Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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 August 7, 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.

2. Furthermore, Catalyst seeks an unwarranted, extraordinary, and intrusive order requiring Moyse to turn over his personal computer and electronic devices for inspection despite having Moyse's full co-operation and disclosure of documents remaining in his power, possession and control.

3. Despite the picture painted by Catalyst's materials, this is not the case of a rogue senior employee covertly stealing confidential information in order to engage in unfair competition, but of a twenty-six year old junior employee who was expected to work long hours and often from home who innocently and accidentally retained documents on his personal computer after working on them at home during the course of his 1.5 year employment with Catalyst.

4. In seeking to escape the poisoned work environment that existed at Catalyst, Moyse made a poor decision and, along with his CV, sent four dated investment memos to West Face Capital Inc. ("West Face"). He did this not to give West Face a competitive advantage, which is wholly supported by the evidence, but simply to provide an example of his writing abilities. The evidence shows that Moyse chose the four memos specifically because he believed that they could not harm Catalyst, either because Catalyst had already completed the transaction or because they had passed on the opportunity. In contrast to Catalyst's depiction of Moyse as an untrustworthy rogue who has concealed and will continue to conceal the true extent of his activities unless an order to forensically examine his personal computer and email accounts is granted, Catalyst is only aware of this disclosure because Moyse stated it in an affidavit. Catalyst admits that it has no evidence of any harm whatsoever caused by this disclosure.

5. Despite retaining an electronic forensic expert to examine Moyse's workplace computer, Catalyst is unable to show any actual evidence of a single instance in which Moyse inappropriately transferred Catalyst documents to a personal cloud storage system.

6. Since, at the time this motion was brought, Catalyst had no actual evidence of wrongdoing by Moyse, it instead pointed to four categories of files that he accessed weeks apart over the span of three months and baldy asserted that it was "very likely" that he transferred the files to a cloud account. Catalyst's argument can be summarized as follows: Moyse accessed work files using his Catalyst computer. Since he also has two cloud accounts, it should be assumed that he transferred the files to those accounts.

7. Catalyst's forensic examiner, Martin Musters ("Musters") did not reach his conclusion based on actual evidence showing Moyse transferred these documents to his Dropbox or Box accounts. In fact, he admits that cannot conclusively make that determination based on the information that he uncovered. Instead, Musters relies upon his own interpretation of Moyse's "pattern of conduct" and goes well beyond the scope of his expertise to make an unsupported judgment which assumes Moyse acted with malicious intent. In doing so, Musters ignores the important context subsequently provided by Moyse, the admissions made by Catalyst's Chief Operating Officer James A. Riley ("Riley"), and relies upon the false premise that the documents accessed by Moyse were open for a few seconds each, despite his own admission that they could have been open for much longer.

8. Moyse has reasonable and credible explanations for each of Catalyst's accusations of misappropriation of confidential information. In many cases, these explanations were supported by Riley during his cross-examination. As a result, it now appears that Catalyst has drastically changed its strategy and has dropped many of its original claims. Notably, Riley acknowledged:

- Moyse had a legitimate work-related reason for having a Box account. Box accounts were used by various employees of Catalyst in order to access files stored in Box folders created by an associate corporation of Catalyst;
- Catalyst had previously included employee information in its investor letters;
- Moyse's explanation for accessing WIND Mobile files was reasonable, given he had been assigned to work on the project;
- Catalyst's remote access system is slow and other Catalyst employees and partners have sent documents to their personal devices using email; and
- He has no information to support his belief that the Masonite documents in Moyse's Dropbox account originated from Catalyst.

9. It is Moyse's position that the non-competition agreement is vague, overbroad, and unreasonable. Furthermore, Catalyst's bald allegations and uncorroborated suspicions do not meet the stringent test of establishing a strong *prima facie* case and therefore Catalyst's request for injunctive relief must be denied. Riley admitted that Catalyst has no proof of any harm suffered by Catalyst and Moyse submits that Catalyst has also failed to provide reliable evidence of future irreparable harm. Finally, the balance of convenience clearly favours Moyse as damages are a calculable and adequate remedy for Catalyst, while an 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

10. Moyse is twenty-six 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

11. 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

12. 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
Cross-Examination of James A. Riley ("Riley Cross"), pp. 9-11, qq. 20, 25-30

13. 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

14. 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
Riley Cross, pp 18-19, qq. 55-58

15. 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

16. During his cross-examination, Riley admitted that Moyse's knowledge of Catalyst's prospective investments was limited to the three opportunities mentioned in Moyse's affidavit.

