

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

**AFFIDAVIT OF JAMES A. RILEY
(Sworn February 18, 2015)**

I, JAMES A. RILEY, of the City of Toronto, MAKE OATH AND SAY:

1. I am the Chief Operating Officer of The Catalyst Capital Group Inc. ("Catalyst"), the plaintiff in this proceeding, and, as such, have knowledge of the matters set out in this affidavit. To the extent my knowledge is based on information and belief, I identify the source of such information and believe the information to be true.
2. I have previously sworn three affidavits in this proceeding – on June 26, July 14 and July 28, 2014. Those affidavits, without exhibits, are attached to this affidavit as Exhibits "A", "B" and "C", respectively, and I adopt and re-state the facts set out in those affidavits in this affidavit. In some cases those facts are repeated in this affidavit to provide a consistent narrative flow of events.

The Parties

3. Catalyst is an independent investment firm that is considered a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence. These are known in the investment industry as “special situations for control”. Catalyst currently has in excess of \$3 billion dollars under management.

4. Within Canada, the “special situations” investment industry is fairly small. “Special situations,” also known as “distressed investments,” is the term used to describe investment opportunities where a company is considered to be under-managed, under-valued, or poorly capitalized. The term “special situation” is also used to refer to significant corporate events such as a proxy battle, take-over or board shake-up.

5. In these cases, “special situations” investors try to find ways to find value and profit in the situation to purchase the debt or equity of the target company with the hope of making a significant gain on the investment.

6. Within the special situations investment industry, there is a small sub-group of investors who invest for control or influence. This is known as investing in “special situations for control”. “Control” often refers to acquiring a sufficient amount of debt or equity to gain control or influence at the company in order to be able to provide direct operational and/or strategic guidance. “Influence” can include acquiring a tactical “blocking position” in order to force management and other creditors/investors to consider Catalyst’s views.

7. In any situation, Catalyst’s confidential information is critical to the successful implementation of an investment plan to capitalize on a special situation. Catalyst spends

substantial time studying opportunities and planning its investment strategy before it decides to pursue a particular situation.

8. If a competitor learns of the opportunities Catalyst is considering or studying, the investment models it is using for a particular situation, the methodology Catalyst is considering for acquiring control or influence, or the turnaround plan Catalyst is considering once it acquires control, that competitor can use that information to acquire blocking positions to prevent Catalyst from implementing its plan or it can “scoop” the opportunity by acquiring the control position that Catalyst intended to acquire. Trading on this Confidential Information (as that term is defined in my affidavit dated June 26, 2014) may also be a breach of the Ontario *Securities Act* or other regulations that govern the investment industry.

9. In these situations, the loss of confidential information can cause significant harm to Catalyst, as explained in greater detail below.

10. The defendant Brandon Moyse (“Moyse”) is a former employee of Catalyst. Moyse worked at Catalyst as an investment analyst from November 1, 2012 until June 22, 2014.

11. The defendant West Face Capital Inc. (“West Face”) is a competitor to Catalyst. Like Catalyst, West Face investigates and invests in Canadian “special situations for control” opportunities.

Moyse Resigns, Breaches his Employment Agreement

12. As one of two investment analysts at Catalyst, Moyse was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

13. Moyses employment agreement with Catalyst included non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"). In particular, the non-competition covenant prohibited Moyses from working in Ontario for a competitor of Catalyst for a period of six months following termination of his employment with Catalyst if Moyses resigned.

14. On Saturday May 24, 2014, Moyses gave Catalyst thirty days' notice of his intention to resign from the firm. On May 26, 2014, Moyses informed me that he had accepted a job at West Face. I understood from Moyses that he intended to begin working at West Face immediately after the thirty-day notice period expired, notwithstanding the clear terms of his Employment Agreement, which prohibited him from doing so.

15. Catalyst was troubled by the fact that Moyses intended to breach the Restrictive Covenants and it arranged for Moyses to work from home for the remainder of his thirty-day notice period.

16. Before he gave notice, Moyses had been working extensively on a particular opportunity in the telecommunications industry that Catalyst had been considering for several years. Catalyst was actively investigating the potential purchase of Wind Mobile, one of the Canadian wireless telecommunications industry's few "independent" wireless carriers. Before he resigned from Catalyst, Moyses was part of Catalyst's due diligence team for the Wind Mobile situation, which was known internally by the codename "Project Turbine".

