Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Moving Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Responding Parties)

FACTUM OF THE RESPONDING PARTY, BRANDON MOYSE

(Motion returnable July 16, 2014)

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PART I - OVERVIEW

1. This motion is an unlawful attempt by The Catalyst Capital Group Inc. ("Catalyst") to prevent its former employee Brandon Moyse ("Moyse") from continuing his employment with West Face Capital Inc. ("West Face") on the basis of an unenforceable non-competition agreement and unsupported speculation that Moyse has misappropriated Catalyst's confidential information.

2. Despite retaining an electronic forensic expert to examine Moyse's workplace computer, Catalyst is unable to show actual evidence of a single instance in which Moyse inappropriately transferred Catalyst documents to a personal cloud storage system. Not content with their expert's inability to find wrongdoing on Moyse's workplace computer, Catalyst now seeks to expand their fishing expedition by requesting an unwarranted, extraordinary and intrusive order requiring Moyse to turn over his personal computer and electronic devices for inspection.

3. Since Catalyst has no actual evidence of wrongdoing by Moyse, it instead points to four categories of files that he accessed weeks apart over the span of three months and baldy

asserts that it was "very likely" that he transferred the files to a cloud account. Catalyst's argument can be summarized as follows: Moyse accessed files using his Catalyst computer. Since he also has two cloud accounts, it should be assumed that he transferred the files to those accounts.

4. As "evidence" of its claims, Catalyst relies on the fact that Moyse's "Box" account had a folder called "Catalyst Capital", neglecting to mention that the Box account was not a personal account, but an account created with Catalyst's knowledge, using his Catalyst email address, and that not only was the "Catalyst Capital" folder not created by him, other employees and Partners at Catalyst had access to it. This is only one of several inaccuracies or misrepresentations contained in the Affidavit of James A. Riley ("Riley"). Moyse has reasonable and credible explanations for each of Catalyst's accusations of misappropriation of confidential information.

5. It is Moyse's position that the non-competition agreement is vague, overbroad, and unreasonable. Furthermore, Catalyst's bald allegations and uncorroborated suspicion do not meet the stringest test of establishing a strong *prima facie* case and therefore Catalyst's request for injunctive relief must be denied. Moyse submits that Catalyst has also failed to provide reliable evidence of irreparable harm and that the balance of convenience clearly favours him as damages are a calculable and adequate remedy for Catalyst, while an interim and interlocutory injunction would be devastating to Moyse, preventing him from maintaining gainful employment and depriving him of valuable experience in his still young career.

PART II - FACTS

(1) BACKGROUND AND ROLE AT CATALYST

6. Moyse is twenty-six (26) years of age. Prior to working for Catalyst, he was employed at Credit Suisse in New York and RBC Capital Markets in Toronto as a junior banker on their respective Debt Capital Markets desks.

Reference: Moyse's Motion Record ("MMR"), Tab 1, Affidavit of Brandon Moyse ("ABM"), para 3, p. 1

7. Moyse commenced employment at Catalyst as an Analyst on or around November 1, 2012, pursuant to a written employment agreement (the "Employment Agreement"), dated October 1, 2012.

Reference: MMR, Tab 1, ABM, para 4, p. 2

Catalyst Employment Agreement, MMR, Tab 1, ABM, Exhibit A

8. Moyse held the most junior position at Catalyst. The hierarchy at Catalyst is as follows: Partner, Vice President, Associate, and Analyst. While Moyse was employed at Catalyst, all potential and actual investments were sourced at the Partner level. Analysts were not actively encouraged to generate ideas for the firm and their thoughts and recommendations were routinely disregarded. Furthermore, as an Analyst, he had no direct input into investment decisions or strategy and did not have substantial autonomy and responsibility, but was instead assigned specific research projects by the Partners.