Reference: Riley Cross, pp. 25-26, qq. 80-81

(2) COMPENSATION AT CATALYST

17. At Catalyst, Moyse earned a base salary of $100,000 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
Cross-examination of Brandon Moyse ("Moyse Cross"), p. 159, qq. 756-757

18. 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
Riley Cross, pp 27-28, qq. 87-89

19. During his cross-examination, Riley acknowledged that despite Moyse's "partner-like interest", Moyse was not invited to partner meetings nor did he have any voting rights.

Reference: Riley Cross, p. 29 qq. 94-95; p. 31, qq. 100-102

20. 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

21. 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

22. 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

23. 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

24. 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

25. As part of his search for new employment, Moyse emailed Thomas Dea ("Dea"), a Partner at West Face on March 14, 2014.

26. Dea and Moyse met for approximately forty-five minutes on March 26, 2014. During that meeting the pair had a general discussion about Moyse's duties at Catalyst, the type of work performed at West Face, and what West Face's potential needs were.

Reference: Moyse Cross, pp. 131-132, qq.620-623
Cross-examination of Thomas Dea ("Dea Cross"), pp. 67-68, qq. 283-288

27. During the meeting, Dea asked Moyse to provide him with research and writing samples to gauge Moyse's research and writing abilities.

Reference: Moyse Cross, p. 132, q. 624
Dea Cross, pp. 68-70, qq. 289-292

28. As a result, on March 27, 2014, Moyse sent Dea a copy of his CV, a deal sheet, and four investment memos that he had worked on at Catalyst. Three of the research pieces were created using only publically available information. Furthermore, Moyse believed that Catalyst was no longer considering the investments. In the fourth case, Catalyst had already successfully completed its investment and therefore Moyse did not believe that the information was of any value to West Face or detrimental to Catalyst. For clarity, despite the colourful suggestions contained in Catalyst's Factum, this one email is the only instance Moyse disclosed confidential Catalyst information to West Face.

Reference: MMR, Tab 1, ABM, paras 62-65, pp. 13-14
West Face Capital Inc. Motion Record, Tab 1, Email from Brandon Moyse to Tom Dea, dated March 27, 2014, Exhibit L

29. 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 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
Riley Cross, p. 38, q. 123

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

(i) Use of Cloud Accounts

30. 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
Riley Answers to Undertakings, q. 255, Moyse Supplementary Motion Record ("MSMR"), Tab 1

31. During his cross-examination, Riley admitted that Catalyst's remote access system can be slow and that employees occasionally experience "difficulties" using it. He further admitted that to his knowledge, at least two people at Catalyst (Zash Michaud and Gabriel de Alba) ("de Alba") use cloud accounts or email to forward documents to their personal computer in order to work from home. When asked to confirm Moyse's information that other specific employees also used Dropbox or their personal email, Riley was unable to answer, stating that he didn't know because Catalyst had not imaged their computers.

Reference: Riley Cross pp. 67-72, qq. 245-254, 257, 263

32. 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

33. During his cross-examination, Riley admitted that at the time he swore his June 26th affidavit, he "*didn't have full information*" and that "*For example, I understand there's a Box account for Natural Markets, which I talked with Zach [Michaud] about yesterday. And it was a Box account created by Natural Markets.*"

Reference: Riley Cross, pp. 74-75, qq. 273-274

34. When pressed about whether his previous statement that Moyse had no reason to have a Box account was false, Riley concurred.

> Q. But you say in your affidavit, Mr. Riley, that there was no reason for Mr. Moyse to have a Box account. So I think we've established that that's a false statement, correct?
>
> A. **Based on subsequent investigations I have to concur with that**. Further information would make that statement untrue at this time. Not false, untrue at this time. In other words, I believed at the time that there was no reason for those Box accounts to be there.