17. The unique plans Catalyst was considering to execute were highly confidential to it. Among other things, Catalyst was thoroughly considering the regulatory risk of attempting to purchase a business that is heavily regulated by Industry Canada and the Canadian Radio-

Television and Telecommunications Commission (“CRTC”). Catalyst’s analysis of that risk was one of the issues actively reviewed by Catalyst while Moyse was part of the Project Turbine review team.

18. By choosing to leave Catalyst for West Face, which is located in Toronto, Moyse chose to transfer to one of the investment firms in Canada that falls within the scope of the non-competition covenant.

19. Catalyst was very concerned about West Face’s reasons for hiring Moyse when it knew, or ought to have known, of the Restrictive Covenants in Moyse’s employment agreement with Catalyst. If Moyse were to disclose Catalyst’s plans for Wind Mobile to West Face, West Face would be able to interfere with those plans by, among other things, scooping the opportunity, thereby causing immeasurable damage to Catalyst’s good will and investment losses that will be almost impossible to quantify given the many possible outcomes of any given investment.

The Defendants Refused to Respect the Restrictive Covenants

20. Between May 30 and June 19, 2014, Catalyst’s outside counsel, Rocchhho Di Pucchio (“Di Pucchio”), exchanged correspondence with Jeff Hopkins (“Hopkins”), Moyse’s counsel, and Adrian Miedema (“Miedema”), West Face’s outside counsel, in which Catalyst expressed its concerns over potential misuse by Moyse and West Face of Catalyst’s confidential information.

21. By June 19, 2014, the parties were at an impasse. West Face and Moyse had offered empty reassurances that they were aware of and would respect Catalyst’s confidentiality interests, but they refused to respect the terms of the non-competition covenant. Hopkins

informed Di Pucchio that Moyse intended to commence employment at West Face on Monday, June 23, 2014.

22. Having exhausted all efforts to resolve the situation without resort to litigation, by email dated June 19, 2014 (attached as Exhibit "D"), Di Pucchio informed Hopkins and Miedema that Catalyst had instructed him to commence legal proceedings against West Face and Moyse, which would include seeking injunctive relief to enforce the Restrictive Covenants. Di Pucchio wrote,

I will try to get our materials to you and to Mr. Miedema forthwith, but in the event that we cannot get the matter heard before next Monday, we trust that no steps will be taken by each of your clients to alter the existing status quo prior to the matter being heard by the Court.

23. By letter dated June 19, 2014, Miedema responded to Di Pucchio's email. Miedema wrote that Moyse has contractually agreed with West Face to maintain "strict confidentiality" over all confidential information obtained by him in the course of his employment with Catalyst, and that both Moyse and West Face take that obligation seriously. Miedema also wrote, "Your client has not provided any evidence that Mr. Moyse has breached any of his confidentiality obligations to Catalyst." Attached as Exhibit "E" is a copy of Miedema's letter to Di Pucchio dated June 19, 2014.

Catalyst Learns Moyse Gave its Confidential Information to West Face

24. Left with no other option, Catalyst began preparing for an action against Moyse and West Face and brought a motion for urgent interim and interlocutory relief to enforce the Restrictive Covenants.

25. Catalyst retained Martin Musters (“Musters”), a forensic IT expert, to conduct a forensic analysis of Moyse’s workplace computer. Musters’ findings are explained in detail in my June 26, 2014 affidavit and in an affidavit sworn by Musters on that date. Briefly stated, Musters analysis of Moyse’s computer revealed:

- (a) On March 28, 2014, between 6:28 p.m. and 6:39 p.m., shortly after Moyse met with Dea, Moyse reviewed Catalyst’s letters to investors in the Catalyst Fund Limited Partnership II (“Fund II”) sent between 2006 and 2011 (the “Investor Letters”). In the Investor Letters, Catalyst reported to our investors on events that transpired with respect to Fund II’s investments. The Investor Letters also contained forward-looking statements. The time period for which Moyse was reviewing the Investor Letters relates to activity on Catalyst’s Stelco investment, which was no longer active and in which Catalyst and West Face were in direct competition. Moyse accessed these files outside of regular office hours at Catalyst. Moreover, eleven minutes is insufficient time to read these letters.
- (b) On April 25, 2014, over a 75-minute period, Moyse reviewed dozens of files related to Catalyst’s investment in Stelco. There was no legitimate business reason why Moyse would review those documents. Moreover, 75 minutes was an insufficient amount of time to read all of the material Moyse was accessing.
- (c) On the evening of May 13, 2014, Moyse accessed several files relating to Project Turbine between 8:39 p.m. and 9:03 p.m. As on the other occasions described above, this was an insufficient amount of time for Moyse to read the documents he was accessing.

