February 13, 2012.[101] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in the then-current owner of Cervelo, and that the document pursuant to which this interest was obtained was executed on or around October 6, 2010. The USPTO website also indicated that this security interest was released by Callidus on or around December 21, 2011.[102]

97 A print-out from the USPTO's website showing this information is attached as Exhibit "**83**".

98 A print-out from CIPO's website showing this information is attached as Exhibit "**84**".

99 <http://www.farberfinancial.com/insolvency-engagements/bid/213412/Tabi-International-Corporation>. A screen-shot of this website is attached as Exhibit "**85**".

100 A copy of this report is attached as Exhibit "**86**".

101 A print-out from CIPO's website showing this information is attached as Exhibit "**87**".

102 A print-out from the USPTO website showing this information is attached as Exhibit "**88**".

19. *Loans to Forefront Innovative Technologies Inc.* ("**FIT**") *and Forefront Automation Inc.* ("**FAI**"): West Face learned of Callidus' loans to FIT and its subsidiary FAI through publicly filed reports of Schonfield Inc., the companies' trustee in bankruptcy. Schonfield's report on FIT stated that Callidus was the senior secured creditor of FIT, pursuant to a general security agreement dated October 15, 2010. The report also stated that as at March 1, 2011, Callidus was owed approximately $4 million on its loan to FIT, that the amount owing to Callidus as at FIT's bankruptcy was approximately $975,000, and that there was no expectation of full recovery of this amount to Callidus. Similarly, Schonfield's report on FAI stated that Callidus was also a senior secured creditor to FIT's subsidiary FAI, and was owed approximately $1.4 million at the time of bankruptcy, with no expectation of full recovery to Callidus. Both reports were obtained through searches on Schonfield's public website.[103]

20. *Loan to Sher-wood Hockey Inc.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with hockey equipment company Sher-wood Hockey Inc. on or around August 29, 2014.[104] West Face learned more about this loan through a press release dated September 9, 2014 published on the CNW newswire website announcing that Sherwood Athletics Group Inc. had acquired all of the assets and liabilities of Sher-wood Hockey Inc. from "Callidus Capital Inc."[105] Based on this information, West Face believed that this was the loan identified as being to "Company B" on the chart in Callidus' IPO prospectus, which stated the industry of the borrower as "Sports Supplies Manufacturing". West Face also believed that this was the same loan referred to in note 17 of the notes to Callidus' consolidated financial statements appended to its IPO prospectus. This note stated that during

103 <http://www.schonfeldinc.com/>. Copies of these reports are attached as Exhibit "**89**".

104 A print-out from CIPO's website showing this information is attached as Exhibit "**90**".

105 A copy of this press release is attached as Exhibit "**91**".

2011, Callidus received 100% of the common shares of a borrower in exchange for a loan valued at $12.6 million, and that the borrower "distributes athletic equipment" and was "being held for sale".[106] Furthermore, note 18 of the notes to Callidus' third quarter 2014 financial statements, released in November 2014, provided that the assets of this borrower "were sold to a third-party in September 2014 for an amount equivalent to the carrying value…". This announcement corresponded quite closely to the announcement made by in the CNW press release.[107]

21. *Loan to Kaptor Group entities*: West Face learned the concerning details of Callidus' loan to certain entities within the Kaptor Group from three sources of information:

(i) One, an article published on the Weil Bankruptcy Blog referring to a January 5, 2012 judgment in the case of *Callidus Capital Corp. v. Carcap Inc.*, in which Callidus was successful in its application to appoint a receiver over a member of the Kaptor Group;[108]

(ii) Two, the website maintained by Crowe Soberman, the court-appointed receiver of certain Kaptor Group entities that had gone bankrupt.[109] All of the orders made and materials filed in this bankruptcy proceeding were (and remain) available to download from this website. Among other details of Callidus' loan, these materials indicated that on September 1, 2011, Callidus agreed to extend up to $15 million of credit to two Kaptor Group companies, namely CarCap Inc. and Car Equity Loans Corp. These companies

106 IPO Prospectus, Appendix “D”, at p. 32.

107 An excerpt from Callidus' third quarter financial statements is attached as Exhibit "**92**".

108 A screen-shot of this webpage is attached as Exhibit “**93**”.

109 <https://www.crowehorwath.net/soberman/services/advisory/corporate_recovery_and_turnaround/court_mandated_files__management_centre/kaptor_and_insignia/2025610_ontario_limited,_kaptor_financial_inc_,_and_insignia_trading_inc_.aspx>. A screen-shot of this webpage is attached as Exhibit "**94**".

were placed into receivership on December 14, 2011 and their assets were sold by order of the court on March 13, 2012. The proceeds of sale were used to repay Callidus in full;[110] and

(iii) Three, a report on Callidus published by Dundee Capital Markets on August 27, 2014.[111]

22. *Loan to Natura World Inc.*: West Face learned of Callidus' loan to mattress manufacturer Natura World through the orders made and materials filed in connection with Natura World's Notice of Intention to Make a Proposal pursuant to the BIA. These materials were (and remain) available to download from the website of Farber Financial Group.[112] In particular, the First Report of the Proposal Trustee dated January 5, 2012 disclosed that in or around December 2011, Natura World's then secured creditor assigned its debt and security to Callidus, and that the company filed for protection from its creditors on December 16, 2011. The report listed the debt to Callidus as being approximately $6,096,000.[113] Based on this information, West Face believed that this was the loan identified as being to "Company D" on the chart in Callidus' IPO prospectus, which stated the industry of the borrower as "Mattresses Manufacturer";

23. *Loan to Steels Industrial Products Ltd.*: West Face learned of Callidus' loan to Steels through the orders made and materials filed in connection with Steels' CCAA proceedings. These materials were (and remain) available to download from the website of Alvarez & Marsal Canada Inc.,

110 See, for example, the excerpt from the Affidavit of Robert Grossman sworn April 2, 2012 in support of the appointment of Crowe Soberman as receiver, an excerpt of which is attached as Exhibit "**95**".

