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

PLAINTIFF'S FACTUM
(MOTION FOR INTERIM RELIEF)

June 29, 2014

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco DiPucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

TO: **GROSMAN GROSMAN & GALE LLP**
Barristers and Solicitors
390 Bay Street
Suite 1100
Toronto ON M5H 2Y2

Jeff C. Hopkins
Tel: (416) 364-9599
Fax: (416) 364-2490

Justin Tetreault
Tel: (416) 364-9599
Fax: (416) 364-249

Lawyers for the Defendant,
Brandon Moyse

AND TO: **DENTONS CANADA LLP**
Barristers and Solicitors
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Jeff Mitchell
Tel: (416) 863-4660
Fax: (416) 863-4592

Andy Pushalik
Tel: (416) 862-3468
Fax: (416) 863-4592

Lawyers for the Defendant,
West Face Capital Inc.

PART I - INTRODUCTION

1. This is a motion to prevent Catalyst's former investment analyst from unlawfully and unfairly competing with Catalyst and from misusing Catalyst's highly confidential information.

2. The defendant Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014. Immediately after the effective date of Moyse's resignation from Catalyst, he began working for Catalyst's competitor, the defendant West Face Capital Inc. ("West Face").

3. The evidence summarized below presents a strong *prima facie* case that Moyse misappropriated Catalyst's confidential information prior to tendering his resignation. Evidence of Moyse's conduct is set out in the affidavits of James A. Riley ("Riley"), Catalyst's Chief Operating Officer, and Martin Musters ("Musters"), a forensic IT expert whom Catalyst retained after Moyse and West Face refused to preserve the *status quo* pending the hearing of this dispute.

4. The forensic IT evidence reveals that while he was seeking employment at West Face, Moyse began to access confidential files that lay outside his area of responsibility. Moreover, Moyse accessed several files in a brief period of time, which leads Musters to conclude that Moyse was very likely transferring these files to his personal Internet file storage accounts, one of which had a "Catalyst Capital" folder.

5. As one of only two investment analysts at Catalyst, Moyse was privy to Catalyst's most sensitive confidential information concerning existing and upcoming investments. In particular, Moyse was working on a major investment opportunity for Catalyst that West Face is also exploring (the "Telecom Situation", described below).

6. Catalyst is vulnerable to unfair competition from Moyse through his immediate employment at West Face. Unless Moyse is prevented from breaching his continuing obligations to Catalyst, it will suffer irreparable and incalculable harm which cannot be quantified by way of damages.

7. At this stage of the proceeding, interim relief is warranted to preserve the *status quo* between the parties which existed before Moyse and West Face decided, on short notice to Catalyst, to proceed with Moyse's employment before the dispute between the parties could be brought before the Court.

PART II - SUMMARY OF FACTS

A. Special Situations for Control or Influence Investments

8. Catalyst is an investment firm that is considered a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations for control". In Canada, the "special situations" industry is small, and the "special situations for control" industry is even smaller. In a "special situation for control" investment, an investor attempts to acquire a sufficient amount of debt or equity in a situation to gain control or influence at a company in order to provide direction operational and/or strategic guidance. [1]

9. In this industry, confidential information is crucial to the successful implementation of an investment plan to capitalize on a special situation. Catalyst invests for an average of three to five years in a business, sometimes substantially longer. It therefore spends substantial time studying opportunities and planning its investment strategy before it decides to pursue a particular situation. If a competitor learns of the opportunities Catalyst is considering or studying, the investment

[1] Affidavit of James A. Riley, sworn June 26, 2014 ("Riley Affidavit"), ¶2-5; Motion Record ("MR"), Tab 2, pp. 10-11.

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, it can "scoop" the opportunity by acquiring the control position that Catalyst intended to acquire, or it can profit from the situation by "front-running" on the investment, which would make it impossible or more expensive for Catalyst to execute its strategy.[2]

10. There are very few investment firms in Canada that invest in special situations for control or influence. One of Catalyst's few competitors in Canada is West Face.[3] Notably, West Face launched a new special situations investment fund in December 2013.[4]

B. Catalyst's Staffing Model and 60/40 Scheme for Employees

11. Catalyst uses a flat, entrepreneurial staffing model and employs only two investment analysts, who are given a lot of training, autonomy and responsibility as compared to their peers. Moyse was employed as an investment analyst at Catalyst pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement") until his resignation effective June 22, 2014.

