

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

CRAIG BOYER

Plaintiff

and

CALLIDUS CAPITAL CORPORATION

Defendant

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendant, Callidus Capital Corporation (“**Callidus**”), has no knowledge in respect of the allegations contained in paragraph 2 of the Statement of Claim.
2. Callidus denies the balance of the allegations in the Statement of Claim unless specifically admitted herein, and denies that the Plaintiff is entitled to any of the relief claimed in paragraph 1 of the Statement of Claim.

The Plaintiff’s Employment with Callidus

3. Callidus is a corporation with its head office located in Toronto, Ontario. Callidus is a publicly traded asset-based lender that provides capital on a bridge basis to meet the financing requirements of companies that cannot access traditional lending sources.

4. On or about July 13, 2009, Callidus hired the Plaintiff, Craig Boyer (“**Boyer**”), as a vice president. Boyer was later promoted to being Callidus’ chief underwriter.

5. Boyer’s responsibilities as chief underwriter included the following:

- (a) directing the collection of information necessary to assess the advisability of potential loans;
- (b) analyzing and assessing potential loans;
- (c) providing accurate and complete information to Callidus’ Credit Committee on potential loans;
- (d) making recommendations to Callidus’ Credit Committee on whether Callidus should advance potential loans; and
- (e) closely monitoring loans that Callidus had advanced and diligently reporting to the Credit Committee on an on-going basis regarding the performance of existing loans.

6. In his role, Boyer reported directly to David Reese, Callidus’ President and Chief Operating Officer. Boyer was also responsible for supervising 10 other Callidus employees, directly or indirectly.

7. Boyer was a senior officer of Callidus and was in a position of trust, and as such owed Callidus a fiduciary duty.

8. As part of his compensation, Boyer received a base salary, health and other benefits, and was entitled to four weeks of vacation annually. Boyer was also eligible for participation in Callidus' Incentive Plan (the "**Incentive Plan**").

Boyer's Decision to Retire and Early Resignation

9. In 2015, Boyer advised Callidus that he intended to retire from his employment at the end of 2016 for personal and health-related reasons. Given Boyer's critical position at Callidus, it was extremely important that Boyer fully cooperate with Callidus' management team in order to ensure that his duties were transitioned to other Callidus employees in an organized and seamless fashion.

10. As a result, Callidus began involving other underwriters at Callidus in Boyer's loan portfolio in order to ensure a smooth transition of responsibility after Boyer's planned resignation at the end of 2016.

11. As other underwriters began to review Boyer's work and reporting, several concerns with Boyer's performance were discovered, including that:

- (a) Boyer had been failing to properly monitor loans in his portfolio, and in particular the loan advanced to Gray Aqua (as defined below);
- (b) Boyer had encouraged certain portfolio companies, and in particular XTG (as defined below), to artificially inflate the results shown on their financial projections and financial statements; and
- (c) Boyer had directed one company in his portfolio (Horizontal, as defined below) to create a letter on fake Callidus letterhead purporting to make financial commitments on Callidus' behalf, and then to sign the letter for Boyer, even though

Boyer did not have authorization from Callidus to make any such commitment or to provide such a letter.

12. Upon discovering this information, Callidus' management team immediately confronted Boyer and repeatedly asked him to provide full disclosure of all information within his knowledge that might impact the performance of the affected loans so that appropriate steps could be taken to manage potential exposure. Boyer intentionally refused to provide meaningful cooperation, and, in fact, by his actions intentionally interfered with the proper operations of Callidus.

13. It was only after Callidus raised these concerns with Boyer that he began to allege that Callidus had created a "poisoned workplace" in an attempt to divert attention away from his own misconduct.

14. As a senior employee of Callidus with direct reports, Boyer was one of a handful of individuals who were instrumental in shaping the work environment at Callidus. Indeed, Boyer himself developed a reputation for being very difficult on those employees who reported to him.

15. In or about early August 2016, Boyer unilaterally decided to cease performing his duties for Callidus. This included refusing to attend for work at Callidus' Toronto office and refusing to attend a mediation and deposition on Callidus' behalf in an on-going litigation matter in the United States.