Reference: MMR, Tab 1, ABM, para 6, p. 2

9. As an Analyst, Moyse performed financial and qualitative research both on potential investment opportunities and companies already owned by Catalyst. There was nothing confidential or proprietary in the methodology that Moyse used to value certain investment opportunities while he worked at Catalyst. Rather, he used commonly used and well-known valuation methods that he learned at the University of Pennsylvania and his previous employment at Credit Suisse and RBC Capital Markets and could be learned by anyone with a generalist background in finance or mathematics.

Reference: MMR, Tab 1, ABM, paras 5 and 15-16, pp. 2 and 4

10. While at the beginning of his employment with Catalyst, Moyse was more involved with researching potential investments, during the last six months of his employment, he was focused almost entirely on performing operating reviews of Catalyst-owned companies. As such, it is Moyse's evidence that he has very little knowledge of Catalyst's current prospective investments.

Reference: MMR, Tab 1, ABM, para 7, p. 2

11. Moyse is aware of three potential investments, however, he had very limited involvement and no strategic involvement in any of the files. Given the junior nature of his position, Moyse

had very little knowledge of Catalyst's potential investments and its strategy for those investments. While Moyse regularly attended Catalyst's Monday meetings, these meetings did not contain in-depth confidential strategy discussions, but normally a very low level update on Catalyst projects. Instead, these strategy discussions primarily took place at Partners only meetings, which Moyse did not attend.

Reference: MMR, Tab 1, ABM, paras 8-13, pp. 2-4

(2) COMPENSATION AT CATALYST

12. At Catalyst, Moyse earned a base salary of $90,000 and had the opportunity to earn a bonus of $80,000.00. His equity compensation did not exceed his base salary and bonus. In fact, the equity compensation he received was negligible. In 2013, Moyse earned $165,127.00, of which $90,000 was his salary and $72,000 was his annual bonus.

Reference: MMR, Tab 1, ABM, para 17, p. 4

2013 T4 and Notice of Assessment, MMR, Tab 1, ABM, Exhibit E

13. Catalyst's "60/40 Scheme" did not provide Moyse with a "partner-like interest" in Catalyst. The compensation earned under the 60/40 Scheme is only paid out after the fund returns all capital to investors, plus the 8% preferred return. Typically, this takes many years. As such, it is extremely rare for any Catalyst Analyst or Associate to receive any money from the 60/40 Scheme. For example, the Catalyst Fund II was raised in 2006 and has yet to trigger payments under the 60/40 Scheme.

Reference: MMR, Tab 1, ABM, para 19, p. 5

14. Furthermore, while Catalyst allows employees the opportunity to earn options in the company, these options can only be exercised by purchasing shares at their fair market value. As such, it is not correct to consider Catalyst's options as a form of compensation.

Reference: MMR, Tab 1, ABM, para 20, p. 5

(3) POISONED WORK ENVIRONMENT AT CATALYST

15. Moyse's evidence is that beyond the compensation scheme at Catalyst, which he considered unfair, the working environment was uncomfortable to the point of being hostile or

toxic. The Co-Founder and Managing Partner of Catalyst, Newton Glassman ("Glassman") would often have outbursts in the office: yelling and screaming, cursing profusely, and even openly threatening to fire employees. In late 2012, Glassman was unhappy with the explanation of a contract given by a Vice President of Catalyst, Zach Michaud ("Michaud"). As a result, during a meeting, Glassman stated that if Michaud was not more specific in his explanation, he would "*fucking bitch slap*" him. In 2013, another Partner, Gabriel de Alba ("de Alba") threw a chair at Mark Horrox.