12. In addition to his base salary and annual bonus, Moyse participated in Catalyst's "60/40 Scheme," whereby sixty per cent of the carried interest from Catalyst's investment funds is allocated to the professionals who participated on the deals made by the fund. The 60/40 Scheme is

[2] Riley Affidavit, ¶7-8; MR, Tab 2, p. 12.
[3] Riley Affidavit, ¶21; MR, Tab 2, p. 16.
[4] Exhibit "B" to the Riley Affidavit; MR, Tab 2-B, p. 43.

unique to Catalyst and gives its employee professionals a partner-like interest in the success of the company. In Moyse's case, his equity compensation exceeded his base salary and annual bonus.[5]

13. The Employment Agreement contains three restrictive covenants: a non-compete clause (the "Non-Compete Covenant"), a non-solicit clause and a confidentiality clause (the "Confidentiality Covenant") (together, the "Restrictive Covenants"). The Non-Compete Covenant and Confidentiality Covenant at issue in this motion are reproduced below for ease of reference:

> 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];
>
> 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

[5] Riley Affidavit, ¶11-16; MR, Tab 2, pp. 13-14.

> 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].[6]

14. By virtue of his position, Moyse had access to Catalyst's confidential information about its existing and prospective investments, including, among other things, through his participation at Catalyst's regular Monday morning meetings, during which Catalyst's professionals review current and prospective special situations.[7]

15. In particular, Moyse was working extensively on the Telecom Situation, a highly confidential opportunity in the telecommunications industry that Catalyst had been considering for several years. If Catalyst's plans for the Telecom Situation were disclosed to West Face, it would cause immeasurable damage to Catalyst's good will and give rise to incalculable losses.[8]

---

[6] Sections 8 and 10 of the Employment Agreement dated October 1, 2012, Exhibit "A" to the Riley Affidavit (the "Employment Agreement"); MR, Tab 2-A, pp. 37-38.
[7] Riley Affidavit, ¶31; MR, Tab 2, p. 18.
[8] Riley Affidavit, ¶30; MR, Tab 2, p. 18.

D. Moyse Resigns from Catalyst to Work at West Face

16. On March 27, 2014, Moyse had coffee with Tom Dea, a partner at West Face ("Dea"). In an email to a colleague, Moyse wrote that he had an "interesting conversation" with Dea.[9]

17. Based on a forensic review of Moyse's work computer, Catalyst believes that between March 27 and May 15, 2014, Moyse met with and exchanged emails with Dea and others at West Face relating to Moyse's move from Catalyst to Weset Face.[10]

18. On May 15, Dea checked Moyse's personal references and on May 19, he offered Moyse a job. Moyse told a colleague by email that day that we was "pretty excited".[11]

19. Five days later, while he was away on vacation, Moyse gave Catalyst notice of his resignation by email, effective June 22, 2014.[12] Catalyst later learned that Moyse had resigned to go work at West Face.[13]

20. Between May 30 and June 19, 2014, counsel for the parties exchanged correspondence and communicated by telephone. Catalyst's counsel tried, but failed, to get the defendants' counsel to agree to terms which would avoid the need for litigation. In this exchange of correspondence, Moyse's counsel acknowledged that Moyse was aware of up to five of Catalyst's potential investment opportunities, which represents over twenty-five percent of the deals Catalyst would make over the life of an investment fund.[14]

---

[9] Email from Moyse dated March 27, 2014, Riley Affidavit, Exhibit "C"; MR, Tab 2-C, p. 46.
[10] Riley Affidavit, ¶26; MR, Tab 2, p. 17.
[11] Email from Moyse dated May 19, 2014, Riley Affidavit, Exhibit "G"; MR, Tab 2-G, p. 60.
[12] Email from Moyse dated May 24, 2014, Riley Affidavit, Exhibit "H"; MR, Tab 2-H, p. 62.
[13] Riley Affidavit, ¶29; MR, Tab 2, p. 18.
[14] Paragraphs 40 and 42 of and Exhibits "I", "J", "K" and "L" to the Riley Affidavit; MR, Tabs 2, 2-I, 2-J, 2-K and 2-L, pp. 21 and 64-76.

