

Commercial List Court File No. CV-11238-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

**AFFIDAVIT OF ANTHONY GRIFFIN  
(sworn January 8, 2015)**

I, Anthony Griffin, of the City of Toronto, in the Province of Ontario, MAKE  
OATH AND SAY:

**PART I ~ OVERVIEW**

1. I am one of four Partners of West Face Capital Inc. ("**West Face**"), a privately-held Toronto-based investment management firm. I have been a Partner of West Face since the Fall of 2006, shortly after West Face was founded. I was the Partner who initially had primary responsibility for the WIND transaction (discussed below), and continued to be involved throughout the transaction. I have also been involved in the sale of West Face's indirect interest in WIND to a company controlled by Shaw Communications Inc. ("**Shaw**"). As such, I have personal knowledge of the information set out in this Affidavit, except where such knowledge is based on information from

others, in which case I have stated the source of the information and believe it to be true.

2. I am swearing this Affidavit in support of an Application by Mid-Bowline Group Corp. ("**Mid-Bowline**") pursuant to section 182 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended (the "**OBCA**") for an order approving a plan of arrangement (the "**Arrangement**") involving Mid-Bowline, its shareholders and optionholders, Shaw, and 1503367 Alberta Ltd. ("**Purchaser**"). Mid-Bowline indirectly owns 100% of WIND Mobile Corp. ("**WIND**").

3. WIND was acquired in September 2014 by a group of investors that included, among others, funds managed by West Face (through WAL Telecom L.P. ("**WAL**")), funds managed by Tennenbaum Capital Partners, LLC ("**Tennenbaum**"), 64NM Holdings, LP ("**64NM**", and together with WAL and Tennenbaum, the "**New Investors**"), and entities controlled by Globalive Capital Inc. ("**Globalive Capital**", and together with the New Investors, the "**Investors**"). WAL currently holds an indirect 34.85% equity interest in Mid-Bowline, which indirectly holds all of the equity interests in WIND.

4. WIND is at present the largest challenger to the three incumbent mobile wireless telecommunications companies in Canada: Rogers, Bell and Telus. Shaw is a major Canadian Internet and cable television service provider. Shaw acquired Advanced Wireless Spectrum throughout Western Canada and Ontario in 2008, but ultimately determined not to build its own mobile network from scratch and subsequently sold the spectrum licences that it had acquired in 2008. Shaw has now decided to enter the mobile wireless telecommunications business through the acquisition of Mid-Bowline

and WIND. The combined assets of Shaw and WIND have the potential to create a stronger fourth wireless company in Ontario, Alberta and British Columbia, which the Government of Canada has been trying to encourage for almost a decade.

5. If approved by the Court, the Arrangement will result in, among other things, the sale by the shareholders of Mid-Bowline of their shares in the corporation for aggregate consideration of approximately \$1.6 billion, representing \$6.11 per share. I believe that the Arrangement is in the best interests of Mid-Bowline and its shareholders. Both Mid-Bowline's board of directors and its shareholders have unanimously approved the Arrangement.

6. The Plan of Arrangement provides that the shares in Mid-Bowline that Purchaser is to receive pursuant to the Plan shall be "free and clear of any Encumbrances, adverse claims or other claims of third parties of any kind." The only claim over the shares of Mid-Bowline of which I am aware arises from a contingent proprietary claim by The Catalyst Capital Group Inc. ("**Catalyst**"). This contingent proprietary claim by Catalyst was made in an Amended Amended Statement of Claim dated December 16, 2014 in an action against West Face and Brandon Moyse.

7. In that action, Catalyst alleges that West Face acquired its interest in WIND in September 2014 thanks to an alleged, but unsubstantiated, breach of confidence by Brandon Moyse. Mr. Moyse, who was 26 years old at the time, was a former junior employee of Catalyst who worked at West Face as a junior analyst for three and a half weeks in June and July 2014. During that time, he was firewalled from any communications and documentation concerning WIND. Catalyst nonetheless alleges

that Mr. Moyses disclosed to West Face, and that West Face misused, confidential information belonging to Catalyst about WIND.

8. This allegation is categorically false. West Face was aware of Catalyst's concerns regarding Mr. Moyses's alleged knowledge of Catalyst's confidential information before he started his brief period of employment at West Face, and took reasonable measures to firewall Mr. Moyses from the West Face deal team that was working on the WIND transaction. Even assuming that Mr. Moyses had any material confidential information about WIND, he never discussed WIND with anyone at West Face. Moreover, the Investors acquired WIND only after Catalyst was unable to reach an agreement with the seller in August 2014 during an exclusive negotiating window three months after Mr. Moyses had left Catalyst, and a month after he left West Face. The Investors succeeded not because of any (non-existent) information received from Mr. Moyses, but because Catalyst's exclusivity expired without reaching an agreement with VimpelCom. Only after Catalyst's failure did the Investors acquire WIND using an ownership structure of which Catalyst was aware, but which it chose not to pursue.

## **PART II ~ BACKGROUND TO THE ARRANGEMENT**

### **WIND Mobile Corp.**

9. WIND is a corporation existing under the OBCA that has its head office in Toronto, Ontario. WIND is Canada's largest non-incumbent wireless carrier, serving approximately 940,000 subscribers in British Columbia, Alberta, and Southern and Eastern Ontario. Mid-Bowline indirectly owns 100% of the shares of WIND.

