

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

**AFFIDAVIT OF ANTHONY GRIFFIN
(sworn June 4, 2016)**

I, ANTHONY GRIFFIN, of the City of Toronto, in the Province of Ontario,

MAKE OATH AND SAY:

1. I am one of four Partners of the Defendant West Face Capital Inc. ("**West Face**"), a privately-held Toronto-based investment management firm. My Partners at West Face are Greg Boland, Peter Fraser, and Thomas Dea. In September 2014, certain funds managed by West Face participated in the acquisition of WIND Mobile Corp. ("**WIND**"), together with a group of investors that included Globalive Capital Inc. ("**Globalive**", formerly AAL Corp.), 64NM Holdings, LP ("**64NM**"), and Tennenbaum Capital Partners, LLC ("**Tennenbaum**", and together with West Face, Globalive, and 64NM, the "**Investors**").

2. I was the Partner at West Face who initially had primary responsibility over the WIND file from early November 2013 into July 2014, around which time my Partners

Messrs. Boland and Fraser became progressively more involved and took on greater roles as the matter progressed through late-July, August, and ultimately culminated in an agreement in September. That said, I continued to be involved throughout the deal. I was also involved in the subsequent sale of WIND by the Investors to a company controlled by Shaw Communications Inc. ("**Shaw**"). As such, I have personal knowledge of the matters set out in this Affidavit.

A. My Prior Evidence

3. I previously swore two Affidavits in this proceeding: the first on March 7, 2015 and the second on May 6, 2015. I was cross-examined on those Affidavits on May 8, 2015. That evidence was given in the context of a motion by the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), for various forms of interlocutory relief against West Face and for an order jailing the Defendant Brandon Moyse for contempt.¹ Justice Glustein dismissed Catalyst's motion in its entirety on July 7, 2015.

4. I also swore an Affidavit on January 8, 2016 in a proceeding very closely related to this one. That evidence was given in support of an application for approval of a plan of arrangement by Mid-Bowline Group Corp. ("**Mid-Bowline**"). Mid-Bowline was the entity through which the Investors held their equity interests in WIND after they had acquired it in September 2014. The plan of arrangement was intended to transfer WIND

¹ Specifically, Catalyst's motion was for: (i) an interlocutory injunction restraining "[West Face], its officers, directors, employees, agents, or any persons acting under its direction or on its behalf" from "[p]articipating in the management and/or strategic direction of [WIND] and any affiliated or related corporations"; (ii) an interlocutory order authorizing an Independent Supervising Solicitor (an "**ISS**") to forensically image (copy), review, and analyze all of West Face's electronic devices, for the stated purpose of determining **whether** West Face had obtained and misused any confidential information belonging to Catalyst; and (iii) an order jailing Mr. Moyse, for contempt of a previous interim consent order.

to Shaw free and clear of Catalyst's claim for a constructive trust over the WIND shares held indirectly through Mid-Bowline by West Face. Catalyst initially opposed the plan of arrangement, but did not file any evidence in response to my January 8, 2016 Affidavit or any of the other Affidavits filed as part of Mid-Bowline's application record. Shortly after receiving a decision by Justice Newbould on January 26, 2016 directing a trial of the alleged constructive trust issue, Catalyst consented to an order approving the plan of arrangement on February 3, 2016. The transaction contemplated by the plan of arrangement later received the necessary regulatory approvals, and WIND was sold by the Investors to a company controlled by Shaw for approximately \$1.6 billion.

5. This Affidavit consolidates and updates the relevant evidence I have given in this proceeding and the plan of arrangement proceeding, omits the evidence that has become irrelevant for the purposes of trial, and also sets out my evidence on matters that have become relevant since the swearing of my previous Affidavits.

6. Given the length of this Affidavit, I have provided a high level overview of my evidence in the following section.

B. Overview

7. In this action, Catalyst alleges that West Face misused Catalyst's confidential information about WIND disclosed to West Face by the Defendant Brandon Moyse. Mr. Moyse was a former junior employee of Catalyst who worked at West Face as the most junior member of West Face's investment team for a three and a half week period in June and July 2014.

8. This allegation is categorically false. West Face made diligent efforts to ensure that Mr. Moyses had no communications with anyone at West Face about WIND. Those efforts were effective, and West Face's participation in the acquisition of WIND had nothing to do with Mr. Moyses. Over the past two years of this proceeding, despite voluminous disclosure by West Face, Catalyst has not identified **any** confidential information in any way related to WIND that has been disclosed to West Face by Mr. Moyses.

9. In reality, West Face acquired WIND because we worked hard to understand the company, and were willing to assume a certain level of risk related to regulatory matters, the business model and the competitive environment. Ultimately, our faith was rewarded but the investment's success was far from assured when we made it. Not only Catalyst but other prominent private equity firms like Oak Hill, Blackstone and Birch Hill had declined to pursue the investment, not to mention various possible strategic investors.

10. West Face's interest in WIND as a potential investment dates back to at least November 2009, almost five years before Mr. Moyses joined West Face as a junior associate, and almost three full years before he was employed by Catalyst.

11. Before Mr. Moyses joined West Face on June 23, 2014, West Face had already engaged in extensive due diligence and exchanged multiple offers with VimpelCom Ltd. (WIND's principal security-holder, which controlled the sale process) and its financial advisor, UBS Investment Bank ("**UBS**"), to acquire WIND. West Face had formulated a strategy to acquire WIND either on its own or in concert with others, and had assembled

the majority of the critical deal components that ultimately allowed it to participate successfully in the acquisition of WIND:

- (a) we had been in contact with Anthony Lacavera of Globalive and Michael Leitner of Tennenbaum, both of whom would ultimately join the successful syndicate of Investors that acquired WIND as described below;
- (b) based on our assessment of WIND's assets, business outlook and regulatory environment, we had accepted VimpelCom's demand that any acquisition be based on an enterprise value in the range of \$300 million for WIND; and
- (c) we knew from our communications with VimpelCom's financial advisor UBS that VimpelCom wanted to sell its entire interest in WIND as quickly as possible, while minimizing risk of regulatory approval.

12. It was these three critical strategic components, and not anything Mr. Moyses may have known (and which he never passed to us) that were critical to the Investors' successful acquisition. Simply, we believed in the business and did not think further regulatory concessions were needed. Catalyst apparently did not share our beliefs. We took a risk Catalyst would not.

13. West Face's decision to hire Mr. Moyses had nothing to do with Mr. Moyses's involvement in or knowledge of Catalyst's plans, strategies, or negotiations for WIND or any other company. In fact, West Face had no knowledge that Mr. Moyses had played any part of Catalyst's WIND deal team until **after** Mr. Moyses had accepted a job offer from West Face and given notice of his resignation to Catalyst, at which point Catalyst raised concerns with West Face about Mr. Moyses's involvement on an active "telecom file". In response to Catalyst's stated concerns, and before Mr. Moyses had even begun

working at West Face, West Face implemented a confidentiality wall to ensure that Mr. Moyse did not disclose to West Face any Catalyst confidential information he may have possessed relating to WIND.

14. Mr. Moyse worked at West Face as a junior associate for three and a half weeks, from June 23, 2014 to July 16, 2014. During that time, to the best of my knowledge, no one breached the confidentiality wall that had been put into place before he arrived, and Mr. Moyse did not disclose to West Face any Catalyst confidential information relating to WIND. In fact, during the short period in which Mr. Moyse worked for West Face, West Face was pursuing the WIND transaction with another strategic partner that ultimately declined to participate. In other words, while Mr. Moyse was at West Face, we were pursuing what proved to be a dead end in which Mr. Moyse had no involvement.

15. On July 16, 2014, West Face and Mr. Moyse agreed to an interim consent order (the "**Interim Consent Order**") pursuant to which Mr. Moyse was immediately placed on indefinite leave from West Face. From that date on, Mr. Moyse never performed any more work for West Face, had no involvement in any investment analysis or decision making at West Face, and ultimately never returned to work at West Face as a result of this proceeding. He and West Face consensually terminated their employment relationship in August 2015.

16. One week after Mr. Moyse was placed on leave by West Face, VimpelCom granted Catalyst exclusive rights to negotiate a binding agreement to acquire WIND. However, Catalyst failed to reach a definitive agreement with VimpelCom to acquire

WIND during its exclusivity window, which (after various extensions) expired on August 18, 2014. VimpelCom had no negotiations with West Face during the exclusivity period, and to my knowledge West Face had nothing to do with Catalyst's failure to reach a definitive agreement during its period of exclusivity.