111 A copy of this report is attached as Exhibit "**96**".

112 <http://www.farberfinancial.com/insolvency-engagements/bid/213396/Natura-World-Inc>. A screen-shot of this website is attached as Exhibit "**97**".

113 An excerpt from this report is attached as Exhibit "**98**".

who was appointed as Steels' monitor.[114] In particular, the Second Report of the Monitor dated May 1, 2012 indicated the terms on which Callidus was prepared to extend a $12 million facility to Steels as debtor in possession financing.[115] The court approved this financing in its order dated May 4, 2012, and Callidus was subsequently paid out following the court's approval and vesting order of July 30, 2012.[116]

24. *Loan to Dynetek Industries Ltd*: West Face learned about Callidus' loan to Dynetek Industries through a press release dated March 29, 2012 published on the CNW newswire website.[117] Through the press release, Dynetek announced, among other things, that on March 23, 2012 it had closed a transaction with Callidus to refinance its previous credit facility held by a Canadian chartered bank. According to the release, the Callidus facility included a $7.0 million demand revolving loan, a $0.7 million demand non-revolving loan, and a $1.3 million demand non-revolving bridge loan.[118] On September 17, 2012, Dynetek announced in a press release that it had been acquired by Luxfer, a global materials technology company, pursuant to a plan of arrangement. West Face concluded that the loans from Callidus were terminated and/or repaid at that time.[119]

25. *Loan to Bluberi Gaming Technologies Inc.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered security agreements with video game company Bluberi Gaming on or around October 29, 2012 and November 28, 2013.[120] Based on this information, West Face believed that this was the loan identified as being to "Company

114 <https://amdoc-web.sharepoint.com/steels/pages/index.aspx>.

115 An excerpt from this report is attached as Exhibit "**99**".

116 Copies of these orders are attached as Exhibit "**100**".

117 <www.newswire.ca>

118 A copy of this press release is attached as Exhibit "**101**".

119 A copy of this press release is attached as Exhibit "**102**".

120 A print-out from CIPO's website showing this information is attached as Exhibit "**103**".

F" on the chart in Callidus' IPO prospectus, which stated the industry of the borrower as "Gaming Technology". In that chart, Callidus also reported the origination date of the loan as August 31, 2012 and the amount outstanding as approximately $35.9 million.

26. *Loan to Xchange Technology Group LLC*: Through Google site searches of CIPO's website, West Face first learned that Callidus registered a security agreement with Xchange Technology on or around November 20, 2012.[121] West Face learned concerning details about Callidus' loan to Xchange Technology through the orders made and materials filed in its receivership proceedings. These materials were (and remain) available to download from the website of Duff & Phelps,[122] who acted as the company's receiver. Based on the information available to West Face, West Face believed that this was the loan identified as being to "Company G" on the chart in Callidus' IPO prospectus, which stated the industry of the borrower as "Computers and Accessories". Additional details about this loan are set out in Appendix "C".

27. *Loan to Viceroy Homes Limited*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Viceroy Homes Limited on or around April 7, 2014.[123] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in Viceroy Homes and that the document pursuant to which this interest was obtained was executed on or around December 21, 2012. The USPTO website also indicated that Callidus released this security interest through a document executed on or around March 10, 2014.[124] Based on Viceroy Homes' business, West Face

121 A print-out from CIPO's website showing this information is attached as Exhibit "**104**".

122 <http://www.duffandphelps.com/intl/en-ca/Pages/RestructuringCases.aspx?caseId=895>. A screen-shot of this website is attached as Exhibit "**105**".

123 A print-out from CIPO's website showing this information is attached as Exhibit "**106**".

124 A print-out from the USPTO's website showing this information is attached as Exhibit "**107**".

believed that this was the loan identified as being to "Company K" on the chart in Callidus' IPO prospectus, which stated the industry of the borrower as "Custom Home Engineering and Manufacturer". In that chart, Callidus also reported the origination date of the loan as December 21, 2012, and the amount outstanding as approximately $5.6 million.

28. *Loan to St. Raymond Veneers Inc. / The Penrod Company*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with St. Raymond Veneers on or around February 7, 2013, and that this registration was removed on or around January 10, 2014.[125] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in St. Raymond Veneers Inc. and that the document pursuant to which this interest was obtained was executed on or around December 31, 2012.[126]

29. *Loan to C&C Wood Products Ltd.*: Through Google site searches of CIPO's website, West Face learned that Callidus entered into a security agreement with C&C Wood Products on or around February 14, 2013.[127] West Face believed that this was the loan identified as being to "Company M" on the chart in Callidus' IPO prospectus, which stated that this borrower was part of the "Lumber Industry". Callidus has also published the details of its loan to C&C on the case studies section of its public website, indicating that it had provided C&C with $35 million in senior credit facilities.[128]

30. *Loan to Leader Energy Services Ltd.*: Callidus disclosed the details of its loan to Leader Energy on the case studies section of its public website.[129]