10. WIND was originally formed in 2008 pursuant to a joint venture between two principal parties: (1) Globalive Capital (then known as AAL Corp.), the principal of which was Anthony Lacavera; and (2) Orascom Telecom Holding S.A.E. ("**Orascom**"), a large Egyptian multi-national telecommunications company. Globalive Capital and Orascom held their interests in WIND indirectly through a corporation called Globalive Investment Holdings Corp. ("**GIHC**").

11. Due to regulatory restrictions on foreign ownership of Canadian telecommunications operators and spectrum licensors that existed at the time, Globalive held 66.68% of the voting interests in GIHC (compared to 32.02% for Orascom) even though Orascom held 65.08% of the total equity interests (as compared to 34.25% for Globalive). 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.

12. Since that time, WIND has expanded into Ottawa and parts of southern Ontario, as well as Edmonton, Alberta, and Vancouver, Abbotsford, and Whistler, British Columbia. As of the date of this affidavit, WIND is Canada's fourth largest mobile operator, and the largest challenger to Rogers, Bell and Telus. As set out in the media release attached as Exhibit "1", it has been the policy of the Government of Canada since at least 2007 to foster more competition in the wireless market by encouraging new entrants into the various regional wireless market across Canada.

13. In 2011, VimpelCom Ltd. acquired the majority shareholder of Orascom, giving VimpelCom a controlling interest in Orascom and, indirectly, Orascom's investment in

GIHC and WIND. VimpelCom is an NYSE-listed mobile telephone operator headquartered in the Netherlands.

14. Notwithstanding 2012 amendments that removed certain restrictions on foreign control of smaller telecommunications service providers like WIND, foreign ownership in Canada remains subject to the *Investment Canada Act*. Indeed, I believe that regulatory concerns prevented VimpelCom from carrying out a reorganization of WIND ownership in 2013 that would have bought out Globalive Capital and given VimpelCom total control of WIND.

15. In late 2013 I learned that, frustrated by the regulatory hurdles it faced in Canada, VimpelCom decided to divest its ownership of WIND. Orascom, and later VimpelCom, had made numerous substantial shareholder loans to WIND to finance WIND's acquisition of AWS-1 wireless spectrum and ongoing operations at WIND, which WIND was not able to repay. 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. A number of interested potential buyers came forward, including Tennenbaum, West Face, and Catalyst. Ultimately, in September 2014, the Investors, acting through Mid-Bowline, closed a transaction to acquire VimpelCom's equity and debt interests in GIHC and WIND.

16. In November 2014, following the receipt of the required regulatory approvals, the ownership structure of WIND was reorganized so that WIND became an indirect wholly-

owned subsidiary of Mid-Bowline so that the Investors held voting interests in proportion to their overall economic interests in WIND.

17. The authorized share capital of Mid-Bowline consists of: (i) an unlimited number of Class A common shares, of which 236,947,534 shares are outstanding; and (ii) an unlimited number of Class C common shares, of which 2,500,000 shares are outstanding. The Class A and Class C common shares have identical rights, restrictions, and privileges. The shareholders of Mid-Bowline, and therefore the indirect owners of WIND, are set out in the document attached as Exhibit "2" (collectively, the "**Shareholders**").

18. Serruya Private Equity Inc. and Luxembourg Famous Star SARL have entered into voting trust arrangements with Globalive Turbine Corp. 1 ("**GTC1**") (one of the Shareholders controlled by Globalive Capital), pursuant to which GTC1 has the right to vote their shares in Mid-Bowline. Siguler Guff Hearst Opportunities Fund, LP and Maycomb Holdings IV, LLC have entered into investment management agreements with Tennenbaum pursuant to which Tennenbaum has the right to vote their shares in Mid-Bowline. Each of the Shareholders who is a natural person is a director or officer of Mid-Bowline and WIND.

19. Mid-Bowline also has outstanding a number of stock options, as follows:

- (a) GTC1 is the holder of fully-vested options to acquire 10,000,000 Class A common shares of Mid-Bowline at an exercise price of \$1.00 per share (the "**Globalive Options**"). The Globalive Options were granted in connection with the acquisition of VimpelCom's interests in WIND in September 2014.

- (b) Two former officers of WIND, Simon Lockie and Brice Scheschuk (the "**Former Officers**"), hold an aggregate of 300,000 fully-vested options to acquire Class A common shares of Mid-Bowline at an exercise price of \$1.00 per share (the "**Former Management Options**"). The Former Management Options were granted in connection with the mutual termination of employment and release of the Former Officers and WIND.
- (c) A number of officers and employees of WIND hold an aggregate of 18,027,000 vested and unvested options to acquire Class A common shares of Mid-Bowline at an exercise price of \$1.50 per share (the "**Management Options**", and together with the Globalive Options and the Former Management Options, the "**WIND Options**"). Depending on the new employment arrangements agreed with Shaw, some or all of the unvested Management Options will vest immediately prior to the completion of the Arrangement.

20. Neither WIND nor Mid-Bowline is a reporting issuer under applicable securities legislation in Canada, and their securities are not offered to the public, nor listed or posted for trading on any stock exchange.

#### **Shaw Communications Inc.**

21. Shaw is a diversified communications and media company, serving 3.2 million customers through a reliable and extensive fibre network. Shaw serves consumers with broadband Internet, WiFi, Digital Phone and Video products and services; its Business Network Services and Business Enterprise Infrastructure Services provide more sophisticated telecommunications products and services to small, medium and large enterprises; and its Media group operates one of Canada's largest conventional television networks and 19 popular specialty channels. Shaw is traded on the Toronto and New York stock exchanges and is included in the S&P/TSX 60 Index.