17. After Catalyst's exclusivity period expired on August 18, 2014, West Face and its co-Investors moved swiftly to seek to convince VimpelCom to engage in negotiations. Eventually, on August 27, VimpelCom agreed to enter exclusive negotiations with the Investors, and a deal was ultimately concluded on September 16, 2014.

C. About West Face

18. West Face is a Toronto-based investment management firm specializing in event-oriented investments where its ability to navigate complex investment processes is the most significant determinant of returns. West Face operates two principal investment funds: the Long Term Opportunities Fund, a hedge fund with a broad investment mandate; and the Alternative Credit Fund, a draw fund focussed on illiquid debt investments.

19. West Face is led by its President and Chief Executive Officer, Greg Boland, along with three other Partners: Peter Fraser, Thomas Dea, and me. The four Partners have, on average, over twenty years of experience in the financial industry and draw on a deep network of strong relationships to provide a unique pipeline of investment opportunities.

20. I joined West Face in 2006, shortly after it was founded. From 2003 to 2006, I was a Managing Director with Amaranth Advisors Canada, where I focused on

23. The CRTC initially blocked WIND's launch on the basis that Orascom's involvement breached Canadian ownership requirements, and it took Federal Cabinet intervention to overrule the CRTC in this regard. In December 2009, WIND commenced operations, providing mobile data and voice services in the Greater Toronto and Hamilton Area in Ontario, and in Calgary, Alberta. WIND later expanded into Ottawa and parts of southern Ontario, as well as Edmonton, Alberta, and Vancouver, Abbotsford, and Whistler, British Columbia.

24. In 2011, VimpelCom acquired the majority shareholder of Orascom, giving VimpelCom a controlling interest in Orascom and, indirectly, Orascom's investment in WIND. VimpelCom is a publicly-traded international telecommunications and technology business with more than 200 million customers. While it has been formally headquartered in the Netherlands since 2010, its origins are Russian.

25. Notwithstanding 2012 legislative amendments that loosened certain restrictions on foreign control of smaller telecommunications service providers like WIND, foreign ownership of the wireless industry in Canada remained (and remains to this day) heavily regulated. Indeed, regulatory concerns had already prevented VimpelCom from carrying out a reorganization of WIND ownership in 2013 that would have bought out AAL and given VimpelCom total control of WIND (through Orascom). VimpelCom's attempt to buy out AAL was reported in the press – see, for example, the April 2013 article of *The Globe and Mail*, attached as Exhibit "1" to this Affidavit.² Given this history, I was well aware by late 2013 that VimpelCom was frustrated by the regulatory

² WFC0109533.

hurdles it faced in Canada, and that this frustration drove its decision to divest its ownership of WIND.

26. Another important factor for WIND's capital structure was that, over the years, Orascom, and later VimpelCom, had made numerous substantial shareholder loans totalling approximately \$1.5 billion to WIND to finance, among other things, the aforementioned \$442 million acquisition of AWS-1 wireless spectrum in 2008, the build-out of WIND's network, and general operating needs. This debt allowed VimpelCom to control the sale process, notwithstanding that it had a minority voting interest in GIHC and WIND, because VimpelCom could seek to force an insolvency if it was not satisfied with the sale process (and in doing so wipe out Globalive's equity).

27. Given VimpelCom's first-hand experiences with the challenges in Canada of obtaining regulatory approval for changes in ownership in WIND, we at West Face understood (and were also repeatedly, explicitly, told by VimpelCom and its advisors) that minimizing or eliminating any such risk would be crucial to a successful bid for VimpelCom's interests in WIND.

(ii) West Face's Efforts to Acquire WIND Before Mr. Moyse was Offered a Job at West Face

28. West Face had a long-standing interest and expertise in the telecom sector. Among other things, West Face or predecessor companies had previously invested in U.S. and Canadian telecom companies including Lightsquared, Clear Wire, TerreStar Corp., Cleveland Unlimited, Broadview Communications, DBSD N.A. (successor to ICO Global), Cogeco, Microcell Communications, and Rogers Communications. West Face also held debt in Mobilicity, but had fully divested itself of this interest by the end of

February 2013. West Face has not traded in Mobilicity since that time. I believe that West Face was a natural source of financing or investment for a telecom company like WIND.

29. On November 4, 2013, I received a telephone call from Mr. Lacavera. I understand that Mr. Lacavera had received my name from Bruce MacDonald, a contact of Mr. Boland's at RBC. West Face's Vice-President, Yu-Jia Zhu, joined me on this call, and took notes. A copy of Mr. Zhu's notes is attached as Exhibit "2".³ During this call, Mr. Lacavera advised us that VimpelCom was interested in selling its debt and equity interests in WIND and in arranging for the repayment of WIND's third party debt. Among other things, Mr. Lacavera also gave us some background information on the existing regulatory environment, and how the Canadian Government had been steadfast in its policy to promote a fourth wireless carrier to compete with the three incumbents (Rogers, Bell and Telus). He also explained that West Face would have to, in essence, "prove" to VimpelCom that it was a credible purchaser, because VimpelCom had become very apprehensive of both the Government and potential purchasers as a result of previous failures to exit the investment. In that regard, I note that it had been reported in the press that both US carrier Verizon and private equity firm Birch Hill had considered acquiring WIND earlier in 2013, but ultimately decided not to pursue a sale or participate in the 700 MHz spectrum auction. Copies of articles reporting these stories are attached as Exhibits "3",⁴ "4",⁵ and "5".⁶

³ WFC0108177.

⁴ WFC0109538.

30. In any event, following this conversation and subsequent conversations with VimpelCom's financial advisor UBS, West Face delivered an expression of interest to VimpelCom and AAL. A copy of West Face's expression of interest letter dated November 8, 2013 is attached as Exhibit "6".⁷ As set out in this letter, at the time, the contemplated enterprise value for the transaction was between \$450 to \$550 million.

31. Shortly thereafter, on December 7, 2013, West Face entered into a confidentiality agreement with VimpelCom and Orascom (by then known as Global Telecom Holdings S.A.E.) to obtain access to VimpelCom's virtual data room and conduct financial due diligence on WIND. A copy of this agreement is attached as Exhibit "7".⁸ West Face gained access to the data room on December 10 and then participated in a management presentation from WIND on December 18.

32. Around the same time in December 2013, the Government of Canada proposed amendments to the *Telecommunications Act* that would put a cap on the roaming rates that could be charged by the incumbents to customers of smaller wireless carriers such as WIND. This was seen as an obvious positive development for WIND, and was reported in the media. A copy of a CBC news article dated December 18, 2013 covering this story is attached as Exhibit "8".⁹

⁵ WFC0109540.

⁶ WFC0109542.

⁷ WFC0080889.

⁸ WFC0107228.

⁹ WFC0109981.

33. From January to March of 2014, West Face carried out its due diligence and financial modelling, prepared business forecasts, assessed capital requirements for the business, determined its wireless spectrum requirements, and analyzed potential debt or equity financing requirements. We did not have much contact with either Mr. Lacavera or VimpelCom during this period. Significantly, however, in mid-January, VimpelCom withdrew its financial support for WIND's bid in the 700 MHz spectrum auction that was then being conducted by Industry Canada. This publicly signalled that VimpelCom had no interest in further supporting WIND's business. A copy of a Financial Post article dated January 13, 2014 reporting on this event is attached as Exhibit "9".¹⁰

34. On April 14, 2014 (before I had ever met or spoken with Mr. Moyses), Mr. Lacavera reached out to me to resume our previous discussions about WIND. An email from Mr. Lacavera to this effect is attached as Exhibit "10".¹¹ There was some urgency to put a proposal together because WIND had approximately US\$150 million in outstanding third-party debt that was coming due on April 30, 2014.

35. West Face worked hard and moved quickly to develop a proposal to submit to VimpelCom. Based on our discussions with Mr. Lacavera, West Face believed at that time that VimpelCom's main priority was to refinance this \$150 million of vendor debt before the expiration of a 30-day forbearance period expiring at the end of May 2014. While we began considering a buyout of a portion of VimpelCom's equity, we did not

¹⁰ WFC0109480.