125 A print-out from CIPO's website showing this information is attached as Exhibit "**108**".

126 A print-out from the USPTO's website showing this information is attached as Exhibit "**109**".

127 A print-out from CIPO's website showing this information is attached as Exhibit "**110**".

128 A print-out from this section of Callidus' website is attached as Exhibit "**111**".

129 A print-out from this section of Callidus' website is attached as Exhibit "**112**".

Callidus' loan to Leader Energy was also referred to in the August 27, 2014 report by Dundee Capital Markets.[130] Based on Leader Energy's business as a provider of well completion services (including coiled tubing and nitrogen services), West Face concluded that this was the loan identified as being to "Company O" on the chart in Callidus' IPO prospectus, which stated the industry of the borrower as "Coiled tubing and Nitrogen services". Moreover, knowing of the existence of this loan, West Face reviewed Leader Energy's public disclosure documents, and believed it found more information about this loan in Leader Energy's interim financial statements for the first quarter of 2014. In particular, note 8 to these financial statements provided, among other things, that in March 2013, Leader Energy finalized a credit facility with a "Canadian asset-based lender", with an initial term of 12 months with an option to extend for an additional six months, and an interest rate of 18%. Note 13 to these financial statements indicated that in May 2014, Leader Energy and its lender had combined certain loans into a single facility due September 6, 2014 with an outstanding balance of approximately $11.6 million.[131] More recently, Leader Energy disclosed in its interim financial statements for the third quarter of 2014 that the amounts outstanding as at September 30, 2014 amounted to approximately $14.4 million.[132] Additional details about this loan are set out in Appendix "C".

31. *Loan to Quality One Wireless, Inc.*: Through searches on the USPTO website, West Face learned that Callidus has a security interest in Florida-based wireless equipment and service provider Quality One Wireless, Inc., and that this interest was obtained on or around October 7, 2013.[133]

130 The Dundee report was previously attached as Exhibit "**96**".

131 Excerpts from Leader Energy's first quarter 2014 financial statements are attached as Exhibit "**113**".

132 An excerpt from Leader Energy's third quarter 2014 financial statements is attached as Exhibit "**114**".

133 A print-out from the USPTO's website showing this information is attached as Exhibit "**115**".

Based on this information, West Face believed that this was likely the loan identified as being to "Company Q" on the chart in Callidus' IPO prospectus, in which Callidus identified the borrower as being a "Wireless Service provider";

32. *Loan to the Arthon Industries Limited*: West Face learned of Callidus' loan to Arthon Industries through the orders made and materials filed in its CCAA proceedings. These materials were (and remain) available to download from the website of A&M, who was appointed as monitor.[134] Based on the information available to West Face, West Face believe this to be the loan identified as being to "Company S" on the chart in Callidus' IPO prospectus, in which Callidus identified the borrower's business as part of the "Mining and Construction Industry". Additional details about this loan are set out in Appendix "C".

33. *Loan to Smardt Inc.*: Through Google site searches of CIPO's website, West Face learned that Callidus registered a security agreement with Smardt Inc., a seller of air conditioning and refrigeration chillers, on or around February 10, 2014.[135] Through searches of the USPTO website, West Face learned that Callidus recorded a security interest in Smardt, and that the document pursuant to which this interest was obtained was executed on or around January 31, 2014.[136]

34. *Loan to North American Tungsten Corporation Ltd.* ("**NTC**"): Callidus' loan to NTC was referred to in the Dundee Report.[137] West Face learned the details of Callidus' loan to NTC through NTC's public filings on SEDAR. In particular, NTC's financial statements for the three and nine months ended

134 <http://www.alvarezandmarsal.com/arthon-industries-limited-et-al>. A screen-shot of this website is attached as Exhibit "**116**".

135 A print-out from CIPO's website showing this information is attached as Exhibit "**117**".

136 A print-out from the USPTO's website showing this information is attached as Exhibit "**118**".

137 The Dundee report was previously attached as Exhibit "**96**".

June 30, 2014 and 2013 provided that, on May 14, 2014, the company had executed an $11 million loan with Callidus.[138] More recently, NTC's financial statements for the three months ended December 31, 2014 and 2013 indicated that, on December 30, 2014, the company extended the maturity date of the Callidus loan to May 31, 2016, and borrowed additional funds of $3.65 million (raising the total balance to approximately $13.3 million).[139] Additional details about this loan are set out in Appendix "C".

35. *Loan to Manor Resources, LLC.*: Through reverse searches on the USPTO website, West Face learned that Callidus obtained a security interest in Manor Resources, LLC on or around August 18, 2014.[140] Callidus also disclosed the amount of its loan to Manor Resources on the case studies section of its public website, stating that it had provided Manor Resources with an operating line of credit of US$10 million.[141]

36. *Loan to Great Lakes Aviation, Ltd.*: West Face learned of Callidus' loan to Great Lakes Aviation through searches on the SEC's EDGAR database. Specifically, through these searches West Face obtained the company's recent Form 8-K, which stated that Great Lakes Aviation had entered into a loan agreement with Callidus on December 22, 2014, pursuant to which Callidus agreed to make available (i) a $25 million single advance term loan facility, (ii) a revolving loan facility with availability of up to $6 million and (iii) a second revolving loan facility with availability of up to $4 million. Further details about the loan are set out in the Form 8-K.[142]