Reference: MMR, Tab 1, ABM, para 23, p. 5-6

16. Glassman's aggressive and hostile nature was not directed solely to employees of Catalyst, and as a result, both he and Catalyst have obtained a negative reputation among many sources of potential investments and leads. It is common knowledge in the industry that many investment banks, law firms, accounting firms, and other investors will not work with Catalyst because of its reputation for being difficult, unreasonable, insincere, and disingenuous in its dealings. Moyse has heard Glassman make statements to Catalyst advisors which include: "*Stop fucking blowing smoke up my ass*", "*do your fucking job*", and *"if you're going to have a fucking argument with me you better be fucking prepared.*" Consequently, Catalyst had limited investment opportunities and "deal flow", which meant that Moyse spent most of his time analyzing companies already owned by Catalyst, rather than researching new opportunities. Moreover, these statements were frequently made in full earshot of employees, perpetuating the hostile and toxic work environment at Catalyst.

Reference: MMR, Tab 1, ABM, paras 24-25, p. 6

Newspaper Article, MMR, Tab 1, ABM, Exhibit F

17. Beyond the uncomfortable and oppressive financial and work environments at Catalyst, Moyse was also unhappy with the future prospects of Catalyst as over approximately the prior six months, operations at several portfolio companies deteriorated and / or missed their forecasts, causing him to lose faith in the firm and his opportunities there.

Reference: MMR, Tab 1, ABM, para 26, p. 6

18. Moyse began looking for alternative employment in or around December 2013. Despite searching for new employment, he continued, at all times, to perform his duties and responsibilities toward Catalyst in a loyal and dedicated manner, and to the best of his abilities.

Reference: MMR, Tab 1, ABM, para 27, p. 6

19. On or about May 19, 2014, Moyse was offered a position with West Face as an Associate. As such, on May 24, 2014, he submitted his resignation to Catalyst and gave the thirty (30) days' notice of his resignation as required by the Employment Agreement. On May 26, 2014, he was instructed by Riley to remain at home for the balance of his notice period.

Reference: MMR, Tab 1, ABM, paras 28-29, pg. 7

Resignation Email, MMR, Tab 1, ABM, Exhibit G

(4) ANSWERS TO CATALYST'S ALLEGATIONS OF MISAPPROPRIATION OF CONFIDENTIAL INFORMATION

(i) Use of Cloud Accounts

20. While Catalyst does have a remote access system, it is notoriously slow and unreliable. As such, it is common practice among Catalyst Associates and Analysts to forward information to their cloud accounts and personal devices in order to work more efficiently from home. Moreover, Partners would request Associates and Analysts to forward certain company information to their personal email addresses when they were unable to access the Catalyst network.

Reference: MMR, Tab 1, ABM, para 37, p. 9

21. Moyse's Box account is not a personal account. The account was established under Moyse's Catalyst email address, with Catalyst's knowledge, to host or have access to information hosted by Catalyst's portfolio companies or advisors.

Reference: MMR, Tab 1, ABM, para 38, p. 9

22. While there was a folder named "Catalyst Capital" in Moyse's Box account, the folder was not created by Moyse but by Capstone Advisory Group ("Capstone"). Capstone was the financial advisor to Advantage Rent-A-Car, a Catalyst portfolio company, and it created the folder to share diligence materials with Catalyst. Moyse did not have control over this folder.

Furthermore, other Catalyst employees and Partners, including de Alba had access to it. All of the folders in Moyse's Box account were related to Catalyst, created with the full knowledge of Catalyst, with access shared amongst various Catalyst employees and Partners.

Reference: MMR, Tab 1, ABM, paras 39-40, p. 9

23. Moyse has not accessed or attempted to access the information located in his Box account since his resignation from Catalyst and has not disclosed any information to West Face or any other parties.

Reference: MMR, Tab 1, ABM, para 41, p. 10

(ii) *Investment Letters*

24. On March 28, 2014, Moyse accessed various quarterly investment letters covering the time period June 2008 to April 2011. The letters did not contain any current investment information. As Moyse had been considering leaving Catalyst, Moyse was looking for statements made by Glassman about employees who had left the firm or were terminated in order to gauge what statements Glassman might make about him if he left. Moyse skimmed the letters over approximately 11 minutes and did not read all of the information in each letter. He did not transfer any of the letters to his Box, Dropbox, or any other personal account and did not provide any of the information to West Face.

