

Commercial List Court File No. CV-16-11272-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

**AFFIDAVIT OF MICHAEL LEITNER  
(sworn June 1, 2016)**

I, MICHAEL LEITNER, of Los Angeles, in the State of California, United States of America, MAKE OATH AND SAY:

1. I am a Managing Partner of Tennenbaum Capital Partners, LLC ("**Tennenbaum**"), an investment management firm. Certain funds managed by Tennenbaum participated in the acquisition of WIND Mobile Corp. ("**WIND**") together with a group of investors (the "**Investors**") that included Globalive Capital Inc. ("**Globalive**", formerly AAL Corp.), 64NM Holdings, LP ("**64NM**"), and the Defendant West Face Capital Inc. ("**West Face**"). I was directly involved in the Investors' negotiations for and purchase of the equity and debt of WIND formerly held by

VimpelCom Ltd. ("**VimpelCom**") in September 2014. As such, I have personal knowledge of most of the matters set out in this Affidavit. Where I do not have personal knowledge, I have stated the source of my information and believe it to be true.

2. I previously swore an Affidavit on January 7, 2016 in support of a plan of arrangement by which WIND was sold to Shaw. A copy of that Affidavit is attached (without exhibits) as Exhibit "1" to this Affidavit.<sup>1</sup>

### Overview

3. I understand that the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), was another bidder for WIND and that it too was in negotiations with VimpelCom in the Summer of 2014. I understand that Catalyst alleges that West Face acquired its interest in WIND by misusing confidential information concerning Catalyst's regulatory strategy in its negotiations with VimpelCom.

4. I previously testified in my January 7, 2016 Affidavit that: (i) I did *not* know whether West Face ever possessed any confidential information concerning Catalyst's regulatory strategy; (ii) I *did* know that West Face never communicated any such information to Tennenbaum; and (iii) that no such information was discussed among the Investors.

5. I have now had the opportunity to read the Affidavit of Newton Glassman sworn May 27, 2016. At no point prior to reading Mr. Glassman's Affidavit did I know what Catalyst's confidential regulatory strategy regarding WIND was. Now that I understand

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<sup>1</sup> WFC0075282.

for the first time Catalyst's regulatory strategy regarding WIND, I can categorically re-affirm that West Face never communicated any such information to Tennenbaum; that Tennenbaum never learned such information from any other source (including the Defendant Brandon Moyse); and that no such information was discussed among the Investors.

6. To be absolutely clear, Catalyst's regulatory strategy was never discussed among the Investors, whether as a strategy that we should pursue ourselves, as an identified strategy of Catalyst, or as the possible strategy of another competing bidder in general. For this reason, it did not and could not have played any role in our negotiations with VimpelCom, nor in our own assessment of the risk involved in pursuing the transaction structure that we put forward to VimpelCom and which ultimately proved to be successful.

7. As set out in more detail below, the transaction structure that the Investors ultimately proposed to VimpelCom, and which proved successful, was one that Globalive had socialized in the past and was apparent to any potential bidder. Moreover, it had nothing to do with Catalyst's confidential plans to seek "regulatory concessions" from the Canadian Government as a condition to closing a transaction with VimpelCom. Rather, we chose to adopt this structure in order to address VimpelCom's known preference for a transaction that would maximize speed and certainty of closing.

**Tennenbaum Capital Partners**

8. Tennenbaum is a leading alternative investment management firm founded by Michael Tennenbaum. It launched its first institutional fund in 1999. Since then, the firm has invested in excess of \$15.5 billion (US) in over 400 companies. Tennenbaum's investment vehicles include private funds, separate accounts, registered funds, and a publicly-traded business development company. Our investors include public and private pension funds, financial institutions, multi-national corporations, endowments and foundations, charitable organizations, and family offices.

9. Tennenbaum divides its investments into two broad investment strategies: "performing credit", and "special situations". Both types of Tennenbaum's investments are made primarily in North American middle-market companies. With respect to our "performing credit" strategy, we provide debt financing to meet the needs of middle-market companies in support of leveraged buy-outs, growth, acquisitions, and refinancings/recapitalizations, as well as expansion stage venture lending.