138 An excerpt from these financial statements is attached as Exhibit "**119**".

139 An excerpt from these financial statements is attached as Exhibit "**120**".

140 A print-out from the USPTO's website showing this information is attached as Exhibit "**121**".

141 A print-out from this section of Callidus' website is attached as Exhibit "**122**".

142 An excerpt from the company's Form 8-K is attached as Exhibit "**123**".

37. *Loan to Netricom Inc.*: Callidus disclosed the details of its loan to Netricom on the case studies section of its public website.[143] Specifically, Callidus stated that it provided a $28 million senior asset-based credit facility for Netricom's acquisition of Prestige Telecom of Montreal. West Faced also learned of Callidus' loan to Netricom through the public website of investment bank Thornhill Investments.[144] The website stated that in January 2012, the "acquisition of Prestige Telecom by Netricom [was] completed with the purchase of Callidus' position and the bank refinancing at cheaper cost".[145]

38. *Loan to Esco Marine*: West Face learned of Callidus' loan to Esco Marine Inc. through an article published on the Trade Winds News website. The article indicated that Callidus has commenced a proceeding against Esco in Southern Texas for $31 million, accusing it and several related companies and executives of "misappropriating collateral on a bridge loan".[146] More recently, West Face retrieved a news article about Callidus' lawsuit from the KRGV.com website.[147] West Face learned additional information about this loan from the documents filed in the Texas proceedings. Additional details about this loan are set out in Appendix "C".

39. *Loan to Midwest Asphalt*: West Face learned of Callidus' loan to Midwest Asphalt through an articled dated January 28, 2015 published on SW

143 A print-out from this section of Callidus' website is attached as Exhibit "**124**".

144 <http://thornhillinvestments.com/en/news>.

145 A print-out from this webpage is attached as Exhibit "**125**". Additional articles related to Prestige Telecom's financial woes are attached as Exhibit "**126**".

146 A copy of this article is attached as Exhibit "**127**".

147 A copy of this article is attached as Exhibit "**128**".

News Media's website.[148] This article stated that Midwest Asphalt had completed a $17.6 million balance sheet recapitalization with Callidus.[149]

40. *Loan to Deepak International*: Finally, West Face first learned of Callidus' loan to Deepak International through Callidus' public filing on SEDAR. Specifically, on February 17, 2015, Callidus filed a document purporting to clarify the terms of the guarantee and indemnity obligations of certain of its funds. In this filing, Callidus referred to a loan by Callidus to Deepak International, and indicated that the current outstanding balance of this loan was approximately $2.6 million. Callidus also disclosed that the terms of this loan provide for interest and fees to accrue and that no cash flow is expected from the borrower until the completion of construction of some kind of facility.[150] West Face learned additional information about this borrower through an article posted on CBC news' website on the same day. That article stated that Deepak International had purchased two empty diamond cutting and polishing plants in Yellowknife, based on the financing received from Callidus. The article also indicated that Deepak International is being sued by the company who arranged for the financing by Callidus.[151] Additional details about this loan are set out in Appendix "C".

148 <http://www.swnewsmedia.com>.

149 A copy of this article is attached as Exhibit "**129**".

150 A copy of Callidus' February 17, 2015 public filing is attached as Exhibit "**130**".

151 A copy of this article is attached as Exhibit "**131**".

APPENDIX "C"

1. In this Appendix, I set out the details of six Callidus loans which in West Face's view are cause for concern to Callidus' investors.

Xchange Technology Group

2. As set out in Appendix "B", West Face learned the details of Callidus' loan to Xchange Technology through the orders made and materials filed in Xchange Technology's receivership proceedings. These materials remain available to download from the website of Duff & Phelps,[152] who acted as the company's receiver. From these materials, West Face learned the following facts.

3. Callidus advanced a one year loan of $22 million to Xchange Technology in October 2012. In February and May 2013, before maturity of the loan, Xchange Technology ran two separate capital raising processes with KPMG and Canaccord Genuity in an attempt to refinance the Callidus loan. Both processes failed. Notably, of the 56 parties contacted in the Canaccord process, only one party proceeded to the due diligence stage, and passed on the opportunity shortly thereafter. Subsequently, the company's founder offered to purchase the company for total consideration of $17 million, which Callidus rejected. This amount would not have permitted Xchange Technology to repay 100% of the principal amount due to Callidus, let alone accrued interest.[153]

[152] <http://www.duffandphelps.com/intl/en-ca/Pages/RestructuringCases.aspx?caseId=895>. A screen-shot of this website was previously attached as Exhibit "**105**".

[153] See the Report of Duff & Phelps as Proposed Receiver dated October 25, 2013, a copy of which is attached as Exhibit "**132**".

4. In October 2013, Callidus commenced a successful receivership application appointing Duff & Phelps as receiver and approving a "stalking horse" sales process for the sale of substantially all of Xchange Technology's business and assets.[154] In his Affidavit filed in support of Callidus' application, Callidus Vice-President Craig Boyer testified that, as part of its review of Xchange Technology's operations, Duff & Phelps prepared a liquidation analysis illustrating "that Callidus will incur a substantial shortfall on its advances … should [Xchange Technology's] business and assets be liquidated".[155] Following its appointment as receiver, Duff & Phelps carried out the sales process. Of 88 prospective purchasers identified by Duff & Phelps, only three executed a confidentiality agreement and gained access to the data room, and no offers were submitted by any of those prospective purchasers.[156]

5. Callidus served as the stalking horse and "credit bid" on Xchange Technology in November 2013 (the purchase price to be paid was to be the Callidus debt less $3 million, plus priority payables).[157] At the time, Callidus was owed approximately $38 million, and Duff & Phelps reported that the Xchange group was "presently not generating sufficient cash flow to service its obligations to Callidus" and that "Callidus has continued to provide advances to the [Xchange Technology] debtors over the last several months".[158] Around the same time period, Triangle Capital, the second lien

154 Report of Duff & Phelps as Proposed Receiver dated October 25, 2013.

155 See the Affidavit of Craig Boyer sworn October 25, 2013, at para. 56, an excerpt of which is attached as Exhibit "**133**".