Reference: MMR, Tab 1, ABM, para 43-46, p. 10

(iii) *Stelco*

25. On April 25, 2014, Moyse reviewed a number of documents related to Stelco over a 75 minute period. Moyse reviewed the documents out of personal curiosity and to learn more about the transaction. The files were accessible to anyone with access to Catalyst's system. By the time Moyse viewed the documents, the transaction was no longer active and Stelco no longer exists. Moyse transferred one file to his Dropbox account to read at home and deleted the file after reading it. He did not provide information about Stelco to West Face or any other parties

Reference: MMR, Tab 1, ABM, para 47-48, p. 11

(iv) *Masonite Files*

26. As part of Moyse's job search, he interviewed with a number of companies, including Mackenzie Investments. As part of the interview process, Moyse was asked to draft a 2-4 page model of the Masonite International. The documents in Moyse's Dropbox account were not confidential and did not belong to Catalyst. The documents were public documents, published by Masonite International and provided to Moyse by Mackenzie Investments or obtained from Masonite International's website. Moyse was unaware that Catalyst had been studying an opportunity related to Masonite International and did not access any Masonite International files on Catalyst's system.

Reference: MMR, Tab 1, ABM, paras 49-52, pp. 11-12

Email from Sharon Beers, MMR, Tab 1, ABM, Exhibit I

(v) *Telecom Files*

27. On May 13, 2014, Moyse accessed a number of files related to WIND Mobile as part of his duties at Catalyst. Moyse was working on a chart to include in an investment memo. As such, he had to open a number of files and quickly scan them to determine if they contained the information he was looking for. Moyse was working amongst other employees at the time. He did not transfer the files to his Box, Dropbox, or other personal account and has not provided any of the information to West Face.

Reference: MMR, Tab 1, ABM, para 55, p. 12

(vi) Monday Meeting Notes

28. Moyse did not attend the Monday meeting on May 26, 2014. Earlier that morning he verbally confirmed his previous written notice of resignation and, as a result, was not invited to the meeting. The "Monday Meeting Notes" were not Moyse's notes from the meeting (which would be impossible as he didn't attend it), but were his notes for the meeting consisting of world news and economic events that might be discussed at the meeting. It was Moyse's usual practice to create notes prior to most Monday meetings. The document did not contain any confidential information and did not belong to Catalyst. Moyse did not transfer the notes to his Box, Dropbox or any personal account, nor has he provided the information to West Face.

Reference: MMR, Tab 1, ABM, paras 58-60, p. 13

(5) POST-RESIGNATION EVENTS

29. Moyse has taken his obligations toward Catalyst seriously. Furthermore, West Face has reminded Moyse of his obligations both prior to and following the commencement of his employment at West Face. For example, on or about May 22, 2014, West Face's General Counsel and Secretary Alex Singh contacted Moyse and instructed him not to use or disclose any confidential or proprietary information belonging to Catalyst.

Reference: MMR, Tab 1, ABM, para 67, p. 14

30. West Face has also taken measures to prevent the use or disclosure of Catalyst's confidential or proprietary information by erecting a "Confidentiality Wall" that prohibits Moyse from having any involvement with West Face's potential investment with WIND Mobile. To that end, employees at West Face have been instructed not to discuss WIND Mobile with Moyse and the IT Group at West Face restricted Moyse's access to West Face's network for files regarding WIND Mobile.

