

AMENDED THIS MAR 26/16 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (A)

THE ORDER OF _____
L'ORDONNANCE DU _____
DATED / FAIT LE _____

Court File No. CV-17-11712-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

REGISTRAR / GREFFIER
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

BETWEEN:

CALLIDUS CAPITAL CORPORATON

Plaintiff/Defendant by Counterclaim

and

OPES RESOURCES INC., RICHARD GEORGE MOLYNEUX
and DARRYL LEVITT

Defendants/Plaintiffs by Counterclaim

AND BETWEEN

RICHARD GEORGE MOLYNEUX

Plaintiff by Counterclaim

and

J. CLAIRE EDWARDS, not individually, but as Chapter 7 Trustee of FORTRESS
RESOURCES, LLC, d/b/a MCCOY ELKHORN COAL COMPANY, CALLIDUS
CAPITAL CORPORATION, OPES RESOURCES INC. and DARRYL LEVITT

Defendants by Counterclaim

**FRESH AS AMENDED STATEMENT OF DEFENCE AND
COUNTERCLAIM OF RICHARD GEORGE MOLYNEUX**

TO THE DEFENDANT(S) TO THE COUNTERCLAIM

A LEGAL PROCEEDING has been commenced against you by way of a Counterclaim in
an action in this Court. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS COUNTERCLAIM, you or an Ontario lawyer acting
for you must prepare a Defence to Counterclaim in Form 27C prescribed by the *Rules of Civil
Procedure*, serve it on the Plaintiff by counterclaim's lawyer or, where the Plaintiff by

proof of service, in this Court, WITHIN TWENTY DAYS after this Statement of Defence and Counterclaim is served on you.

If you are not already a party to the main action and you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

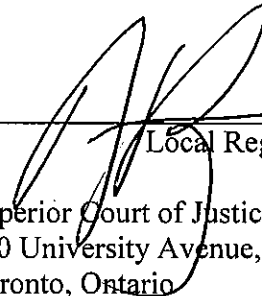
If you are not already a party to the main action, instead of serving and filing a Defence to Counterclaim, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your defence to Counterclaim.

IF YOU FAIL TO DEFEND THIS COUNTERCLAIM, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

March 28/18

Issued by



Local Registrar

Address of
court office:

Superior Court of Justice
330 University Avenue, 7th Floor
Toronto, Ontario
M5G 1R7

TO

J. Claire Edwards, not individually,
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Lawyers for Darryl Levitt

1. This Defendant admits the allegations contained in paragraphs 3, 4, 5, 6 and 8 of the Statement of Claim but save and except as otherwise admitted, this defendant denies the balance of the allegations as pleaded.

Overview

2. The Plaintiff, Callidus Capital Corporation (“Callidus”), is a predatory lender which lends money with the objective to obtain ownership or control of the assets of a borrower. This is part of the business plan of Callidus. Callidus induced the Defendants to have Fortress Resources, LLC (“Fortress”) borrow funds from Callidus by misrepresenting Callidus’ business practices as pleaded herein. Callidus breached the Overall Loan Agreement (as defined herein) by, *inter alia*,

- (i) failing to provide all of the funds Callidus agreed to lend, under the Revolver (a loan facility as defined herein), in a timely manner; and,
- (ii) failing to act in good faith and honestly in the performance of Callidus’ obligations under the Overall Loan Agreement. Callidus did this intending to force the Defendants to provide their personal guarantees, contrary to previous representations and provide Fortress with no alternative but to enter into the Second Overall Loan Agreement.

3. Thereafter, the Plaintiff/Defendants by Counterclaim breached the Second Overall Loan Agreement by manufacturing and conniving a default by Fortress, thus manipulating the triggering

of the obligations under the personal guarantees of Molyneux, Levitt and Smith (hereinafter the “Guarantees”).

4. The Defendant, Richard George Molyneux (“Molyneux”) further states that there was no consideration for the guarantees provided pursuant to the Second Overall Loan Agreement.

5. Further, Molyneux pleads Callidus’ misconduct materially altered the risks associated with the Guarantees, which material alteration was not consented to by the Guarantors. The Guarantees are discharged, unenforceable, or rendered invalid or void. In the alternative, the Guarantees were limited to the amount of any Permitted Liens that were senior to Callidus. As there were no Permitted Liens, no monies are due or owing under the Guarantees relied upon by Callidus.