156 See the First Report of Duff & Phelps as Receiver dated November 19, 2013, pp. 4 – 5, a copy of which is attached as Exhibit "**134**".

157 First Report of Duff & Phelps as Receiver dated November 19, 2013, pp. 5 – 7.

158 First Report of Duff & Phelps as Receiver dated November 19, 2013, p. 9.

creditor of Xchange Technology whose debt was subordinate to Callidus', wrote down their investment of $6.4 million to $0.[159]

6. In April 2014, Callidus completed its IPO, which was led by Canaccord Genuity (the same firm that had led Xchange Technology's refinancing process in May 2013). Callidus made no disclosure in its IPO prospectus about the difficulties regarding this loan, which by that time made up approximately 10% of Callidus' loan book.

7. The transaction still had not closed as at November 7, 2014, when Callidus Executive Chairman and CEO Newton Glassman stated that Callidus did not have a single non-performing loan in its portfolio.

8. Based on a Receiver's Certificate dated January 2, 2015, it appears that the transaction has now been completed.[160] Callidus now presumably owns 100% of the equity and is holding the asset for sale, yet as of the date of swearing this Affidavit, Callidus had not made any additional disclosure regarding this specific loan.

Arthon Industries

9. As set out in Appendix "B", West Face learned the details of Callidus' loan to Arthon Industries through the orders made and materials filed in its CCAA proceedings. These materials remain available to download from the website of Alvarez & Marshall

[159] See Triangle Capital Corporation Form 10-K filed February 26, 2014, p. 67, an excerpt of which is attached as Exhibit "**135**".

[160] A copy of the Receiver's Certificate dated January 2, 2015 is attached as Exhibit "**136**".

("**A&M**"), who was appointed as monitor for Arthon.[161] These materials, and in particular the monitor's reports, set out the following facts.

10. Arthon Industries is the primary holding company for the operating entities of the Arthon Group.[162] While Arthon Industries has a number of subsidiaries and affiliated entities, its four main operating subsidiaries are: (1) Arthon Contractors; (2) Arthon Equipment; (3) Coalmont Energy; and (4) 84% of Sandhill Materials.[163] According to the principal of Arthon Industries, Arthon Contractors is the "active construction arm of the Arthon Group",[164] Arthon Equipment is the owner of the equipment used (and leased) by Arthon Contractors,[165] Coalmont Energy has the rights to operate a coal mine near Tulameen, British Columbia (the "**Coalmont Mine**"),[166] and Sandhill Materials has an acquired title to a major deposit of natural aggregate materials (primarily gravel and sand) in the process of development in Kitimat, BC.[167]

161 <http://www.alvarezandmarsal.com/arthon-industries-limited-et-al>. A screen-shot of this website was previously attached as Exhibit "**116**".

162 See the Affidavit of Kerry Ning Leong sworn November 28 2013, para. 15, a copy of which is attached as Exhibit "**137**".

163 See, for example, the Second Report of the Monitor dated December 17, 2013, paras. 5.1 to 5.2, and Appendix "D" thereto, a copy of which is attached as Exhibit "**138**". See also the Affidavit of Kerry Ning Leong sworn November 28 2013, paras. 3 to 11.

164 Affidavit of Kerry Ning Leong sworn November 28 2013, para. 16.

165 Affidavit of Kerry Ning Leong sworn November 28 2013, para. 17.

166 Affidavit of Kerry Ning Leong sworn November 28 2013, para. 18.

167 Affidavit of Kerry Ning Leong sworn November 28 2013, para. 11.

11. In 2013, Arthon experienced a number of difficulties. Among others, there was a spill of filtercake slurry material from the Coalmont Mine, which resulted in the halt of development of the mine.[168]

12. At the time, the primary secured lender to Arthon was HSBC. Various HSBC facilities were secured and cross-collateralized within the Arthon Group. In late October 2013, HSBC served notices of its intention to enforce its security on the Arthon Group.[169] As a result, various entities within the group, including Arthon Industries, were forced to apply for CCAA protection. A&M was appointed as monitor for these entities on November 29, 2013.[170]

13. In December 2013, Arthon's $47 million loan from HSBC was assigned to Callidus, and Arthon and Callidus entered into a forbearance agreement.[171] Callidus also agreed to provide $5 million in interim financing.[172] Around the same time, MNP was retained to manage a sales process for the Coalmont Mine,[173] and HSBC agreed to provide a $10 million letter of credit in favour of Callidus, to be drawn upon if the Coalmont Mine and related assets of Coalmont Energy were sold for anything less than

168 Affidavit of Kerry Ning Leong sworn November 28 2013, para. 62.

169 Affidavit of Kerry Ning Leong sworn November 28 2013, para. 25.

170 Second Report of the Monitor dated December 17, 2013, para. 1.

171 Second Report of the Monitor dated December 17, 2013, paras. 7.4 to 7.11. See also Third Report of the Monitor dated February 25, 2014, paras. 1.4(b) and 6.1, a copy of which is attached as Exhibit "**139**".

172 Second Report of the Monitor dated December 17, 2013, para. 7.7 to 7.9; Third Report of the Monitor dated February 25, 2014, paras. 6.1 to 6.8.