Reference: MMR, Tab 1, ABM, para 56, pp. 12-13

Memorandum from Supriya Kapoor, MMR, Tab 1, ABM, Exhibit K

PART III – LAW

(1) NON-COMPETITION – CATALYST HAS NOT ESTABLISHED A STRONG *PRIMA FACIE* CASE

(a) The Legal Principles

31. At paragraph 31 of its factum, Catalyst misstates the burden it is required to meet as the moving party. Rather than "a serious issue to be tried" or that the action is "neither vexatious nor frivolous", this Court has consistently held that a party seeking to enforce a restrictive covenant in an employment context must meet the elevated standard of a strong *prima facie* case. The reason for requiring a strong *prima facie* case is that the remedy will interfere with an individual's ability to earn a living and use their knowledge and skills.

Reference: *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 at para 58 (S.C.J.), Moyse's Book of Authorities ("MBA"), Tab 1

Brown v. First Contact Software Consultants Inc., [2009] O.J. No. 3787 at paras 24-25 (S.C.J), MBA, Tab 2

Trapeze Software Inc. v. Bryans, [2007] O.J. No. 276 at paras 30-31 (S.C.J.), MBA, Tab 3

32. Thus, Catalyst must show that it has a strong *prima facie* case that the non-competition clause in the Employment Agreement is enforceable. It cannot do so.

Reference: *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 at para 59 (S.C.J.), MBA, Tab 1

(b) The Non-Competition Clause is Unenforceable

33. A non-competition covenant is *prima facie* void as being in restraint of trade and contrary to public policy. Moyse agrees with Catalyst's summary of the case law regarding restrictive covenants at paragraphs 35-38 of its factum.

Reference: *Lyons v. Multari*, [2000] O.J. No. 3462 at para 19 (C.A.), MBA, Tab 4

34. While Catalyst advances the proposition that there may be circumstances where the advantage gained by an employee from access to and misuse of confidential information is such that a confidentiality clause would be inadequate to protect the employer's interest, it has provided no case law supporting that contention.

35. Even if that theory were true, which is explicitly denied, Moyse submits that it would be inapplicable to the facts of this case. Moyse held a junior role and was privy to limited confidential information. Importantly, the Employment Agreement contains a confidentiality clause, thus Catalyst has acknowledged that its interests could properly be protected in that manner.

36. In *Mason v. Chem-Trend Limited Partnership*, the Ontario Court of Appeal examined an employment agreement that contained both a confidentiality clause and a non-competition clause. The employer attempted to justify the non-competition clause as necessary because the former employee had significant knowledge of the company's confidential product and customer information, which would be damaging if he were allowed to compete. In examining the contract as a whole, the Court found that the confidentiality clause was a significant protection that

weighed against the enforceability of the non-competition clause. As the contract had a clause which protected the company from the misuse of its confidential information, the complete prohibition on competition could not be justified.

Reference: *Mason v. Chem-Trend Limited Partnership*, [2011] O.J. No. 1994 at paras 21-24 (C.A.), MBA, Tab 5

37. In order for a non-competition agreement to be enforceable, an employer must prove that it is reasonable – that it goes only as far as necessary to protect the company's proprietary interests. Moyse submits that the non-competition clause goes too far.

38. Moyse submits that the non-competition clause is overly broad in its scope. In its materials, Catalyst repeatedly attempts to minimize the scope of the clause stating, for example, "*The Non-Competition Covenant precludes Moyse from engaging in 'any business or undertaking of the type conducted by' Catalyst*", "*It only prevents him from taking [his skills] to a direct competitor in the narrow, but highly competitive industry of special situations investing for control*", and "*The Non-Competition Covenant is restricted to Toronto, which is where Catalyst's competitors are principally based.*"

Reference: Factum of the Moving Party at paras 42, 45, and 47

39. The non-competition clause states:

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

Reference: Catalyst Employment Agreement, MMA, Tab 1, ABM, Exhibit A

40. The clause is not limited to the business conducted by Catalyst. Contrary to Riley's affidavit and Catalyst's factum the clause is also not limited to Toronto, but in fact, seeks to restrict Moyse's conduct throughout the entire Province of Ontario. Additionally, there is nothing in the clause which limits the prohibited activity to special situations investing for control. Instead, the clause also prohibits Moyse from engaging in any business conducted by the "Fund" (which is not defined in the Employment Agreement) and "any direct Associate" of Catalyst.