6. In the alternative, Molyneux states that, but for the conduct of Callidus as hereinafter placed, there would have been no default by Fortress and no demand on the Guarantees.

7. Furthermore, Fortress is not indebted to Callidus. As a result, Molyneux is not indebted to Callidus.

The Parties and Others Involved

8. Callidus is a corporation incorporated pursuant to the laws of the Province of Ontario and is based in Toronto, Ontario. It engaged in short-term lending throughout the United States and Canada.

9. Callidus was formed in 2003 as a subsidiary of Catalyst Capital Corp. Inc. (“Catalyst”) and was spun off into a stand-alone publicly traded company in 2014. Catalyst remains a majority shareholder of Callidus.

10. Catalyst is incorporated pursuant to the laws of the Province of Ontario and is a privately held Canadian equity firm whose principal is Newton Glassman.

11. Newton Glassman is the directing mind of both Callidus and Catalyst and was directly involved in the First Overall Loan Agreement and the Second Overall Loan Agreement.

12. Fortress is a Delaware limited liability company which had its principal place of business located at in Pikeville, Kentucky. Fortress was incorporated pursuant to the laws of the State of Delaware for the purpose of completing the acquisition of a mine owned by McCoy Elkhorn Coal Company from James River Coal (a publicly listed company in the U.S.). Fortress is majority-owned by a Canadian private company, Opes Resources (“Opes”) of which Gary Smith (“Smith) (who lives in the State of Virginia), Molyneux, and Darryl Levitt (“Levitt”) are the main shareholders (collectively Smith, Molyneux and Levitt are hereafter referred to as “Guarantors”).

13. On November 5, 2015, Fortress filed a voluntary petition for relief under Chapter 11 of Title 11 of the *United States Bankruptcy Code*.

14. On October 19, 2016, the Court in the United States entered an Order Converting Case to Chapter 7 granting that motion and converting the bankruptcy case to a case under Chapter 7 of the

Bankruptcy Code. That same day, the Office of the United States Trustee appointed J. Claire Edwards as Chapter 7 Trustee of the Estate of Fortress, not individually, but only as Trustee for the Chapter 7 Bankruptcy Estate of Fortress.

15. Fortress was a valuable operating mining business. It included a mine and equipment to mine coal, significant mining operations including plants that were licensed facilities to wash the product so that it would be refined to be pure coal. It was also licenced to do this for other producers of coal from other smaller mines as well. The licensed facilities had preconditions to ensure the quality of runoff water and the necessary delivery of dirty product to refuse dumps. The permits were valuable permits that could be lost if the mining operations did not comply with the necessary legislation, including water and air quality controls, all the particulars of which were known to Callidus (the “Essential Assets”) (collectively the assets are referred to as the “Mine”).

Introduction to Callidus and the Representations as to the Conditions of Financing

16. Opes and the Guarantors were interested in acquiring the Mine.

17. In the spring of 2014, Opes signed an exclusive agreement with Huntington National Bank (“HNB”). . Opes had received an irrevocable commitment to finance from HNB. The purpose was to finance the acquisition of the Mine by Opes. One of the conditions that HNB insisted upon was the inclusion of personal guarantees from the Guarantors. Opes, Levitt, Molyneux and Smith had

already received a detailed appraisal of the Mine from Darco Energy Management Corporation (“Darco”). The Mine was valued at approximately \$125 million.

18. Around the time when Opes received the irrevocable financing commitment from HNB, its principals, Levitt, Molyneux and Smith, were introduced to Callidus. At a meeting, Callidus presented Opes with a proposed term sheet. Opes explained to Callidus that the main concern preventing it from proceeding with HNB was the requirement by HNB of personal guarantees. For its part, Callidus represented that the only consideration in its lending decision would be the asset values and that it would lend up to 90% of the forced liquidation value (“FLV”).

19. Callidus further represented that personal guarantees were not important to Callidus, as Callidus’ business practice was to lend against hard assets, and that they often worked with companies in difficult financial circumstances. It claimed that it never put or forced its customers into bankruptcy, as it preferred to work with them and assist their customers’ business operations through difficult times.

20. Callidus also represented that it could close a loan transaction in as little as four days and that any personal guarantees that were granted as part of the *pro forma* interim closing process would only be effective and required until the value of the assets, as determined by Darco, could be verified by Callidus’ appraiser, Hilco. Thereafter, the Guarantees would be cancelled and returned to the Guarantors.