21. On June 19, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. Moyse and West refused to preserve the *status quo* while Catalyst sought to enforce the Restrictive Covenants. On June 24, West Face rebuffed Catalyst's efforts to negotiate a resolution, following which Catalyst commenced this action and brought a motion for injunctive relief.[15]

C. Moyse Reviewed and Likely Took Catalyst's Confidential Information

22. Shortly after learning on June 19 that Moyse intended to commence employment at West Face before the parties could negotiate a resolution of their dispute, Catalyst retained Musters to perform a forensic review of Moyse's work computer. The following facts became known to Catalyst as a result of Musters' review.

23. On March 28, 2014, the day after Moyse met Dea for coffee and had an "interesting conversation," Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time period when Catalyst was active in an investment in Stelco, in which Catalyst and West Face were in direct competition. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.[16]

24. On April 25, 2014, Moyse reviewed dozens of riles related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse

[15] Paragraph 47 of and Exhibits "M", "N" and "O" to the Riley Affidavit; MR, Tabs 2, 2-M, 2-N and 2-O, pp. 22 and 78-83.
[16] Riley Affidavit, ¶55-57 and Exhibit "R"; MR, Tabs 2 and 2-R, pp. 24-25 and 91-93.

would review these documents, which he did in an insufficient amount of time to read the material he was accessing.[17]

25. On the evening of May 13, 2014, Moyse:

(a) Accessed documents related to an opportunity Catalyst was studying, but which Moyse was not working on, which were apparently stored on his "Dropbox" account (described below); and

(b) Accessed several files related to the Telecom Situation in less than twenty-five minutes.[18]

26. In both cases, the period during which Moyse was reviewing these documents was insufficient to actually read the documents.

27. Catalyst also learned that Moyse had accounts with two Internet-based file-storage services, "Dropbox" and "Box". These services enable users to create a folder on their computer which is synchronized over the Internet so that it files stored in the folder can be viewed from any computer with an Internet connection. The services are capable of moving large amounts of data in a relatively brief period of time without leaving a record of the activity. Notably, Moyse's "Box" account had a directory entitled "Catalyst Capital".[19]

28. In all four of the situations described above, Moyse's conduct of reviewing several documents over a relatively brief period of time is consistent with transferring files to his Dropbox or Box account. Musters' opinion is that Moyse was very likely transferring the documents from Catalyst's computers to his Dropbox or Box accounts.[20]

---

[17] Riley Affidavit, ¶58-59 and Exhibit "S"; MR, Tabs 2 and 2-S, pp. 25 and 95-96.
[18] Riley Affidavit, ¶60-63 and Exhibits "T" and "U"; MR, Tabs 2, 2-T and 2-U, pp. 25-26 and 98-104.
[19] Affidavit of Martin Musters, sworn June 26, 2014 ("Musters Affidavit"), ¶8-10 and Exhibit "B"; MR, Tabs 3 and 3-B, pp. 110 and 119.
[20] Musters Affidavit, ¶17; MR, Tab 3, p. 111.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

29. An injunction may be granted by a judge where it appears just or convenient to do so. Such an order may include such terms as are just.[21] The test for injunctive relief (the "*RJR* Test") asks:

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

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

(iii) Does the balance of convenience favour granting the injunction?[22]

30. In the circumstances, all aspects of the *RJR* Test are met. The evidence shows that Moyse is in clear breach of the Restrictive Covenants and that he breached his duty of confidence to Catalyst.

A. Catalyst has Established a Strong *Prima Facie* Case

31. The first part of the *RJR* Test requires the moving party to establish that the underlying action is neither vexatious nor frivolous.[23] As explained by Sharpe J. (as he then was) in *Omega Digital v. Airos Technology*:

> 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, 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".[24]

---

[21] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 40.01.
[22] *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at ¶49 ("*RJR*").
[23] *RJR* at ¶50.
[24] *Omega Digital Data Inc. v. Airos Technology Inc.*, [1996] O.J. No. 5382 at ¶10 (Gen. Div.) ("*Omega Digital*").