- (d) According to Musters, Moyses's conduct between March 27 and May 26, 2014, was consistent with uploading confidential Catalyst documents from Catalyst's server (which Catalyst controls) to Moyses's personal accounts with two Internet-based file storage services, "Dropbox" and "Box", which Catalyst does not control and cannot access.
- (e) Over the course of his employment at Catalyst, Moyses regularly emailed Catalyst's Confidential Information to his personal email accounts. There was no legitimate business reason for Moyses to do this, as Catalyst has a secure virtual private network that enables remote access to its servers.

26. Musters later analyzed the Blackberry smartphone Moyses used while he was employed at Catalyst, which belonged to Catalyst. Musters' analysis revealed that on June 18, 2014, prior to returning the Blackberry to Catalyst, Moyses "wiped" all of the data from his Blackberry such that it was incapable of being recovered through forensic analysis.

27. On July 7, 2014, Moyses and West Face filed responding records in Catalyst's motion for injunctive relief. In their records, for the first time, and without prior notice to Catalyst, Moyses and West Face confirmed that Moyses had transferred Catalyst's Confidential Information to West Face prior to giving notice of his intent to resign.

28. West Face attached the Confidential Information to its responding motion record and filed it in open court without notice to Catalyst. Catalyst later learned that this confidential information had been circulated to all of the partners and to a senior manager of West Face by Thomas Dea ("Dea"), the West Face partner who was primarily responsible for hiring Moyses.

29. In his responding affidavit, Moyse made the following statement concerning his conduct and the merits of Catalyst's action and its motion for interlocutory relief:

Furthermore, there is no basis to order a forensic review of my personal computer equipment and accounts, which is requested only as a fishing expedition. Despite retaining an expert to forensically examine my Catalyst computer, Catalyst was unable to provide any actual evidence that I transferred any confidential information to my personal equipment or accounts.

30. As explained below, this statement appears to have been intended to deceive the Court, as at this point Moyse knew or ought to have known that in fact he had retained hundreds of Catalyst documents on his personal devices after he resigned and started to work for West Face.

The Preservation Undertaking and the Interim Relief Order

31. On June 30, 2014, the parties' counsel attended Motion Scheduling Court to schedule Catalyst's motion for urgent interim relief. Attached to this affidavit as Exhibit "F" is a copy of Justice Himel's endorsement dated June 30, 2014 from that attendance. In her endorsement, Justice Himel records that Andy Pushalik of Dentons LLP, counsel for West Face and speaking for Moyse, agreed to preserve the status quo regarding documents, etc. The specific language of the undertaking is attached to the endorsement:

Defendants' counsel agree to preserve the status quo with respect to relevant documents in the defendants' power, possession or control.

32. Catalyst's motion for interim relief was on July 16, 2014. On that date, the parties consented to interim terms, which were incorporated into an Order of Justice Firestone (the "Interim Relief Order"). The Interim Relief Order is attached to this affidavit as Exhibit "G". Among other things, pursuant to the Interim Relief Order:

- (a) Pending a determination of an interlocutory injunction, Moyse was enjoined from misusing or disclosing any and all confidential and/or proprietary information of Catalyst, including all confidential information and/or proprietary information provided to Catalyst by third parties;
- (b) Pending a determination of an interlocutory injunction, Moyse was enjoined from engaging in activities competitive to Catalyst and was to fully comply with the restrictive covenants set forth in his employment agreement with Catalyst;
- (c) Moyse and West Face, and its employees, directors and officers, were to preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 24, 2014, and /or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed by Catalyst;
- (d) Moyse was to turn over any personal computer and electronic devices owned by him or within his power or control (the "Devices") to his legal counsel for the taking of a forensic image of the data stored on the Devices (the "Images"), to be conducted by a professional firm as agreed to by the parties;
- (e) The Images were to be held in trust by Moyse's counsel pending the outcome of the interlocutory motion; and
- (f) Prior to the return of the interlocutory motion, Moyse was to deliver a sworn affidavit of documents to Catalyst, including copies of Schedule "A" documents, setting out all documents in his power, possession or control, that relate to his

employment at Catalyst. Moyse was also to disclose whether any of the documents had been disclosed to third parties, including West Face, and the details of any such disclosure.