21. These representations were material, relied upon by Opes and the Guarantors and induced Opes and the Guarantors to not accept the HNB offer but rather to proceed with Callidus.

22. A term sheet dated August 5th, 2014 proposed a loan facility of up to twenty million dollars which included a Revolver (a working capital loan facility subject to Callidus monitoring and “sweeping” the daily deposits) of up to a minimum of five million dollars. Callidus did not require any personal guarantees under this term sheet.

23. As part of the business plan of Callidus, on September 3, 2014, just before the closing of the sale, Callidus provided a revised term sheet that now required personal guarantees. Callidus, however, again represented that these Guarantees would be temporary and would be removed once Hilco completed a valuation of the assets. This representation was relied upon by Opes and the Guarantors.

The Callidus Financing – the Overall Loan Agreement

24. The Callidus financing was closed in a matter of four days by September 5, 2014. The deal was structured in two tranches, with Callidus very much aware and informed that the Revolver, which was part of the second tranche was critical to the ongoing cash flow and operations of the business (the “Overall Loan Agreement”).

25. In reliance upon the Overall Loan Agreement, Fortress closed on the acquisition of the Mine, and proceeded with its business operations.

26. Levitt, Smith and Molyneux, and Opes provided the temporary guarantees based upon Callidus’ representations.

27. Thereafter, Fortress complied with the conditions precedent as set out in the Overall Loan Agreement and advised Callidus and demanded compliance by Callidus, in numerous calls and emails made to Callidus. Callidus intentionally failed to put the Revolver in place. This was in

breach of the Overall Loan Agreement. Without the Revolver, Fortress began running out of money that was critical to sustain their business operations. Callidus knew this.

28. Throughout November and December 2014, Fortress was in jeopardy of being in default of the Overall Loan Agreement due to the Callidus conduct. As Callidus was being paid a monitoring fee, it was aware of the financial crisis it was causing by withholding the Revolver. Excuses made by Callidus that the Credit Committee was working on the matter were false and misleading. Callidus was also profiting from this delay given the monitoring fee and progressively putting Fortress on the verge of or into financial crisis. This was Callidus' intended plan.

29. The delay in funding was deliberate and intended to permit Callidus to maintain the personal Guarantees of the Guarantors. Callidus' lack of honest performance was part of the business plan of Callidus. It was also intended to eventually place Levitt, Molyneux and Smith in a position where it could maintain their personal Guarantees. Levitt, Molyneux and Smith would be placed in a position where Fortress would not receive the necessary cash flow for the survival of Fortress. Callidus' breach of its duty of honest performance was part of the business plan of Callidus. All of the above was part of its ongoing predatory practices.

30. One of the conditions precedent met by Fortress was for the injection of \$2 million in equity. Opes, Levitt, Molyneux and Smith had sought equity financing for Fortress to fund as discussed with and required by Callidus. They secured that financing from Big Sandy.

31. In particular, in the fall of 2014, Big Sandy was prepared to advance \$2 million USD to Fortress by way of a subordinated loan on the condition that Callidus' term loan, part of the Overall Loan Agreement, would not be increased. However, Callidus stated it would lend more money to Fortress. It also advised against accepting the \$2 million USD loan and represented that

it would waive the \$2 million requirement. Callidus then reneged on the waiver of the \$2 million requirement, after Callidus knew that Fortress had committed to not proceed with the Big Sandy funding and had so advised Callidus.

32. It was not until January, 2015 that Callidus agreed to implement the Revolver—but this agreement was conditional on Levitt, Molyneux, Smith, and Opes permanently maintaining their Guarantees. Callidus knew that Fortress and the Guarantors had no alternative.

33. Furthermore, Fortress was within 3 days of defaulting on the initial Callidus term loan. Without the Revolver, Fortress was not able to meet worker's compensation payments, power bills, taxes, and other expenses essential to avoid a complete shutdown of the business, and a default on the Overall Loan Agreement. Callidus knew and intended this to occur.

Callidus Extracts the Second Overall Loan Agreement

34. As a result of this extreme financial distress created by Callidus, Fortress had no alternative but to sign an amended and restated financing agreement and leave the Guarantees of the Guarantors in place, even though Hilco, the appraiser, provided Callidus with a valuation which was considerably higher than first anticipated. All conditions precedents were satisfied. (the "Second Overall Loan Agreement").