¹¹ WFC0061108.

understand this to be VimpelCom's priority, and for this reason discussed the prospect of buying the equity only at a later stage. Copies of various email exchanges between me and Mr. Lacavera reflecting our conversations in this regard are attached as Exhibits "11",¹² and "12",¹³ and a copy of an email exchange I had with Mr. Boland regarding my discussions with Mr. Lacavera is attached as Exhibit "13".¹⁴

36. On April 21, we were provided with an updated investor presentation (a copy of which is attached as Exhibit "14"¹⁵) and retained corporate counsel (specifically, Pat Barry of Davies Ward Phillips & Vineberg LLP). On or around April 23, we submitted our first proposals for WIND. At that time, our bid proposed a combination of debt refinancing and equity investment that would allow VimpelCom to retain minority ownership of WIND. Copies of West Face's late April proposals are attached as Exhibits "15"¹⁶ and "16".¹⁷

37. VimpelCom's advisors gave us their initial feedback on these proposals on or around April 25, 2014. Emails reflecting this feedback are attached as Exhibits "17"¹⁸ and "18".¹⁹ One question VimpelCom had asked was how quickly we could complete our due diligence. We could tell that speed of closing was a significant issue to

¹² WFC0059125.

¹³ WFC0051129.

¹⁴ WFC0060279.

¹⁵ WFC0060563 and attachment WFC0060565.

¹⁶ WFC0066640.

¹⁷ WFC0066644.

¹⁸ WFC0109155.

¹⁹ WFC0041076.

VimpelCom. For this reason, West Face stated that given all the work we had already done, we could halve the required due diligence period from 90 days to only 45 days.

38. However, on May 1, 2014, West Face was advised by Jonathan Herbst or Francois Turgeon of UBS that VimpelCom was interested only in an outright sale of VimpelCom's debt and equity interests in WIND. The next day, I sent an email to the West Face WIND deal team (the four West Face Partners and Mr. Zhu) and our internal and external legal counsel (Alex Singh of West Face and Pat Barry of Davies) informing them of this feedback. A copy of my May 2, 2014 email is attached as Exhibit "19".²⁰

39. Thus, while we had initially understood that VimpelCom would consider a range of alternatives, including a continuing equity interest, from that point forward, it was clear that the three essential deal elements for a successful bid to acquire WIND were as follows:

- (a) a deal that could close quickly, without material representations and warranties by the vendor;
- (b) a purchase price targeting an enterprise value of \$300 million; and
- (c) a transaction structure that allowed for the full exit of VimpelCom that minimized any risk related to regulatory approval.

40. As an aside, I note that VimpelCom's \$300 million asking price was common knowledge to the interested parties and, indeed, had even been referred to by the press

²⁰ WFC0109163.

in the Summer of 2014. For example, see the July 31, 2014 article from the Globe and Mail attached as Exhibit "20".²¹

41. Thus, while West Face's initial April 2014 proposals were focussed more on buying WIND's debt than its equity, West Face knew that we had to work within the paradigm being established by VimpelCom as the seller. West Face understood the competitive nature of the sale process being run by VimpelCom, and was willing to adapt and evolve its strategies and proposed transaction structures in its attempts to win VimpelCom over.

42. On May 4, 2014, West Face sent VimpelCom a revised proposal to address VimpelCom's required deal terms. This proposal included a purchase of 100% of WIND's equity, based on the \$300 million enterprise value that had been communicated to interested parties by VimpelCom and its agents. This offer was made to VimpelCom almost two weeks **before** West Face offered Mr. Moyses a job and almost two months **before** Mr. Moyses actually began working at West Face. A copy of West Face's May 4, 2014 proposal is attached as Exhibit "21".²²

43. Mr. Lacavera's only comment on our May 4 proposal was that we should indicate to VimpelCom that West Face was Canadian owned and controlled and had no relationship with an incumbent, so as to make it clear that there would not be any significant issues regarding the time it would take West Face to gain regulatory approval for the transaction. I understand that Mr. Lacavera's reason for giving this advice was

²¹ WFC0080891.

²² WFC0106772.

because of VimpelCom's apprehensiveness of the regulatory approval process and its desire for an extremely low-risk transaction. A copy of Mr. Lacavera's email to this effect is attached as Exhibit "**22**".²³

44. For this reason, we put "Introduction and background on West Face / Addressing any questions VimpelCom has on the firm, our capital base, etc." as the first agenda item on our next meeting with VimpelCom's advisor, scheduled for May 7, 2014. A copy of an email to this effect is attached as Exhibit "**23**".²⁴

45. VimpelCom did not accept West Face's May 4 offer for a variety of different reasons unrelated to price, but indicated that it was willing to negotiate further. To this end, West Face requested that its corporate counsel, Davies, also be given access to VimpelCom's virtual data room in order to conduct legal due diligence. Also around this May time period, West Face hired a number of consultants to advise West Face regarding WIND's business, including Peter Rhamey and George Horhota, two consultants in the Canadian wireless market, and Altman Vilandrie & Company ("**AV&Co**"), a well-known US consultancy firm specializing in the telecom, media and technology industry.²⁵ West Face ultimately paid these advisors hundreds of thousands of dollars for their expertise, industry specific advice, and with respect to AV&Co, technical diligence on WIND. A copy of AV&Co's report is attached as Exhibit "**25**".²⁶

²³ WFC0052574.

²⁴ WFC0053973.

²⁵ While West Face did not execute its contract with AV&Co until May 21, 2014, AV&Co had already been given access to the data room on or around May 11, 2014. An email to this effect is attached as Exhibit "**24**" (WFC0052730).

²⁶ WFC0085622.

46. Notably, at no time throughout the process did West Face intend to pursue any regulatory concessions from Industry Canada or any other regulatory body. We knew that any transaction involving WIND and a transfer of its spectrum licenses would require regulatory approval, but we did not see the need for any concessions in terms of future transferability of spectrum. From reviewing the Affidavits of Gabriel De Alba and Newton Glassman, sworn May 27, 2014, I understand Catalyst's theory to be that West Face altered its strategy to be more aggressive in assuming regulatory risk. However, based on our due diligence efforts and analysis of the company and the regulatory environment, we were confident Industry Canada would approve any sale to us, and we did not believe WIND required regulatory concessions to be profitable moving forward. Based on this analysis, we concluded that the regulatory considerations were manageable and ultimately not a material risk to West Face's investment thesis.

47. All that West Face wanted from Industry Canada was more certainty regarding when, how, and at what cost WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network. Until the new LTE network was built and all customers had been transitioned, some customers would need to remain on 3G and use WIND's pre-existing AWS-1 spectrum. This issue was resolved on July 7, 2014, as described below, when the Government of Canada announced an auction for AWS-3 spectrum with significant set-asides for new entrants like WIND.

48. On May 21, 2014, West Face delivered a presentation to Industry Canada. A copy of this presentation is attached as Exhibit "26".²⁷ One purpose of this presentation was to give Industry Canada some information about West Face and why it would be a suitable owner of WIND (as stated above, any acquisition for control of WIND would be subject to regulatory approval). The presentation informed Industry Canada that from West Face's perspective, the key risk factor was the uncertainty regarding WIND's ability to acquire additional spectrum enabling it to build out an LTE network.

49. WIND's dire need for additional spectrum to transition to LTE had been disclosed to West Face by WIND from the outset of the negotiations in December 2013. More notably, it was, in any event, entirely public knowledge. For example, the January 13, 2014 Financial Post article that I previously attached as Exhibit "9" stated (in the context of WIND withdrawing from the 700 MHz auction):

Mr. Lacavera said the fact that Wind will not secure additional airwaves in this year's auction will not affect its ability to operate its network or serve its customers **in the immediate term**.

"Wind has emerged as the fourth carrier in Ontario, B.C. and Alberta, **but we still have need of additional spectrum for LTE**," he said in an emailed statement. **"Today's development leaves us with a spectrum shortfall we must still address"**.

Wind built a third-generation [3G] network on its existing spectrum, which is what is known as the AWS band of spectrum.

In order to update to a more advanced LTE (long-term evolution or fourth-generation) network, it must either reallocate part of its existing spectrum and carefully migrate

²⁷ WFC0106480.

its customers to the faster network **or acquire more airwaves.**²⁸ (emphasis added)

50. As West Face indicated to Industry Canada on May 21, West Face was willing to accept a number of business and regulatory risks, including:

- (a) WIND's ability to solidify its position in the Canadian market and achieve self-funding status;
- (b) WIND's ability to improve the quality and reach of its network;
- (c) navigating and responding to competitive actions by incumbents;
- (d) assuming the financing risk associated with future funding needs including operating losses and network requirements; and
- (e) assuming the risk that final rulings regarding wholesale roaming and tower sharing would not be as favourable to WIND as currently expected.²⁹

51. However, as of May 21, 2014, there was no certainty as to how WIND was going to be able to acquire the necessary additional spectrum. As stated in the presentation, West Face could not assume prior to closing that WIND would obtain the spectrum necessary to migrate to LTE.