### Background to the Arrangement

22. WIND and the Investors on one hand, and Shaw on the other, are not related parties, and are dealing with each other at arm's length.

23. As mentioned above and described in more detail below, the New Investors, acting with Globalive Capital through Mid-Bowline, acquired WIND in September 2014. The New Investors are investment and private equity firms that saw WIND as an undervalued asset that was being sold by VimpelCom at a distressed price because of ongoing regulatory challenges posed by Canada's foreign ownership restrictions. It was never the New Investors' intention to own WIND indefinitely, but rather to improve the company's fortunes and sell it to a buyer at an appropriate time. The most obvious potential buyer would be a strategic buyer (*i.e.* an existing telecommunications company) like Shaw.

24. WIND's prospects improved in March 2015, when it was the only challenger to the three incumbent wireless companies to successfully bid for AWS-3 wireless spectrum in all regions of Canada which had been set aside for non-incumbents in an auction run by Industry Canada (now known as the Department of Innovation, Science and Economic Development, or "DISED").<sup>1</sup> WIND's principal non-incumbent competitor in this regard, Mobilicity (of which Catalyst was at the time a creditor), did not bid for spectrum in the AWS-3 auction. WIND was therefore able to obtain extremely valuable wireless spectrum capable of carrying the latest 4G LTE wireless signals on attractive

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<sup>1</sup> Notably, DISED's webpage on Canada's Wireless Policy now emphasizes the fact that Canadians have "more choice" because a "fourth wireless service provider [aka WIND] obtained spectrum in every region of the country, delivering on the Government's commitment to encourage more competition in Canada's wireless industry". A screen-shot of this webpage as of December 18, 2015 is attached as Exhibit "3".

terms. WIND's value increased further when it acquired additional AWS-1 spectrum licenses from Rogers (many of which Rogers had acquired from Shaw, as described in the next paragraph) for nominal consideration in July 2015 in connection with Rogers' acquisition of Mobilicity.

25. Shaw has been interested in developing wireless capabilities for many years. I rely in this regard on a Shaw investor presentation that is attached to this Affidavit as Exhibit "4". In 2008, Shaw acquired AWS-1 wireless spectrum, and commenced an initial build-out of wireless infrastructure in 2010. Ultimately, in 2011, Shaw decided that building a wireless network from scratch was prohibitively expensive at that time, and decided not to move forward any further and instead focus its energies on building a WiFi network to provide free mobile connectivity to Shaw's wireline customers.

26. In 2013, Shaw granted Rogers an option to acquire its AWS-1 spectrum licenses, which Rogers ultimately exercised in July 2015 in connection with its acquisition of Mobilicity. In order to obtain regulatory approval for this acquisition, Rogers transferred most of this spectrum to WIND for nominal consideration. Now, with the opportunity to acquire WIND, Shaw is able to acquire Canada's fourth largest wireless provider with sufficient wireless spectrum to transition to 4G LTE technology and compete effectively with the three incumbent wireless carriers without having to build its own network from scratch.

27. I am informed by Greg Boland and believe that Shaw, WIND and certain of the Shareholders began discussing the possibility of an acquisition transaction in mid-July, 2015 (Shaw and WIND entered into a non-disclosure and confidentiality agreement on

July 16, 2015). I am further informed by Kevin Greenspoon of Davies Ward Phillips & Vineberg LLP, counsel for Mid-Bowline, and believe that WIND delivered management presentations to Shaw on or around July 27 and September 14, 2015, and that Shaw was provided access to the WIND data room the following day, on September 15. Shaw conducted extensive due diligence on Mid-Bowline and WIND from then through to December 16, 2015. From mid-September through early December, Shaw and certain of the Shareholders exchanged drafts of a non-binding letter of intent and term sheet (the "LOI") outlining the key parameters of a transaction. On December 7, 2015, Shaw delivered a draft share purchase agreement to WIND and the Shareholders.

28. On December 8, 2015, Shaw, WIND and certain of the Shareholders executed the LOI and an exclusivity agreement, which granted Shaw exclusive negotiating rights with respect to a transaction involving Mid-Bowline and WIND through December 15, 2015. Shaw and the Shareholders negotiated the terms of the definitive acquisition agreement through to December 16, 2015. In addition to the purchase and sale of the shares of Mid-Bowline, the definitive agreement addresses the exercise and sale, or termination, of the WIND Options, so that no person other than the Purchaser would have a right to acquire equity interests in Mid-Bowline (and indirectly WIND) following closing of the transaction.

29. In the course of negotiations and, more specifically, in the context of certain representations and warranties that Shaw requested from the Shareholders with respect to encumbrances on the Mid-Bowline shares and pending litigation, West Face disclosed to Shaw that Catalyst had commenced an action (described in more detail below) in which it asserted a constructive trust over "all property, including, but not

limited to, securities, security interests, debts and other financial instruments, acquired by West Face, its officers, directors, employees, agents or any persons acting under its direction or on its behalf, as a result of its misuse of [Catalyst's] Confidential Information." Catalyst has taken the position during the course of that litigation that West Face acquired its indirect interest in WIND "as a result of its [alleged] misuse of the Confidential Information."