16. On September 6, 2016, and without prior warning, Boyer submitted his resignation letter to Callidus. Contrary to paragraph 18 of the Statement of Claim, Callidus issued a Record of Employment to Boyer on September 14, 2016, which accurately stated that Boyer had quit his employment.

Boyer Was Not Dismissed and Is Not Entitled to Further Compensation

17. Callidus denies that it created a poisoned work environment for Boyer.

18. From the time he commenced employment at Callidus, Boyer understood that he would be working in a fast-paced and demanding Bay Street environment. Given the nature of its business, Callidus has always strived for a culture of excellence and expects all of its employees to meet very high performance standards. This necessarily involves occasionally having to critique an employee's performance – discussions which can sometimes become unpleasant for the employee being critiqued. This having been said, all of Callidus' employees are treated fairly and with dignity.

19. Put simply, Boyer never raised any issue with his superiors about the quality of his work environment until they started directly questioning his performance in 2016.

20. Callidus further denies that Boyer was constructively dismissed. Rather, Boyer had always intended on retiring for his own personal reasons by the end of 2016, and he voluntarily resigned approximately three months early when he was confronted with evidence of his misconduct.

21. In the alternative, Callidus pleads that Boyer's conduct as described further in the counterclaim below justifies his dismissal for cause.

22. In view of his voluntary resignation, or, alternatively, his dismissal for cause, Callidus is not obligated to provide any further compensation to Boyer.

23. With regards to vacation pay, Callidus does not permit its employees to carry over unused vacation from year to year except with express written approval. Boyer never sought or received any such approval. Rather, Boyer took his vacation time and, to the extent he did not use all of his

vacation days in any given year, received compensation for the unused vacation days. For example, in 2015 Boyer took 13 days of vacation and was paid for seven unused days.

24. To the extent Boyer had accumulated any unused vacation days at the date of his resignation, which is not admitted but denied, those days were exhausted in any event in August and September 2016, when Callidus continued to pay Boyer notwithstanding his refusal to attend to his duties at Callidus.

25. With regards to stock options, Boyer's entitlements were exclusively governed by the Incentive Plan, the terms of which he fully understood. Pursuant to s. 4.3(d)(i) of the Incentive Plan, if an option holder ceases to be an employee:

[T]he Expiry Date for any vested portion or portions of the Option will be, unless otherwise provided for in the Option Certificate, the earlier of the Fixed Expiry Date and the 60th day following the Termination Date unless the Option Holder ceases to be an Employee or Consultant as a result of Cause, in which case the Expiry Date will be the Termination Date. The Expiry Date for any unvested portion of the Option will be the Termination Date.

26. Boyer ceased to be an employee of Callidus when he voluntarily resigned on September 6, 2016. As a result: (i) Boyer's vested options expired because he failed to exercise them within 60 days of his resignation; and (ii) any unvested options that Boyer held as of the date of his voluntary resignation also expired. Boyer is not entitled to any relief from Callidus in this regard.

27. With regards to his benefits, Boyer was only entitled to receive benefits up to the date of his resignation or, alternatively, his dismissal for cause. Boyer received such benefits, and Callidus has no obligation to provide him with any further benefits.

28. Callidus therefore asks that Boyer's claim be dismissed with costs.

COUNTERCLAIM

29. Callidus claims against Boyer:
- (a) damages in the amount of \$150 million;
 - (b) in the event that Boyer is awarded any damages in respect of his claim, set-off of such damages against damages awarded to Callidus;
 - (c) pre- and post-judgment interest in accordance with ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (d) costs of this proceeding; and
 - (e) such further and other relief as to this Honourable Court may seem just.
30. Callidus repeats and relies on the allegations in its Statement of Defence in support of its Counterclaim.
31. Given Boyer's seniority, responsibilities and position of trust, he was Callidus' fiduciary. Callidus' Credit Committee at all material times relied on Boyer to provide fair, accurate and complete information about the loans in his portfolio. Boyer knew that he was required to be scrupulously honest and transparent with Callidus' Credit Committee in order to enable the Credit Committee to make appropriate decisions that would maximize the benefits to Callidus' shareholders.
32. Boyer breached his fiduciary duties to Callidus. He failed to provide honest and transparent reporting to the Credit Committee, going so far as to deliberately mislead the Credit Committee

on certain matters. Further, Boyer purported to make substantial financial commitments on Callidus' behalf knowing that he did not have the authority to do so, thereby putting Callidus at risk of serious losses.