52. While West Face was alive to other regulatory issues affecting WIND such as wholesale roaming and tower sharing, it was expected in the industry that the Government and CRTC would implement changes that would be beneficial to WIND. See, for example, the Bank of America Merrill Lynch article published on July 6, 2014,

²⁸ WFC0109480.

²⁹ A copy of the PowerPoint presentation used at this meeting, which outlines this acceptance of risk at p. 11, was attached above as Exhibit "26" (WFC0106480).

outlining its expectation on roaming rates, attached as Exhibit "27".³⁰ West Face was willing to assume the risk that these issues would be resolved in a manner favourable to WIND given the Government's commitment to encouraging the development of a fourth wireless courier in every region of Canada.

53. Thus, the only significant regulatory hurdle that West Face had yet to gain sufficient comfort on, and which would have been well-known to all bidders including Catalyst, was WIND's path to obtaining spectrum. This was not an issue specific to West Face or any other particular bidder. Rather, it was a fundamental going-forward issue that WIND faced as a business.

54. The significance of WIND's ability to acquire additional spectrum to support the build-out of the LTE network is perhaps best evidenced by West Face's June 3, 2014 proposal to VimpelCom. This bid proposed that West Face would: (1) provide \$160 million in bridge financing to fund the repayment of WIND's existing third party vendor debt; (2) enter in a share purchase agreement for 100% of WIND for deferred contingent consideration of \$100 million, payable to VimpelCom upon West Face obtaining sufficient spectrum within 12 months to support WIND's LTE rollout strategy; and (3) be responsible for funding the company's working capital. Because this proposal involved a change of control at WIND, it was necessarily contingent on regulatory approval. Indeed, any change of control of WIND would necessarily require regulatory approval from Industry Canada and the Competition Bureau, which is why VimpelCom's initial draft share purchase agreement (a copy of which is attached as

³⁰ WFC0107350.

Exhibit "28"³¹) provided for such approvals. However, West Face attempted to allay any possible VimpelCom concerns regarding the risk of such approval not being obtained by noting in its proposal that West Face would use a "Canadian acquisition vehicle" and therefore "did not anticipate any significant regulatory issues in connections with our proposal". A copy of this June 3 proposal is attached as Exhibit "29".³²

55. In spite of making a proposal to acquire WIND on our own on June 3, we were interested in finding other parties with which we could combine our efforts and reduce our total exposure. For example, in addition to our ongoing conversations with VimpelCom, we were aware that Tennenbaum was assembling a consortium because Tennenbaum's principal Michael Leitner had reached out to Mr. Boland. On June 4, I advised Mr. Lacavera that West Face was thinking of joining the Tennenbaum consortium. I also commented that to my knowledge, Tennenbaum and West Face were "the only real proposal[s] in front of" VimpelCom, because my perception was that "Catalyst seems to be a lot of air." A copy of this email is attached as Exhibit "30".³³ At this time we did not, however, join the Tennenbaum consortium nor did we exchange any information with them.

56. At this time, we suspected Catalyst might be involved because of their long-stated public desire to pursue a combination of WIND and Mobilicity, and their existing investment in Mobilicity's bonds. I said Catalyst "seems to be a lot of air" because at

³¹ WFC0106564.

³² WFC0106765.

³³ WFC0068142.

the time I was aware of no evidence indicating that Catalyst was a serious bidder for WIND at the time. I certainly knew nothing of Catalyst's strategy with respect to WIND.

57. In response to our June 3 offer, VimpelCom again made it clear that it was looking for a "clean exit". In that regard, Francois Turgeon of UBS emailed me on June 10, saying:

Tony,

The delayed settlement feature you proposed does not work for VimpelCom has the objective is still a clean exit at a \$300 million EV [*sic*].

My client is not prepared to have any portion of the proceeds contingent on a future event, in this case the acquisition of spectrum.

I am happy to discuss if required

Francois

58. A copy of this email is attached as Exhibit "31" to my Affidavit.³⁴ This was consistent with VimpelCom's messaging since at least May 1, 2014.

59. Faced with this consistent feedback, West Face was again willing to adapt, and began considering its alternatives. By June 12, 2014, West Face was considering two possible options for financing a transaction to acquire WIND:

- (a) raising \$100 million in debt through an investment bank, \$100 million of senior equity contributed by West Face, and \$100 million of subordinate equity from Mr. Lacavera and other investors with whom he had relationships; or

³⁴

WFC0058252.

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- (b) joining a syndicate of investors led by Tennenbaum, which at that time also included two other prominent U.S. private equity firms – Blackstone and Oak Hill – which did not ultimately participate in the purchase of WIND (the "**Tennenbaum Syndicate**").

60. An email from me to Mr. Lacavera outlining these two "paths" is attached as Exhibit "**32**".³⁵

61. While neither of these options ultimately resulted in a deal for WIND, the combination of relationships with Globalive and Tennenbaum, the strategies to meet the conditions for a successful acquisition imposed by VimpelCom, the outlines of the agreements developed, and the significant due diligence conducted by that date, including the engagement of third party consultants such as AV&Co, all proved critical in completing the transaction several months later. All of this was accomplished before Mr. Moyses even started working at West Face, and of course there was never any involvement by or information from him at any time.

62. After considering its options, West Face determined that it did not, at that time, want to become a fourth member of the Tennenbaum Syndicate and instead, on June 19, 2014, decided to make another proposal to VimpelCom for the acquisition of 100% of WIND's equity based on an enterprise value of \$311 million. Again, because this proposal involved a change of control transaction, it was conditional on regulatory approval, and West Face included the same language as its previous proposal that it

³⁵ WFC0050393.

did "not anticipate any significant regulatory issues in connection with our proposal". A copy of this proposal is attached as Exhibit "33".³⁶

63. During the period of June 20 to 22, 2014, West Face's counsel prepared a share purchase agreement for delivery to VimpelCom's financial advisor, UBS, and a list of outstanding legal due diligence items following its initial review. I emailed the draft agreement and supplemental due diligence request list to Francois Turgeon of UBS on the morning of Monday, June 23, 2014. A copy of this email, and Mr. Turgeon's response, is attached as Exhibit "34".³⁷ Mr. Turgeon and I exchanged further emails where he expressed disappointment that West Face and its counsel had drafted their own share purchase agreement from scratch instead of using VimpelCom's counsel's draft. Mr. Turgeon again advised that VimpelCom was looking for a "clean exit on [an] 'as-is basis'". Copies of these emails are attached as Exhibits "35",³⁸ "36",³⁹ and "37".⁴⁰ This episode drove home for us VimpelCom's desire for a simple, "clean exit". As I will describe below, this philosophy – and not any non-existent information from Mr. Moyses – drove our winning strategy for WIND.

64. Shortly thereafter, on July 7, 2014, Industry Canada announced that a large, 30 MHz block of AWS-3 spectrum (of 50 MHz total) would be set aside and made available exclusively for new entrants like WIND. This ensured that WIND would have access to additional spectrum without having to bid against the incumbents Rogers, Telus and

³⁶ WFC0059316.

³⁷ WFC0080895.

³⁸ WFC0073246.

³⁹ WFC0069341.

⁴⁰ WFC0067814.

Bell. This announcement effectively provided West Face with sufficient certainty regarding the ability to acquire the additional spectrum WIND needed to roll-out LTE. In short, by July 7, 2014, the only regulatory concern that West Face had raised in its May 21 presentation to Industry Canada had been addressed. This was before Catalyst even entered into exclusive negotiations with VimpelCom, and, to state the obvious, had nothing to do with Mr. Moyses. A copy of a news release of the Government of Canada regarding this announcement is attached as Exhibit "38".⁴¹

65. A copy of a speech given by Minister Moore on July 7 in conjunction with this announcement is attached as Exhibit "39".⁴²

E. Mr. Moyses's Hiring By West Face

66. In the meantime, Mr. Moyses had contacted West Face in March 2014 seeking employment in response to a West Face press release announcing the launch of its Alternative Credit Fund in January 2014. Mr. Moyses's hiring by West Face is described in detail in the Affidavit of Thomas Dea sworn June 3, 2016 (which I have reviewed in draft).