30. As will be explained in more detail below, Catalyst's allegations are entirely without merit. However, so long as Catalyst's claim remains outstanding, Shaw would be exposed to the possibility of litigation claiming a constructive trust over the shares of WIND in which West Face had an interest, and which Shaw is proposing to acquire in this transaction. Shaw was not willing to subject itself to such risks. The Plan of Arrangement is therefore necessary in order to provide that Shaw will take title to West Face's (or rather WAL's) WIND shares free and clear of Catalyst's claim.

31. After the close of markets on December 16, 2015, Shaw, Mid-Bowline and the Shareholders entered into the Arrangement Agreement and announced the transaction.

32. The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND, while at the same time giving Catalyst an opportunity to be heard before Shaw's title is validated by the Court. Had this not been required, the Shareholders were prepared to proceed by Share Purchase Agreement without any requirement of Court approval. The only adverse third party claim over the WIND shares of which the Investors are aware is the contingent constructive trust claim asserted by Catalyst. Having said that, the Plan of

Arrangement structure also facilitates the exercise of the WIND Options such that optionholders can participate in the transaction in a tax-efficient manner that does not require a significant outlay of capital by them.

33. The Mid-Bowline Board unanimously believes that the Arrangement is reasonable and fair to Mid-Bowline, and unanimously approved the transaction. Attached as Exhibit "5" to this Affidavit is a unanimous written resolution of the board of directors of Mid-Bowline approving the Arrangement Agreement and Plan of Arrangement, executed by each of the directors. The Shareholders also unanimously support the Arrangement. Attached as Exhibit "6" to this Affidavit is a unanimous written resolution of the Shareholders of Mid-Bowline approving the Arrangement Agreement and Plan of Arrangement, executed by each Shareholder. Among other things, these resolutions:

- (a) approve the proposed Arrangement Agreement and Plan of Arrangement;
- (b) confirm that the Arrangement, the Arrangement Agreement, the Plan of Arrangement, and the transactions contemplated therein are reasonable and fair to Mid-Bowline; and
- (c) authorize Mid-Bowline to take all necessary steps to execute the Plan of Arrangement and obtain a Final Order approving of the Plan of Arrangement.

### **PART III ~ THE ARRANGEMENT**

34. The transaction contemplates concluding the transaction by means, among other things, of the Arrangement. The terms and conditions of the Arrangement are set out in the Arrangement Agreement and the Plan of Arrangement, copies of which are attached

as Exhibit "7" to this Affidavit (the Plan of Arrangement is Exhibit D to the Arrangement Agreement). If approved by the Court, and upon satisfaction of the other conditions set out in the Arrangement Agreement, including approval of DISED and the Competition Bureau, it is anticipated that the Arrangement will become effective by no later than July 1, 2016 (the "**Effective Date**").

35. Pursuant to the Arrangement, Shaw will acquire all of the outstanding shares of Mid-Bowline for an aggregate consideration comprised of \$6.11 for each share, less the amount of any dividend paid, if any, by Mid-Bowline on the shares between the date of the Arrangement Agreement and the time of closing (the "**Purchase Price**"). The total price paid will be approximately \$1.6 billion.

36. The transaction, if approved, will occur by way of a six-step process:

- (a) First, Purchaser will make a loan to GTC1 in an amount equal to the exercise price of the Globalive Options (the "**Option Loan**"). This loan is made to facilitate the exercise of the Globalive Options without a significant outlay of capital by GTC1 and is intended to facilitate the achievement of the desired tax treatment on the disposition of the Mid-Bowline shares acquired by exercising the Globalive Options. The Option Loan is a non-interest bearing loan for \$10 million, being the aggregate exercise price in respect of the Globalive Options. GTC1 will then direct Purchaser to pay this \$10 million to Mid-Bowline on GTC1's behalf (see step three, below), in satisfaction of the exercise price of the Globalive Options.
- (b) Second, any Management Options or Former Management Options that have vested (the "**Vested Options**") will be exchanged for options to purchase a share of Mid-Bowline (a "**Replacement Options**") at a

nominal price. The number of shares that may be acquired pursuant to the Replacement Options are intended to have a value equal to the "in-the-money" amount of the Management Options and Former Management Options based on the Purchase Price. Similar to the Option Loan, this exchange mechanism allows for the exercise of the Vested Options to occur without a significant outlay of capital by the holders thereof and is intended to facilitate the achievement of the desired tax treatment on the disposition of the Mid-Bowline shares acquired on the exercise of the Vested Options. These optionholders (other than the Former Officers) will be required to either receive shares of Shaw (in lieu of cash) or to purchase shares of Shaw on the sale of their Mid-Bowline shares as described in subparagraph (e) below. For this reason, a loan to exercise these stock options was not feasible because the holders may not have had cash proceeds with which to repay the loan.

- (c) Third, all Replacement Options and Globalive Options will be exercised and each option holder will receive the appropriate number of common shares of Mid-Bowline as provided for by the relevant option. Replacement Option holders will pay a nominal exercise price, and GTC1 will pay the exercise price pursuant to the Option Loan described above in subparagraph (a). As a result of these steps, all holders of Vested Options will become Shareholders of Mid-Bowline.
- (d) Fourth, all shares of Mid-Bowline, except those shares acquired by employees and the Former Officers as a result of the exercise of Replacement Options, are transferred to Purchaser in exchange for the Purchase Price less, in the case of GTC1, an amount equal to the Option Loan which GTC1 will direct the Purchaser to retain in repayment of that loan. Critically, section 3.1(d) of the Plan also provides that "Purchaser shall be recorded as the registered holder of such Purchased Shares so transferred and shall be deemed to be the legal and beneficial owner thereof, free and clear of any Encumbrances". Catalyst's claim for a

constructive trust over West Face's shares of Mid-Bowline is an encumbrance that will be eliminated by this and the next step of the transaction.