41. Given the definition of "Associate" in the Ontario *Business Corporations Act*, which includes, "*any body corporate of which the person beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights attached to all voting securities of the body corporate for the time being outstanding*" and the nature of Catalyst's investments, which include a wide variety of industries and sectors that are completely unrelated to Moyse's duties with Catalyst, the clause would prevent Moyse from working in the film and television production, biologics / pharmaceuticals and casino gaming industries, among others. This is an overly broad restriction and which goes well beyond protecting Catalyst's proprietary interests.

Reference: *Business Corporations Act*, RSO 1990, c B. 16 at s. 1(1), "Associate"

MMR, Tab 1, ABM, paras 34-35, p. 8

42. In addition to being overbroad in scope, the clause is impermissibly vague and ambiguous, as "Fund" is not defined anywhere in the Employment Agreement.

43. An ambiguous restrictive covenant is, by definition, *prima facie* unreasonable and unenforceable.

Reference: *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6 at para 43 (S.C.C.), MBA, Tab 6

BrettYoung Seeds Limited Partnership v. Dyck, [2013] A.J. No. 567 at paras 92-94 (Q.B.), MBA, Tab 7

44. Finally, contrary to paragraph 53 of Catalyst's factum, the fact that the Employment Agreement contained an acknowledgement that the restrictive covenants are reasonable and

enforceable is not determinative of the matter. These boilerplate clauses are routinely disregarded by the court, as parties cannot usurp the exclusive jurisdiction of the court to determine whether injunctive relief is appropriate.

Reference: *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3787 at para 61 (S.C.J), MBA, Tab 2

Trapeze Software Inc. v. Bryans, [2007] O.J. No. 276 at para 55 (S.C.J.), MBA, Tab 3

Jet Print Inc. v. Cohen, [1999] O.J. No. 2864 at paras 25-27 (S.C.J.), MBA, Tab 8

(2) BREACH OF CONFIDENCE – CATALYST HAS NOT ESTABLISHED A STRONG *PRIMA FACIE* CASE

45. In order to have a cause of action for breach of confidence, a plaintiff must prove 1) that the information was confidential; 2) that it was misused by the party to whom it was communicated; and 3) that the plaintiff suffered harm from the misuse. Moyse submits that Catalyst has failed to meet all three requirements.

Reference: *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 at para 52 (S.C.J.), MBA, Tab 9

46. Catalyst has not proven that any of the material that was accessed by Moyse was confidential. It has not adequately described the contents of the documents nor put any of the impugned documents into the record, even in a redacted form in order to allow the court to make a proper determination. Instead, Catalyst has supplied only the names of the files and relies on a blanket assertion of confidentiality. Moreover, Riley's affidavit has claimed confidentiality over documents, such as the Masonite Investment documents, which not only were not confidential, but did not belong to Catalyst. This should put the confidentiality of every document into doubt.

47. Where a party does not lead adequate evidence to establish that documents are confidential, it cannot prove that confidential documents have been misappropriated.

Reference: *731328 Ontario Limited (c.o.b. LDI Industries (2000)) v. Century Mould Ltd.*, [2006] O.J. No. 4830 at paras 29-31 (S.C.J.), MBA, Tab 10

Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve, [2013] O.J. No. 3769 at para 25 (S.C.J.), MBA, Tab 11

48. Moreover, putting aside the question of confidentiality, Catalyst has absolutely no evidence that Moyse has misappropriated any documents. Musters found no evidence that Moyse copied any documents, only that he accessed them. Moyse has provided credible and reasonable explanations for each of the allegations.

49. It is not appropriate to issue an injunction where a speculative belief by an employer that a former employee may have or may use confidential information is countered by express testimony, supported by other evidence, that they neither have such information nor intend to have or use such information.