67. I did not play a significant role in Mr. Moyses's hiring, and primarily left the matter in Mr. Dea's hands. I therefore generally defer to his evidence regarding Mr. Moyses's hiring process. However, I can say that I met with Mr. Moyses when he attended at West Face's office on April 15, 2014 for his first round of interviews. We did not discuss WIND, or any other specific company or potential investment he had studied at Catalyst

⁴¹ WFC0109450.

⁴² WFC0109454.

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or any other previous employer, at all during that meeting. We discussed his resume, academic background, training he had received at his previous employers, and why he was interested in a job at West Face. Mr. Moyse told me he was dissatisfied with his lack of responsibility, limited deal flow, and overall career path at Catalyst and wanted to move into a role with greater responsibility and analysis.

F. West Face Implements a Confidentiality Wall in Response to Catalyst Complaints

68. As set out in Mr. Dea's Affidavit, in response to Catalyst's stated concerns about Mr. Moyse's involvement at Catalyst on a "telecom file", West Face implemented a confidentiality wall regarding WIND **before** Mr. Moyse started working at West Face. Pursuant to this confidentiality wall: (1) Mr. Moyse was forbidden from communicating with anyone at West Face about the ongoing WIND negotiations, and vice versa; and (2) West Face's IT group restricted access to the computer network for files regarding WIND.

69. To the best of my knowledge, neither Mr. Moyse nor anyone else at West Face breached the confidentiality wall. Our WIND deal team did not discuss the matter around Mr. Moyse on the trading floor and he was not privy to any of our communications.

G. No Disclosure by Mr. Moyse of WIND-Related Information

70. Mr. Dea did forward to me (and to my Partners and Mr. Zhu) Mr. Moyse's email of March 27, 2014 attaching four writing samples marked as "Confidential" and "For Internal Discussion Purposes Only". Reviewing a potential employee's writing samples was a standard hiring practice for recruiting junior investment professionals at West

Face. I believe I opened one of the attachments relating to a company called Homburg, but did not pay it much attention. I do not recall opening the other attachments. In any event, none of the attachments related to WIND.

71. I understand from counsel to West Face that Catalyst stopped treating the contents of Mr. Moyses's March 27, 2014 email as confidential over 16 months ago in January 2015, when it instructed its litigation counsel to unseal the Court File where a copy of the email and its attachments had been filed. Shortly thereafter, newspaper articles about this litigation quoting from Catalyst's very recent court filings that were critical of West Face appeared in the *Globe and Mail* and the *National Post*. Neither West Face nor its counsel advised the media of the unsealing of the court file, suggested the media consult the court file, or otherwise instigated this newspaper coverage of the litigation. I understand from my counsel that Catalyst refused to answer questions about whether it was the party who alerted the media to the unsealing of the Court File and Catalyst's recent motion. Copies of these articles are attached as Exhibit "40",⁴³ and the relevant excerpts from the transcript of James Riley's cross-examination held May 13, 2015, and answers to undertakings from this cross-examination, are attached as Exhibit "41".⁴⁴ In any event, West Face has not used or relied on any of the writing samples attached to the March 27, 2014 email, other than to evaluate Mr. Moyses's job application.

⁴³ WFC0081343.

⁴⁴ WFC0111150 and UTS000783.

H. Mr. Moyse's Brief Period of Employment at West Face

72. As set out above, Mr. Moyse began working at West Face on June 23, 2014, and approximately three and a half weeks later, on July 16, he was put on indefinite leave pursuant to the Interim Consent Order. From that date on, Mr. Moyse never performed any more work for West Face, and ultimately never returned to work at West Face as a result of this proceeding. He and West Face consensually terminated their employment relationship in August 2015.

73. Much of Mr. Moyse's three and a half week period at West Face was spent in orientation and training in order to acclimatize him to the West Face working environment. Based on my recollection of Mr. Moyse's time at West Face and the work I asked him to do for me during this period, as well as on conversations with the other West Face Partners, I believe that during his brief time at West Face, Mr. Moyse's work was limited to performing some preliminary analyses on several potential investments that had nothing to do with WIND. In that regard, I set out my knowledge and information of the work Mr. Moyse performed while at West Face in Appendix "A" to my March 7, 2015 Affidavit. For ease of reference, a copy of that Appendix is attached as Exhibit "42" to this Affidavit.⁴⁵

74. During his three and a half weeks at West Face, Mr. Moyse kept a physical notebook in which he took handwritten notes during meetings and phone calls. This notebook includes notes on a number of West Face projects or potential deals. I have reviewed a copy of Mr. Moyse's notebook and to the best of my knowledge, it contains

⁴⁵ WFC0111146.

no confidential information belonging to Catalyst. Rather, it relates entirely to either public information, or information that was generated internally at West Face. Copies of the relevant pages from Mr. Moyses's notebook are attached as Exhibit "43".⁴⁶

75. Catalyst has had the ability to "audit" the work Mr. Moyses did at West Face for over a year now. In March 2015, West Face delivered to Catalyst all non-privileged emails found on West Face's email server that were sent to or from (including by way of "cc" and "bcc") Mr. Moyses's West Face email address or his known personal email addresses. These emails were redacted only where necessary as a result of: (a) West Face's confidential information; and (b) personal confidential information belonging to Mr. Moyses such as banking passwords and other private information. At the same time, West Face also offered to produce to the Independent Supervising Solicitor a USB drive containing all documents created, modified or accessed by Mr. Moyses while at West Face (the "**Moyse-Accessed Documents**"). Catalyst ignored this offer. A copy of West Face's letter including this offer is attached as Exhibit "44".⁴⁷

76. In January 2016, West Face again offered to produce the Moyse-Accessed Documents, this time on a counsels' eyes only basis. Again, Catalyst ignored this offer. A copy of West Face's letter including this offer is attached as Exhibit "45".⁴⁸

⁴⁶ WFC0080915. West Face confidential information in the notebook has been redacted, none of which relates to WIND.

⁴⁷ CCG0018715.

⁴⁸ WFC0075855.

77. For the purposes of this trial, more important than the work Mr. Moyses did do while at West Face is the work he did not do. Mr. Moyses did not work on anything related to WIND (which was subject to a confidentiality wall as described above).

I. The Preservation of Mr. Moyses's Records

78. Catalyst ultimately commenced this action on June 25, 2014. As described above, three weeks later West Face agreed to the July 16 Interim Consent Order, under which Mr. Moyses was placed on indefinite leave. As of that date, Mr. Moyses was denied all access to West Face's facilities, his computer access was terminated, and his physical access cards were taken back from him. The hard drive from his computer has been preserved and not re-used for any other purpose. Based on my discussions with West Face personnel, from July 16 until long after the WIND acquisition was complete, no one at West Face had any communications with Mr. Moyses, other than in respect of human resources matters and in response to personal trading approvals sought by Mr. Moyses from West Face's compliance department. I also understand that non-material emails were sent to Mr. Moyses's West Face email address, to which Mr. Moyses no longer had access, as part of mass emails to West Face employees or subsets thereof (for example, emails regarding fire drills, compliance training, daily market updates sent by West Face summer intern Alex Goston, the office holiday party, etc.). Again, all of these emails were produced to Catalyst in March 2015.

79. As part of the Interim Consent Order, Mr. Moyses and West Face agreed to an order to preserve and maintain all relevant records in their possession, power or control. West Face preserved Mr. Moyses's computer and retained a forensic computer expert to image and retain all relevant records, as described in the Affidavit of Harold Burt-

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Gerrans sworn March 9, 2015, and the Affidavit of Chap Chau sworn May 14, 2015. Searches of those records have found no evidence that Mr. Moyses had anything to do with WIND, or otherwise conveyed **any** confidential Catalyst information to West Face other than the March 27, 2014 email described above.

J. Mr. Moyses Played No Role in WIND Negotiations While at West Face

80. At the time that Mr. Moyses joined West Face, West Face was in fact beginning to explore a joint bid for WIND with a potential strategic partner. This party has requested that its identity not be disclosed. West Face pursued this option throughout the three and a half weeks that Mr. Moyses was working at West Face, without any input from or discussion with Mr. Moyses.

81. Negotiations with this company continued through to July 18, 2014, two days after Mr. Moyses stopped working for West Face. On that day, the company advised West Face that it was withdrawing from the transaction.

