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 INTERLOCUTORY RELIEF)

August 4, 2014

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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. On June 23, 2014, Moyse began working for Catalyst's competitor, the defendant West Face Capital Inc. ("West Face"), in breach of a non-competition covenant in Moyse's employment contract with Catalyst.

3. The evidence summarized below definitively proves that prior to his resignation from Catalyst, Moyse transferred Catalyst's confidential information to his personal possession and transferred Catalyst's confidential information to West Face. Moyse and West Face refused to return that confidential information to Catalyst prior to the hearing of Catalyst's motion for interim relief on July 16, 2014 (the "Interim Relief Motion"). Instead, they filed it in open court for the world to see.

4. After the Interim Relief Motion, Moyse finally disclosed to Catalyst a list of over **830** Catalyst documents he now admits remain in his power, possession or control. Just from reviewing the document titles on the list, Catalyst has identified approximately 245 confidential documents that Moyse transferred to his personal possession before leaving Catalyst.

5. By their conduct both before and after this proceeding began, Moyse and West Face have demonstrated a cavalier attitude towards Catalyst's proprietary right to protect its confidential information. At his cross-examination on his four affidavits, Moyse admitted he cannot determine what Catalyst information is confidential and what is not confidential.

6. Meanwhile, West Face's partner, Thomas Dea ("Dea"), acknowledged that after Moyse sent him Catalyst's confidential documents, he reviewed the documents and **knowingly circulated Catalyst's confidential documents to his fellow partners at West Face.**

7. 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 working on (the "Telecom Situation," described below).

8. West Face claims to have erected a "confidentiality wall" that prevents Moyse from participating in the Telecom Situation. However, it admits that not all of West Face's employees were notified of the existence of the wall and that the wall only applies to one of two companies that make up the Telecom Situation. Moreover, West Face has refused to state what consequences would follow a breach of the confidentiality wall by its employees.

9. In the circumstances, interlocutory relief is needed to protect Catalyst's proprietary interest in its confidential information. Catalyst is vulnerable to unfair competition from Moyse and West Face through Moyse's immediate employment at West Face. Unless Moyse is prevented from breaching his contractual obligations to Catalyst, Catalyst will suffer palpable irreparable harm.

10. In contrast to the irreparable harm that Catalyst will suffer if more of its confidential information is disclosed to West Face by Moyse, neither Moyse nor West Face will suffer any irreparable harm if Moyse is forced to comply with the non-competition covenant in his employment agreement with Catalyst. The balance of convenience weights heavily in favour of granting the interlocutory relief sought by Catalyst.

PART II - SUMMARY OF FACTS

A. Special Situations for Control or Influence Investments

11. 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]

12. 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 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]

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[1] Affidavit of James A. Riley, sworn June 26, 2014 ("Riley June 26 Affidavit"), ¶2-5; Motion Record ("MR"), Tab 2, pp. 10-11.
[2] Riley June 26 Affidavit, ¶7-8; MR, Tab 2, p. 12.

13. 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] In December 2013, West Face launched a new special situations investment fund in December 2013.[4] West Face's investment mandate includes investing in special situations for control or influence.[5]

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

14. 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.

15. 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 unique to Catalyst and gives its employee professionals a partner-like interest in the success of the company. By May 2014, Moyse had accrued over $500,000 in the 60/40 Scheme.[6]

16. 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:

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[3] Riley June 26 Affidavit, ¶21; MR, Tab 2, p. 16.
[4] Exhibit "B" to the Riley June 26 Affidavit; MR, Tab 2-B, p. 43.
[5] Cross-examination of Thomas Dea, held July 31, 2014 ("Dea Cross"), pp. 24-25, qq. 75-82.
[6] Riley June 26 Affidavit, ¶11-16; MR, Tab 2, pp. 13-14. Affidavit of James Riley sworn July 14, 2014 ("Riley July 14 Affidavit"), ¶9; Supplementary Motion Record ("SMR"), Tab 1, p. 3. Cross-examination of Brandon Moyse, held July 31, 2014 ("Moyse Cross"), pp. 30-35, qq. 142-67.