- (e) Fifth, all shares of Mid-Bowline acquired as a result of the exercise of Replacement Options (as described above) ("**Eligible Option Shares**") are transferred to Purchaser in exchange for an amount equal to the Purchase Price, comprised either of cash (50% of which must thereafter be reinvested in shares of Shaw, except in the case of the Former Officers), shares of Shaw, or divided equally between cash and shares of Shaw, at the election of the Shareholder in accordance with the Plan of Arrangement. Again, section 3.1(e) of the Plan provides that the shares acquired by Purchaser in this manner "shall be deemed to be the legal and beneficial owner thereof, free and clear of any Encumbrances".
- (f) Sixth, and finally, Mid-Bowline's stock option plan will be terminated and all unvested stock options will be terminated in accordance with the terms thereof.

37. For the sake of greater certainty, section 4.4 of the Plan further provides that "Any exchange or transfer of securities pursuant to this Plan of Arrangement shall be free and clear of any Encumbrances, adverse claims or other claims of third parties of any kind."

38. In the Arrangement Agreement, the vendors and Mid-Bowline make a number of standard representations and warranties, including regarding the organization and authority of Mid-Bowline, its capitalization, approvals and compliance, conflicts and litigation, financial condition, environmental and employment matters, wireless spectrum licences and other permits, real estate, taxes and intellectual property.



39. As a wireless telecommunications company, the acquisition of WIND by Shaw is subject to a number of additional regulatory approvals. As a result, the Arrangement Agreement contains various covenants with respect to obtaining appropriate regulatory approvals from DISED and the Competition Bureau. It is a condition precedent to closing that all requisite regulatory approvals, and a Final Order of this Court, be obtained.

40. The Arrangement Agreement does not provide any Shareholder with dissent rights because all Shareholders unanimously support the transaction.

#### **PART IV ~ NECESSITY AND FAIRNESS OF THE ARRANGEMENT**

41. I am informed by Mr. Greenspoon of Davies and believe that it is impractical to effect the result contemplated by the Arrangement under any provision of the OBCA other than section 182 because there is no other way to provide Shaw on a timely basis with title to WIND's shares free and clear of the constructive trust asserted by Catalyst.

42. In this section, I will provide a brief background to the Catalyst litigation and explain why it is without merit. Except where otherwise indicated, the facts set out below are taken from the record of the Catalyst litigation. Attached to this Affidavit as Exhibits "8" to "42" are the following pleadings, filings, orders and reasons for decision from that litigation:

- (a) The Amended Amended Statement of Claim of Catalyst dated December 16, 2014 (attached as Exhibit "8");
- (b) The Amended Amended Statement of Defence of West Face dated December 24, 2014 (attached as Exhibit "9");

- (c) The affidavits (without exhibits) of James Riley of Catalyst dated June 26, 2014, July 14, 2014, July 28, 2014, February 18, 2015 and May 1, 2015 (attached as Exhibits "10" to "14");
- (d) The affidavits (without exhibits) of Brandon Moyse dated July 4, 2014, July 7, 2014, July 16, 2014, October 10, 2014, and April 2, 2015 (attached as Exhibits "15" to "19");
- (e) The affidavit (without exhibits) of Tom Dea of West Face dated July 7, 2014 (attached as Exhibit "20");
- (f) The affidavit (without exhibits) of Alexander Singh of West Face dated July 7, 2014 (attached as Exhibit "21");
- (g) My affidavits (without exhibits) dated March 7, 2015 and May 6, 2015 (attached as Exhibits "22" and "23");
- (h) The affidavit of Harold Burt-Gerrans dated March 9, 2015 (attached as Exhibit "24");
- (i) The affidavit (without exhibits) of Asser El-Shanawany of WIND dated March 9, 2015 (attached as Exhibit "25");
- (j) The various transcripts of cross-examinations and associated answers to undertakings (without exhibits) of the foregoing affiants (attached as Exhibits "26" to "34");
- (k) The reports of the Independent Supervising Solicitor (the "ISS") dated February 17, 2015, March 13, 2015, and March 30, 2015 (attached as Exhibits "35", "36" and "37");
- (l) The Interim Consent Order of Mr. Justice Firestone dated July 16, 2014 (attached as Exhibit "38");

- (m) The Reasons for Decision of Mr. Justice Lederer dated November 10, 2014 (attached as Exhibit "39");
- (n) The Reasons for Decision of Mr. Justice Glustein dated July 7, 2015 (attached as Exhibit "40");
- (o) The Orders of the Ontario Court of Appeal quashing Catalyst's appeal of the decision of Mr. Justice Glustein dated November 5, 2015 (attached as Exhibits "41" and "42");

### **West Face's Hiring of Brandon Moyse**

43. The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23, 2014 and as will be explained below, ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not "recruited" or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

44. At the time of Mr. Moyse's hiring, West Face had already been pursuing an acquisition or financing of WIND for over six months, since November 2013. It was well-known throughout the industry that VimpelCom wanted to sell its interest in WIND because of the well-publicized regulatory challenges it had faced as a foreign owner. VimpelCom made it known that it wanted to sell its interest in WIND for an enterprise value of \$300 million, and would accept whichever bid could meet that price in the most expeditious and risk-free manner. West Face conducted due diligence and made a series of offers to VimpelCom before Mr. Moyse was ever hired. I understand from

evidence filed in the Moyse litigation that Catalyst, by contrast, did not begin in depth negotiations with VimpelCom until May 2014, shortly before Mr. Moyse's departure.