35. Callidus further knew and relied upon the fact that litigation by Fortress was not a viable alternative when no funding was available, due to the circumstances engineered and connived by Callidus.

36. Molyneux pleads that Callidus, having already agreed to provide the Revolver without the guarantees, there was no consideration given to, or for, Molyneux's Guarantee. He further pleads

that he agreed to the amendment requiring the Guarantees as it had been represented by counsel for Callidus in writing that in “Phase Two, the personal guarantees would remain in place limited to the amount of any Permitted Liens that are senior to Callidus”. As there are no Permitted Liens, there is nothing owing on the Guarantees.

37. Further, and in any event, Callidus’ representation that the Guarantees would be returned was not true and known by Callidus to be untrue. Callidus had no intention of returning the Guarantees and made this representation fraudulently, or recklessly not caring whether they were true or false.

38. Further, once the Hilco appraisal came in above expectation, Callidus was in breach of the Overall Loan Agreement by demanding Guarantees and not discharging or returning the Guarantees.

39. The new term loan dated January 9th, 2015, under the Second Overall Loan Agreement, continued to run until September 5th, 2015. Meanwhile, Fortress proceeded to look at alternative financing methods in the form of royalties and further, had engaged a fund to market the royalty to replace the Callidus debt.

40. In around July, 2015, Callidus asked Hilco to do another appraisal and Smith was informed directly by Hilco that Hilco had been conservative in the appraisals and that the value of the equipment had increased substantially. Based on that representation, Fortress called Craig Boyer and Duane Morrison, asking whether Callidus wished to extend the Second Overall Loan Agreement. Callidus said it would extend for an additional nine months. Based on this call and

Callidus' representations, Fortress, Opes, Levitt, Molyneux and Smith believed they would have the funding that would enable them to finalise the royalty structure to support further financing. Further and again based on these representations, which were material, relied upon and which induced them, in reliance, Fortress, Opes, Levitt, Molyneux and Smith put on hold Fortress' immediate plans for this royalty financing alternative. Over the ensuing months, Fortress repeatedly asked for documentation for the extension, but Callidus remained silent on the issue until September, 2015.

Breach and Failure to Act in Good Faith or Honestly Perform the Second Overall Loan Agreement

41. Following the execution of the Second Overall Loan Agreement, Callidus required that all funds received from the sale of coal go into a Blocked Account, as a segregated account controlled by Callidus. Opes, Molyneux, Levitt, Smith and Fortress had no control over the funds and were required to continually request in writing that expenses, including payroll be paid. Fortress lost financial control over the management of Fortress' venture. This was part of the business plan of Callidus and what its conduct was designed to achieve.

42. Callidus' refusal to comply with its funding commitments caused further significant financial harm to Fortress' business operations, driving it first into Chapter 11 bankruptcy and then Chapter 7, as Callidus fully intended.

43. For instance, the lack of funds led Fortress to miss one of its optimal business opportunities, the time of the season when utilities enter into contract terms for coal. Fortress thus

had to rely on spot business while working to obtain contract term business. The low natural gas prices and mild weather reduced the need for coal purchases and pushed out the bidding process for contract term business.

44. Furthermore, after seeking to procure certain supply contracts, for many months prior to bankruptcy, Fortress finally received a contract to supply 240,000 tons per year from AK Steel. Because Fortress was only awarded the contract after the Chapter 11 filing, Fortress did not receive the financial benefits of this profitable contract. Similarly, ArcelorMittal approved Fortress for a 10,000-ton test burn, but the coal was not available due to operations being shut down. These contracts could have been achieved had Callidus cooperated with a restructuring under Chapter 11, which they had promised and represented it would do in its earlier representations.

45. During the Chapter 11 process, Callidus tried to force Fortress to reduce its staff, with no concern by Callidus for the safety of Fortress' employees or the environment. It insisted Fortress not pay any holiday or overtime and that Fortress reduce its staff to below what was necessary for safe working conditions. Callidus resisted Fortress' efforts to carry on its normal business activities. Callidus had Hilco appraise the Fortress assets, but after reviewing the data would not allow Hilco to place values on the assets. An auction company was proposed by Fortress which had offered to guarantee \$5 million, just on the rolling stock of equipment, yet Callidus turned them down. Callidus had Fortress pull equipment up from the Mine to the surface. Callidus left it outside during the winter.