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 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].[7]

17. By virtue of his position, Moyse had access to Catalyst's confidential information about its existing and prospective investments. 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]

C. Moyse Resigns from Catalyst to Work at West Face

18. On March 26, 2014, Moyse had coffee with Tom Dea, a partner at West Face ("Dea"). Between March 27 and May 26, 2014, Moyse met with and exchanged emails with Dea and others at West Face relating to Moyse's move from Catalyst to West Face.[9]

19. On May 19, West Face offered Moyse a job. Moyse told a colleague by email that day that he was "pretty excited".[10]

20. Five days later, while he was away on vacation, Moyse gave Catalyst notice of his resignation by email, effective June 22, 2014.[11] Catalyst later learned that Moyse had resigned to go work at West Face.[12]

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[7] Sections 8 and 10 of the Employment Agreement dated October 1, 2012, Exhibit "A" to the Riley June 26 Affidavit (the "Employment Agreement"); MR, Tab 2-A, pp. 37-38.
[8] Riley June 26 Affidavit, ¶30-31; MR, Tab 2, p. 18.
[9] Affidavit of Thomas Dea, sworn July 7, 2014 ("Dea Affidavit"); Responding Motion Record of West Face ("WF RMR"), pp. 6-7, ¶20-23.
[10] Email from Moyse dated May 19, 2014, Riley June 26 Affidavit, Exhibit "G"; MR, Tab 2-G, p. 60.

21. Moyse signed his employment contract with West Face on May 26, 2014 (the "West Face Contract").[13] The West Face Contract includes a confidentiality covenant that is almost identical to the Confidentiality Covenant.

22. The West Face Contract appears to include a non-competition covenant which survives termination of his employment. Moreover, West Face has refused to state whether its employment agreements with its other analysts include non-competition covenants. In circumstances where the defendants argue that a non-competition covenant is an unreasonable restraint of trade in this industry, an adverse inference should be drawn from this refusal, and the Court should assume that West Face does in fact impose a non-competition covenant over analysts in its employ.

23. Finally, the West Face Contract provides that a breach of the restrictive covenants in that agreement cannot be adequately compensated for by monetary damages and in the event of such a breach, or reasonable apprehension of a breach, West Face is entitled as a matter of right to seek an injunction.

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

24. 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.

25. 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

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[11] Email from Moyse dated May 24, 2014, Riley June 26 Affidavit, Exhibit "H"; MR, Tab 2-H, p. 62.
[12] Riley June 26 Affidavit, ¶29; MR, Tab 2, p. 18.
[13] Dea Affidavit, Exhibit "B"; WF RMR, Tab 1-B.

twenty-five percent of the deals Catalyst would make over the life of an investment fund.[14] Counsel for both defendants claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality.[15] In particular, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is [...] baseless."

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

27. On June 19, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. Moyse and West refused to preserve the *status quo* while Catalyst sought to enforce 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.[16]

28. Unbelievably, the defendants insisted on rushing to destroy the *status quo* even though West Face had no immediate need for Moyse's services: **for the first two weeks of Moyse's employment at West Face, he was not assigned any tasks.**[17]

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

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[14] Paragraphs 40 and 42 of and Exhibits "I", "J", "K" and "L" to the Riley June 26 Affidavit; MR, Tabs 2, 2-I, 2-J, 2-K and 2-L, pp. 21 and 64-76.
[15] Riley June 26 Affidavit, Exhibits "E" and "F"; MR, Tabs 2-E and 2-F.
[16] Paragraph 47 of and Exhibits "M", "N" and "O" to the Riley June 26 Affidavit; MR, Tabs 2, 2-M, 2-N and 2-O, pp. 22 and 78-83.
[17] Moyse Cross, p. 171, qq. 794-795.

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

(b) Moyse consented to the creation of a forensic image of his personal computer, iPad and smartphone, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(c) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[18]

30. The Interim Order was agreed to on a without prejudice basis; Catalyst does not suggest that any inference should be drawn from the defendants' agreement to its terms. However, as discussed below, the affidavits of documents Moyse swore pursuant to the Interim Order reveal very damning facts which demonstrate that Moyse and West Face casually disregarded Catalyst's proprietary interest in its confidential information and which support Catalyst's claim for interlocutory relief.

E. Moyse Transferred Catalyst's Confidential Information to West Face

31. As a result of the Defendants' refusal to respect the *status quo* in June 2014, Catalyst moved with urgency to seek interim relief and prepared its interim relief materials without the benefit of any evidence from the Defendants. On July 7, 2014, Moyse and Dea swore responding affidavits which confirmed Catalyst's worst fear: Moyse had transferred Catalyst's confidential information to West Face, and West Face distributed that confidential information throughout the firm.

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[18] Order of Justice Firestone dated July 16, 2014; Second Supplementary Motion Record ("SSMR"), Tab 1.