The Image is Created on July 21, 2014

33. After the parties consented to the Interim Relief Order, by emails dated July 16 and 17, 2014, Hopkins and Andrew Winton (“Winton”), outside counsel for Catalyst, agreed to retain Harold Burt-Gerrans of H&A eDiscovery (“H&A”) to create the Images. Attached to this affidavit as Exhibit “H” is a copy of the email correspondence between Hopkins and Winton dated July 16 and 17, 2014.

34. By email dated July 17, 2014, Hopkins forwarded a draft engagement letter from H&A to outside counsel for Catalyst and West Face. Attached to this affidavit as Exhibit “T” is a copy of Hopkins’ email of July 17, 2014, with the attached draft engagement letter. In his cover email, Hopkins wrote:

~~The imaging can be conducted (and I assume completed) on Monday, July 21. Given the need to complete the imaging prior to Mr. Moyse reviewing any Catalyst documents on his computer devices, we cannot commit to delivering the [affidavit of documents] on Tuesday, July 22. However, we should be able to deliver the [affidavit of documents] on the 23rd.~~

35. By email correspondence exchanged on Friday, July 18, 2014, counsel for Catalyst and Moyse agreed to amend the terms of H&A’s engagement. Attached to this affidavit as Exhibit “J” is a copy of the July 18, 2014 email correspondence between counsel.

36. After the parties agreed to terms, by email dated July 18, 2014, Hopkins forwarded a summary of the changes to H&A. Hopkins' email is attached to this affidavit as Exhibit "K". In his email, Hopkins wrote:

Mr. Moyse has confirmed he will be at our office by 10:00 am Monday with his three computer devices.

37. Hopkins' July 18, 2014 email to H&A included copies of his earlier correspondence with H&A. In that earlier correspondence, H&A informed Hopkins that it could create the Images on Friday, July 18 or Monday, July 21, 2014. Hopkins scheduled the Images to be created at his firm's office on July 21.

38. By email dated July 18, 2014, Hopkins forwarded a signed engagement letter with H&A. That email and the attached engagement letter are attached to this affidavit as Exhibit "L".

39. By email dated July 22, 2014, Hopkins forwarded a report from H&A on its creation of the Images. The report confirmed that the Images were created on Monday, July 21, 2014. Hopkins' July 22, 2014 email is attached to this affidavit as Exhibit "M".

Moyse Delivers Affidavits of Documents Disclosing Hundreds of Catalyst Documents

40. Pursuant to the Interim Relief Order, on July 22, 2014, Moyse swore an affidavit of documents which purported to disclose all of the documents belonging to Catalyst in his power, possession or control. Attached to this affidavit as Exhibit "N" is a copy of a cover letter from Hopkins dated July 22, 2014 and the enclosed affidavit of documents sworn by Moyse.

41. Despite having previously sworn an affidavit in which he attempted to suggest that he did not have any of Catalyst's proprietary or confidential information on his personal devices, the

July 22, 2014 affidavit of documents revealed that in fact there were hundreds of such documents in his power, possession or control.

42. As explained in my July 28, 2014 affidavit, Zach Michaud, a Catalyst employee, and I reviewed Moyses's affidavit of documents and we were able to identify approximately 250 confidential documents belonging to Catalyst in Moyses's possession.

West Face did not Require Moyses's Services in June/July 2014

43. On July 31, 2014, Moyses was cross-examined by Di Pucchio. During his cross-examination, Moyses admitted that for the first two weeks he was employed by West Face, he did not do any work, after West Face and Moyses had previously refused to postpone his employment at West Face to let the parties attempt to negotiate a resolution of their dispute.

West Face Purchases Wind Mobile Immediately after Catalyst's Negotiations Fail

44. In July and August 2014, Catalyst was negotiating with Vimpelcom Ltd. ("Vimpelcom") for the potential purchase of Wind Mobile. During this period, Catalyst had exclusive negotiating rights (the "Exclusivity Period").

45. During the Exclusivity Period, Catalyst and Vimpelcom were able to negotiate almost all of the terms of the potential sale of Wind Mobile to Catalyst. The only point over which the parties could not agree was regulatory approval risk -- Catalyst wanted to ensure that its purchase was conditional on receiving certain regulatory concessions from Industry Canada, but Vimpelcom would not agree to the conditions Catalyst sought.

46. The Exclusivity Period expired in mid-August 2014. Very shortly thereafter, Catalyst learned that a syndicate of investors led by West Face (the "Consortium") was negotiating with Vimpelcom to purchase Wind. Ultimately, the Consortium purchased Wind from Vimpelcom on what I believe were essentially the same terms as Catalyst had proposed, with the one exception that the Consortium waived the regulatory conditions Catalyst had been seeking.