45. Upon learning of Mr. Moyse's move to West Face, Catalyst immediately advised West Face of its position that Mr. Moyse was prohibited from working for West Face as a result of a non-competition clause in his employment agreement. Catalyst also advised West Face that Mr. Moyse had received access to confidential information regarding a "telecom file" during his employment with Catalyst. This was the first time, after it had already hired Mr. Moyse, that West Face learned that Catalyst had been pursuing what West Face assumed to be the WIND opportunity.

46. As will be described in more detail below, and as is evident from Exhibits "8" to "42", the parties have exchanged voluminous and comprehensive evidence concerning the Investors' acquisition of WIND. Nonetheless, Catalyst has identified only two pieces of allegedly confidential information relating to Catalyst's bid for WIND that Mr. Moyse supposedly possessed. Both supposedly relate to Catalyst's "regulatory" concerns:

- (a) Mr. Moyse transcribed hand-written notes into a Powerpoint presentation that Catalyst used for a meeting (which Mr. Moyse did not attend) with Industry Canada in March 2014 about regulatory matters affecting the wireless industry generally (Catalyst was also the largest secured debentureholder of Mobilicity). Catalyst maintains that all paper and electronic copies of this presentation were destroyed shortly after it was used, and has never produced a copy of this presentation.
- (b) Mr. Moyse received Catalyst's initial blackline of VimpelCom's standard form of share purchase agreement while he was on vacation in South East Asia on May 24, 2014, two days before tendering his resignation, and (as

described below) almost three months before negotiations between Catalyst and VimpelCom ultimately broke down.

47. Upon learning of Catalyst's objections to Mr. Moyses's hiring, West Face took the position that Mr. Moyses's non-competition covenant was unenforceable, and denied receiving any confidential information from Mr. Moyses. Out of an abundance of caution, given Catalyst's express concerns about the "telecom file", West Face nonetheless established strict firewalls around West Face's own work on WIND. Mr. Moyses was denied access to computer files relating to that project, and all members of the WIND team at West Face were explicitly instructed not to speak to Mr. Moyses about that transaction.

48. In spite of the fact that the Catalyst has not produced its own Affidavit of Documents nor ever insisted that West Face do so at any point during the past 19 months of litigation, in March 2015 West Face voluntarily produced to Catalyst all email communications to, from, or copying Mr. Moyses found on West Face's computer systems. At that time, West Face also retrieved, and offered to produce to the Independent Supervising Solicitor ("ISS"), every document that Mr. Moyses created, modified, or accessed on the computer systems of West Face. Catalyst never accepted this offer. In this voluminous record, there is no evidence that West Face's firewalls were ever breached, nor that Mr. Moyses ever communicated with anyone at West Face about WIND, let alone that he had or conveyed any confidential information about WIND belonging to Catalyst. Indeed, while Catalyst claims that Mr. Moyses disclosed regulatory concessions that Catalyst was demanding as a condition of its offer, there is no

evidence that Mr. Moyle was even aware of what regulatory concessions Catalyst would ultimately ask of VimpelCom.

49. The only evidence of Mr. Moyle providing any Catalyst information to West Face is an email from Mr. Moyle to West Face dated March 27, 2014, to which Mr. Moyle attached four memos he had prepared for Catalyst and which were marked "Confidential". Mr. Moyle provided these memos as part of his job application to demonstrate his written communication skills. Notably, these memos have nothing to do with WIND, Catalyst never pursued an investment in any of the four companies covered by the memos, Catalyst does not allege any loss from the memos' disclosure by Mr. Moyle to West Face, and in January 2015 Catalyst directed its own counsel to unseal the Court file where these memos were filed (indicating that Catalyst does not view them as confidential).

50. West Face disclosed to Catalyst that it had received these writing samples from Mr. Moyle in the very first materials that West Face filed in this proceeding, six business days after Catalyst commenced the action and brought a motion for interim relief. West Face admitted its mistake in not immediately deleting the writing samples upon their receipt, and in overlooking the memos during the initial flurry of pre-litigation correspondence. Largely on the basis of these mistakes, West Face and Mr. Moyle agreed with Catalyst to the terms of an interim consent order from Mr. Justice Firestone on July 16, 2014, only three and a half weeks after Mr. Moyle started work at West Face. Mr. Moyle's last day of work at West Face was July 16, 2014, and he has in fact never returned to work as a result of the Catalyst litigation. I am informed by Phil Panet, general counsel to West Face, and believe that Mr. Moyle remained on a leave of

absence until he and West Face mutually agreed to terminate his employment, effective August 31, 2015.

51. As a term of the interim order, Mr. Moyses agreed not to destroy any relevant evidence, and to turn over his personal electronic devices so that the ISS could search for any confidential information belonging to Catalyst. Before turning over his devices, Mr. Moyses deleted his Internet browser history in order to prevent his private, personal browsing history – which I understand based on Mr. Moyses's evidence was unrelated to any work he did at Catalyst – from being disclosed to the ISS, the other parties, or ultimately put into the public record.