Reference: Riley Cross pp. 79-80, q. 280

35. Furthermore, 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

36. 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. Riley admitted that Catalyst has no evidence to dispute these facts.

Reference: MMR, Tab 1, ABM, para 41, p. 10
Riley Cross, p. 82, q. 288

37. These important admissions are not addressed in Catalyst's materials. Instead, while Catalyst's factum for the interim motion was replete with references to Moyse's Box account, in its current factum, the account is mentioned only twice.

(ii) *Investment Letters*

38. On March 28, 2014, two days after Moyse met with Dea and nearly two months before he was offered a position at West Face, Moyse accessed various quarterly investment letters covering the time period June 2008 to April 2011. While in his June 26th affidavit, Riley took issue with the fact that Moyse accessed these documents between 6:28 p.m and 6:39 p.m., which he stated was "outside of regular office hours at Catalyst", **during his cross-examination, Riley admitted that it would not be unusual for Moyse to be in the office at that time** and in fact before Riley would leave the office, usually between 6:30 p.m. and 8:00 p.m, he would say good night to Moyse.

Reference: MMR, Tab 1, ABM, para 43
Riley Cross, pp. 83-84, qq. 291-293

39. The letters Moyse accessed did not contain any current investment information. While Riley took the position in his June 26th affidavit that investment letters contained forward-looking statements, during his cross-examination, Riley clarified that they did not contain any information about potential acquisitions.

Q. But would the investment letters not talk about potential acquisitions in a more –

A. No.

Q. -- general form?

A. No.

Q. Not at all?

A. No. Well, I'd have to go back and look at each one again.

Q. I find that hard to believe.

A. Generally speaking, that's very sensitive information. So we would not want to signal it because of a need to ensure that we didn't have information out there that could be used against us. We don't think the limited partners would ever use it improperly, and they're always cautioned to not use the information we give them. But we try to be very, very, careful with our use of information.

Reference: MMR, Tab 1, ABM, para 44, p. 10
Riley Cross, pp. 86-87, qq. 302-305

40. Even if the letters did contain such information, both in his affidavit and during his cross-examination, Riley was clear that forward looking information loses its value after six months.

Reference: Catalyst Motion Record, Tab 2, Affidavit of James A. Riley, sworn June 26, 2014, para 33
Riley Cross, p. 203, q. 713

41. As Moyse had been considering leaving Catalyst, he 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. During his cross-examination, Riley acknowledged that investment letters contained employee updates and that Glassman had recently made negative statements about a former employee's performance during a meeting with investors.

Reference: MMR, Tab 1, ABM, para 45, p. 10
Riley Cross, pp. 88-90, qq. 313-321

42. Moyse skimmed the letters over approximately eleven 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. **Catalyst has no evidence that Moyse has disclosed the contents of any investment letter to West Face nor that he transferred any of the investment letters to his personal Dropbox or a personal email account.**

Reference: MMR, Tab 1, ABM, para 43-46, p. 10
Riley Cross, pp. 90-91, qq. 323-325

(iii) *Stelco*

43. On April 25, 2014, Moyse reviewed a number of documents related to Stelco over a seventy-five 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. During his cross-examination, Moyse testified that he often reviewed old transactions and provided specific examples.

Reference: MMR, Tab 1, ABM, para 47-48, p. 11
Moyse Cross, pp. 81-82, qq. 375-378

44. Moyse transferred one Stelco 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. **Catalyst has no evidence that Moyse has disclosed the contents of any Stelco file to West Face nor that he transferred any of the Stelco files (apart from the one he admits transferring) to his personal Dropbox or a personal email account.**

Reference: MMR, Tab 1, ABM, para 47-48, p. 11
Riley Cross, pp. 99-100, qq. 357-359

(iv) *Masonite Files*

45. 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 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

46. Neither Catalyst nor Musters has any evidence that the documents in Moyse's Dropbox originated from Catalyst's system, nor do they have no evidence that Moyse has disclosed any Masonite documents to West Face or any other third party.