47. I believe that Moyses may have communicated Catalyst's Confidential Information concerning its negotiation plans and concerns to West Face, based on the following facts:

- (a) Moyses was working on Catalyst's Wind project prior to his resignation from Catalyst;
- (b) West Face insisted on rushing ahead with Moyses's employment on June 23, 2014, even though it had no legitimate immediate use for his services;
- (c) The Consortium led by West Face was able to negotiate a deal with Vimpelcom very shortly after the Exclusivity Period ended by agreeing to the one term that Catalyst had been concerned about from the outset of its review of the Wind Mobile situation;
- (d) If West Face had been starting from scratch, without the benefit of inside information, it would not have been able to negotiate a deal with Vimpelcom that easily;
- (e) In Musters' opinion, Moyses's conduct is consistent with the pattern of employees who take confidential information from their former employer when they depart to immediately begin working for a competitor; and

- (f) As explained in greater detail below, Moyse breached the Interim Relief Order by using a software “scrubber” to permanently delete files and/or folders from his personal computer the night before the Images were created.

The Interlocutory Order

48. The parties argued Catalyst’s motion for interlocutory relief on October 27, 2014. On November 10, 2014, Justice Lederer released reasons for decision in which he granted Catalyst the interlocutory relief it sought. In particular:

- (a) Moyse was enjoined from working at West Face until his six-month non-competition covenant expired on December 22, 2014; and
- (b) The Court ordered that an ISS was to review the Images created on July 21, 2014 to determine if Moyse had taken any Catalyst Confidential Information and/or had communicated any Catalyst Confidential Information to West Face.

49. Attached to this affidavit as Exhibit “O” is a copy of Justice Lederer’s reasons for decision dated November 10, 2014. Attached to this affidavit as Exhibit “P” is a copy of the Order of Justice Lederer dated November 10, 2014 (the “Interlocutory Order”).

50. Moyse and West Face have sought leave to appeal the Interlocutory Order. Their motions for leave to appeal has not yet been determined by the Court.

The ISS Process

51. Pursuant to the Interlocutory Order, Stockwoods LLP was retained to act as the ISS. Between November 10 and December 16, 2014, the parties negotiated a document review

protocol (“DRP”) to govern the ISS’s review of the Images. The DRP executed by counsel for the parties is attached to this affidavit as Exhibit “Q”.

52. Among other things, pursuant to the DRP:

- (a) Catalyst provided the ISS with a list of search terms to use to help identify potential documents containing Catalyst’s Confidential Information;
- (b) Moyse had five business days to object to the use of a search term by the ISS;
- (c) Subject to further order of the Court or the agreement of the parties, the ISS was not to provide Catalyst or its counsel with access to the Images or any work product generated during the ISS’s review of the Images;
- (d) The ISS shall provide a draft report to Catalyst and Moyse. Moyse then had ten business days to object to the inclusion of a document or documents referred to in the draft report; and
- (e) If Catalyst believes that a document has been improperly excluded from the final report, it may bring a motion for production of that document.

53. By email dated December 23, 2014, Brendan van Neijenhuis of Stockwoods LLP (“van Neijenhuis”) shared with counsel for Catalyst and Moyse the results of an initial report from the ISS’s forensic expert as to the results of the search terms proposed by Catalyst. Van Neijenhuis’s email Attached to this affidavit as Exhibit “R” is a copy of Van Neijenhuis’ email dated December 23, 2014 and the attached search results.

54. The search results indicated that there was a significant number of “hits” for several search terms proposed by Catalyst that are unique to the Wind Mobile situation. Examples include:

- (a) Wind: 26,118 hits;
- (b) Turbine: 756 hits;
- (c) Spectrum: 3852 hits;
- (d) MHZ: 5885 hits;
- (e) Ministry of Industry: 105 hits; and
- (f) Industry Canada: 80 hits.

55. In addition, these results indicated there were 132 hits on Moyses’s personal computer for the term “Callidus”. Callidus Capital Corporation (“Callidus”) is a publicly-traded company in which investment funds managed by Catalyst now own a 60 per cent interest. Prior to April 2014, when Callidus completed an initial public offering, Callidus was wholly owned by investment funds managed byh Catalyst.

56. During his employment at Catalyst, Moyses had no involvement with the operations of Callidus, so it was very suspicious that he would have any hits relating to Callidus on his personal computer.