46. Callidus did not winterize, tarp, drain fluids or in any way maintain the value of the equipment. There was also other equipment over which Callidus maintained control.

47. Furthermore, when Fortress brought some of the equipment to the surface, Fortress lost the ability to realize any value on its leases. They were independently valued at \$28 million.

48. Callidus further prevented Fortress from selling its inventory of coal. The value of the inventory and future reserves of coal were in excess of \$50 million if mined and sold in the normal course of business or an orderly liquidation.

49. Callidus knew all of this, but was intending to take this for itself and include it on its financial statement at an inflated value.

50. In February, 2016, shortly after the bankruptcy of Fortress, Callidus finally took the step that it had planned initially. Callidus took advantage of the situation by submitting a credit bid on part of the collateral for \$100,000, which collateral was worth in excess of \$20 million. This minimal bid would have left Fortress without the necessary resources to meet the reclamation obligations. The State of Kentucky intervened to ensure adequate environmental safeguards would be in place on any sale. Callidus' counsel instructed Smith not to pay the employees and to stop all insurance payments. In the face of a Court Order that required them to pay the insurance, Callidus said they would not approve the next cash collateral if Fortress did not stop those payments. As a result, Callidus was not the successful bidder for the Mine.

51. Callidus intervened in Fortress' business to such an extent that Fortress was left without any meaningful ability to carry out its functions (mining coal) and obtain revenues by selling coal. The fair market value of all assets in Fortress were valued at \$125,328,650 prior to Callidus'

involvement. This does not include surface or mineral leases, which had values in excess of \$50 million. This value was destroyed by Callidus. Ope, Molyneux and Levitt plead that throughout the Chapter 11 process and prior to it, Callidus at no time acted in a commercially reasonable manner in dealing with:

- (i) the Overall Loan Agreement;
- (ii) the Second Overall Loan Agreement; and,
- (iii) the assets of Fortress.

52. Molyneux pleads reliance on the fact that a debtor including a guarantor may not waive certain *Uniform Commercial Code* rights. These statutory rights included a requirement that the secured party act in a commercially reasonable manner in the disposition of collateral. Callidus' conduct in the disposition of Fortress' assets was highhanded and intended to deprive Ope, Molyneux and Levitt of their rights, the value of their assets, the value of Fortress' assets, so that Callidus could thereby profit.

53. Molyneux also pleads that the Overall and Second Overall Loan Agreements are void as having been induced by fraudulent misrepresentation, duress, lack of honest performance and bad faith.

54. Molyneux states that Callidus' conduct was unconscionable, and, in any event, carried out in bad faith as evidenced by its pattern of conduct in Canada and the United States. Such conduct includes but is not limited to the following:

- (a) Inducing borrowers to enter into loan agreements by misrepresenting the assistance Callidus actually provides to its customers and in failing to disclose that at least 50% of the loans made by Callidus result in a loss of control by the customer of its business;
- (b) the use of last minute changes to the terms of loan agreements to obtain concessions from customers including personal guarantees;
- (c) Failing to make advances, even when obligated to do so under contractual obligations. Routine payments were withheld around critical events such as payroll to place the maximum financial pressure on its customers;
- (d) Leveraging its power over the borrowers' finances in order to displace managements' ability to control their companies, being the customers of Callidus:
- (e) Controlling the cash flow of the customer, including payments to critical suppliers and the ability to generate business;
- (f) Controlling the bankruptcy process to appropriate the customers' assets, at significantly discounted values; and,
- (g) Attempting to abuse the process of the Court.

Each of these enumerated acts described above were in fact carried out by Callidus knowing and intending to cause the financial downfall of Fortress so that Callidus could profit thereby. Callidus intended to cause damages and loss to Opes, Levitt and Molyneux and Fortress.

55. Ope, Levitt and Molyneux further rely on the following misrepresentations made by Callidus and its employees and agents:

- (a) That no personal guarantees were required;
- (b) That Callidus works closely with borrowers, such as Fortress, to assist the success of the business;
- (c) That the personal guarantees would be returned on satisfying a number of conditions precedent;
- (d) That the Revolver would be put in place once Hilco valued the assets and confirmed the value was at least the Darco value; and,
- (e) That the Overall Loan Agreement would be extended thereby obviating the need to:
 - (i) provide personal guarantees; and,
 - (ii) seek another source of financing. .