32. At his meeting with Moyse on March 26, Dea asked Moyse to send him research and writing samples so Dea could assess Moyse's writing and research ability.[19]

33. In response to this request, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contain Moyse's and other Catalyst employees' analyses of investment opportunities and were marked "Confidential" and "For Internal Discussion Purposes Only".[20] Moyse did not consider these markings to have any meaning:

> 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.**[21]

34. Moyse's evidence on this point is disturbing – he freely acknowledged that one of the memos (the "Homburg Memo") was confidential, but he refused to agree that the other three memos were confidential and admitted he is unable to identify Catalyst's confidential information:

> 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?

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[19] Moyse Cross, pp. 132-33, qq. 624-26; Dea Cross, pp. 68-69, q. 289.
[20] Dea Affidavit, Exhibit "L"; WF RMR, Tab 1-L, pp. 70-204.
[21] Moyse Cross, pp. 141, qq. 664-665.

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.[22]

[...]

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 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.**

35. After four years in the investment industry, the fact that Moyse does not understand that his analysis of public information is confidential information belonging to Catalyst undermines any

[22] Moyse Cross, pp. 92-94, qq. 426-37 [emphasis added].

assurances he can offer the Court that he will abide by the Confidentiality Covenant. By his own evidence, Moyse is cognitively incapable of doing so.

36. While he is seemingly incapable of identifying Catalyst's confidential information, Moyse knew that what he did was wrong, and he deleted the email he sent Dea:

> 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 reflection after sending it, yes.
>
> 414. 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.
>
> 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.[23]

F. The Investment Memos are Highly Confidential

37. Catalyst is adamant that the Investment Memos contain its confidential information.[24] The memos analyze private or publicly available information to create an "investment thesis", which is the theory as to how the firm might potentially profit from an investment in the situation. Despite his initial difficulties, Moyse eventually agreed that the memos contained information that Catalyst would not want disclosed to a third party, that the memo disclosed strategies that Catalyst may or may not employ in a given situation and that when Catalyst draws conclusions with respect to publicly available information, those conclusions are not publicly available.[25]

38. At his cross-examination, Dea admitted that West Face considered its investment strategies and investment theses to be confidential and that West Face has a proprietary interest in protecting that confidentiality.[26]

G. West Face Circulated Catalyst's Confidential Information within the Firm

39. Dea admits that after he received the Investment Memos, he reviewed them and saw that they were marked confidential. Dea determined that the documents were "benign" (whatever that means). Dea admits that after he reviewed the documents and saw that they were marked

[23] Moyse Cross, pp. 89-91, qq. 412-420.
[24] Riley July 14 Affidavit, ¶12; SMR, Tab 1, pp. 3-4.
[25] Moyse Cross, pp. 145-6, qq. 685-686; pp. 148-151, qq. 702-717.
[26] Dea Cross, pp. 61-63, qq. 252-59.

"Confidential", he circulated the Investment Memos to the other partners and a vice-president at West Face.[27]

40. West Face never informed Catalyst that Moyse had given it copies of Catalyst's confidential information. Instead, West Face attached the Investment Memos to its responding motion record and filed them in open court. West Face did not seek Catalyst's permission to do so or otherwise give Catalyst an opportunity to seal the court file prior to the hearing of the motion for interim relief on July 16.[28]

41. Dea admits that West Face understood that Moyse had sent it confidential information and that he would not want Moyse to treat West Face's confidential information in a similar fashion:

> 335. 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.
>
> 336. Q. That's going forward you had this expectation, but whatever he did in the past that's in the past; is that your attitude?
>
> A. Well, our view was that he -- it was -- there was nothing in there that we viewed particularly damaging. There was nothing that we were looking at and, you know, we viewed it sort of as a rookie error. And so we felt compelled to convey to him that you don't do this kind of thing. You should stop doing this. Don't do this again. And by the way, if you come and work here the expectation is that you will take this seriously and protect our confidential information.

[27] Dea Cross, pp. 72-77, qq. 305-332 and pp. 151-52, qq. 718-722.
[28] Riley July 14 Affidavit, ¶13; SMR, Tab 1, p. 4.

> 337. Q. You protect our confidential information? You're referring to West Face's information, correct?
>
> A. Correct.
>
> 338. Q. So, in other words, what he did here you wouldn't want him to do with your information?
>
> A. Correct.
>
> 339. Q. If he was looking for prospective employment somewhere else your expectation is he wouldn't take your memos and send them to that employer, correct?
>
> A. Yeah, that's right.[29]

42. Likewise, West Face's general counsel admits that if an employee of West Face distributed its internal deal memos to third parties, it would be considered a breach of the employee's confidentiality obligations to West Face.[30]

43. In this proceeding, West Face has refused to disclose Moyse's work product created during his brief tenure there, from which the Court can reasonably infer that it considers Moyse's work product to be confidential, just as Catalyst asserts a proprietary right of confidentiality over Moyse's work product.[31]