10. With respect to our "special situations" investments, we invest in companies undergoing operational, financial or industry change through both private lending activities (often referred to as rescue financing), structured equity investments and through secondary market purchases (which we refer to as both deep-value and distressed-for-control investing). We provide rescue financing to companies that do not have easy access to conventional capital sources and generally require capital to avoid a restructuring or insolvency. In our deep-value and distressed-for-control investing, we purchase debt in the secondary market at a discount to what we believe is its intrinsic value.

11. Tennenbaum's investment team is organized by industry so that we can source, monitor, analyze, and engage in transactions with relevant knowledge, with speed, as needed. We consider ourselves to be experts in a number of industries, including Technology/Media/Telecom (or "TMT"). Our TMT investments comprise a significant portion (approximately 30%) of Tennenbaum's total portfolio.

12. I am the senior partner leading Tennenbaum's TMT practice, largely as a result of my extensive experience in this sector. In that regard, prior to joining Tennenbaum in 2005, I served as Senior Vice President of Corporate Development for WiTel Communications, and before that as President and CEO of GlobeNet Communications (which I led through a successful turnaround and sale). I was also Vice President of Corporate Development of 360networks, and served as Senior Director of Corporate Development for Microsoft, where I managed corporate investments and acquisitions in the telecommunications, media, managed services, and business applications software sectors. Prior to Microsoft I was Vice President in the M&A group of Merrill Lynch. Specifically in the TMT sector, I currently serve on the board of directors of Integra Telecom, and recently just left the board of Primacom (Germany's fourth largest cable company) as a result of a recent sale.

#### **Tennenbaum's Investment in WIND**

13. Tennenbaum's investment in WIND dates back to May 2012, when Q Advisors introduced Tennenbaum to a debt investment opportunity in WIND. Q Advisors is a leading investment bank focused on the TMT industry (including in Canada, where Q Advisors have advised Public Mobile on a number of transactions, including its recent sale to Telus). At the time, Nokia-Siemens Networks was looking to sell its

approximately CAD\$55 million (the debt was in euros at the time and subsequently converted) vendor debt commitment (CAD\$46 million of which was drawn at the time) owed by WIND. Q Advisors informed us of this opportunity, and ultimately we partnered with Providence Equity Partners LLC ("**Providence**") to purchase Nokia-Siemens' vendor debt. Each of Tennenbaum and Providence took 50% of the committed and then outstanding Nokia-Siemens debt.

14. By March 2014, WIND had approximately \$150 million (US) in outstanding third party vendor debt (not to mention significantly more debt owed to its parent company, VimpelCom). In addition to the debt acquired by Providence and Tennenbaum, this third party debt was also held by Huawei and Alcatel-Lucent. Tennenbaum continued to hold the approximately \$25 million (US) in debt that we had acquired in May 2012. During 2013 and 2014, Tennenbaum and Providence repeatedly reached out to VimpelCom and WIND to provide additional debt and equity capital to fund the business on a go forward basis, including buying certain of VimpelCom's shareholder loans as part of a funding transaction.

15. The third party vendor debt (including that held by Tennenbaum) came due on April 30, 2014. In March and April 2014, WIND and VimpelCom reached out to the third party lenders, including Tennenbaum, to seek an extension and/or refinancing of these instruments. No such agreements were made prior to the debts' maturity on April 30. Thus, as of May 1, WIND was in default on its debts to the third party lenders, including Tennenbaum.

16. Shortly if not immediately thereafter (*i.e.*, in very early May 2014), VimpelCom advised Tennenbaum that VimpelCom had decided to sell its debt and equity interests in WIND and that it had retained UBS to manage the sale process. That VimpelCom sought an exit strategy was not particularly surprising to me given that: (1) VimpelCom had just allowed WIND to default on its third party debts; (2) VimpelCom had recently withdrawn its financial support for WIND's bid in Industry Canada's 700 MHz spectrum auction held in January/February 2014 (which I believe signalled to many observers, including me, that VimpelCom had no interest in further supporting WIND's business); and (3) while VimpelCom had inherited a majority equity / minority voting position in WIND (through its acquisition of Orascom), it had never been able to acquire voting control of WIND due to the Canadian regulatory environment.