#### **Catalyst's Inability to Acquire WIND**

52. Two days after Mr. Moyses's departure, on July 18, 2014, the strategic partner with whom West Face had been working on a potential acquisition of WIND for the previous month backed out. In other words, the WIND deal that West Face had been pursuing while Mr. Moyses had worked there (but from which Mr. Moyses had been firewalled) had been a dead end.

53. Moreover, one week after Mr. Moyses left West Face, on July 23, 2014, VimpelCom informed West Face that it had entered into exclusive negotiations with another bidder, which West Face presumed to be Catalyst (and which Catalyst ultimately confirmed in this litigation). This period of exclusivity was ultimately extended to August 18, during which time VimpelCom was forbidden to, and in fact did not, negotiate with West Face.

54. Nonetheless, West Face decided to join with a group of investors in the event that VimpelCom's preferred bidder was unable to reach an agreement during the period of exclusivity. This group would ultimately become the New Investors. Tennenbaum and 64NM had themselves been pursuing the investment independently for a number of months.

55. The New Investors (*i.e.* the Investors other than Globalive Capital) knew from previous discussions that Globalive Capital was interested in participating in a transaction that would allow it to have a continuing interest in WIND. Globalive Capital's involvement was significant because, as noted above, it owned approximately two-thirds the voting shares of GIHC, the sole shareholder of WIND. Larry Guffey of 64NM therefore proposed that the New Investors structure an offer that would leave Globalive in place, and therefore would not require the transfer of voting control of WIND concurrently with the acquisition by the New Investors of VimpelCom's interests in GIHC and WIND. This meant that the transaction with VimpelCom could be completed prior to obtaining any regulatory approvals, virtually eliminating 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 Capital to all of the Investors in proportion to their economic interests in WIND.

56. I knew based on my previous interactions with VimpelCom and its advisors that the New Investors were not perceived as a credible potential purchaser by VimpelCom in early August, 2014. I also knew that the transaction structure described in the previous paragraph would require us to negotiate an ownership structure with Globalive Capital, and I was advised by Globalive Capital that it was negotiating a support



agreement with VimpelCom in respect of a competing bid. The New Investors therefore decided to make one last attempt at a bid using the aggressive structure proposed by Mr. Guffey.

57. On August 6, 2014, uncertain as to when the exclusivity period would end, the New Investors submitted an unsolicited offer for WIND. A more formal proposal followed the next day, August 7. Because the New Investors' proposal left Globalive Capital's voting interest undisturbed, the New Investors' offer did not include a regulatory approval condition. In other words, the Investors would pay the purchase price to VimpelCom and close that transaction immediately, without first obtaining regulatory approval. As noted above, the New Investors were prepared to bear the risk of seeking regulatory approval to transfer voting control of WIND from Globalive Capital to the full Investors' syndicate (including Globalive Capital) post-closing.

58. That same day however, August 7, Globalive Capital agreed to a support agreement with VimpelCom, which obliged Globalive Capital to support VimpelCom in its exclusive negotiations with Catalyst. Similarly, VimpelCom did not respond to the New Investors' offer. Instead, 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. I therefore believe that Catalyst failed to close a deal for WIND not because of anything West Face or the Investors did, but because Catalyst and VimpelCom were unable to reach an agreement during Catalyst's exclusive period of negotiations.

59. I was not aware of any of Catalyst's plans, strategies or negotiations concerning WIND. To the best of my knowledge, neither were any of the New Investors, and no Catalyst information played any role in our own negotiating position.

#### **Mid-Bowline Acquires WIND**

60. Upon the expiry of exclusivity, the New Investors quickly revived their efforts with VimpelCom and, subject to VimpelCom's approval, with Globalive Capital. Under the proposed transaction structure, Globalive Capital would initially control Mid-Bowline, with the New Investors holding non-voting interests. Only following receipt of post-closing regulatory approvals would the share ownership of WIND and shareholdings of Mid-Bowline be reorganized to give all members of the Investors' syndicate voting interests in Mid-Bowline proportionate to their economic interests in Mid-Bowline.

61. On August 25, 2014, the New Investors' counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter from the Investors. To address VimpelCom's continuing concerns about regulatory approval, the Investors agreed to give a representation in the definitive purchase agreement 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.

62. Catalyst's interlocutory motion regarding Mr. Moyses was heard on October 27, 2014 by Mr. Justice Lederer. His Honour issued his decision on November 10, granting an interlocutory injunction enjoining Mr. Moyses from disclosing any confidential

information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left Catalyst's employment), and directing the ISS to review the image of Mr. Moyses's personal electronic devices.

63. On December 16, 2014, Catalyst delivered its Amended Amended Statement of Claim, asserting the constructive trust over West Face's interest in WIND.

64. According to Catalyst's Jim Riley, on December 23, 2014, the ISS sent to Catalyst and Mr. Moyses an interim report containing the initial results of its review of Mr. Moyses's electronic devices. This interim report included the preliminary number of "hits" found by the ISS's technical expert on Mr. Moyses's electronic devices of certain search terms put forward by Catalyst. On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face largely, if not wholly, on the basis of this preliminary number of "hits". The ISS subsequently released a draft report on February 1 and its final report on February 17. As set out therein, the ISS found no evidence that Mr. Moyses had provided any of Catalyst's confidential information to West Face. It did, however, find evidence suggesting that Mr. Moyses had deleted his browser history. Upon receiving the preliminary report, Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyses for contempt of the earlier interim consent order of Justice Firestone.