H. Moyse Reviewed Confidential Information Unrelated to his Work Before he Resigned

44. In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time period when Catalyst was active in an investment in Stelco, in which Catalyst and West Face were in direct competition. Ten minutes is

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[29] Dea Cross, pp. 78-79, qq. 335-39 [emphasis added].
[30] Cross-examination of Alexander Singh, held July 31, 2014 ("Singh Cross"), p. 19, q. 68.
[31] Moyse Cross, pp. 172-73, qq. 797-800.

an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.[32]

45. On April 25, 2014, Moyse reviewed dozens of files related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse would review these documents, which he did in an insufficient amount of time to read the material he was accessing.[33] Moyse admitted during cross-examination that he "routinely" reviewed transaction files from Catalyst's old transactions.[34]

46. At all material times, 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.[35]

47. In the opinion of Martin Musters, Catalyst's forensic IT expert ("Musters"), Moyse's conduct of reviewing several documents over a relatively brief period of time is consistent with transferring files to an Internet-based file storage account. Musters' opinion is that Moyse was very likely transferring the documents from Catalyst's computers to his Dropbox or Box accounts.[36]

I. Moyse Retained Hundreds of Catalyst Documents after he Left Catalyst

48. In his first affidavit, Moyse's sworn evidence was as follows:

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[32] Riley June 26 Affidavit, ¶55-57 and Exhibit "R"; MR, Tabs 2 and 2-R, pp. 24-25 and 91-93.
[33] Riley June 26 Affidavit, ¶58-59 and Exhibit "S"; MR, Tabs 2 and 2-S, pp. 25 and 95-96.
[34] Moyse Cross, pp. 80-82, qq. 370-78.
[35] 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.
[36] Musters Affidavit, ¶17; MR, Tab 3, p. 111.

> It is noteworthy that neither Mr. Riley nor Mr. Musters provide any actual evidence that I transferred information, confidential or otherwise, from Catalyst's servers to my Dropbox or Box accounts or other personal devices. Instead, Mr. Riley and Mr. Musters rely solely on unsupported speculation and innuendo.

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

50. Moyse admits that he frequently emailed Catalyst documents to his personal accounts and that he retained those documents on his personal devices. At his recent cross-examination, Moyse could not say with absolute certainty that his most recent search has been exhaustive, and he admits that he deleted documents between March and May 2014, that he did not inform Catalyst when he resigned that he had its confidential information and that he did not offer to return confidential information to Catalyst.[37]

51. At his cross-examination, Musters was asked by Moyse's counsel to identify the common patterns of employees who take confidential information. Musters identified employees who email themselves documents to their personal accounts or who transfer files using an Internet file storage account as two types of employees who take confidential information, and he confirmed that Mr.

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[37] Moyse Cross, pp. 71-79, qq. 329-363.

Moyse's use of his work computer "very much" fit the profile of an employee who took confidential information.[38]

J. Moyse's Credibility Problems

52. Moyse has engaged in a long-standing course of conduct whereby he is willing to say whatever he feels is necessary to get what he wants. For example:

(a) He admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[39]

(b) He admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have led a due diligence process that he merely participated in with more senior employees at Catalyst;[40]

(c) Moyse justified the "embellishments" on his deal sheet because he wanted a job, and it was not a sworn document;

(d) Moyse now claims that he did not understand all of the terms of the Employment Agreement, even though he indicated by signing the contract that he had reviewed, understood and accepted the terms of the offer;[41]

(e) Moyse's evidence at paragraph 18 of his first affidavit is misleading, in that it suggests he was unaware of the compensation he had accrued under the 60/40 Scheme, when in fact he had been told in March 2014 by Catalyst's CFO that he

[38] Cross-examination of Martin Musters, held August 1, 2014, p. 62, q. 183 and pp. 64-66, q. 188.
[39] Moyse Cross, p. 15, qq. 57-62.
[40] Moyse Cross, pp. 17-20, qq. 69-91;
[41] Moyse Cross, pp. 27-28, qq. 126-130.

had accrued $500,000 in the 60/40 Scheme, which is entirely consistent with the evidence in Catalyst's affidavit that Moyse was attempting to undermine;[42]

(f) Paragraph 11 of Moyse's affidavit states that he performed an "analysis" of private documents provided to Catalyst by WIND Mobile (of two companies involved in the Telecom Situation), but during his cross-examination he attempted to downplay his role in the situation by claiming he merely transposed financial information into chart form;[43]

(g) Moyse admits he made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[44]

(h) Moyse admits that by disclosing the Homburg Memo to West Face, he knowingly caused Catalyst to breach a non-disclosure agreement;[45]