57. Based on these hit results, and other activity by West Face concerning Callidus that is explained in greater detail below, by email dated January 8, 2015, Catalyst submitted additional search terms relating specifically to Callidus to the ISS. Attached to this affidavit as Exhibit “S”

is a redacted copy of the email from Winton to Van Neijenhuis dated January 8, 2015 asking for the additional search terms to be included in the ISS's review.

58. The ISS released its draft report (the "Draft Report") on February 1, 2015 and its final report (the "ISS Report") on February 17, 2015. Attached to this affidavit as Exhibit "T" is a copy of the ISS Report, without the appendices referred to therein.

59. The ISS listed hundreds of documents that it reviewed from the Images that it classified as containing Catalyst's Confidential Information. However, the ISS only identified a relatively small number of documents that were not already disclosed in Moyse's July 22, 2014 affidavit of documents. Based on my review of the ISS Report, it is my belief that the ISS did not disclose more documents because it made mistaken assumptions as to certain facts. The potential errors by the ISS concern Wind Mobile, Mobilicity and Callidus.

60. With respect to Wind Mobile, as explained above, the search terms indicated that there were hundreds of "hits" for many Wind-related search terms, such as "Turbine" and "Spectrum". While a word such as "wind" may have many contexts, there are many fewer contexts for a word such as "Turbine", which was Catalyst's codename for the Wind Mobile situation. I believe that the ISS must have inadvertently omitted relevant documents from the ISS Report based on a misunderstanding as to the origins of certain documents that were responsive to the search terms provided by Catalyst.

61. Mobilicity is another wireless telecommunications situation that both Catalyst and Wind are heavily involved with. Mobilicity is currently in CCAA proceedings. While he was employed at Catalyst, Moyse had some involvement with the Mobilicity situation. The search term results for his personal computer revealed a significant number of "hits" for Mobilicity-related terms

such as Mobilicity (765 hits), DAVE (2216 hits) and Data & Audio-Visual (36 hits). Again, it is likely that the ISS erred in excluding all of the documents that were responsive to these terms, as Catalyst has generated thousands of documents related to the Mobility situation.

62. With respect to Callidus, the ISS Report states that it found five documents that were solely responsive to the additional Callidus-related search terms submitted on January 8, 2015, but the ISS determined that none of the documents contained Catalyst's Confidential Information. This classification appears to be based on a misunderstanding as to the relationship between Callidus and Catalyst, as potentially any document in Moyses's possession that was responsive to the additional search terms by its nature very likely contained Catalyst's Confidential Information.

63. On February 12, 2015, the ISS and counsel for Catalyst and Moyses participated in a conference call to discuss Catalyst's concerns that its confidential information was potentially mistakenly omitted from the Draft Report. Minutes of that conference call taken by the ISS are attached to this affidavit as Exhibit "U".

64. As recorded in the minutes, during the call, Winton, on behalf of Catalyst, asked the ISS four questions:

- (a) The additional search terms that were supplied on January 8, 2015 apparently yielded only five independent documents for review by the ISS. Winton proposed to ask the ISS to indicate which specific terms yielded those results. Depending on which terms generated those "hits", Catalyst may or may not continue to have a concern that an error occurred in the evaluation having regard to the uniqueness of the terms, particularly with regard to "Callidus" and associated terms;

- (b) Catalyst proposed that the ISS also advise about the total number of hits which would have resulted, had the second set of terms been run without regard to de-duplicating previously-produced items (i.e., items produced as a result of raising a 'hit' under the original set of search terms supplied in December 2014);
- (c) Catalyst expressed the concern that the number of hits associated with Wind Mobile and directly related search terms such as "Turbine" exceeded the actual number of documents identified in the search process by a very wide margin. Winton proposed that ISS should provide an explanation, if possible, for the divergence between the number of "hits" and the ultimate number of documents found and identified in the report; and
- (d) Catalyst expressed the same concern with respect to hits associated to Mobilicity and directly-related search terms, asking again for an explanation as to the large difference between the raw hit-count identified in the initial results and the ultimate number of documents identified.

65. By email dated February 12, 2015, in response to Catalyst's questions, Moyse's counsel objected to letting the ISS answer the questions and insisted that Catalyst had to bring a motion if it wanted its questions answered. Attached to this affidavit as Exhibit "V" is a copy of the email from Hopkins to Winton sent February 12, 2015.