Each of these misrepresentations were false and misleading, material, and were made to induce Molyneux and Fortress to enter into the Overall Loan Agreement and Second Overall Loan Agreement, and specifically the Guarantees, intended to be used in a predatory manner by Callidus.

56. Molyneux denies that any monies are owing to the Plaintiff and ask that this action be dismissed with costs on a substantial indemnity basis.

COUNTERCLAIM

57. The Defendant/Plaintiff by Counterclaim, Molyneux claims as against Fortress, Callidus,

Levitt and Opes as follows:

- (a) Judgment declaring that:
 - (i) Fortress is not indebted to Callidus;
 - (ii) was not indebted to Callidus at the time of the demand on the guarantee of Molyneux; and,
 - (iii) was not indebted to Callidus at the time that this action was commenced by Callidus;
- (b) Judgment declaring that Opes and Levitt are bound by this declaratory judgment;

58. The Defendant/Plaintiff by Counterclaim, Molyneux claims as against Callidus as follows:

- (a) Damages in the amount of \$1 million against Callidus;
- (b) An accounting by Callidus, or if necessary, a reference to determine the amount owed by Callidus to Fortress and if necessary a judgment to that effect;
- (c) An accounting of:
 - (i) all funds received by Callidus; and,
 - (ii) all funds that should have been received by Callidus from the assets of Fortress but for its breach of duty and misconduct as pleaded herein;

- (d) Judgment declaring that:
- (i) the Guarantee of Molyneux is unenforceable, discharged, invalid or void or of no force and effect; and,
 - (ii) in the alternative, that there is no money owed under the Guarantee of Molyneux, as Fortress is not indebted to Callidus for any amount.
- (e) Punitive or exemplary damages of \$5,000,000 or such amount as is determined by this Honourable Court which will be based, in part, on the ability of Callidus to pay punitive damages;
- (f) Pre-judgment and post-judgment interest according to the *Courts of Justice Act*, R.S.O. 1990, c.C.43;
- (g) Costs on a substantial indemnity basis together with HST; and,
- (h) Such further and other relief as this Honourable Court may deem just.

59. Molyneux repeats and relies on the facts hereinbefore pleaded in the Statement of Defence and uses the same defined terms herein.

60. Callidus was aware of the valuable nature of the Essential Assets and the extent of the operations that had the potential to generate significant profit.

61. Callidus was also aware that certain payments were critical for the running of the business of Fortress. This included payroll, insurance for all aspects of the mining business, workmen's compensation, utilities and equipment maintenance for the safety of employees, such as

ventilation equipment, pumping equipment and other equipment essential to ensure the safe operation of the Mine. Furthermore, Callidus was aware of the significant contracts that were in place with suppliers and the potential of further contracts with suppliers and customers (the “Essential Payments”).

62. Notwithstanding that knowledge, Callidus breached the Overall Loan Agreement and failed and refused to fund the Revolver intending that the Essential Payments not be made, in order that Fortress would not remain operational and not be able to meet its obligations.

The Fraudulent Misrepresentations Related to the Personal Guarantees

63. Prior to the Overall Loan Agreement, Callidus represented to Molyneux, Smith and Levitt that:

- (a) Callidus only lent money on the value of assets and did not require personal Guarantees;
- (b) because the financing was taking place so quickly, until Callidus could confirm the value of the assets as determined by Darco, with an independent appraiser, temporary personal guarantees would be in place. Callidus represented it would release and return those personal Guarantees when:
 - (i) the value of the assets was confirmed; and,
 - (ii) a further \$2 million in additional equity funding was to be provided to Fortress.

64. The value of the assets was confirmed on October 2014 by Hilco.

65. By November 14, 2014 Molyneux, Levitt and Smith had made arrangements with Big Sandy which had committed to provide the necessary equity funding. Molyneux, Levitt and Smith had commenced these negotiations with Big Sandy prior to entering into the Overall Loan Agreement. Big Sandy was ready to provide a \$2 million equity investment.

The Failure to Preserve the Value of the Equipment and the Business

66. Callidus had a duty to act reasonably and not recklessly to preserve the value of the Mine and to protect the equipment and the related contracts that depended upon the equipment, from loss or damage.