Reference: *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, [2005] B.C.J. No. 1368 at para 41 (S.C.), MBA, Tab 12

50. Unless a plaintiff can show that he has some basis for a reasonable belief in his assertion that a defendant is making use of his confidential information, then the action can only be characterized as speculative and fishing, and ought not be allowed to proceed.

Reference: *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, [2005] B.C.J. No. 1368 at para 35 (S.C.), MBA, Tab 12

51. It is not enough to rely upon negative inferences or speculation, nor to assert that misuse of confidential information is inevitable. An injunction should not be granted without an evidentiary base that it is likely that a breach of confidentiality will occur without an injunction being granted.

Reference: *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 at para 62 (S.C.J.), MBA, Tab 3

52. Additionally, Catalyst has not provided any evidence of harm it has suffered because of alleged misuse of confidential documents. As such, Catalyst has not only failed to make out a strong *prima facie* case, it has failed to establish that there is even a serious issue to be tried.

(3) <u>Catalyst has not Established Irreparable Harm</u>

53. The onus is on the party seeking an injunction to place sufficient evidence before the court on which a finding can be made that irreparable harm will be sustained if an injunction is not granted.

Reference: *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 at para 21 (S.C.J.), MBA, Tab 8

54. Even where the subject matter of the litigation is the alleged breach of a restrictive covenant, the moving party must show evidence of irreparable harm that is clear and not speculative.

Reference: *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663, at para 36 (S.C.J.), MBA, Tab 13

Trapeze Software Inc. v. Bryans, [2007] O.J. No. 276 at para 52 (S.C.J.), MBA, Tab 3

55. Catalyst has provided no evidence that it has suffered or will suffer irreparable harm. As the case law indicates, Catalyst is not permitted to rest on bald assertions or speculation about potential harm. A party's concern about irreparable harm must be based on actual events, not speculation.

Reference: *Consumer Impact Marketing Ltd. v. Shafie*, [2010] O.J. No. 2424 at paras 38-41 (S.C.J.), MBA, Tab 14

(4) THE BALANCE OF CONVENIENCE FAVOURS MOYSE

56. Where a plaintiff has not established a strong *prima facie* case nor that it will suffer irreparable harm, the balance of convenience cannot favour the plaintiff.

Reference: *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 at para 30 (S.C.J.), MBA, Tab 8

57. Where there is no evidence of actual misuse of confidential information, concern about potential future misuse and theoretical damages are outweighed by the significant impact on an employee who will lose their income.

Reference: *QuIC Financial Technologies Inc. v. Chang*, [2008] B.C.J. No. 1410 at para 37 (S.C.), MBA, Tab 15

58. Catalyst has provided no basis for its assertion that if an injunction is granted preventing Moyse from performing services for West Face, that West Face will continue his salary for the period of the injunction.

59. Beyond a potential loss of salary, if an injunction is granted, Moyse will be deprived of the fulfillment of working and the opportunity to continue to develop his skills. The Supreme Court of Canada has repeatedly commented on the nature of work stating:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*
>
> Reference: *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41 at para. 30 (S.C.C.), MBA, Tab 16

(5) A FORENSIC EXAMINATION OF MOYSE'S COMPUTER IS UNWARRANTED

60. Forensic analysis of another party's computer has been described as "an invasive order" and an "extraordinary remedy" by this Court.

> Reference: *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663, at paras 48-54 (S.C.J.), MBA, Tab 13
>
> *Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve*, [2013] O.J. No. 3769 at para 43 (S.C.J.), MBA, Tab 11

61. As such, Moyse submits that it would be inappropriate to grant forensic analysis as a form of interim relief. Given the intrusive and invasive nature of the order, Moyse submits that forensic examination should only be granted, in appropriate circumstances, after a full interlocutory motion where the parties have had an opportunity to cross-examine each other's affidavits and the full evidentiary record is before the motion judge. In any event, a forensic examination is not warranted in this case.