173 Second Report of the Monitor dated December 17, 2013, para. 8.1; Third Report of the Monitor dated February 25, 2014, paras. 1.4, and 7.1 to

net proceeds of $10 million.[174] Concurrently, Great West Equipment was retained to manage a parallel sales process to sell approximately 100 pieces of heavy equipment owned by Arthon, on a consignment basis. The equipment had been rendered "redundant" as a result of the inactivity of the Coalmont Mine.[175]

14. According to the Third Report of the Monitor dated February 25, 2014, 77 potential purchasers/investors were contacted by MNP with respect to the sales process of the Coalmont Mine, and non-binding letters of intent were received from certain interested parties.[176] However, A&M had conducted an analysis of possible asset values, and concluded that: "the two key assets that will impact the exposure of Callidus and HSBC are the Coalmont Mine and the Sandhill property" and that "it does not appear likely that [the Coalmont Mine] will generate sufficient proceeds to retire the claims of both HSBC and Callidus".[177] It appeared de minimis value was attributed to Arthon Contractors. Notably, by that time Callidus' advances to the Arthon Group totalled approximately $56.8 million.[178]

15. Arthon failed to negotiate a sale of the Coalmont Mine, and in April 2014 advised A&M that it planned to "revise the focus of its immediate restructuring efforts away from a sale of all or part of the Coalmont Mine".[179] Instead, the company turned its attention

174 Second Report of the Monitor dated December 17, 2014, para. 7.5

175 Second Report of the Monitor dated December 17, 2014, paras. 9.1 and 9.2; Third Report of the Monitor dated February 25, 2014, paras. 7.7 to 7.9.

176 Third Report of the Monitor dated February 25, 2014, para. 7.2.

177 Third Report of the Monitor dated February 25, 2014, para. 8.10.

178 Supplement to the Third Report of the Monitor dated February 26, 2014, para. 3.1, attached as Exhibit "**140**".

179 Fourth Report of the Monitor dated April 11, 2014 at para. 1.6, attached as Exhibit "**141**".

to: (i) preserving the Coalmont Mine for potential operation or sale at a later date; (ii) continuing to sell the redundant equipment; and (iii) pursuing a refinancing and/or sale of all or part of Sandhill Materials.[180]

16. In that regard, in May 2014 the Arthon Group presented analyses to A&M indicating that Sandhill Materials would garner more value for its stakeholders if it was further developed rather than sold immediately in its then-undeveloped state. The company further advised that it was in advanced negotiations for the pre-sale of a large volume of aggregates to an international organization looking to develop a liquid natural gas terminal in Kitimat, British Columbia.[181] However, at the same time, A&M concluded that the "nature of the assets of Sandhill [Materials] pose significant challenges in estimating realizations that may be achieved depending upon the monetization approach and timelines adopted".[182] By that time, equipment sales totalled $5.6 million, and (following repayments to Callidus from the proceeds of such equipment sales), total amounts due to Callidus were approximately $48.2 million.[183]

17. The Arthon Group subsequently engaged MNP to assist with developing and monetizing Sandhill Materials. According to the Sixth Report of the Monitor dated July 22, 2014, MNP had identified 51 prospective investors, customers or purchasers, and had received confidentiality agreements from 11 parties (although letters of intent were

180 Fourth Report of the Monitor dated April 11, 2014, at para. 1.6.

181 Fifth Report of the Monitor dated May 6, 2014, at paras. 6.4 to 6.9, attached as Exhibit "**142**".

182 Fifth Report of the Monitor dated May 6, 2014, at para. 6.19.

183 Fifth Report of the Monitor dated May 6, 2014, at paras. 7.2 and 9.8 to 9.9.

not yet due).[184] While equipment sales totalled approximately $6 million for the 25 pieces sold by that date, the company indicated that it would consider reducing the list prices of the equipment in order to expedite further sales and meet the scheduled principal repayments provided for in the forbearance agreement with Callidus. As at July 22, 2014, total amounts due to Callidus were approximately $52.5 million.[185]

18. Around the same time, Callidus drew down on the $10 million letter of credit issued by HSBC as a result of the failed sales process for the Coalmont Mine.[186]

19. Progress on MNP's efforts to develop and monetize Sandhill Materials was largely redacted from the Seventh Report of the Monitor dated October 29, 2014, although it appeared to West Face that some progress had been made on the pre-sale of aggregates. More concerning, however, was the status of equipment sales. By the end of October 2014, the equipment sales process had resulted in total net proceeds of $6 million, on sales of 28 pieces of equipment. The company advised that it would no longer focus on sales of equipment.[187] Total amounts due to Callidus at that time were approximately $44.6 million, although a further advance of $10 million to Sandhill Materials was being negotiated.[188]

20. In summary, in the Fall of 2014, Callidus had approximately $45 million due from the Arthon Group (with another $10 million advance being negotiated), yet the group's

184 Sixth Report of the Monitor dated July 22, 2014, at paras. 6.3 to 6.4, attached as Exhibit "**143**".

185 Sixth Report of the Monitor dated July 22, 2014, at paras. 6.15 to 6.17.

186 Seventh Report of the Monitor dated October 29, 2014, at para. 8.5, attached as Exhibit "**144**".

187 Seventh Report of the Monitor dated October 29, 2014, at paras. 6.10 to 6.12.

188 Seventh Report of the Monitor dated October 29, 2014, at paras. 8.3 to 8.6.

only assets of value were two development stage projects: the Coalmont Mine and Sandhill Materials. As set out above, the sales process for the Coalmont Mine had failed, and Sandhill Materials required approximately $25 to $30 million in additional capital to develop.[189] By that time, Callidus had not made any disclosures regarding impairment of this loan.