67. Callidus controlled the cash flow of Fortress by controlling the Revolver.

68. The Revolver was to provide the working capital for Fortress. The Revolver was controlled by Callidus. There were conditions that attached to the release of funds under the Revolver. Callidus determined whether those conditions were satisfied. Callidus had a duty to determine whether those conditions were satisfied by acting in good faith. Callidus had a duty to act honestly with respect to those conditions. Callidus interpreted those conditions in a manner that was not in good faith to prevent Fortress from having the funds necessary to carry on business. In fact, even though Fortress met the conditions for the release of funds under the Revolver, Callidus refused to fund or provided inadequate funds, less than permitted under the Revolver.

69. The conduct of Callidus was reckless or intentional and was intended to force Fortress into a liquidation process such as bankruptcy or receivership.

70. Furthermore, although representations were made that Callidus would provide funding, Callidus continually delayed its process intending to put financial pressure on Fortress. Callidus used the excuse that Callidus was required to go to a credit committee. This was used continually in order to delay any decision and put further unrealistic and extreme financial pressure on Fortress to provide concessions. This contributed to the demise of Fortress.

71. Fortress was forced into bankruptcy on November 5, 2015.

72. Callidus controlled the equipment and how it should be dealt with, in light of Callidus' security interest over the equipment.

The Underground Equipment Brought to the Surface

73. Callidus recklessly, for Callidus' own benefit and to the detriment of the Guarantors and Opes and all of the creditors of Fortress, brought the equipment that was only useful underground to Mine the coal, up to the surface during the winter failed to protect the equipment as pleaded thus causing damages.

74. This was to the benefit of Callidus only and detrimental to Fortress, Opes, Levitt, Smith and Molyneux, as well as all other creditors and stakeholders of Fortress.

75. The sale of the equipment has not been properly accounted for by Callidus. Molyneux states that Callidus should be required to account for the full value of that equipment of the Mine.

Furthermore, after Callidus brought the equipment up to the surface, it was offered significant amounts of money for the equipment (millions of dollars), all the particulars of which are known to Callidus and unknown to Molyneux. Callidus did not agree to any of those sales as it intended to

add that equipment to its financial statements at inflated values. As a result that equipment did not sell or was sold at materially lower prices.

Other Equipment

76. Callidus attempted to obtain the Mine by bidding \$100,000.00, having initially obtained valuations in excess of \$100 million. The bid was unsuccessful as Callidus refused to accept responsibility for remediation.

77. Callidus' plan was to purchase the Mine at a significant discount, was part of its loan-to-own scheme. It would then be able to incorporate in its financial statement assets at a significant inflated value. In this way, it could misrepresent to its investors asset values on its financial statements and thereby artificially inflate the price of its publically traded stock.

78. Callidus' bid was rejected. At the same time, Callidus did not agree to approve the bid by Quest which provided for all of these protections.

Leases of Inventory

79. As a result of the conduct of Callidus with regard to the equipment, the leases of the mining rights and the inventory including certain of the Essential Assets, being coal, lost significant value.

80. Callidus has not accounted for the amount that was received for either the mining leases or the coal inventory.

81. As a result of the conduct of Callidus, Fortress suffered significant losses which are required to be credited against any amount claimed by Callidus from Fortress.

82. As a result, Callidus:

- (i) breached the Overall Loan Agreement;
- (ii) misrepresented its intention to Ope, Levitt, Smith and Molyneux;
- (iii) failed to provide funds through the Revolver to enable Fortress to carry on business.

83. Molyneux further pleads that once Fortress was required to seek protection under Chapter 11, Callidus acted unreasonably in that it:

- (a) Failed to auction off the Fortress assets in a commercially reasonable manner and acted improvidently;
- (b) Impaired the value of certain of the equipment by bringing it to the surface which caused significant damage;
- (c) Destroyed the value of the leases by bringing certain equipment to the surface; and,
- (d) Sold the inventory of coal at below current rates per ton.

84. To date, Callidus has also not provided an accounting of monies received including funds in the segregated account, the surety bond of some \$4 million USD, and the funds received from the sale of coal inventory.