Reference: Riley Cross, pp. 113-115, qq. 405-408
Cross-examination of Martin Musters ("Musters Cross"), pp. 49-51, qq/ 150-154

47. This allegation no longer appears in Catalyst's factum.

(v) *Telecom Files*

48. On May 13, 2014, Moyse accessed a number of files related to WIND Mobile as part of his duties at Catalyst. Specifically, 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

49. During his cross-examination, Riley admitted that Moyse's explanations, both for accessing the files and the pattern in which he accessed them, were reasonable and that Moyse had a legitimate reason for accessing the documents on Catalyst's system.

Q. ...**The question is, as part of Brandon working on Wind Mobile in the two weeks prior to his resignation on May 26th –**

A. **Yes**.

Q. **-- he would have had legitimate reasons for accessing documents on Catalyst's system**?

A. **Yes. I assume so. It was an assigned task**...

Q. **Now in terms of Brandon's explanation for why he was accessing the Wind Mobile materials on Catalyst's system...Do you have any reason to dispute that statement?**

A. **No.**

Q. Are there in fact hundreds of files related to Wind Mobile on Catalyst's system? Do you know if that's true?

A. I don't know. There would be a substantial number, but I don't know whether it's hundreds.

Q. So I put it to you that **Brandon's explanation then seems reasonable, does it not, that he would have had to open a number of files and quickly review them to determine if they contained the confidential information he was looking for if, as you say, there were many Wind Mobile documents**?

A. **Yes. I think that's a fair comment**.

Q. **And Catalyst has no evidence that Brandon disclosed any Wind Mobile documents or confidential information to West Face or any other third party at this time?**

A. **At this time we do not**.

Reference: Riley Cross, pp. 120-122, qq. 422-428

50. Despite the emphasis that Catalyst places on what it calls the "Telecom Situation", this allegation no longer appears in Catalyst's factum.

(vi) Monday Meeting Notes

51. 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

52. During his cross-examination, Riley admitted that he doesn't recall if Moyse was invited to the meeting and has no evidence to dispute Moyse's statement that the notes were not created after the meeting. Furthermore, Riley admitted that Catalyst has no evidence that the notes were transferred to a third party. Again, this allegation appears to have been dropped by Catalyst.

Reference: Riley Cross, p. 55, q. 195; pp. 57-59, q. 205, 208-212

(5) POST-RESIGNATION EVENTS

54. 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
Cross-examination of Alexander Singh, p. 11, q. 33

55. 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

56. Although Catalyst now takes the position that the confidentiality wall is insufficient because it does not cover Mobilicity, this is another attempt by Catalyst to shift the goal posts after it realized the weaknesses of its case based on the original allegations. Catalyst has known about the scope of the confidentiality wall since June 19. Notably, during his cross-

examination, Riley admitted that Catalyst had not made any inquiries about the details of the confidentiality wall or request that West Face modify the wall.

Reference: Riley Cross, pp. 213-214, qq. 756, 760

PART III – LAW

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

(a) The Legal Principles

57. At paragraph 58 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

58. 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

59. 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 62-65 of its factum.

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

60. 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.

61. 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.

62. 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

63. 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.

64. Moyse submits that the non-competition clause is overly broad in its scope. In its materials, Catalyst attempts to minimize the scope of the clause stating, "The Non-Competition Covenant precludes Moyse from engaging in 'any business or undertaking of the type conducted by' Catalyst". However, this is only one small part of the restrictions placed upon Moyse.

Reference: Factum of the Moving Party at para. 69

65. 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

66. The clause is not limited to the business conducted by Catalyst. There is also 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.

67. 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.

Reference: *Business Corporations Act*, RSO 1990, c B. 16 at s. 1(1), "Associate"
MMR, Tab 1, ABM, paras 34-35, p. 8

68. In his July 28, 2014 affidavit, Riley lists Catalyst's seven associates:

(a) Geneba Properties N.V., a European real estate company;

(b) Advantage Rent a Car, a car rental business;

(c) Sonar Entertainment Inc., a television series, mini-series, and made-for-TV movie production company;

(d) Natural Markets Restaurant Corporation, a retail food and restaurant company;

(e) Callidus Capital Corporation, a specialty asset-based lender;

(f) Therapure Biopharma Inc., a contract manufacturer and developer of biological drugs; and

(g) Gateway Casinos & Entertainment Inc., a gambling company.