82. In summary, during the time Mr. Moyses was at West Face, we had pursued what turned out to be a dead end, and we were no closer to a WIND transaction than when he joined the firm. Even so, and as described above, Mr. Moyses had no involvement in this or any other aspect of the potential WIND transaction as pursued by West Face.

K. Catalyst Wins the Right to Negotiate Exclusively with VimpelCom

83. Given the withdrawal of West Face's potential strategic partner, West Face had to again act nimbly and re-adjust its strategy in order to stay in the race that was the competitive sale process for WIND.

84. For this reason, West Face revived its former discussions with the Tennenbaum Syndicate, as well as discussions with other potential partners. As described above, West Face's discussions with Tennenbaum had pre-dated Mr. Moyse's employment at West Face. Before discussions with Tennenbaum could advance however, on July 23, 2014 (a week after Mr. Moyse went on leave), West Face learned from Oak Hill that VimpelCom had granted another bidder (which I now understand to be Catalyst) an exclusive negotiating period to conclude a binding agreement for the acquisition of WIND. A copy of an email from Jonathan Friesel of Oak Hill to members of the Tennenbaum consortium at the time which referred to VimpelCom entering into exclusivity with an unnamed bidder is attached as Exhibit "46".⁴⁹

85. This period of exclusivity was extended several times, ultimately to August 18, 2014. During the period of exclusivity, VimpelCom was forbidden to, and in fact did not, negotiate with West Face. While we continued to work on refining our proposal, we could not receive any feedback from VimpelCom or its advisors, nor could we receive any further information from WIND management as to whether our proposals would be satisfactory to VimpelCom. Other than the fact of Catalyst's exclusivity, we had no insight into the status of Catalyst's negotiations and no ability to influence the outcome of these negotiations.

86. Ultimately, and despite having the benefit of an exclusive negotiating period, Catalyst was not able to conclude a deal with VimpelCom. Catalyst's period of exclusivity expired on August 18, 2014.

⁴⁹ WFC0048724.

L. Catalyst's Regulatory Strategy

87. I have read the Affidavits of Newton Glassman and Gabriel De Alba sworn May 27, 2016, and in particular their evidence about Catalyst's confidential regulatory strategy regarding WIND. As a preliminary matter, I can unequivocally say that during the events in question in 2014 and right up to the time that I read the Glassman and De Alba Affidavits, I had no awareness of Catalyst's confidential regulatory strategy regarding WIND. Mr. Moyses never informed West Face of anything about WIND, let alone Catalyst's confidential regulatory strategy regarding WIND.

88. Now that I understand for the first time Catalyst's regulatory strategy regarding WIND, I can confidently state that knowledge of Catalyst's strategy would not have affected West Face's strategy. By the time our consortium came together in late July and we had committed financing to acquire the entire company, we knew that we were in a competitive auction process. VimpelCom entering exclusivity with Catalyst only heightened the need to make the best bid possible. We were in a "Hail Mary" situation. We knew based on VimpelCom's expressed desires – and not based on anything Catalyst may have intended to do – that we needed to offer the greatest certainty of closing and the lowest risk to VimpelCom, whether regulatory, financial, or otherwise. That was what the Investors' bid did.

89. In short, we were structuring our efforts around VimpelCom's known preferences. Even if Mr. Moyses had conveyed Catalyst's strategy (as of May 24, 2016 – the day he resigned from Catalyst) to West Face, that information would have been completely irrelevant to us and our own negotiating strategy with VimpelCom.

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90. **First**, I fundamentally disagree with Catalyst's premise that a fourth wireless carrier was not viable without major regulatory change. It was neither West Face's internal belief nor outward negotiating position towards the Government of Canada that "an independent fourth wireless carrier would not be viable in Canada without changes to the regulatory environment" or that a fourth carrier would "not survive without changes to the existing regulatory structure", as Mr. Glassman states in paragraph 10 of his May 27, 2016 Affidavit.

91. On the contrary, West Face believed that WIND's business was fundamentally viable (subject only to gaining additional certainty regarding WIND's ability to obtain additional spectrum to build-out an LTE network, as described above, which certainty was adequately provided for by the Government's July 7 announcement of the AWS-3 set-aside spectrum auction). Indeed, in our memorandum summarizing the proposed transaction to investors, we noted that "Wind appears to be at a favourable inflection point in a number of regards". A copy of this memorandum is attached as Exhibit "47".⁵⁰

West Face's belief in this regard was well-founded and based on, among other things:

- (a) our own extensive and months-long internal due diligence and financial modelling process, led by me and Mr. Zhu;
- (b) our extensive discussions with WIND management, including Messrs. Lacavera, Lockie, and Scheschuk, all three of whom had been deeply steeped in WIND's business for a number of years;
- (c) the advice we received from our industry consultants, Peter Rhamey and George Horhota; and

⁵⁰ WFC0108004.

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(d) the findings made and conclusions reached by West Face's technical industry consultant, AV&Co.⁵¹

92. Through all of the above sources of information and advice, West Face gained a good understanding of WIND's branding, marketing, customer service, sales, distribution, key performance indicators, network infrastructure, operating and financial information, tax attributes, and, of course, its spectrum holdings and requirements and working capital needs.

93. West Face's belief in the basic viability of WIND was also necessarily shared by its co-Investors Globalive, Tennenbaum, and 64NM. I believe that none of these entities would have invested millions of dollars for their respective interests in WIND had they not believed it was a sound investment. While I believe this would be true of any rational investor, it is notable that the principals of Globalive (Messrs. Lacavera, Lockie and Scheschuk) were also, of course, members of WIND management, and had been deeply steeped in WIND's business for a number of years as I stated above.

94. Moreover, Tennenbaum was a leading investment management firm that specialized in the technology/media/telecom ("TMT") industry, and the leader of its WIND deal team, Mr. Leitner, was the senior partner of Tennenbaum's TMT practice and had extensive experience in the sector. Tennenbaum had previously been invested in WIND's vendor debt, and had conducted its own extensive due diligence and modelling regarding an equity investment, which it shared with West Face in late July

⁵¹ In fact, AV&Co had concluded that in a worst-case "break-up" scenario, WIND's assets were worth \$200-\$350 million. See Exhibit "25", WFC0085622 at pp. 2, 26. Notably, this valuation assigns no value to WIND's spectrum in operating markets on the assumption it could not be sold to an incumbent, contrary to Mr. Glassman's assumptions.

(after receiving permission from VimpelCom) when the Investor consortium was formed. In fact, Tennenbaum had even more optimistic views than West Face about what WIND's working capital needs were. Attached as Exhibit "48" is an email chain from July 22, 2014 in which Mr. Leitner states that he has obtained permission from VimpelCom for West Face to join the Tennenbaum consortium.⁵² It was only after obtaining this permission that we started to share information and analyses together. For example, the next day, July 23, Mr. Leitner asked other members of his consortium to forward me their technical presentation, the last version of their share purchase agreement, and their updated financial model. A copy of this email is attached as Exhibit "49".⁵³

95. Finally, Mr. Guffey, the principal of 64NM, was also a highly knowledgeable and sophisticated investor in the telecom sector. That all three of these parties were enthusiastic about injecting equity capital into the WIND business gave West Face extra comfort that WIND was a sound investment, although we were of course already confident in our own evaluations.

96. **Second**, West Face was much more optimistic than Mr. Glassman about our ability to profitably exit the investment without any regulatory changes.

97. Mr. Glassman repeatedly states his view that WIND was not a viable investment without fundamental regulatory concessions:

⁵² WFC0059172.

⁵³ WFC0056117.

- (a) "...an independent fourth wireless carrier would not be viable in Canada without changes to the regulatory environment including changing or reversing the unilateral and retroactive conditions imposed upon the 2008 licenses" (para. 10);
- (b) "...an independent fourth wireless carrier could not survive without changes to the existing regulatory structure" (para. 10);
- (c) "Without the changes [sought by Catalyst], the fourth carrier would only be able to compete in the short term with the incumbents...." (para. 11);
- (d) "In the regulatory environment that existed in 2014, the new entrants, like Wind, were therefore not equipped to survive any kind of competitive war with the incumbents" (para.11);
- (e) "...the prospects of Mobilicity and Wind in the existing regulatory environment were not good" (para. 21); and
- (f) "[WIND] would have difficulty obtaining conventional arms-length financing as a result of the federal government's recent regulatory actions" (para. 21).