Similar Fact Evidence – Callidus’ Pattern of Conduct

85. Callidus’ treatment and conduct with regard to Fortress which resulted in Fortress being forced into a liquidation process is part of a pattern of conduct that Callidus has carried out over a number of years with various customers who borrowed money from Callidus.

86. This pattern of conduct was unknown to the Guarantors and Fortress and was hidden by Callidus from its customers.

87. Callidus' loan-to-own strategy was carried out and executed with regard to a number of companies. Callidus intended to significantly profit from this strategy by including inflated values of assets on their financial statements which trade on public stock markets.

88. Callidus' pattern of conduct included the following similar facts involving other loans and customers including:

- (a) abuse of process;
- (b) breach of the duty of honest performance;
- (c) breach of the duty to act in good faith and in fact, bad faith conduct;
- (d) unlawful interference with contracts with third party providers to Fortress;
- (e) fraudulent misrepresentations, concealment of material information, misinterpretation of contractual obligations and breaching of contractual obligations;
- (f) reckless conduct; and,
- (g) procuring or obtaining assets of its customers from a liquidation process caused by Callidus, or obtaining the assets referred placed upon Callidus' financial statements at artificially inflated values to manipulate the price of its publically traded stock.

89. The conduct of Callidus in all of these loan transactions, all the particulars of which are known to Callidus, including promising cooperation, support, funding and then renegeing on those promises or representations. All of which was connived to orchestrate a default by the borrower so that Callidus could obtain the assets at a significant discount.

90. Since the commencement of this action, there have been a number of cases that have been litigated where this conduct of Callidus has come to light, including the McFarlane case in Ontario, the Baumann case in Saskatchewan, the Blueberi Gaming Technologies Inc. case in Quebec, Esco in the United States and such other cases as may be determined after completion of examinations for discovery in this proceeding. All the particulars of which are known to Callidus and unknown to Molyneux.

91. Callidus often attempts to abuse the process of the Court in order to gain advantage over the borrowers that it forces into liquidation.

92. Callidus' wrongful conduct, which includes allegations of fraudulent misrepresentation, abuse of process, and attempt to interfere improperly with the judicial system and solicitor-client privilege, has further come to light in a recent action commenced by Callidus against Westface and others, including Molyneux, bearing Court File No. CV-17-586096 ("Westface Action").

93. In the Westface Action, Callidus alleges that Molyneux was part of a conspiracy to short-sell the publicly traded stock of Callidus.

94. Callidus does not have a scintilla of evidence to support this allegation against Molyneux. The Westface Action is an abuse of process.

95. In the Westface Action, Callidus alleges that the defence of Molyneux in this proceeding is spurious and specious. This is known by Callidus to be incorrect.

96. Furthermore, in the Westface Action, the surreptitious and unlawful conduct of Callidus has come to light and will be relied upon by Molyneux in the defence of this action. The conduct of Callidus demonstrates fraudulent misrepresentation, abuse of process, and attempt to interfere improperly with the judicial system and solicitor client privilege.

97. The Callidus' business plan as hereinbefore described seeks to profit by taking advantage of its borrowers, including Fortress, to the detriment of Guarantors, such as Molyneux. Its dishonest performance, bad faith and fraudulent misrepresentations, the particulars of which are known to Callidus and unknown to Molyneux, placed Fortress in a financial position where it was unable to protect its interests or litigate its rights. The facts as pleaded support a pattern of misconduct which resulted in the damages claimed. The full extent of the damages are unknown at this time but will be provided prior to trial.

98. Molyneux pleads that Callidus' conduct was highhanded in pursuit of its predatory lending practices. Such conduct is in violation of the laws of Canada and the United States and merits the sanction of the laws of Canada by the imposition of punitive damages. The conduct of Callidus was designed to be in disregard of the rights of creditors and employees of Fortress in order to profit for their own account.

99. Molyneux relies upon Rule 17.02(c), (f), (g), and (q) for the service of this Defence outside on Ontario and the facts pleaded herein.

100. Molyneux asks that the Counterclaim be tried together with the main action.

(date of issue)

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CALLIDUS CAPITAL CORPORATION
Plaintiff

-and- OPES RESOURCES INC. et al.
Defendants

Court File No. CV-17-11712-00CL

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TORONTO

**FRESH AS AMENDED STATEMENT OF
DEFENCE AND COUNTERCLAIM OF
RICHARD GEORGE MOLYNEUX**

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