17. From the outset of our discussions with VimpelCom, we knew that their priority was speed and certainty of closing, and we directed our efforts accordingly. VimpelCom had grown suspicious and mistrustful of the Canadian government, and minimizing regulatory risk was paramount. While the membership of our consortium and our precise approach evolved over time in response to the circumstances, we always knew that the best approach, which would be most likely to win VimpelCom's favour in a competitive auction process, would be the one that minimized regulatory risk to VimpelCom.

18. Upon being informed by VimpelCom that it was selling its interests in WIND in early May 2014, representatives of Tennenbaum, including me, in addition to our consultant Alek Krstajic (the ex-CEO of Public Mobile), travelled to Toronto to meet with WIND management where they delivered a management presentation and thorough

update on WIND's business. Following the management presentation, Tennenbaum immediately began working on a proposal to acquire WIND. Among other things, Tennenbaum signed a non-disclosure agreement with VimpelCom on May 12, 2014, and was granted access to the WIND data room on the same day. We began conducting due diligence right away, and continued to do so throughout May and June.

19. We also immediately began canvassing for other investors who would be interested in joining us in the purchase of WIND. We spoke to a number of potential equity partners, initially including Oak Hill, Blackstone, LG Capital (whose principal is Larry Guffey, the founder of our ultimate investing partner 64NM), and Globalive. Our consortium (led by Tennenbaum, Oak Hill and Blackstone) submitted an initial indication of interest on or around May 30 and we were allowed to proceed with continued diligence and access to management.

20. Tennenbaum, along with its other consortium members at the time, continued to conduct due diligence throughout June and July 2014, and began negotiating a purchase agreement with VimpelCom. In early June we had very preliminary discussions with West Face about providing principally debt capital and a smaller minority equity position in support of our group's bid, but by mid-June West Face was pursuing a different avenue. Our due diligence efforts at that stage were focussed on learning more about WIND's wireless network and how the company would be able to obtain access to additional spectrum over time to create a competitive network to the incumbents (Rogers, Bell and Telus). Based on my experience in the wireless industry, network capacity is a crucial indicator of success, and Tennenbaum was not willing to acquire equity in WIND until it had sufficient comfort that there was a path forward.



These concerns were largely addressed on July 7, 2014, when Industry Canada announced a set-aside auction of AWS-3 wireless spectrum for new entrants like WIND. Industry Canada's announcement in this regard is attached as Exhibit "2".<sup>2</sup>

21. In late July 2014, Blackstone and Oak Hill's interests in pursuing WIND were waning. We therefore resumed our discussions with West Face to partner alongside of Tennenbaum and LG Capital. In late July we exchanged our financial modelling information with West Face, and the two firms joined together in our efforts to acquire WIND. We additionally shared our third party network and technology diligence with West Face, and they shared their third party diligence on the Canadian wireless market. As an example, attached as Exhibit "3" is an email from myself to Tony Griffin and individuals at Oak Hill and Tennenbaum, asking that our technical presentations, latest share purchase agreement, and updated model be sent to West Face.<sup>3</sup> None of these discussions concerned Catalyst's negotiating position or its confidential regulatory strategy as described by Mr. Glassman.

22. On July 23, we were informed by UBS, VimpelCom's financial advisor, that VimpelCom had entered into exclusive negotiations with another party. We were fairly confident that this other party was Catalyst, given that Catalyst had been actively seeking financing in the market. To me, this signalled that VimpelCom and UBS felt that Catalyst had made a more advanced proposal that provided a clearer path to closing a deal at that time. I also knew from my discussions with VimpelCom and its

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<sup>2</sup> WFC0109454.

<sup>3</sup> WFC0056117.

advisors that they did not consider Tennenbaum to be a credible bidder for WIND at that time given the disclosure we made about Blackstone and Oak Hill and our failure to make a concrete proposal on acceptable terms.

23. Nevertheless, Tennenbaum was not ready to abandon the deal given the significant amount of time and effort we had already expended, and the fact that we were already a material stakeholder given our debt position. We continued working with West Face, Globalive (until August 7, when they signed a Support Agreement with VimpelCom as described below) and Mr. Guffey toward a stronger proposal for WIND. In our minds, the best way to do this given VimpelCom's expressed preferences for speed and certainty of closing was to structure the transaction to minimize regulatory risk of closing.