98. Mr. Glassman clarifies in paragraph 29 of his Affidavit that the "crucial" concession sought by Catalyst from the Canadian Government was the ability to "exit the investment with no restrictions in five years". As I read his Affidavit, Mr. Glassman believed that an acquisition of WIND was only worth pursuing if Catalyst were allowed to sell WIND and/or its spectrum to an incumbent after five years, provided an initial public offering or other sale had not occurred.

99. West Face did not share Mr. Glassman's concerns. Indeed, in its May 21 presentation to Industry Canada,⁵⁴ West Face explicitly advised the Government that it was willing to **accept** a number of business risks, without any regulatory concessions whatsoever. As set out in this presentation, the risks West Face was willing to accept included:

- (a) WIND's ability to solidify its position in the Canadian market and achieve self-funding status.
- (b) WIND's ability to improve the quality and reach of its network.
- (c) Navigating and responding to competitive actions by incumbents.
- (d) Assuming the financing risk associated with future funding needs including operating losses and network requirements.
- (e) Assuming the risk that final rulings regarding wholesale roaming and tower sharing are as favorable to Wind as currently expected.

100. West Face was willing to assume these risks because, for the reasons described above, we concluded that WIND was a fundamentally sound business, including in the context of the existing regulatory environment.

101. We had no need for a guarantee from the Government that West Face would be able to sell WIND and/or its spectrum to an incumbent in five years. West Face was content to operate the business, and confident that either by taking WIND public or selling to a strategic buyer, West Face could achieve a reasonable rate of return on any

⁵⁴ Exhibit "26", above (WFC0106480).

investment in WIND. Again, I believe West Face's confidence in this regard was reasonable and well-founded.

102. West Face's confidence in this regard has been confirmed by the recent sale by the Investors of WIND to Shaw – a strategic buyer, but not an incumbent – for \$1.6 billion, less than two years after they had acquired WIND. Clearly, West Face and its co-Investors had no need for a guarantee from the Government that they would be able to sell WIND to an incumbent after five years. West Face never sought such a concession, nor was one ever required.

103. **Third**, putting aside the issue of selling spectrum to an incumbent, Catalyst's other regulatory concessions that Catalyst requested from Industry Canada were already being sought by WIND and/or had been publicly proposed by the Government and the relevant regulatory agencies. For example, both the CRTC and the Government had publicly announced changes to roaming costs, including a legislative cap on roaming. Thus, while it may have been "confidential" to Catalyst that it had requested these concessions from Industry Canada as a pre-condition to purchasing WIND, such asks were not unique to Catalyst.

104. Nevertheless, the fact that Catalyst had made these requests would still have been irrelevant to West Face's strategy. West Face did not demand such regulatory concessions from the Government **prior** to acquiring WIND, nor did we feel like any one such concession, nor all of them collectively, were necessary for WIND to succeed. As

set out in West Face's May 21, 2014 presentation to Industry Canada⁵⁵ delivered three days before Mr. Moyse gave notice to Catalyst of his departure, West Face did not ask Industry Canada for (nor even hint at) any of the regulatory concessions that Mr. Glassman outlines in paragraphs 25 to 26 of his Affidavit.

105. **Fourth**, at no point did West Face consider what Mr. Glassman describes in his Affidavit as "Option 2" – namely, seeking to operate WIND as a "wholesaler". I understand from Mr. Glassman's Affidavit that this option was not possible under the existing regulatory framework (which is why Catalyst sought concessions). Operating a "wholesale" spectrum business would not advance the Government's stated objective of fostering a fourth wireless carrier in the retail market, and I see no reason why the Government would have made regulatory concessions to allow it.

106. **Fifth**, West Face would never have based its strategy on the "litigation" that Mr. Glassman believed some unnamed party other than Catalyst would have pursued against the Federal Government over the regulatory restrictions that limited transferability of the 2008 spectrum licenses. I understand that Quadrangle Group LLC has commenced litigation of this nature but that it is not close to being resolved. We would never base our investment strategy on speculation concerning the outcome of future litigation by third parties. I have no knowledge of whether the Government is "embarrassed" by this litigation, as Mr. Glassman predicted, but do note that, apparently, they have not capitulated to the litigation nor conceded on the regulations, as Mr. Glassman suggests is the inevitable outcome of such a proceeding. In fact, the

⁵⁵ Exhibit "26", above (WFC0106480).

government brought a motion to strike the claim and then appealed a dismissal of that motion.

107. As such, I categorically disagree with Mr. Glassman's statement in paragraph 34 of his Affidavit that "knowledge of this analysis and approach would prove **invaluable** to any other potential bidder since it in essence would **massively mitigate**, if not entirely **eliminate**, their financial risk in bidding". In fact, we fundamentally disagreed with Mr. Glassman's analysis. Based on our own discussions with Industry Canada, including during the May 21 meeting with Industry Canada, described above, West Face believed that the Government was going to continue to promote a fourth wireless carrier by maintaining the existing restrictions on transfers of spectrum to incumbents. We never understood the Government's policy stance to be a "bluff".

108. I also note that Mr. Glassman's view that this type of litigation would be successful was **not** shared by Globalive. The April 21 investor presentation delivered to West Face by Globalive stated:

Government has a firm and express commitment to the long-term success of an alternative to ROBELUS in every region; the recent ROBELUS public relations campaign and legal applications (challenging Government authority to have Conditions of License and restrict transfers) will not succeed and has only reinforced Government resolve.⁵⁶

109. With no disrespect intended to Mr. Glassman, had Mr. Moyses informed me of Mr. Glassman's opinions, I would not have put any stock in them given that they were

⁵⁶ Exhibit "14", above (WFC0060563 and attachment WFC0060565 at p. 8).

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directly contradictory to our own views, and the views of Simon Lockie, WIND's Chief Legal Officer.

110. In short, even if I had considered Mr. Glassman's "analysis and approach", I would not have considered it as meaningfully mitigating the financial risk in bidding for WIND, let alone "eliminating" it.

111. **Finally**, Catalyst's regulatory strategy necessarily involved exerting high-pressure negotiating tactics on the Federal Government. Mr. Glassman expressly states that Catalyst's strategy was to sign a share purchase agreement with VimpelCom for the acquisition of WIND, and then "put them [them being Industry Canada, the Privy Council Officer, and the Prime Minister's Officer] in a position of having no choice but to provide the regulatory approvals requested by Catalyst". I have reviewed the draft share purchase agreement between VimpelCom and Catalyst that Mr. De Alba identified as being final, and note that section 6.3(d) forbade Catalyst from seeking any regulatory concessions or even pursuing plans that might jeopardize regulatory approval. Based on Mr. Glassman's Affidavit it would appear that Catalyst did not intend to abide by this prohibition. West Face would not have ever negotiated an agreement with VimpelCom without any intention of closing the transaction unless the Government granted certain regulatory concessions. Nor do I believe that West Face would ever have resorted to pressuring the Government into having to reverse its longstanding policy of promoting a fourth wireless carrier.

112. In conclusion, Catalyst's confidential regulatory strategy vis-à-vis the Government and VimpelCom would have been completely irrelevant to West Face, even if Mr.

Moyse had conveyed it to us. Now that I understand what Catalyst's strategy was, I consider it to be a much riskier strategy insofar as it was contingent on (a) seeking regulatory concessions that the Government had repeatedly said would not be forthcoming; (b) relying on uncertain litigation brought by unnamed third parties; and (c) negotiating for regulatory concessions after signing but before closing the share purchase agreement in breach of section 6.3(d) of the Catalyst-VimpelCom share purchase agreement.

M. New Investor Syndicate Reaches Agreement to Acquire WIND

113. By early August 2014, we knew that our chances of acquiring WIND were low. VimpelCom had rejected our various requests to engage in exclusive negotiations with West Face, and had instead agreed to enter into exclusive negotiations with Catalyst on July 23. These exclusive negotiations were still ongoing in early August. We did not know anything about the transaction structure being negotiated between Catalyst and VimpelCom, nor did we know anything about Catalyst's regulatory strategies regarding WIND. We did, however, know that VimpelCom's regulatory risk tolerance was extremely low (having been told as much repeatedly by VimpelCom and its advisors).

114. At the same time, I knew based on my previous interactions with VimpelCom and its advisors that Tennenbaum, West Face, and 64NM (collectively, the "**New Investors**") were not perceived by VimpelCom as being a credible potential purchaser. I think this was for at least two reasons. First, each of the New Investors had made a number of proposals in the past that had not been acceptable to VimpelCom for various reasons. Second, a number of the New Investors' other potential syndicate members had initially expressed interest, only to drop out at a later date. These drop-outs

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included the two former members of the Tennenbaum Syndicate – U.S. private equity firms Blackstone and Oak Hill – as well as the strategic party West Face had been working with for the duration of Mr. Moyses's brief period at West Face.