65. Thus, at that point, the relief sought by Catalyst included:

- (a) an Order prohibiting West Face from playing any role in the management of WIND (the "**Management Injunction**");

- (b) an Order requiring West Face to provide to the ISS for review electronic images of all of its computers (the "Imaging Order"); and
- (c) a finding of contempt against Mr. Moyse.

66. One of the stated purposes of Catalyst's motion for the Imaging Order was to determine "whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information".<sup>2</sup>

67. Catalyst's motion was not heard until July 2, 2015, in spite of West Face delivering its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials. This delay was at least in part attributable to Catalyst not delivering its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

68. Justice Glustein rendered his decision five days after argument, on July 7, 2015, and dismissed Catalyst's motion in its entirety. With respect to the Management Injunction, Justice Glustein held that (a) Catalyst's failure to provide an undertaking as to damages disentitled it to the extraordinary injunctive relief that it was seeking; and (b) in any event, it had failed to establish that it would suffer irreparable harm were the injunction not granted, and the balance of convenience favoured West Face. Justice Glustein therefore did not address the issue of whether Catalyst had presented a serious issue to be tried.

69. With respect to the Imaging Order, Justice Glustein held that "[t]here is no evidence that West Face has failed to comply with its production obligations, let alone

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<sup>2</sup> Emphasis added. Affidavit of James Riley dated February 18, 2015, at para. 91.

intentionally delete materials to thwart the discovery process or evade its discovery obligations." Justice Glustein also noted that "West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer", and specifically adverted to the "voluminous records" and voluntary disclosure that West Face had made in order to refute Catalyst's allegations (see paras. 52-57 of his reasons).

70. Finally, Justice Glustein held that the evidence was consistent with Mr. Moyse's evidence that he had done nothing but delete his irrelevant personal browsing history, and that the court therefore could not conclude beyond a reasonable doubt that Mr. Moyse had deleted relevant evidence in breach of his obligations under the interim consent order (see para. 86 of his reasons).

71. Since receiving Justice Glustein's decision on July 7, 2015, Catalyst has taken no steps to move the litigation forward. Instead, it purported to appeal the decision to the Court of Appeal, even though Justice Glustein's decision was interlocutory. I am informed by Andrew Carlson, counsel to West Face, and believe that within two days of receiving the Notice of Appeal, on July 24, 2015, Mr. Carlson immediately notified Catalyst's counsel that it was not entitled to appeal directly to the Court of Appeal. Catalyst ignored this advice, following which West Face served a notice of motion to quash Catalyst's appeal on August 5, and an amended notice of motion, factum and book of authorities on September 11, 2015. Catalyst never responded to this motion, but instead on November 5, 2015, consented to an order quashing the appeal. Catalyst then waited until December 10, 2015 to deliver a notice of motion to extend the time for it to seek leave to appeal to the Divisional Court. That motion is returnable January 19,

2016, but Catalyst has yet to file any affidavit or other evidence that might justify its delay in seeking leave to appeal from the Divisional Court.

#### PART V ~ CONCLUSION

72. In summary, I believe that Catalyst's claim for a constructive trust is without merit. Catalyst had sufficient grounds to obtain the interim consent order in July 2014 and the interlocutory injunction against Mr. Moyses in November 2014, and succeeded in preventing Mr. Moyses from working for West Face outside of three and a half weeks in the Summer of 2014. It has a claim against Mr. Moyses for any breach of his employment agreement which it can pursue by arbitration pursuant to the dispute resolution clause in his employment agreement should Catalyst wish to do so.

73. However, there is no merit whatsoever to any claim in respect of WIND. In spite of voluminous affidavit materials, cross-examinations and voluntary documentary productions by West Face, Catalyst has found no evidence to support its assertion of a constructive trust:

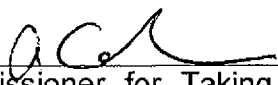
- (a) There is no evidence that Mr. Moyses was aware of Catalyst's negotiating position during its period of exclusivity with VimpelCom from July 23, 2014 to August 18, 2014;
- (b) There is no evidence that Mr. Moyses had any communications whatsoever with anyone at West Face about WIND, let alone about any confidential Catalyst information concerning WIND;
- (c) There is no evidence that Catalyst failed to conclude an agreement with VimpelCom during its period of exclusivity because of anything done by Mr. Moyses or West Face; and


(d) There is no evidence that the Investors or West Face acquired WIND using confidential Catalyst information.

74. Catalyst has not diligently prosecuted this action since filing its amended claim seeking a constructive trust in December 2014, and I do not believe it had any good faith basis for continuing to press its claims once Mr. Moyses was enjoined from working at West Face. Even assuming it had such a basis, it should have been dispelled when West Face delivered its voluminous responding motion materials on March 10, 2015, as described above. I believe that Catalyst has maintained this action to this date, and continued to assert a constructive trust over WIND, as a tactical measure so that it could insert itself in the event of a potential sale of WIND.

75. I make this Affidavit in support of Mid-Bowline's application for a final order approving the Plan of Arrangement and for no other purpose.

SWORN before me at the City of )  
Toronto, in the Province of Ontario )  
this 8th day of January 2016 )  
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)

  
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Commissioner for Taking Affidavits,  
etc. *ANDREW CARLSON*

  
\_\_\_\_\_  
ANTHONY GRIFFIN

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182  
AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*  
AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders  
and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

Commercial List File No. CV-11238-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**AFFIDAVIT OF ANTHONY GRIFFIN  
(Sworn January 8, 2016)**

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