21. More recently, in the Eleventh Report of the Monitor dated January 27, 2015, A&M reported that Arthon's debt to Callidus totalled $53.8 million at the time.[190]

Leader Energy Services

22. As set out in Appendix "B", West Face learned the details of Callidus' loan to Leader Energy from a variety of public sources, including Callidus' own website and Leader Energy's public disclosure. A review of the history of Callidus' loan to Leader Energy gives cause for concern.

23. According to its public website, Leader Energy provides well completion services in the Canadian energy sector.[191] This sector has been adversely affected by the recent precipitous decline in oil prices. Moreover, a review of Leader Energy's financial statements indicates that the company has generated little cash flow and EBITDA over the last several years.

189 According to a District of Kitimat Investment Summary prepared by the district's Economic Development Department, a copy of which is attached as Exhibit "**145**".

190 Eleventh Report of the Monitor dated January 27, 2015, at paras. 1.7 and 4.11, attached as Exhibit "**146**".

191 <http://www.leaderenergy.com//index.php>.

24. On March 6, 2013, Leader Energy announced in a press release that it had "entered into a credit facility with a private Canadian asset-based lender". The release stated that the credit facility included a demand revolving facility of up to $4 million, and a one year demand non-revolving loan of up to $12 million. The release also noted that while the facility carried a "significantly higher borrowing cost than a conventional bank facility", it had "no financial covenants".[192] This information matched the other public sources of information set in Appendix "B", and West Face concluded that this was the loan from Callidus.

25. On October 31, 2013, Leader Energy announced in a press release that it had obtained an additional $1 million demand non-revolving single advance loan repayable January 31, 2014 from its "current lender". The company also announced that the terms of its demand revolving facility (of up to $4 million) and its demand non-revolving loan (of up to $12 million) had been extended for an additional six months to September 6, 2014.[193]

26. In March 2014, Leader Energy announced that it had increased the size of its demand revolving facility from $4 million to $5 million.[194]

27. On August 28, 2014, Leader Energy released its financial and operating results for the second quarter of 2014. According to its press release, the company was actively selling assets, and was being sued for $7 million following its default on a lease

[192] A copy of this press release is attached as Exhibit "**147**".

[193] A copy of this press release is attached as Exhibit "**148**".

[194] A copy of this press release is attached as Exhibit "**149**".

of a vacant facility in Alberta. The company also announced that it had combined its $1 and $12 million facilities into a demand non-revolving single advance term loan, and that the balance outstanding on this loan was $11.4 million, due September 6, 2014. Leader Energy further disclosed that it was "over advanced" on its demand revolving facility by approximately $0.85 million and was "working with its lender on a six-month extension".[195]

28. On February 19, 2015, Leader Energy filed a Notice of Intention to Make a Proposal pursuant to the BIA.[196] To my knowledge, Callidus has not provided any further disclosure on these facilities. In particular, Callidus has offered no information on when or how its outstanding and overdue loans to Leader Energy might be paid, nor has it disclosed any impairment or default on these loans.

North American Tungsten

29. As set out in Appendix "B", West Face learned the details of Callidus' loan to North American Tungsten through the latter company's public filings on SEDAR. These materials provide as follows.

[195] A copy of this press release is attached as Exhibit "**150**".

[196] A copy of this press release is attached as Exhibit "**151**".

30. North American Tungsten is engaged in tungsten mining. Its primary assets are the Cantung mine in the Northwest Territories and the Mactung mineral property in Yukon.[197]

31. According to the company's most recently filed technical report on the Cantung mine (dated September 19, 2014), the mineral reserves of the Cantung mine support a mine life through to only 2017-2018.[198] The mine also faces significant reclamation liabilities related to anticipated closure costs of the mine.[199]

32. The Mactung property is a pre-development asset that has only recently passed its environmental assessment from the Yukon Environmental and Socio-economic Assessment Board. To date, North American Tungsten has been unable to develop strategic alternatives to finance the estimated capital cost of over $400 million to develop the project based on an April 2009 technical report.[200] The company has not conducted an updated feasibility study since April 2009.

33. North American Tungsten has historically not generated any free cash flow and its only operating asset, the Cantung mine, is approaching the end of its economic life. While Callidus' loan is secured, the security is over all assets of the company *excluding* the Mactung property, certain accounts receivable, and all mining and mineral leases,

197 See, for example, North American Tungsten's Unaudited Interim Consolidated Financial Statements for the Three and Nine Months Ended June 30, 2014 and 2013, excerpts of which are attached as Exhibit "**152**".

198 See North American Tungsten Technical Report on the Cantung Mine, Northwest Territories (NI 43-101), at pp. 16-26 to 16-27, excerpts of which are attached as Exhibit "**153**".

199 North American Tungsten Technical Report on the Cantung Mine, Northwest Territories (NI 43-101), at pp. 20-1 to 20-2.

200 See North American Tungsten Technical Report on the Mactung Property, Yukon (NI 43-101), at p. 1-10, excerpts of which are attached as Exhibit "**154**".

claims and tenures.[201] In West Face's experience, North American Tungsten's assets over which Callidus has security would not realize full book value on a liquidation of the company.

Esco Marine

34. As set out in Appendix "B", West Face learned the concerning details of Callidus' loan to Esco Marine through public court proceedings between Callidus and Esco. These materials provide as follows.