62. While Catalyst relies upon the forensic analysis ordered in *GDL Solutions Inc. v. Walker*, a review of the case shows that there are substantial differences between the circumstances of the two cases: 1) In *GDL*, the restrictive covenant was contained in agreement to sell a business, not an employment contract; 2) The employer's forensic expert uncovered evidence that the employees had transferred thousands of files onto a USB key; 3) Once the employee was served with a motion record, there was evidence that the employee tried to delete all of the files from the USB key; 4) The employer established that the confidential information was being misused and harm was being caused, as the company was losing customers to their former employee. None of those factors are applicable in this case.

Reference *GDL Solutions Inc. v. Walker*, [2012] O.J. No. 3768 at paras 1, 13-15, and 17-18 (S.C.J.), MBA, Tab 17

63. Instead, this case is more like the number of recent cases which have held that an order for forensic analysis is inappropriate where there is no proof that a person has misused any confidential information.

Reference *Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve*, [2013] O.J. No. 3769 at paras 42-43 (S.C.J.), MBA, Tab 11

Brown v. First Contact Software Consultants Inc., [2009] O.J. No. 3787 at para 67 (S.C.J), MBA, Tab 2

Altus Group Ltd. v. Yeoman, [2012] O.J. No. 3663, at paras 48-54 (S.C.J.), MBA, Tab 13

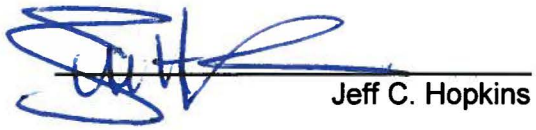
PART IV – ORDER REQUESTED

64. Given the foregoing, Moyse respectfully requests:

(a) that this motion be dismissed; and

(b) his costs of this motion on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Jeff C. Hopkins

Justin Tetreault

Lawyers for the Respondent, Brandon Moyse

SCHEDULE 'A'

1. *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (S.C.J.)

2. *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 (S.C.J.)

3. *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 (S.C.J.)

4. *Lyons v. Multari*, [2000] O.J. No. 3462 (C.A.)

5. *Mason v. Chem-Trend Limited Partnership*, [2011] O.J. No. 1994 (C.A.)

6. *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6

7. *BrettYoung Seeds Limited Partnership v. Dyck*, [2013] A.J. No. 567 (Q.B.)

8. *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 (S.C.J.)

9. *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 (S.C.J.)

10. *731328 Ontario Limited (c.o.b. LDI Industries (2000)) v. Century Mould Ltd.*, [2006] O.J. No. 4830 (S.C.J.)

11. *Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve*, [2013] O.J. No. 3769 (S.C.J.)

12. *ACS Public Sector Solutions Inc. v. Courthouse Technologies Ltd.*, [2005] B.C.J. No. 1368 (S.C.)

13. *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663 (S.C.J.)

14. *Consumer Impact Marketing Ltd. v. Shafie*, [2010] O.J. No. 2424 (S.C.J.)

15. *QuIC Financial Technologies Inc. v. Chang*, [2008] B.C.J. No. 1410 (S.C.)

16. *Machinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41

17. *GDL Solutions Inc. v. Walker*, [2012] O.J. No. 3768 (S.C.J.)

SCHEDULE 'B'

***Business Corporations Act*, RSO 1990, c B. 16, s. 1(1) "Associate":**

"associate", where used to indicate a relationship with any person, means,

(a) any body corporate of which the person beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights attached to all voting securities of the body corporate for the time being outstanding,

(b) any partner of that person,

(c) any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,

(d) any relative of the person, including the person's spouse, where the relative has the same home as the person, or

(e) any relative of the spouse of the person where the relative has the same home as the person; ("personne qui a un lien")

THE CATALYST CAPITAL GROUP INC. - and - MOYSE ET AL.

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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