(i) Moyse admits he wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device;[46]

(j) Moyes claims he misrepresented his opinion of his employment at Catalyst in an email to Dea and another partner at West Face;[47]

(k) Moyse incorrectly stated in his affidavit that he earned a base salary of $90,000 and had an opportunity to earn a bonus of $80,000, but in email correspondence with

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[42] Moyse Cross, pp. 31-35, qq. 149-168.
[43] Moyse Cross, pp. 53-56, qq. 246-266.
[44] Moyse Cross, pp. 85-86, qq. 394-396.
[45] Moyse Cross, pp. 96-98, qq. 446-452.
[46] Moyse Cross, p. 103-106, qq. 473-486.
[47] Moyse Cross, pp. 126-27, qq. 596-602 and pp. 153-54, q. 729.

Dea he stated that his base salary was $100,000 and he earned a "minimum" bonus of $80,000;[48] and

(l) Moyse admitted that contrary to his affidavit evidence regarding his "limited" role on the Telecom Situation, he was in fact part of the Catalyst deal team for the situation and received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement.[49]

53. In light of these repeated misstatements, made by Moyse in email correspondence over a long period of time as well as in his affidavit evidence, he is not a credible witness on any point of conflict with Catalyst's evidence and Catalyst's evidence should be preferred over Moyse's evidence.

K. West Face's Porous Confidential Wall

54. West Face claims to have erected a confidentiality wall to separate Moyse from its own pursuit of the Telecom Situation, but the wall it has erected is extremely weak:

(a) The wall does not apply to all of West Face's employees;[50]

(b) The wall applies to WIND Mobile, but it does not apply to other companies in the telecommunications industry, including Mobilicity, a telecommunications company that West Face admits it is studying;[51]

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[48] Affidavit of Brandon Moyse, sworn July 7, 2014, ¶17; Moyse Responding Motion Record, Tab 1, p. 4. Moyse Cross, p. 159, qq. 753-758. Exhibit "1" to the Moyse Cross; SSMR, Tab 2.
[49] Moyse Cross, pp. 174-74, qq. 803-809.
[50] Singh Cross, pp. 25-27, qq. 106-116. Singh Answers to Undertakings, q. 116; SSMR, Tab 6.
[51] Dea Cross, pp. 27-28, qq. 93-96. Singh Cross, pp. 28-29, qq. 118-125.

(c) West Face takes no steps to obtain acknowledgments from its investment team that a wall has been established;[52] and

(d) West Face refused to state what consequences an employee would face if he or she did not comply with the confidentiality wall, from which the Court can draw the adverse inference that there are no material consequences.[53]

55. The confidentiality wall was only erected after Catalyst's counsel confirmed to the defendants' counsel that he had instructions to immediately bring proceedings to restrain Moyse from working at West Face.[54] The wall is window dressing that, like the rest of West Face's evidence, only pays lip-service to any alleged concern by West Face for Catalyst's interests.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

56. 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.[55] 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?[56]

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

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[52] Singh Cross, p. 23, q. 94.
[53] Dea Cross, p. 99, q. 436.
[54] See Riley Affidavit, Exhibit "N"; MR Tab 2-N, p. 80. Dea's Answers to Undertakings, question 433, SSMR, Tab 5. Dea Affidavit, Exhibit "J"; WF RMR, Tab 1-J, p. 61. Singh's Answers to Undertakings, question 86, SSMR, Tab 6.
[55] *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.
[56] *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at ¶49 ("*RJR*").

and that West Face amplified the harm of that breach by distributing Catalyst's confidential information to the senior members of its investment team.

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

58. The first part of the *RJR* Test requires the moving party to establish that the underlying action is neither vexatious nor frivolous.[57] 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".[58]

59. 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.[59]

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[57] *RJR* at ¶50.
[58] *Omega Digital Data Inc. v. Airos Technology Inc.*, [1996] O.J. No. 5382 at ¶10 (Gen. Div.) ("*Omega Digital*").
[59] *Omega Digital* at ¶20.

1) Breach of Non-Competition Covenant

60. 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.

61. 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 must determine is whether the Non-Competition Covenant is *prima facie* enforceable.

62. 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 has 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 from competing with its purchaser.[60]

63. 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.[61]

64. 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

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[60] *The Dent Wizard (Canada) Ltd. et al. v.Catastrophe Solutions International Inc.*, 2011 ONSC 1456 at ¶10 ("*Dent Wizard*").
[61] *Ibid.*

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.[62]

65. 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.[63]

66. 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 covenant might be inadequate to protect the employer's interest and a non-competition clause would be reasonable.[64] 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 taking and misusing confidential information mean that a confidentiality covenant will be inadequate to protect the employer's proprietary interests.