32. Sharpe J. described the necessity of this low threshold in light of the evidentiary challenges facing moving parties in cases involving confidential business information, on reasoning applicable to any scenario in which the actions of the defendants are only directly known by them:

> …misuse [of confidential information] 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.[25]

1) Breach of Non-Competition Covenant

33. Catalyst has established a strong *prima facie* case that Moyse breached the Non-Compete Covenant to which he contractually agreed as a condition of his employment. In the Employment Agreement, Moyse agreed, among other things, not to engage in or render any services to a party with an economic interest in or any business or undertaking of the type conducted by Catalyst.

34. It is clear that by June 24, 2014, when it was evident he had commenced employment at West Face, Moyse breached the Non-Compete Covenant. The issue the Court will determine at the interlocutory injunction is whether the Non-Competition Covenant is enforceable.

35. While covenants in restraint of trade generally are unenforceable as contrary to the public interest, reasonable restrains of trade may be enforceable. The reasonableness of restrictive covenants have been recognized in two circumstances: (i) covenants which restrain competition by an employee with his former employer; and (ii) covenants which restrain the vendor of a business

[25] *Omega Digital* at ¶20.

from competing with its purchaser.[26]

36. The validity of a restrictive covenant of employment, as in the current case, 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, Moyse) bears the onus of proving that a covenant that is reasonable between the parties is contrary to the public interest.[27]

37. Reasonableness is to be determined from the peculiar circumstances of a particular case. Circumstances are of infinite variety – other cases may help enunciate general principles but are otherwise of little assistance. In determining what is "reasonable" in a particular case, the Court should not lift the restrictive covenant out of an employment agreement and examine it in a disembodied manner. Rather, the validity of the restrictive covenant can only be determined upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.[28]

38. The examination of reasonableness of a restrictive covenant often focuses on whether an employer has over-reached in attempting to protect its interests. The Court usually considers the extent of the activity sought to be prohibited and the extent of the temporal and geographical restrictions.[29]

39. In *Dent Wizard*, Justice David Brown held that where the nature of employment may result in the employee gaining significant influence over the employer's customers, a non-solicitation

---

[26] *The Dent Wizard (Canada) Ltd. et al. v.Catastrophe Solutions International Inc.*, 2011 ONSC 1456 at ¶10 ("*Dent Wizard*").
[27] *Ibid.*
[28] *Ibid.*, at ¶11, quoting from *Elsey v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916, at 923-24.
[29] *Dent Wizard* at ¶16.

covenant might be inadequate to protect the employer's interest and a non-competition clause would be reasonable.[30] It is submitted the same principle applies to the potential harm arising from misuse of confidential information – namely, there may be circumstances where the advantage gained by the employee from access to and potential misuse of confidential information such that a confidentiality covenant may be inadequate to protect the employer's interest.

40. In this case, each of the factors and principles summarized above support the enforcement of the Non-Competition Covenant pending the determination of an interlocutory injunction. In particular, consideration must be given to the unique needs of the "special situations investments for control" industry, which is highly specialized and in which confidentiality is at the core of the industry's way of operating. Moreover, there are very few competitors seeking out the same opportunities and a competitor can block, scoop, or front-run a competitor's investment opportunities without detection, thereby rendering confidentiality restrictions incapable of protecting a company's interests without the added protection of a non-competition restriction.

41. Moreover, in looking at the Non-Compete Clause in the context of the entire Employment Agreement, and not just in isolation, it is notable that Catalyst offered, and Moyse accepted, equity-like compensation to Moyse in exchange for his services and his agreement to the Restrictive Covenants. Having accepted the benefit of equity-like participation in Catalyst's success, Moyse now seeks to avoid the corresponding burden of avoiding competing against Catalyst in Toronto during the six-month period following his resignation.

[30] *Dent Wizard* at ¶17.

i) The Scope of Prohibited Activities is Neither Vague nor Unreasonable

42. The Non-Competition Covenant precludes Moyse from engaging in "any business or undertaking of the type conducted by" Catalyst. This is common language in a non-competition provision and courts have consistently upheld such terms and have had no issue finding covenants prohibiting engaging in work similar to a business to be clear and unambiguous.[31]

43. In *GDL Solutions Inc. v. Walker*, Justice C. Brown considered similar language in a non-competition provision. Her Honour concluded the provision used plain language, was not vague, and was enforceable. In *GDL*, as in this case, the employee was able to interpret the scope of the prohibited activities by identifying a competitor to the former employer.[32]

44. In the current case, there is no doubt that Moyse knew, even before he met with Dea in March 2014, that West Face was a competitor to Catalyst. He acknowledged this in an email he sent to a colleague in February 2013, approximately three months after he commenced employment at Catalyst.[33] Thus, as in *GDL*, it does not lie in Moyse's mouth to now claim that the scope of the prohibited activities is vague or ambiguous.