Reference: Affidavit of James A. Riley, sworn July 28, 2014, para. 14

69. As Riley explained during his cross-examination, the breadth of industries in which Catalyst's Associates operate has a profound effect on Moyse's career options. The effect of the non-competition clause is to prevent Moyse from working in a number of industries and in a number of roles that have nothing to do with Moyse's duties at Catalyst.

Q. So, Mr. Riley, just so I understand the plaintiff's position and interpretation on the non-compete. Is it your evidence that **the non-compete would not prevent Brandon from working at other organizations that may do special situations investments, but would also do other lines of business provided he's also working in those other lines of business?**

MR DIPUCCHIO: No.

A. No.

Q. **He can't work at that organization whatsoever?**

A. **No.**

...

Q. Now turning back to the seven associates that you've listed in paragraph 14 of your reply affidavit. **You'd agree with me that based on this list, Brandon would be prohibited from working at any company that works, for example in the food retail or restaurant industry?**

A. **Mm-hmm.**

Q. **The biologics industry?**

A. **Yes.**

...

Q. **So is it your position that he cannot work for a gambling operation in Ontario?**

A. **Yes, it is.**

Reference: Riley Cross, p. 160, 578-579; p. 165, qq. 591-592; p. 197, q. 696

70. In *Quantum Management Services Ltd. v. Hann*, the employee's contract contained a similar non-competition provision which prohibited her from working for a competitor of Quantum or its affiliates in any capacity. Upon review of the contract, the court rejected the clause, holding that it was unreasonable for the prohibition to extend beyond the specific services that Hann performed for Quantum.

Reference: *Quantum Management Services Ltd. v. Hann*, [1989] O.J. No. 542 at para. 38 (H.C.J.), Moyse Supplementary Book of Authorities ("MSBA"), Tab 1.

71. According to Riley, Moyse's non-competition clause applies whether or not Moyse had any involvement with the Associate and applies even if the Associate does not operate in Ontario.

Reference: Riley Cross, p. 160, q. 578; pp. 196-201, qq. 692-704

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

73. Despite acknowledging that "Fund" is a "very important" and "critical" term, Riley had significant difficulty explaining what was meant by Fund, first taking the position that it meant Fund IV, then taking the position that it meant Funds III and IV, and finally being unable to explain what would have happened in the hypothetical scenario that Moyse's employment outlasted the life of Funds III and IV.

Reference: Riley Cross, p. 136, q. 491; pp. 189-190, qq. 672-673

74. Later in Riley's cross-examination, Catalyst's counsel took the position that Fund "*could be any one of the funds.*"

Reference: Riley Cross, p. 193, q. 681

75. If Catalyst, the party that drafted the agreement, is unable to determine what is meant by "Fund", it is in no position to argue that the term is unambiguous and understood by Moyse. **As candidly acknowledged by Riley during his cross-examination when speaking about the clause, "*Someone made a mistake.*"**

Reference: Riley Cross, pp. 140-141, q. 509

76. In addition to being ambiguous because of the undefined word "Fund", Moyse submits that the non-competition agreements is unclear because the scope of the prohibited conduct changes over time as Catalyst adds or sells Associates. This was acknowledged during Riley's cross-examination.

> Q. So it's also true just by the nature of Catalyst business that the subject matter of this non-compete in terms of the number of associates and who those associates are, **that would change over time from the date Brandon signed the agreement to the date that – some future date that he might leave?**
>
> A. **Yes.**
>
> Q. **So by extension then Brandon is essentially agreeing not to work for a company when he signs the agreement, he's agreeing, potentially agreeing not to work for a company which at the time Catalyst had absolutely no business relationship with whatsoever?**
>
> A. **Yes.**
>
> Reference: Riley Cross, pp. 161-162, qq. 582-583

77. At the time of the execution of the agreement, it would have been impossible for Moyse to know the extent of the non-competition agreement, as he would not know what other businesses Catalyst's Associates might carry on during his employment. The reasonableness of an agreement must be determined as of the date of its execution. As of the date of the execution of the Employment Agreement, the number and kind of businesses in which Moyse may be prohibited from participating was unlimited. This is not a reasonable restriction.