66. Catalyst's position is simple: if Moyse had Wind Mobile or Mobilicity documents on his personal computer, those documents either originally belonged to Catalyst or they belonged to West Face. In either case, possession of those documents prejudices Catalyst:

- (a) If the documents belonged to Catalyst, then it is possible that Moyse shared those documents with West Face but covered up his actions by deleting files from his computer, as described below; or
- (b) If the documents belonged to West Face, then West Face and Moyse breached the “ethical wall” that West Face purported to erect on June 19, 2014 to prevent Moyse from participating in West Face’s involvement in the Wind Mobile and Mobilicity situations.

Moyse Scrubbed Data from his Computer Before the Images were Created

67. The Draft Report was not restricted to listing documents reviewed by the ISS that it classified as containing Catalyst’s Confidential Information. Paragraphs 44 to 48 of the ISS Report reveal that:

- (a) On Wednesday, July 16, 2014, an email message was sent to Moyse’s Hotmail account. The email constituted a receipt and license key for a software product entitled “Advanced System Optimizier 3 [Special Edition]”;
- (b) Based on the creation date of associated folders, the forensic IT expert assisting the ISS was able to determine that Advanced System Optimizer 3 was installed on Moyse’s personal computer on July 16, 2014 at 8:53 a.m.;
- (c) On July 20, 2014, at 8:09 p.m., a folder entitled “Secure Delete” was created on Moyse’s personal computer;

- (d) Due to the military-grade nature of the Secure Delete tool, the ISS's forensic expert was unable to determine what files were deleted on June 20, 2014.

68. I have reviewed the affidavit sworn by Musters on February 15, 2015, in which Musters confirms that the creation of the "Secure Delete" folder on Moyse's computer on July 20, 2014 at 8:09 p.m. can only result from the operation of the Secure Delete program.

69. Based on the correspondence attached to this affidavit which indicated that Moyse retained possession of his personal computer between July 16 and July 21, 2014, it is my belief that Moyse ran a military-grade software deletion program to hide evidence that he shared Catalyst's Confidential Information with West Face. I cannot think of any other reason why Moyse, whom I know to be an intelligent man, would knowingly breach a Court Order requiring him to preserve evidence.

The Callidus Report

70. While the ISS process was ongoing, West Face engaged in other conduct that I believe was intended to harm Catalyst by defaming Callidus.

71. In November 2014, West Face began a "whisper campaign" in which it suggested to other market participants that Callidus' loan book was not as strong as disclosed in its publicly filed information. Beginning in mid-November 2014, around the same time West Face commenced its whisper campaign, Callidus' share price began a rapid decline.

72. In December 2014, Callidus learned that West Face had prepared a research report on Callidus that it was circulated to market participants. By letter dated December 15, 2014, David Hausman ("Hausman"), Callidus' outside counsel, wrote to Greg Boland of West Face to seek

confirmation that a West Face report on Callidus exists and if so, to request a copy of that report. Attached to this affidavit as Exhibit "W" is a copy of Hausman's letter dated December 15, 2014.

73. West Face did not reply to Hausman's letter. By letter dated December 24, 2014, attached to this affidavit as Exhibit "X", Hausman repeated his request for the report. Hausman noted that given the report would be producible in the context of litigation, it made sense for West Face to produce the report at that time so as to potentially avoid litigation.

74. By letter dated January 6, 2015, attached to this affidavit as Exhibit "Y", Matthew Milne-Smith ("Milne-Smith"), outside counsel for West Face, responded to Hausman's December 24 letter.

75. Among other things, Milne-Smith wrote:

- (a) "West Face is confident in the accuracy of its investment research";
- (b) "It does not discuss companies with third parties without extensive research to supports its analysis"; and
- (c) Should Callidus commence defamation proceedings against West Face, West Face will vigorously defend itself in its Statement of Defence and **demonstrate the truth of any statements that it has made about Callidus**". [Emphasis added.]

76. By letter dated January 13, 2015, attached to this affidavit as Exhibit "Z", Di Pucchio responded to Milne-Smith on behalf of Callidus. Di Pucchio thanked Milne-Smith for

confirming that West Face prepared a report on Callidus that it has circulated to third parties and for the third time requested a copy of the report.

77. By letter dated January 14, 2015, attached to this affidavit as Exhibit “AA”, Milne-Smith responded to Di Pucchio to “clarify” his statements from his January 6 letter by stating that he had neither confirmed nor denied that a report existed. Apparently Milne-Smith was only speaking in generalities on January 6.