67. In this case, each of the factors and principles summarized above support the enforcement of the Non-Competition Covenant. 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. There are very few

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[62] *Ibid.*, at ¶11, quoting from *Elsey v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916, at 923-24.
[63] *Dent Wizard* at ¶16.
[64] *Dent Wizard* at ¶17.

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.

68. Moreover, in looking at the Non-Competition Covenant in the context of the entire Employment Agreement, and not just in isolation, it is notable that Catalyst offered, and Moyse accepted, significant long-term remuneration 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 via the 60/40 Scheme, Moyse now seeks to avoid the corresponding burden of avoiding competing against Catalyst in Toronto during the six-month period following his resignation.

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

69. 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.[65]

70. 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 identify a competitor to the former employer.[66]

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[65] *Doerner v. Bliss and Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 at 868 and 872; *GDL* at ¶63.
[66] *GDL* at ¶59-63.

71. 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.[67] 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.

72. Moreover, by Moyse's own admission, there are only a "handful" of firms in Ontario that participate primarily in the special situations field.[68] In contrast, Dea readily admitted in his affidavit and at his cross-examination that there are "hundreds" of analyst jobs in Toronto. Dea admitted that the skills used in an analyst's job are interchangeable, such that an analyst at a special situations investment fund (such as Catalyst or West Face) could easily perform the same function at an investment bank, a securities dealer or a bank – *i.e.*, market participants that do not compete with Catalyst.[69] Thus, 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.

73. Moyse has had four jobs in four years in the investment industry. He admits that there has been a considerable degree of mobility in his career.[70] Moyse could immediately begin working at dozens of other market participants in Ontario, 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 handful of companies that he knew directly competed with Catalyst.

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[67] See Exhibit "D" to the Riley Affidavit; MR, Tab 2-D, p. 48.
[68] Moyse Cross, pp. 123-124, qq. 581-588.
[69] Dea Affidavit, ¶25; WF RMR, Tab 1, p. 8. Dea Cross, pp. 28-29, qq. 97-100.
[70] Moyse Cross, p. 10, qq. 30-31.

ii) The Area of Prohibition is Reasonable

74. 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".[71]

75. The Non-Competition Covenant is restricted to Ontario, which is where Catalyst's competitors are principally based.[72] While Catalyst has referred in its materials to the geographic restriction as being "Toronto", this is a shorthand reference to the Greater Toronto Area, which is where the majority of financial firms are located in Ontario. The Greater Toronto Area is not a legally enforceable geographic area, and thus it is reasonable for Catalyst to have used Ontario as the area of geographic restriction in the Non-Competition Covenant.

76. Prior to joining Catalyst, Moyse worked in New York City, and he was applying for jobs there as part of his 2014 job hunt.[73] Thus, the Non-Competition Covenant does not prevent Moyse from working in the geographic area where he worked immediately prior to joining Catalyst and where he was willing to return earlier this year.

iii) The Duration of Prohibition is Reasonable

77. 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.

78. The three-month / six-month distinction is reasonable, in that it differentiates between a situation where the trigger for the termination lies outside the control of Catalyst (resignation or

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[71] *Dent Wizard* at ¶19.
[72] Riley Affidavit, ¶33; MR, Tab 2, p. 19.
[73] Moyse c.v., Dea Affidavit, Exhibit L; WF RMR, Tab 1-L, p. 203. Exhibits "2" and "3" to the Moyse Cross; SSMR, Tabs 3 and 4.

termination for cause) and a situation where Catalyst is fully in control of the timing of the termination (termination without cause). In the latter circumstance, Catalyst can give Moyse working notice, which will effectively buttress the three-month non-competition period. Where working notice is not an option, Catalyst has a proprietary interest in ensuring that a minimum six-month non-competition period is respected.

79. In any event, in this case it is undisputed that Moyse resigned effective June 22, 2014, thereby triggering the six-month period.

80. As discussed above, Moyse had significant autonomy at Catalyst and was one of only three or four professionals who worked on any particular special situation. Moreover, Moyse had access to, and took with him, Catalyst's confidential information and was privy to its existing and prospective investments.

81. 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

82. Taking the three factors individually and as a whole, 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.[74]

83. The defendants may argue that this acknowledgement is meaningless, but they agreed to a similar acknowledgment in the West Face Contract:

> The parties agree that all restrictions in this Agreement are necessary and fundamental to the protection of the Corporation and are reasonable and valid.[75]

84. The defendants cannot have it both ways: by their own conduct, they have shown that these acknowledgments must mean something, or else they would not have bothered to include one in the West Face Contract.