45. Moreover, the scope of the prohibited activities does not prevent Moyse from immediately taking the skills he acquired at Catalyst to another employer in the wider investment industry. It only prevents him from taking them to a direct competitor in the narrow, but highly competitive industry of special situations investing for control. Moyse could immediately begin working at a less specialized investment firm, where he would not be directly competing with Catalyst in the special situations for control market. Instead, Moyse chose to pursue immediate employment at one of the few companies in Toronto that he knew directly competed with Catalyst.

---

[31] *Doerner v. Bliss and Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 at 868 and 872; *GDL* at ¶63.
[32] *GDL* at ¶59-63.
[33] See Exhibit "D" to the Riley Affidavit; MR, Tab 2-D, p. 48.

ii) The Area of Prohibition is Reasonable

46. In deciding the reasonableness of the geographic scope of a restrictive covenant, a court will assess the extent of the employer's "protectable business operations".[34]

47. The Non-Competition Covenant is restricted to Toronto, which is where Catalyst's competitors are principally based.[35] Prior to joining Catalyst, Moyse worked in the New York City area.[36] Thus, the Non-Competition Covenant does not prevent Moyse from working in the area where he worked immediately prior to joining Catalyst, nor does it prevent him from working in other cities within Canada. It is clearly reasonable in the circumstances.

iii) The Duration of Prohibition is Reasonable

48. The duration of the prohibition in the Non-Competition Covenant is six months following the date on which Moyse ceases to be an employee of Catalyst by reason of resignation or termination for cause. The duration is reduced to three months if Moyse's employment is terminated by Catalyst without cause.

49. It is undisputed that Moyse resigned effective June 22, 2014, thereby triggering the six-month period.

50. As discussed above, Moyse had significant autonomy at Catalyst and was one of only three or four professional who worked on any particular special situation. Moreover, Moyse had access to Catalyst's Confidential Information and was privy to its existing and prospective investments by virtue of his attendance at Catalyst's Monday morning meetings.

---

[34] *Dent Wizard* at ¶19.
[35] Riley Affidavit, ¶33; MR, Tab 2, p. 19.
[36] Moyse LinkedIn Profile, Exhibit "P to the Riley Affidavit; MR, Tab 2-P, p. 85.

51. In these circumstances, Catalyst is particularly vulnerable to competition from Moyse in the period immediately following his resignation, when he is best positioned to misuse confidential information, and a six-month non-competition period is reasonable.

iv) Conclusion on Enforceability of the Non-Compete Covenant

52. Taking the three factors individually and as a whole, it is clear the Non-Competition Covenant is reasonable and enforceable. This is further supported by the express acknowledgment by Moyse in section 11 of the Employment Agreement that:

> …[he is] satisfied that the provisions of [the Restrictive Covenants] are necessary and reasonable and that they reflect the mutual desire and intent of [Moyse] and [Catalyst] that such provisions be upheld in their entirety and be given full force and effect.[37]

53. Moreover, Moyse acknowledged when he signed the Employment Agreement that he reviewed, understood and accepted the terms of the agreement and that he had an adequate opportunity to seek and receive independent legal advice prior to signing the Employment Agreement.[38]

54. Under these circumstances, Catalyst has demonstrated not only a serious issue to be tried with respect to whether Moyse breached the Non-Competition Covenant, but indeed a strong *prima facie* case that he breached an enforceable restrictive covenant.

2) Breach of Duty of Confidence

55. There is also a serious issue to be tried, and indeed a strong *prima facie* case, that Moyse misappropriated Catalyst's Confidential Information, in breach of contractual and common law duties he owes Catalyst.

---

[37] Employment Agreement, p. 6, s. 11; MR, Tab 2-A, p. 38.
[38] Employment Agreement, p. 9; MR, Tab 2-A, p. 41.