78. By letter dated January 16, 2015, attached to this affidavit as Exhibit “BB”, Di Pucchio asked Milne-Smith to clarify whether in fact a report exists and if so, was it shared with third parties. For the fourth time, Callidus’ outside counsel requested a copy of the report.

79. By letter dated January 20, 2015, attached to this affidavit as Exhibit “CC”, Milne-Smith stated that West Face is “neither required nor inclined to share its research with **the target** of such research, let alone a target majority-owned by one of West Face’s competitors” [emphasis added].

80. By letter dated January 26, 2015, attached to this affidavit as Exhibit “DD”, Di Pucchio questioned why it took an exchange of several letters for West Face to finally confirm that it had prepared a research report on Callidus.

81. The final letter in this exchange, dated January 28, 2015, is from Milne-Smith to Di Pucchio and is attached to this affidavit as Exhibit “EE”. In this letter, Milne-Smith denies any wrongdoing by West Face and indicates that it was not appropriate for the parties to engage in further correspondence since the matter was now before the Court.

82. Catalyst has found independent evidence that a West Face report exists and was shown to third parties in an effort to drive down Callidus' stock price. Attached to this affidavit as Exhibit "FF" is a copy of the "Stockchase" online blog report for Callidus and for Jerome Hass, the author of one of the comments published by Stockchase.

83. Mr. Hass's comment about Callidus, dated December 30, 2014, confirms that "a firm presented a very formidable 'Short' case recently, which is probably part of the reason for the selloff." I believe that Mr. Hass's comment referred to the West Face report.

84. Catalyst is concerned that Moyse had confidential information pertaining to Callidus on his personal computer that he shared with West Face and which West Face used to prepare its research report. That is one of the reasons why Catalyst attempted to clarify with the ISS why Callidus-related documents were not included in the Draft Report.

85. The correspondence with West Face's outside counsel and Moyse's objection to the questions Catalyst posed to the ISS are consistent with the way West Face and Moyse have dealt with Catalyst throughout this proceeding – first they deny that documents exist, or they admit documents exist but deny wrongdoing, and then they insist that Catalyst bring a motion or otherwise commence litigation to protect its interests.

Catalyst's Vulnerability to the Defendants' Unfair Competition

86. As indicated above, based on Moyse's conduct of breaching a Court Order by deleting files the night before his computer was to be imaged, I believe that Moyse destroyed evidence of serious wrongdoing.

87. I have already stated in my affidavit sworn June 26, 2014 how Catalyst is vulnerable to unfair competition by West Face. That vulnerability was borne out by West Face's apparent "scooping" of Wind Mobile, possibly through the use of Catalyst's Confidential Information.

88. If West Face was able to succeed in its negotiations with Vimpelcom through the wrongful use of Catalyst's Confidential Information, monetary damages will not give Catalyst an appropriate or adequate remedy. For this reason, Catalyst has amended its claim to seek a constructive trust over West Face's interest in Wind Mobile. Attached to this affidavit as Exhibit "GG" is a copy of Catalyst's Amended Amended Statement of Claim dated December 16, 2014.

89. In the interim, West Face continues to own a significant interest in Wind Mobile. Attached to this affidavit as Exhibit "HH" is a flowchart setting out the various beneficial interests in Wind Mobile owned by the Consortium members. This chart indicates that West Face controls 35 per cent of Wind Mobile and constitutes the largest of the four beneficial owner groups.

90. As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

The Need to Conduct a Forensic Review of West Face's Computers and Electronic Devices

91. A forensic review of any computers or personal electronic devices such as smartphones or tablet computers owned by West Face or its partners will reveal whether Moyse in fact

communicated Catalyst's Confidential Information to West Face and what use West Face made of such information. Given Moyses's conduct of scrubbing his personal computer the night before he knew a forensic image was being made of that computer, after he had already consented to a preservation order, Catalyst has no other means of ascertaining this information.

92. In light of (a) the suspicious nature of his actions to date, which only came to light because of Catalyst's forensic review of Moyses's hard drive; and (b) the fact that on June 19, the Defendants refused to agree to maintain the *status quo* pending the determination of Catalyst's motion for injunctive relief because Catalyst had not provided evidence that Moyses had breached his confidentiality undertakings to Catalyst, I have no confidence that Moyses will disclose this information honestly and forthrightly.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario on
February 18th, 2014,



Commissioner for Taking
Affidavits, etc.

ANDREW WINTON



JAMES A. RILEY

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and- BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JAMES A. RILEY
(SWORN FEBRUARY 18, 2014)

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