85. 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

86. There is more than a strong *prima facie* case that Moyse misappropriated Catalyst's confidential information, in breach of contractual and common law duties he owes Catalyst. In this case, the evidence overwhelming demonstrates that Moyse has already transferred Catalyst's confidential information to West Face and that West Face circulated that information within the firm. The only question for the Court to determine is how to remedy this breach and how to properly prevent future possible breaches.

87. Moyse admitted he is unable to identify Catalyst's confidential information, which means he is incapable of determining in advance what information from his employment at Catalyst he is

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[74] Employment Agreement, p. 6, s. 11; MR, Tab 2-A, p. 38.
[75] Dea Affidavit, Exhibit "B"; WF RMR, Tab 1-B, p. 29.

forbidden from discussing with his new West Face colleagues. His confusion appears to arise from his inability to distinguish the confidentiality of the data obtained by Catalyst and the use Catalyst made of this data. But the law is less confused. As Justice Sharpe J. held in *Omega Digial*:

> 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.[76]

88. West Face and Catalyst are working on a hotly contested Telecom Situation, which Moyse worked on at Catalyst. West Face claims to have created a confidentiality wall to separate Moyse from its situation, but, as explained above, the wall:

(a) Only applies to one of two corporations at play in the Telecom Situation – it applies to WIND Mobile, but not to Mobilicity, which it is studying;

(b) Was not communicated to all of West Face's employees;

(c) Was not acknowledged by West Face's investment team; and

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[76] *Omega Digital*, *supra*, at ¶22.

(d) Does not state what consequences would befall an employee who breaches the wall (and West Face has refused to state what those consequences are).

89. 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.[77] In addition to this common law duty, Moyse contractually agreed not to disclose or misuse the confidential information of Catalyst.[78]

90. As described above, Catalyst has now proven on a balance of probabilities that Moyse took Catalyst's confidential information with him after resigning from Catalyst and that he transferred Catalyst's confidential information to West Face. In these circumstances, it is not a question of whether the court should grant Catalyst injunctive relief, but what relief is necessary to protect Catalyst's proprietary interests in its confidential information.

91. In this case, where:

(a) Moyse transferred confidential information to West Face, which was then circulated to the partners and a senior analyst at the firm;

(b) Moyse secretly accessed confidential information which lay outside the scope of his responsibilities;

(c) Moyse retained hundreds of Catalyst documents, including at least 245 confidential documents, after he resigned from Catalyst;

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[77] *GasTOPS Ltd. v. Forsyth,* 2012 ONCA 134 at ¶56-58 ("*GasTOPS*").
[78] Employment Agreement, p. 6; MR, Tab 2-A, p. 38.

(d) Moyse had extensive knowledge of Catalyst's operations, including the Telecom Situation and other special situations Catalyst is currently invested in or considering;

(e) Moyse has admitted he is unable to identify Catalyst's confidential information; and

(f) West Face's Confidential Wall is full of holes;

the Court must fashion injunctive relief that effectively ends the defendants' "better to ask forgiveness than to seek permission" attitude towards Catalyst's confidential information.

92. In these circumstances, enforcement of the Non-Competition Covenant will sufficiently protect Catalyst's interests. At the same time, as argued below, neither Moyse nor West Face will suffer any irreparable harm if Moyse is prohibited from working at West Face for another four-and-a-half months.

C. Catalyst Will Suffer Irreparable Harm

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

93. 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.

94. Where, however, the plaintiff demonstrates a strong *prima facie* case, irreparable harm and the balance of convenience are less of a concern.[79] As Sharpe J.A. states in his text *Injunctions and Specific Performance*:

> 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.[80]

95. As discussed above, there is a strong *prima facie* case that Moyse breached the Restrictive 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 here.

2) Catalyst Will Suffer Irreparable Harm in any Event

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

97. 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.[81] 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.[82]

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[79] *GDL* at ¶34-37.
[80] Sharpe, *Injunctions and Specific Performance*, looseleaf, (Toronto: Canada Law Book, 2013) at ¶9.40.
[81] *RJR*, at ¶59.
[82] *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703 at ¶25 (S.C.J.).

98. 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.[83]

99. Misappropriation and use of confidential information gives rise to irreparable harm.[84]

100. 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. Dea admits 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.[85]

101. 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.