56. Departing employees are constrained by common law from misappropriating a former employer's confidential information or using it to compete with the former employer or at all.[39] Departing employees are also prohibited from "springboarding" off of confidential information.[40] In addition to this common law duty, Moyse contractually agreed not to disclose or misuse the confidential information of Catalyst.[41]

57. As described above, there is a strong *prima facie* case that Moyse reviewed and took Catalyst's Confidential Information in the weeks during which Moyse was meeting with West Face and before he gave notice of his intention to resign:

(a) Moyse accessed the Confidential Information as described at paragraphs 22-28, above;

(b) He reviewed the Confidential Information in circumstances which leads Musters, Catalyst's forensic IT expert, to conclude that Moyse was copying the information to his personal Dropbox or Box accounts;

(c) Moyse's personal Box account had a folder entitled "Catalyst Capital", which strongly suggests he was taking Confidential Information and storing it online for his personal use; and

(d) Moyse never disclosed the existence of his Dropbox and Box accounts, or the presence of Confidential Information with those file-storage services, either before or after giving notice of his resignation from Catalyst or his commencement of employment at West Face.

58. In these circumstances, the court should draw a negative inference and conclude that Moyse misappropriated and retained Catalyst's Confidential Information, in breach of the provisions of his Employment Agreement.

---

[39] *GasTOPS Ltd. v. Forsyth,* 2012 ONCA 134 at ¶56-58 ("*GasTOPS*").
[40] *GasTOPS*, *ibid.*; *Omega Digital* at ¶21-22.
[41] Employment Agreement, p. 6; MR, Tab 2-A, p. 38.

59. These events, combined with Moyse's and West Face's refusal to preserve the *status quo* pending determination of the dispute that emerged between the parties in early June, provides a strong *prima facie* case that Moyse breached his contractual and common law obligations not to misuse Catalyst's Confidential Information.

60. As discussed below, an order to create a forensic image of and permitting and independent supervising solicitor ("ISS") to review Moyse's electronic devices will assist the Court in determining at an interlocutory motion the extent to which Moyse has communicated Confidential Information to West Face. Until that issue can be fully investigated and determined, in order to prevent any *future* communication of Confidential Information, an interim injunction is required to prevent Moyse from engaging in further communication with West Face. Anything less will not protect Catalyst's legitimate business interests.

C. Catalyst Will Suffer Irreparable Harm

1) Irreparable Harm Less of a Concern when a Strong *Prima Facie* Case is Established

61. In the context of an injunction sought to restrain breach of a negative covenant, the strength of the plaintiff's case informs the weight the court gives to the questions of irreparable harm and balance of convenience. If the plaintiff demonstrates a *prima facie* case but nothing more, then the court will give ordinary consideration to the remaining two factors.

62. Where, however, the plaintiff demonstrates a strong *prima facie* case, irreparable harm and the balance of convenience are less of a concern.[42] As Sharpe J.A. states in his text *Injunctions and Specific Performance*:

[42] *GDL* at ¶34-37.

> 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.[43]

63. As discussed above, there is a strong *prima facie* case that Moyse breached express negative covenants in the Employment Agreement, as well as his common duty of confidence to Catalyst. As such, the question of irreparable harm and balance of convenience is less of a concern in this case.

2) Catalyst Will Suffer Irreparable Harm in any Event

64. In any event, Catalyst will suffer irreparable harm if the injunction is not granted.

65. Irreparable harm is harm that either cannot be quantified in monetary terms or that cannot be cured. The Court must consider the nature of the harm, rather than its magnitude.[44] Unfair competition often leads 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.[45]

66. Potential loss of goodwill has long been recognized as constituting irreparable harm. In such circumstances, it is difficult, if not impossible, to know or prove the impact of the conduct of the employee.[46] In this case, where Moyse secretly accessed Confidential Information which lay

---

[43] Sharpe, *Injunctions and Specific Performance*, looseleaf, (Toronto: Canada Law Book, 2013) at ¶9.40.
[44] *RJR*, at ¶59.
[45] *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703 at ¶25 (S.C.J.).
[46] *Gunning and Associates Marketing, Inc. v. Kesler*, [2005] O.J. No. 1059 at ¶30-34 (S.C.J.); *GDL* at ¶70-72.

outside the scope of his responsibilities, and given Moyse's extensive knowledge of Catalyst's operations, including the Telecom Situation and other special situations Catalyst is currently invested in or considering, it is likely that Moyse has already or will in the future breach the Confidentiality Covenant.