33. Boyer's misconduct and breach of duty involve at least three companies in his loan portfolio: Xchange Technology Group ("**XTG**"), the Gray Aqua Group ("**Gray Aqua**") and Horizontal Well Drillers ("**Horizontal**").

34. With respect to XTG, Boyer directed XTG's senior management to artificially inflate EBIDTA during XTG's budgeting process. Boyer then failed to tell Callidus' Credit Committee that XTG's financial statements were based on an artificially inflated EBIDTA. Boyer deliberately misled Callidus' Credit Committee about XTG's financial results.

35. With respect to Gray Aqua, Boyer failed to conduct adequate due diligence and/or ignored the results of the due diligence he did conduct in recommending that Callidus advance funds to Gray Aqua. Among other things, Boyer ignored information that the inventory collateral being provided for the loan could not be monetized, as would be expected in asset-based loans.

36. As a result, the loan to Gray Aqua was in effect project financing, rather than the asset-based lending in which Callidus engages. Boyer knowingly failed to inform Callidus' Credit Committee of the risks involved in the loan. Had he done so, Callidus would not have advanced any funds to Gray Aqua. Instead, Callidus has had to record substantial loss provisions on its financial statements due to the Gray Aqua loan.

37. With respect to Horizontal, Horizontal holds drilling rights for oil in Venezuela. The Venezuelan government asked Horizontal to provide comfort that Horizontal would be able to

meet its financial commitments, and Horizontal asked Boyer to provide a commitment from Callidus to provide to Venezuelan government officials.

38. Boyer allowed Horizontal to create a letter on forged Callidus letterhead purporting to make financial commitments on behalf of Callidus. Boyer was not authorized to make these commitments on Callidus' behalf, and never sought or received the required approval from Callidus' Credit Committee to do so.

39. In addition, when these matters were brought to his attention for response, Boyer resigned abruptly and without adequate notice to Callidus, thereby impeding a smooth transition of Boyer's critical duties to Callidus' other underwriters.

40. As a result of Boyer's breach of his fiduciary duties and wrongful resignation, Callidus has suffered damages at least in the amount pleaded above, further particulars of which will be provided prior to trial.

41. Callidus proposes that the Counterclaim be tried together with the main action and that both claims be tried at Toronto.

February 21, 2017

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Rocco DiPucchio LSUC#: 38185I

rdipucchio@counsel-toronto.com
Tel: 416 598 2268

Hilary Book LSUC#: 52479I

hbook@counsel-toronto.com
Tel: 416 644 5354

Fax: 416 598 3730

Lawyers for the Defendant

TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**

Barristers and Solicitors
130 Adelaide Street West
Suite 2600
Toronto ON M5H 3P5

Peter H. Griffin LSUC#: 19527Q

Tel: 416 865 2921
Fax: 416 865 3558
pgriffin@litigate.com

Lawyers for the Plaintiff

CRAIG BOYER
Plaintiff

-and- CALLIDUS CAPITAL CORPORATION
Defendant

Court File No. CV-17-569065

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF DEFENCE AND COUNTERCLAIM

LAX O'SULLIVAN LISUS GOTTLIEB LLP

Counsel

Suite 2750, 145 King Street West

Toronto ON M5H 1J8

Rocco DiPucchio LSUC#: 38185I

rdipucchio@counsel-toronto.com

Tel: 416 598 2268

Hilary Book LSUC#: 52479I

hbook@counsel-toronto.com

Tel: 416 644 5354

Fax: 416 598 3730

Lawyers for the Defendant