> Reference: *Creditel of Canada Ltd. v. Faultless et al.*, [1977] O.J. No. 2474 at para. 25 (H.C.J.), MSBA, Tab 2

78. 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

79. Finally, contrary to paragraphs 82-84 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

80. 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 these requirements.

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

81. Catalyst's allegations of breach of confidence can be separated into three categories:

1. Catalyst's original allegations;
2. Moyse's March 27th email disclosure to West Face; and
3. Documents listed in Moyse's Affidavits of Documents

Catalyst's Original Allegations

82. 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. In fact, during his cross-examination, Riley admitted that he had not reviewed any of the documents in question. As such, his evidence that the documents contained confidential information should be given no weight. 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.

Reference: Riley Cross, pp. 110-111, qq. 394-395

83. 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

84. Moreover, putting aside the question of confidentiality, Catalyst has absolutely no evidence that Moyse has misappropriated any documents. In fact, Riley admits that Catalyst has no evidence that Moyse has breached the confidentiality clause in the Employment Agreement and has no evidence that Moyse has disclosed any documents other than Moyse's March 27th email to West Face.

Reference: Riley Cross, pp. 168-169, qq. 605-610; pp. 172-173, q. 619

85. 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, many of which Catalyst appears to have dropped. Despite this new information, Musters refuses to revise his opinion and instead clings to his belief that Moyse misconducted himself, not because of any actual evidence, but because of Musters' interpretation of Moyse's "pattern of conduct".

86. It is Moyse's position that Musters' opinion that he, "very likely" transferred documents to his cloud account is flawed because it rests on a premise that Musters himself acknowledges is false. Musters' closed mind on this point is displayed in the following excerpt from his cross-examination:

Q. Okay. **So even though this group of files was accessed over an 11-minute period, they could have been open for much longer; correct?**

A. If you're asking me did I – did the user open document 1, and then while document 1 was open, open document 2 and then open document 3 and so on, **it's possible**.

Q. What evidence do you rely upon for your belief that it was very likely that he transferred these files to his Cloud accounts?

A. Because when I look at the times, it's 6:28:18, 6:28:27, 6:29:31, 6:30:15...people don't just look at a document for 15 seconds, 11 seconds, 9 seconds and so on.

Q. But didn't you just state that it was possible that these were open longer than the 11 minutes?

A. Okay. Let me add to my answer. Is it possible? Sure. Is it likely? No.

...

Q. Is it fair to say that your belief is speculation?

A. No.

Reference: Musters Cross, pp. 33-34, qq. 93-94, 96

87. Later, when asked if Moyse's file activity was consistent with Moyse's explanation that he skimmed the files looking for specific information and closed them, Musters provided resistance to the idea, again without having any actual evidence of Moyse's wrongdoing, before finally conceding that Moyse's explanation was possible.

Q. **Would you agree that Brandon's activity is also consistent with his own explanation that he skimmed the files looking for specific information and then closed them?**

...

A. I will – in my experience, I will say to paragraphs 43 and 45 that it's an unlikely explanation.

Q. **Is it possible?**

A. **Anything is possible.**

Reference: Musters Cross, pp. 36-37, qq. 102-104

88. When asked how Moyse's file activity would look different if Moyse's explanation was true, Catalyst's counsel repeatedly refused to let Musters answer the question. Moyse submits that an adverse inference should be made that Moyse's file activity would not look any different if his explanations for accessing the information are true.

Reference: Musters Cross, p. 38, qq. 106-108

89. Incredibly, even when faced with an acknowledgement by Riley that Moyse's explanation for accessing the WIND files was reasonable, Musters continued to assert that it was "very likely" that Moyse had copied at least some of the WIND documents to a cloud account. Notably, that appears to be an even stronger position than Catalyst is taking.