67. Misappropriation and use of confidential information also gives rise to irreparable harm,[47] and the evidence strongly indicates that Moyse has control over and access to Catalyst's Confidential Information. The losses that Catalyst will sustain from Moyse's use of its Confidential Information are not compensable by damages.

68. In light of, among other things, Moyse's knowledge of Catalyst's current and prospective investments and his conduct of secretly accessing and likely copying Catalyst's Confidential Information, Catalyst is extremely vulnerable to unfair competition by the defendants.

69. There is compelling evidence that Moyse accessed Confidential Information for the purpose of sharing it with West Face. Allowing the defendants to violate Catalyst's rights will cause incalculable harm to Catalyst's business for which damages will not give Catalyst an appropriate or adequate remedy.

70. It will not be possible to calculate the harm caused by Moyse's potential misuse of Catalyst's Confidential Information to scoop, block, or otherwise profit from Catalyst's current or prospective investments in special situations for control. 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.

---

[47] *Messa Computing Inc. v. Phips*, [1997] O.J. No. 4255 at ¶32-33 (Gen. Div.).

71. Moreover, the ripple effect of a compromised special situation is incalculable – that is, it is impossible to know what further special situations Catalyst would have been able to profit from had the initial situation succeeded. Generally, it is impossible to know how the misuse of the confidential information will damage Catalyst's business long term.

72. Further, it is impossible for Catalyst to know precisely why an investment or prospective investment in a special situation did not succeed. It is impossible to accurately quantify how Moyse's unfair competition and misuse of Catalyst's Confidential Information will damage Catalyst in the long term.

D. The Balance of Convenience Favours Granting Interim Relief

73. Assessing the balance of convenience requires evaluating whether the harm prevented in granting an injunction to a moving party will outweigh the potential harm that the party facing the injunction may suffer.[48] In light of the magnitude of harm former employers face if an injunction is not granted to prevent unfair competition by departing employees, and given that the employee is not restrained from fair competition, courts have routinely held that the balance of convenience favours the employer.[49]

74. Here, the balance of convenience favours Catalyst as it is likely to suffer significant and ongoing harm if Moyse is not restrained from unfairly competing with it and misusing its Confidential Information. If an interim injunction is not granted but Catalyst is successful, it is unlikely that the Court will be able to remedy any unfair competition or misuse of confidential information that occurred during the relatively brief interim relief period.

---

[48] *Gunning* at ¶35 and 40.
[49] *GDL* at ¶69-73; *Omega Digital* at ¶34-40..

75. By contrast, an interim injunction will not prevent Moyse from working at West Face if the defendants are ultimately successful at the interlocutory injunction hearing. Assuming Moyse remains employed by West Face during a brief interim relief period, but is compelled to avoid all contact with West Face as requested by Catalyst, Moyse will suffer no damages and West Face's damages will be limited to the salary it paid Moyse for which it received no services. In both cases, Catalyst's undertaking as to damages is more than adequate to remedy any damage suffered by the defendants during the interim relief period.

E. The Need To Preserve West Face's Computers, Servers and Electronic Devices

76. Catalyst acknowledges that it has no direct evidence which suggests that West Face knowingly assisted or encouraged Moyse to take Catalyst's Confidential Information, or that he did so at its direction. At this early stage, that evidence only resides on computers, servers and devices belonging to Moyse and West Face.

77. However, in light of what Catalyst learned from the forensic review of Moyse's work computer, the evidence supports an immediate order that West Face preserve the contents of its computers, servers and electronic devices, including all such computers and devices belonging to its employees, pending further Order of the Court. A preservation order is the only way the Court will be able to ensure that potentially inculpatory evidence will be available and is minimally invasive against West Face at this point in the proceeding.

F. The Need to Create a Forensic Image of and Review Moyse's Electronic Devices

78. Catalyst has demonstrated a strong *prima facie* case that Moyse secretely accessed and took Catalyst's Confidential Information prior to resigning from Catalyst. In these circumstances, where the evidence of use of the Confidential Information only resides on Moyse's personal

computers or electronic devices, the Court should allow Catalyst to access that evidence though the making of a forensic image of Moyse's computers and electronic devices for review by an ISS.