102. 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 Interlocutory Relief

103. 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

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[83] *Gunning and Associates Marketing, Inc. v. Kesler*, [2005] O.J. No. 1059 at ¶30-34 (S.C.J.); *GDL* at ¶70-72.
[84] *Messa Computing Inc. v. Phips*, [1997] O.J. No. 4255 at ¶32-33 (Gen. Div.).
[85] Dea Cross, pp. 48-54, qq. 196-218.

injunction may suffer.[86] 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.[87]

104. 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 interlocutory injunction is not granted but Catalyst successfully proves at trial that Moyse and West Face have misused Catalyst's confidential information, the Court will be able to remedy the unfair competition or misuse of confidential information that occurred during the interlocutory relief period.

105. By contrast, an interlocutory injunction will not cause Moyse any material harm. Moyse acknowledged that he has had considerable mobility in his career in the investment industry and he even claimed during his cross-examination that he was ready to quit his employment at Catalyst if he could not find another job.[88] During his recent job search, Moyse was looking for jobs in New York City and at firms in Toronto that did not invest in special situations (which would not breach the Non-Compete Covenant).

106. Moreover, even though Moyse claims in his affidavit evidence that an interlocutory injunction would be "devastating" to his career and livelihood, there is no evidence to support this bald assertion. Depsite having numerous opportunities to do so, West Face has provided no evidence that it will not continue to employ Moyse if he is forced to comply with his

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[86] *Gunning* at ¶35 and 40.
[87] *GDL* at ¶69-73; *Omega Digital* at ¶34-40..
[88] Moyse Cross, p. 148, q. 701.

Non-Competition Covenant before he commences employment there. Moreover, Moyse and West Face have refused to state whether West Face has indemnified Moyse for legal fees, damages or losses resulting from these legal proceedings.[89]

107. West Face's omission of evidence that it will not employ Moyse and its refusal to say whether it has indemnified him ground the obvious inference that West Face has indemnified Moyse and has promised to continue to pay his salary if an interlocutory injunction is granted.

108. In these circumstances, Moyse will face no harm if he is forced to comply with the Restrictive Covenants, let alone irreparable harm.

E. The Need to Review the Forensic Image of Moyse's Electronic Devices

109. Pursuant to the Interim Order, forensic images of Moyse's electronic devices have been created and are held in trust by his counsel. At this stage of the proceeding, Moyse was unable to confirm that he had checked his devices for every Catalyst document in his possession. He has also admitted to having deleted documents, including the email evidence of his having transferred confidential information to West Face.

110. According to Musters, Catalyst's forensic IT expert, the only way Catalyst can determine the full extent of what Catalyst documents Moyse still has in his possession and what he may have transferred to third parties is to analyze the forensic images of his devices.

111. Moyse argues that a review of his devices would be a "fishing expedition," but that is not the case. The need to review the forensic images of Moyse's devices is grounded in the

[89] Moyse Cross, pp. 115-16, q. 538. Dea Cross, pp. 101-102, q. 443.

overwhelming evidence which proves that Moyse has demonstrated a callous disregard for Catalyst's interests in preserving its confidential information.

112. Moyse admits he accessed and took Catalyst's confidential information prior to resigning from Catalyst. He admits he still possesses hundreds of Catalyst's documents, but he cannot confirm that his search was exhaustive. In these circumstances, where the evidence of the presence and use of Catalyst's confidential information only resides on Moyse's personal computers or electronic devices, the Court should allow Catalyst to access that evidence though the review by an ISS of the forensic images that were already made.

113. 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 or other parties, and report his or her findings to the parties and to the Court prior the return of the interlocutory injunction.

114. Through correspondence 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 the evidence that West Face knowingly circulated Catalyst's confidential information around the firm and filed it in an open court record with no advance warning, and in light of Moyse having taken over 245 confidential documents with him when he left Catalyst.

115. At this stage of the proceeding, having already established on a balance of probabilities that Moyse breached the Confidentiality Covenant, the only way to ensure that evidence that will

disclose the full extent of his wrongful conduct is available is to allow a third party neutral to review the evidence that is currently held in trust by Moyse's counsel.[90]

PART IV - ORDER REQUESTED

116. Catalyst requests:

(a) An interlocutory injunction 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 interlocutory injunction 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, continue 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 or are relevant to any of the matters raised in this action;

(d) An order that the Forensic Images that were created in compliance with the Interim Relief Order 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; and

(e) An order that the review of the Forensic Images by the ISS shall be completed before any examinations for discovery conducted in this action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of August, 2014.

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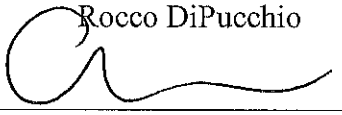
[90] See *GDL* at ¶89-93, where in similar circumstances a motion for a forensic image was granted.

Rocco DiPucchio



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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 INTERLOCUTORY RELIEF)

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