Reference: Musters Cross, pp. 51-56, qq. 156-165

90. It is Moyse's position that the information and conclusions provided by Musters should be given no weight as Musters lacks the impartiality and objectivity to be considered an expert witness. As stated in *Alfano (Trustee of) v. Piersanti*:

> *The court expects objectivity on the part of the expert. In other words, he or she cannot "buy into" the theory of one side of the case to the exclusion of the other side. To do so, poses the danger that could taint the court's understanding of the issues that must be decided with impartiality and fairness to both sides. The fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court. If it becomes apparent that an expert had adhered to and promoted the theory of the case being advocated by either Plaintiffs or Defendants, he or she becomes less reliable and is not an expert in the way that the role has been defined in the recent and well known jurisprudence.*
>
> Reference: *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224 at para. 6 (S.C.J.), MSBA, Tab 3

Moyse's March 27th Email Disclosure to West Face

91. Moyse acknowledges that he should not have sent the email to West Face with Catalyst's documents, but it is important to put that disclosure into the proper context.

92. While Catalyst appears to take the position that the very fact that Moyse sent this email means that it is entitled to relief, including enforcement of the non-competition agreement, the case law says otherwise.

93. In *Edac Inc. v. Tullo*, this court considered this exact situation. In that case, Joseph Tullo held the position of Director, Sales and Marketing. While employed at Edac Inc, Tullo sent a proposal to one of Edac's suppliers in an attempt to gain a job at that company. The proposal contained confidential information about Edac Inc., who argued that Tullo breached his duty of confidentiality, entitling the company to damages. Justice Nordheimer disagreed:

> 50. ... I earlier mentioned that the defendant had sent a proposal to Tact in May, 1997 regarding him possibly acting as its representative if he actually left the plaintiff. There is considerable information in that proposal regarding the plaintiff and its business, some of which is clearly confidential. For example, the sales volumes by the plaintiff to customers such as Matrox and Colorado Memory Systems would not generally be known nor would the rate of growth of those sales be known.
>
> 51. I have considerable concerns regarding this document. I find it troubling that it was produced and given to a supplier of the plaintiff at a time when the defendant was still in the plaintiff's employ. The defendant contends that the document is nothing more than a written job interview. In other words, he says that such a conversation could properly have occurred in the context of a job interview, but here, given the distance between the defendant in Toronto and Tact in Taiwan, the interview had to be in writing. Even accepting that characterization of the document, I do not agree that the defendant would have been at liberty in a job interview to reveal the confidential information which is

> contained in the documents. Indeed, I would have considered it improper if he had done so.
>
> 52. However, it is evident from the case law that, in order to have a complete cause of action for breach of confidence, the plaintiff must not only establish a misuse of confidential information, but must establish a corresponding detriment to the plaintiff arising from that misuse...
>
> 53. **There is no evidence in this case that the plaintiff suffered any detriment from the actions of the defendant in respect of the proposal he sent to Tact...**Therefore, while I have found that his actions in regard to the proposal were inappropriate and a breach of his duty to maintain the confidence of his employer's information, I concluded that no detriment was suffered by the plaintiff from these actions and **therefore the plaintiff has no sustainable claim arising therefrom**. [emphasis added]

Reference: *Edac Inc. v. Tullo*, [1999] O.J. No. 4837 at paras 50-53 (S.C.J.), MBA, Tab 9

94. Similarly, in this case, Catalyst acknowledges that it has no evidence whatsoever that is has suffered any harm or damages as a result of Moyse's conduct, either before or after his resignation from Catalyst.

Reference: Riley Cross, p. 171, q. 617

Documents Listed in Moyse's Affidavits of Documents

95. While Moyse has identified a number of documents relevant to this matter in his power, possession, and control, it is important to place those documents in the appropriate context.

96. First, it is not correct for Catalyst to assert that Moyse "disclosed over 830 Catalyst documents that remain in his possession". That is not what Moyse agreed to search for. Instead, Moyse agreed to search for and produce "all documents in his power, possession or control, that relate to his employment with Catalyst". While Moyse acknowledges that some documents may be proprietary to Catalyst, the vast majority of documents do not belong to Catalyst, but are, in fact, public documents such as annual reports of various companies.