79. The parties are all represented by sophisticated counsel. It is submitted that should the relief sought in this motion be granted, counsel will be able to jointly identify an ISS and agree to a protocol by which the ISS can review the forensic images of Moyse's devices. The ISS can then determine what use Moyse has made of the Confidential Information, including whether it was shared with West Face, and report his or her findings to the parties and to the Court prior the return of the interlocutory injunction.

80. Through counsel from their respective lawyers, Moyse and West Face stated that they take the protection of Catalyst's Confidential Information seriously. Those statements ring hollow in light of Catalyst's discovery, through a forensic review of Moyse's work computer, that Moyse secretly accessed Confidential Information that was unrelated to his work in circumstances in which he very likely transferred the Confidential Information to his personal Dropbox or Box accounts.

81. At this stage of the proceeding, having already established a strong *prima facie* case against Moyse, the only way to ensure that relevant evidence is available at the return of the interlocutory injunction is to allow a third party neutral to review the evidence that is solely within Moyse's power, possession or control.[50]

[50] See *GDL* at ¶89-93, where in similar circumstances a motion for a forensic image was granted.

PART IV - ORDER REQUESTED

82. Catalyst requests:

(a) An interim injunction pending the determination of an interlocutory injunction or until varied by further Order of this Court, enjoining the defendant Brandon Moyse ("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. ("Catalyst"), and all confidential and/or proprietary third party information provided to Catalyst;

(b) An interim injunction, extending until an interlocutory injunction is determined or until varied by further Order of this Court, enjoining Moyse from engaging in activities competitive to Catalyst, and requiring Moyse to comply fully with the restrictive covenants set forth in his Employment Agreement, dated October 1, 2012;

(c) An order that Moyse and the defendant West Face Capital Inc. (West Face") and its employees, directors and officers, 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 or are relevant to any of the matters raised in this action;

(d) An order that Moyse turn over any personal computer and electronic devices owned by Moyse or within his power or control (the "Devices") to Musters for the taking of a forensic image of the data stored on the Devices (the "Forensic Images");

(e) An order that the Forensic Images shall be reviewed by an independent supervising solicitor (the "ISS") identified by and pursuant to a protocol to be jointly agreed to by counsel for the parties or, failing such agreement, by way of further direction from the Court, in order to assess the extent of Catalyst's loss of confidential information;

(f) An order that the review of the Forensic Images by the ISS shall be completed before the hearing of Catalyst's motion for an interlocutory injunction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of June, 2014.

Rocco DiPucchio

Andrew Winton

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco DiPucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Doerner v. Bliss and Laughlin Industries Inc.*, [1980] 2 S.C.R. 865.

2. *GasTOPS Ltd. v. Forsyth*, [2009] O.J. No. 3969 (S.C.J.), aff'd 2012 ONCA 134.

3. *GDL Solutions Inc. v. Walker*, 2012 ONSC 4378.

4. *Gunning and Associates Marketing, Inc. v. Kesler*, [2005] O.J. No. 1059 (S.C.J.).

5. *Messa Computing Inc. v. Phips*, [1997] O.J. No. 4255 (Gen. Div.).

6. *Omega Digital Data Inc. v. Airos Technology Inc.*, [1996] O.J. No. 5382 (Gen. Div.).

7. *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703 (S.C.J.).

8. *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

9. Sharpe, *Injunctions and Specific Performance*, looseleaf, (Toronto: Canada Law Book, 2013).

10. *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.*, 2011 ONSC 1456.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 101, 104

Injunctions and receivers

101.(1)In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2)An order under subsection (1) may include such terms as are considered just.

[…]

Interim order for recovery of personal property

104.(1)In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

Damages

(2)A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 40

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

HOW OBTAINED

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

[…]

UNDERTAKING

3. **40.03** 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.

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

PLAINTIFF'S FACTUM
(MOTION FOR INTERIM RELIEF)

LAX O'SULLIVAN SCOTT LISUS LLP
Counsel
Suite 2750, 145 King Street West
Toronto, Ontario M5H 1J8

Rocco DiPucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: (416) 644-5342
Fax: (416) 598-3730

Lawyers for the Plaintiff