115. While our chances were low, no transaction had been announced, and we were not willing to give up on the potential acquisition of WIND given all of the time and money that we had each put into our efforts to acquire WIND by that date. Moreover, while we had each approached our due diligence and financial modelling in different ways and using different assumptions, each of the New Investors had independently reached the conclusion that WIND was a sound investment, particularly at the relatively low \$300 million price. We therefore put our heads together to try and come up with a pragmatic, credible, and extremely low-risk proposal to VimpelCom that could close quickly in the event they were unable to reach an agreement with Catalyst.

116. In doing so, we knew from previous discussions that Globalive was interested in participating in a transaction that would allow it to have a continuing interest in WIND. The New Investors were open to Globalive's involvement (indeed, as set out above, West Face had been considering proposals involving Mr. Lacavera's equity participation since before Mr. Moyses had even arrived at West Face). The New Investors' willingness to involve and include Globalive was significant because, as noted above, it owned approximately two-thirds of the voting shares of GIHC, the sole shareholder of WIND.

117. Given the competitive landscape, Larry Guffey of 64NM and Michael Leitner of Tennenbaum proposed structuring the transaction in a manner that would initially leave

Globalive in place. By avoiding a change of control, the transaction with VimpelCom could be completed without the need for regulatory approvals at all, virtually eliminating all regulatory risk to VimpelCom. Instead, the New Investors would bear the risk of obtaining regulatory approval post-closing to transfer voting control of WIND from Globalive to all of the Investors in proportion to their economic interests in WIND.

118. We hoped that this two-stage approach would satisfy VimpelCom's desire to minimize regulatory risk. VimpelCom would be paid immediately upon signing the purchase agreement, rather than waiting until after regulatory approval had been obtained some number of months later. Again, these advantages were only possible with the participation of Globalive. West Face's relationships with Globalive and Mr. Lacavera went back to at least November 2009, and had been more recently rekindled through my conversation with Mr. Lacavera on November 4, 2013, and not from anything Mr. Moyse did or said.

119. The risks of this approach to the New Investors were that it would require us to negotiate an ownership structure with Globalive at a later date. Moreover, Globalive would have full voting control of WIND until regulatory approval for our equity reorganization was obtained, despite only contributing approximately 25% of the equity funding for the transaction. While the New Investors anticipated that Globalive would commit to support a post-closing reorganization that would give the New Investors their proportionate shares of the voting interests in WIND, the reorganization might require regulatory approval. If that approval was denied, the members of the New Investors would have been required to remain in a minority voting position – the very position that VimpelCom had found untenable and which led to its desire to exit WIND by the end of

2013. Despite these risks, the New Investors were prepared to bear the risk of seeking and obtaining regulatory approval to transfer voting control of WIND from Globalive Capital to the full Investors' consortium (including Globalive) post-closing.

120. On August 6, 2014, Mr. Leitner submitted this unsolicited offer for WIND on behalf of the New Investors. Mr. Leitner followed this with a more formal proposal the following day, August 7. A copy of the New Investors' August 7, 2014 proposal to VimpelCom is attached as Exhibit "50".⁵⁷ The email that Mr. Leitner had sent before delivering the formal proposal is attached as Exhibit "51".⁵⁸

121. That same day, however, August 7, Globalive agreed to a support agreement with VimpelCom, which obliged Globalive to support VimpelCom in its exclusive negotiations with Catalyst. Mr. Lacavera advised the New Investors that Globalive had entered into the support agreement with VimpelCom and informed us that he was required to cease discussions with the New Investors. A copy of Mr. Lacavera's email to this effect is attached as Exhibit "52".⁵⁹

122. VimpelCom did not respond to the New Investors' offer. Instead, on August 11, VimpelCom extended Catalyst's period of exclusivity to August 18, 2014. We had no further negotiations with Globalive or VimpelCom until we learned that exclusivity had expired on August 18, 2014.

⁵⁷ WFC0040932.

⁵⁸ WFC0051622.

⁵⁹ WFC0063562.

123. During Catalyst's exclusivity period, to the best of my knowledge the deal remained entirely in Catalyst's hands, and we believed that our chances of proceeding with the transaction were essentially nil. For example, on August 12, Mr. Leitner posited that the only reason the Catalyst deal had not yet been announced was "internal VimpelCom shuffling of papers and getting internal approvals [rather] than a positive sign". A copy of this email is attached as Exhibit "53".⁶⁰ Mr. Boland had a similar email exchange with Mr. Guffey on August 13, in which Mr. Guffey stated that it was "too bad we [the New Investors] weren't all better organized on this [WIND] deal", and Mr. Boland agreed and expressed frustration that we "got our act together way too late". A copy of this email chain is attached as Exhibit "54".⁶¹

124. Catalyst's exclusivity period expired on August 18, 2014, but they did not immediately enter into exclusivity with the Investors. We were not given the impression that they had terminated exclusivity with Catalyst in order to pursue our offer. On the contrary, it was apparent to us that VimpelCom was considering all of its options. We needed to convince VimpelCom that we were serious and credible bidders, and that they should enter into exclusivity with us as, opposed to pursuing other options such as insolvency or another purchaser. We also thought that it was possible that Catalyst was still pursuing the deal even after exclusivity had expired. VimpelCom would not initially grant us exclusivity, but on August 21, 2014, it agreed that it would not enter into another exclusivity arrangement with any party until August 25, 2014. West Face's

⁶⁰ WFC0056380.

⁶¹ WFC0061144.

understanding was that the New Investors needed to present an acceptable deal structure by that time if it wanted to be considered for exclusive negotiations.

125. On August 23, 2014, West Face's counsel delivered a revised proposal on behalf of the New Investors that addressed certain concerns raised by VimpelCom with the transaction structure in the New Investors' proposal from August 7, 2014. On August 25, 2014, West Face's counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter on behalf of the New Investors, Globalive and two other investors who would be co-investing with Globalive.⁶² On August 27, VimpelCom granted exclusive negotiating rights to the New Investors, and further negotiations continued.

126. In particular, VimpelCom remained concerned that, notwithstanding the proposed two-stage transaction, Industry Canada would take the position that approval was required for the first stage. To alleviate VimpelCom's concerns, the New Investors gave a representation that no regulatory approval was required to close the first phase of the transaction (whereby VimpelCom would be paid), and also agreed to indemnify VimpelCom in the event this representation was wrong. Ultimately a definitive purchase agreement was signed and the transaction closed on September 16, 2014. A copy of a press release announcing the deal is attached as Exhibit "55".⁶³

⁶² A copy of this letter is attached as Exhibit "56" (WFC0080932).

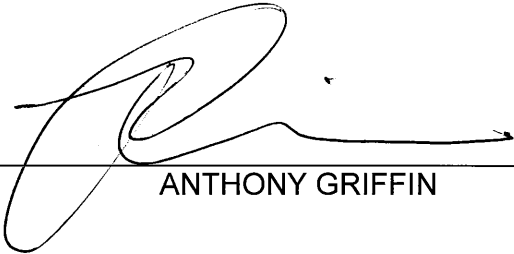
⁶³ WFC0080940.

N. Conclusion

127. Mr. Moyse's hiring had nothing to do with WIND. He only worked at West Face for approximately three and a half weeks, from June 23 until July 16, 2014. During Mr. Moyse's brief period of employment, West Face was aware of the dispute between Catalyst, Mr. Moyse, and West Face, and took steps to ensure that Mr. Moyse did not have any involvement with WIND. The deal that West Face was pursuing during the time Mr. Moyse worked for West Face ultimately proved to be a dead end, and following Mr. Moyse's departure Catalyst had several weeks of exclusive negotiations with VimpelCom. West Face and the Investors acquired WIND because they made an acceptable offer to VimpelCom based on their own assessment of VimpelCom's needs, not because of anything that Mr. Moyse did.

SWORN before me at the City of)
Toronto in the Province of Ontario)
this 4th day of June, 2016.)
)
)

Commissioner for Taking Affidavits, etc.



ANTHONY GRIFFIN

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE et al.

Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**AFFIDAVIT OF ANTHONY GRIFFIN
(SWORN JUNE 4, 2016)**

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