35. Esco is a marine yard based in Brownsville, Texas. It specializes in recycling metals and the proper disposal of obsolete maritime vessels. According to Callidus' motion materials, Callidus and Esco entered into a loan agreement on June 30, 2014, pursuant to which Callidus agreed to lend up to a maximum of $34 million. The loan took the form of a borrowing base facility in conjunction with several other facilities. Because Esco was in severe financial distress, a "Blocked Account" was set up, into which Esco was obligated to deposit all funds from all sources. All funds deposited into the Blocked Account would be the property of Callidus.[202]

36. On the closing date of the loan, Callidus refused to advance $3.5 million of the total loan amount. Callidus also refused to advance amounts based under a borrowing

201 North American Tungsten's Unaudited Interim Consolidated Financial Statements for the Three and Nine Months Ended June 30, 2014 and 2013, at p.9.

202 See Callidus' Motion for Temporary Restraining Order and Preliminary Injunction, pp. 1-4, a copy of which is attached as Exhibit "**155**".

base facility. According to Esco, this meant that it could not pay down the overdue payables, making it difficult for Esco to pay essential operating expenses.[203]

37. Eventually, in November 2014, Esco resorted to diverting funds away from the Blocked Account in order to pay amounts due to critical vendors and employees. Callidus alleges that this act constituted theft, and in December 2014, Callidus filed a temporary restraining order and preliminary injunction against Esco in order to protect its collateral.[204]

38. There are essentially two versions of the truth being alleged in the lawsuit: (a) Esco alleges that Callidus premeditatedly refused to advance the full loan amount in order to accelerate Esco's insolvency; (b) Callidus alleges that Esco was misappropriating funds.

39. As of February 11, 2015, Callidus' borrowing base facility had a collateral deficit of $6 million, which has consistently grown more negative week to week.[205] Esco also currently has a negative shareholders' equity balance, which means that the net book value of its assets is less than debt outstanding to Callidus based on a Duff & Phelps report dated August 27, 2014.[206] In a liquidation, we are highly confident that Esco would be sold at a discount to the net book value of its assets, which would result in impairment in the Callidus loan.

[203] See Esco's Response to Plaintiff's Motion for Preliminary Injunction, at p. 5, a copy of which is attached as Exhibit "**156**".

[204] Callidus' Motion for Temporary Restraining Order and Preliminary Injunction, pp. 1-4

[205] See Callidus' Supplemental Update Regarding Plaintiff's Motion for Preliminary Injunction, a copy of which is attached as Exhibit "**15**7".

[206] A copy of the Duff & Phelps report is attached as Exhibit "**158**".

40. Regardless of which party's allegations are correct, it is apparent that Esco is in extreme financial distress. Indeed, Callidus itself has alleged that Esco is incapable of paying a monetary judgment.[207]

Deepak International

41. As set out in Appendix "B", West Face first learned of Callidus' loan to Deepak International through Callidus' recent public disclosure on February 17, 2015, as well as the CBC article which referred to the lawsuit against Deepak by the financial advisor who brokered the Callidus loan. West Face has since learned the following additional facts about this loan.

42. On January 7, 2013, the Government of the North West Territories ("**GNWT**") granted Deepak International with "Approved NWT Diamond Manufacturer" ("**ANDM**") status. This enabled Deepak to purchase a portion of the territory's rough diamond production. At the same time, Deepak was in the process of acquiring two GNWT-owned buildings in Yellowknife and the lease of related airport lands as the site of its diamond manufacturing operations.[208]

43. According to the Statement of Claim filed against Deepak by its financial advisor Chippingham Financial Group, on April 21, 2014, Callidus and Deepak sign a term sheet providing for a loan of up to $20.5 million.[209]

207 See Callidus' Emergency Motion for Reconsideration of Order Denying Temporary Restraining Order, p. 3, attached as Exhibit "**159**".

208 A copy of a news article reflecting this information is attached as Exhibit "**160**".

209 A copy of this Statement of Claim is attached as Exhibit "**161**".

44. After 18 months, in June 2014, Deepak finally closed on acquiring the buildings in Yellowknife for $1.9 million.[210]

45. As set out in Appendix “B”, on February 17, 2015, Callidus disclosed that it was owed $2.6 million by Deepak and that “no cash flow is expected … until construction of a facility is completed”. [211]

46. After more than 2 years after ANDM status was received, there is currently no timeline for when construction will begin, much less when the company will start to produce cash flow. The state of Deepak’s website also suggests that the company may not have any operations.[212]

210 A copy of a CBC news article disclosing this information is attached as Exhibit “**162**”.

211 A copy of Callidus’ February 17, 2015 public filing is attached as Exhibit "**130**".

212 A screen-shot of this website is attached as Exhibit “**163**”.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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Court of Appeal File No.
Court File No. CV-14-507120

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

APPELLANT'S CERTIFICATE

The Appellant certifies that the following evidence is required for the Appeal, in the Appellant's opinion:

1. Motion Record;
2. Supplementary Motion Record;
3. Second Supplementary Motion Record;
4. Responding Motion Record of the Defendant West Face Capital Inc. (4 volumes);
5. Supplementary Motion Record of the Defendant West Face Capital Inc.;
6. Responding Motion Record of the Defendant Brandon Moyse;
7. Supplementary Responding Motion Record of the Defendant Brandon Moyse; and
8. Joint Supplementary Responding Motion Record.

July 22, 2015

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Court of Appeal File No.
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

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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

CERTIFICATE OF COMPLETENESS

I, Andrew Winton, lawyer for the Plaintiff, certify that the appeal book and compendium in this appeal is complete and legible.

September 21, 2015

Andrew Winton

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Court File No. C60799

ONTARIO
COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
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