97. Furthermore, of the files that are proprietary to Catalyst, many of the documents are duplicates or different versions of the same documents. For example, documents 527 to 561 are various versions of the file "NMFG Operating Model"

Reference: Moyse Affidavit of Documents, MSMR, Tab 2

98. It is not surprising that an employee who was expected to work at home could have documents left on his computer. It was Moyse's evidence during his cross-examination that he attempted to delete all of Catalyst documents on his computer prior to litigation, but missed these documents, most of which were in his "Downloads" folder.

Reference: Moyse Cross, pp. 69-72, qq. 322-330

99. While Catalyst asserts that Moyse "could not say with absolute certainty that his most recent search has been exhaustive", Moyse did state that he believes he has captured all of the documents.

Reference: Moyse Cross, p. 72, q. 332

100. It is important to note that while Catalyst states that it has identified 245 confidential documents that have remain in Moyse's possession, power or control, it has not actually reviewed the documents, but is instead relying only on the file names. Moyse submits that this is not an appropriate basis for Catalyst to assert confidentiality or obtain injunctive relief. Furthermore, Catalyst has not put any of the documents in front of the court, even in a redacted form, to allow the court to make the appropriate determination.

101. While Catalyst attempts to discredit Moyse and essentially calls him a liar throughout its factum, it's important to consider three important points; 1) Being wrong about something doesn't mean a person is lying; 2) Moyse voluntarily agreed to search his computer for these documents; and 3) He voluntarily produced them to Catalyst. Catalyst's allegation that Moyse is hiding information does not stand up to scrutiny when one considers the fact that Catalyst's case rests upon documents Moyse has voluntarily produced.

102. This court recently considered a similar situation in *Canadian Bank Note Co. v. Leblanc*. In that case a former employee also retained documents that remained on his personal computer after working from home. At various points during the litigation process, Leblanc swore that he did not have any confidential or proprietary documents in his power, possession or control. However, Leblanc then produced a number of documents. The plaintiff attempted to use Leblanc's previous statements and subsequent disclosure in support of its argument that there must be more relevant documents amongst Leblanc's personal materials. The court rejected that argument, stating:

While it is true that some documents were produced subsequent to the delivery of the affidavit of documents, firstly that routinely happens in litigation for a variety of reasons. The fact is that they were voluntarily produced, and the simple fact that occurred subsequent to delivery of the affidavit of documents does not in any way lead to an inference that there is "likely" further confidential information and trade secrets in the Defendant's possession.

Reference: *Canadian Bank Note Co. v. Leblanc*, [2013] O.J. No. 1925 at paras 18-19 (S.C.J.), MSBA, Tab 4

103. 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

104. 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

105. 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

106. 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) CATALYST HAS NOT ESTABLISHED IRREPARABLE HARM

107. 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

108. 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

109. 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

110. 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

111. 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

112. 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.

113. 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

114. 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

115. 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

116. While Catalyst has attempted to make the case that Moyse intentionally destroyed evidence by wiping his Blackberry, Musters was clear that Moyse's Catalyst emails were not destroyed and remain available to Catalyst.

Reference Musters Cross, p. 69, qq. 198-199; p. 71, qq. 208-209

117. 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

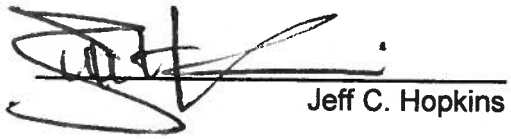
PART IV – ORDER REQUESTED

118. Given the foregoing, Moyse respectfully requests:

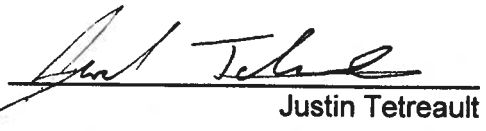
(a) that this motion be dismissed; and

(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.)
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THE CATALYST CAPITAL GROUP INC. **- and -** MOYSE ET AL.

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Proceeding commenced at TORONTO

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