24. In or around the very end of July or the first days of August, the "**New Investors**" (Tennenbaum, 64NM, and West Face) engaged in discussions regarding a new, streamlined transaction structure whereby Globalive's equity would be left in place and the New Investors would simply step into the shoes of VimpelCom. To the best of my recollection, Mr. Guffey proposed this approach to me on a phone call in late July or early August. While the concept behind this transaction structure was not new to the New Investors, we had not previously seriously considered putting forward such an aggressive proposal.

25. By that point, however – and particularly given that VimpelCom was in exclusivity with another party – we believed that the window of opportunity to acquire WIND was very quickly closing, and that we needed to put forward the best possible proposal in the

hopes that VimpelCom would consider it as an alternative to insolvency if it was unable to reach an agreement with Catalyst.

26. The advantage of the New Investors' proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. By leaving Globalive in place and avoiding a change of control, our proposal permitted VimpelCom's interests in WIND to be bought out upon signing of the purchase agreement, rather than having to wait several months until regulatory approval had been obtained. The existing financing commitments regarding the \$150 million vendor debt that Tennenbaum and the Investors had already obtained were not altered by this new structure.

27. Further, we also felt that the simplicity of a securities purchase agreement limited the amount of documentation that needed to be negotiated and provided VimpelCom with the simplest and most straightforward agreement. Given that our firm was already a lender to WIND, we understood the rights of the various loans issued in the WIND capital structure and our group believed that if we successfully acquired the VimpelCom shareholder loans, we would have a path to full ownership under a CCAA or similar proceeding if necessary.

28. The New Investors very quickly put together a proposal with this transaction structure and, close to midnight on August 6, 2014, I, on behalf of the New Investors, submitted an unsolicited offer for WIND that was conditional only on the participation of

Globalive. A copy of this email is attached as Exhibit "4" to this Affidavit.<sup>4</sup> We submitted a more formal proposal the next day, August 7. Our proposal was entirely unsolicited, and was entirely "blind", in the sense that we had had no substantive communications with VimpelCom since it entered exclusivity on July 23, 2014. We knew nothing about the status or nature of the negotiations between Catalyst and VimpelCom, nor did we at any time during their period of exclusivity.

29. Unfortunately for us, that same day (August 7), Anthony Lacavera of Globalive informed us that Globalive had signed a support agreement with VimpelCom, pursuant to which it agreed to support a sale transaction acceptable to VimpelCom. A copy of Mr. Lacavera's email to this effect is attached as Exhibit "5" to this Affidavit.<sup>5</sup> Neither VimpelCom nor Globalive resumed or engaged in any negotiations with Tennenbaum or, to my knowledge, any of the New Investors from August 7 to August 18, 2014, and the New Investors made no further proposals to VimpelCom during this time period. It was only after exclusivity expired on August 18, 2014 that the New Investors joined with Globalive and resumed negotiations with VimpelCom.

#### **No Knowledge of Catalyst's Regulatory Strategy**

No one at Tennenbaum had any knowledge of the details of Catalyst's regulatory strategy concerning WIND, nor the details of its offer or its negotiations with VimpelCom during its period of exclusivity from July 23 to August 18. Neither VimpelCom nor Globalive told us anything about the negotiations with Catalyst, and we had no negotiations with either of them after August 7, 2014. Furthermore, West Face never

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<sup>4</sup> WFC0075054.

<sup>5</sup> WFC0063562.

communicated any information about Catalyst's strategies or negotiations to Tennenbaum, and no such information was used by the Investors in developing the transaction structure that the Investors put forward to VimpelCom. On the contrary, the successful transaction structure was proposed to the New Investors by Mr. Guffey.

SWORN before me in the City of New York, in the State of New York, this 1st day of June, 2016.

  
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Commissioner for Taking Affidavits, etc.  
ANDREW CARLSON

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MICHAEL LEITNER

THE CATALYST CAPITAL GROUP INC.  
Plaintiff

BRANDON MOYSE ET AL  
and  
Defendants

Court File No.: CV-16-11272-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Commercial List)**

Proceeding commenced at Toronto

**AFFIDAVIT OF MICHAEL LEITNER  
(SWORN JUNE 1, 2016)**

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