TORYS LLP
NEW YORK TORONTO

Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada

TEL 416.865.0040
FAX 416.865.7380

www.torys.com

Patricia A. Koval
Direct Tel. 416.865.8209
Direct Fax 416.865.7380
pkoval@torys.com

April 25, 2007

BY EMAIL AND DELIVERY

Ontario Securities Commission
P.O. Box 55, Suite 1903
20 Queen Street West
Toronto, Ontario M5H 3S8

Attention: The Secretary of the Commission

Dear Sir:

Re: Sterling Centrecorp Inc. Going Private Transaction
Application under section 127 of the *Securities Act*

We are the solicitors for First Capital Realty Inc. ("First Capital") and Gazit Canada Inc. ("Gazit") (sometimes, collectively "First Capital" or "the Applicants").

The Applicants hereby apply for relief under s. 127 of the *Securities Act* (the "Act") in respect of the going-private transaction (the "Going Private Transaction") involving Sterling Centrecorp Inc. ("Sterling") and certain of its inside directors and officers (the "Insiders"). The Going Private Transaction is to be effected by means of a statutory plan of arrangement. In connection with the transaction, the Insiders, through their acquisition vehicle, have entered into a series of support agreements with Sterling shareholders (the "Support Agreements"). Sterling intends that the votes of the Support Agreement counterparties be counted towards approval of the Going Private Arrangement under corporate law and for majority of the minority approval under Rule 61-501.

The Applicants submit that the effect of the Support Agreements makes the supporting parties and the Insiders joint actors, and that the effect of the Support Agreements in any event are contrary to the public interest. In that regard, the Applicants seek from the Commission a hearing for the purposes of obtaining an order cease trading the Going Private Transaction until (i) the Going Private Transaction is approved by a majority of the minority with the common shares and other securities controlled by the Support Agreement counterparties not counted as part of the minority, and (ii) there is appropriate public disclosure reasonably in advance of the shareholders meeting of the majority of the minority approval requirement, the exclusion from the minority of the common shares and other securities controlled by the Support Agreement counterparties, and the reason for that exclusion.

This application is organized as follows:

A. *Overview.* This provides a summary of the issues giving rise to the Applicant's request for relief from the Commission.

B. *Factual Background.* We set out the facts relevant to the Going-Private Transaction derived from Sterling's public disclosure, and a description of the Support Agreements and the parties to them.

C. *Joint Actors.* We set out the analysis of the effect of the Support Agreements, and the basis for concluding that the Insiders and the Support Agreement counterparties are joint actors.

D. *Deal Protection Measures.* We argue that the Support Agreements as deal protection measures are coercive and preclusive of a better offer for Sterling's shareholders, and therefore contrary to the public interest. The Support Agreements, as deal protection measures, supplement a large break fee of 4.6%.

E. *Public Interest Jurisdiction.* We summarize the jurisdiction of the Commission under s. 127 to grant the relief requested.

F. *Relief Requested.* We set out the relief the Applicants are requesting.

A. Overview

1. The Insiders, collectively, own or control 35.5% of Sterling's common shares. Through a series of extraordinary support agreements (the "Support Agreements"), the Insiders now also exercise control over the votes attaching to 14,764,964 Sterling shares -- more than half of the shares not owned or controlled by the Insiders -- thereby assuring that the Going-Private Transaction will be approved by two-thirds of Sterling shareholders, as required by corporate law, and by a majority of minority shareholders, as require by Rule 61-501.

2. The effect of the Support Agreements is that the Insiders have enlisted the Support Agreement counterparties to protect the Insiders' offer for Sterling and to prevent any other proposed transaction from succeeding without the Insiders' consent, including a superior offer that would provide minority shareholders with greater value.

3. It is the position of First Capital and Gazit that the Support Agreement counterparties and the Insiders are "joint actors" within the meaning of Ontario securities law. As a result of the Support Agreements, the interests of the Support Agreement counterparties are unconditionally aligned with the Insiders, and their interests diverge from those of the independent minority shareholders.

4. The effect of the Support Agreements is not merely a permissible hard lock-up, it is an "absolute lock-up"[1] that guarantees for the Insiders the success of the Going-Private Transaction

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[1] See: *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A 2d 914 (Del. Supreme Court, 2003) ("*Omnicare*").

irrespective of whether a superior offer may be available. Furthermore, in the context of an offer by Insiders, who have statutory and fiduciary duties in their capacity as directors and officers of Sterling, the absolute lock-up not only leads to joint actor status for the Insiders and the Support Agreement counterparties, but it operates as a deal protection measure for conflicted Insiders, acting in their capacity as bidders, to protect their offer for Sterling, to discourage other offers from emerging, and to prevent a superior offer from succeeding. As a deal protection measure, the absolute lock-up is both preclusive and coercive. Moreover, these Support Agreements operate as a deal protection measure for the Insiders' benefit in concert with a large break fee, payable to the Insiders, and also large change of control payments, payable to the Insiders.

B. Factual Background

5. ***The arrangement.*** Sterling has proposed a plan of arrangement to its shareholders whereby the Insiders, through the acquisition vehicle SCI Acquisition Inc. ("SCI Acquisition"), will acquire all the issued and outstanding common shares of Sterling for $1.26 per share, taking the corporation private. SCI Acquisition and Sterling entered into the arrangement agreement on February 9, 2007.

6. Sterling announced the Going Private Transaction in a press release issued on February 8, 2007. The company obtained an *ex parte* interim order from the Court on March 6, 2007 to initiate the Going-Private Transaction. On March 30, 2007, Sterling mailed its management information circular (the "Circular") to its shareholders in connection with the meeting at which the company's shareholders will consider and vote on a resolution to approve the Going-Private Transaction.

7. The Special Committee of Sterling recommended that the shareholders of Sterling vote to approve the Going Private Transaction. The Special Committee relied, in part, on a valuation opinion provided by GMP Securities L.P. dated March 1, 2007. That opinion was based on Sterling's interim financial statements dated September 30, 2006, and not the year-end financial statements dated December 31, 2006. Between those two reporting periods, Sterling's holdings of cash and cash equivalents increased from approximately $29.8 million to more than $42 million. Some of the considerations of the Special Committee in making its recommendation are discussed below.

8. The arrangement agreement includes a "superior proposal" provision, allowing Sterling a "fiduciary out" in the event of a financially better proposed transaction. However, as explained below in Part D, the nature of the Support Agreements negotiated by the Insiders renders the fiduciary out in the arrangement agreement ineffectual as a means of safeguarding the rights of the minority shareholders.

9. The shareholders meeting to consider the Going Private Transaction is scheduled for April 30, 2007, and Sterling will seek a Court order approving the arrangement on May 14, 2007 on the basis that, among other things, it is fair and reasonable to the minority shareholders of Sterling.

10. ***The Insiders and their interests.*** The Insiders are four directors and officers of Sterling or its subsidiaries: (i) John Preston is a director of Sterling and its Co-Chairman and Co-Chief

Executive Officer; (ii) Robert S. Green is a director and is President and Chief Operating Officer of Sterling; (iii) Brian Kosoy is a Vice President of a Sterling subsidiary; and (iv) Stephen Preston is a Vice President of a Sterling subsidiary. Each of the Insiders is directly or indirectly a Sterling shareholder.

11. In addition to their status as shareholders, and their positions as directors and officers, the Insiders' interests in Sterling include non-arms length contracts with Sterling in respect of property management, debt on real estate and corporate debt, financing contracts, and real estate investments, as set out in the Circular. For example, in 2006:

- The Company incurred rent expense of approximately $0.4 million for the office located at 2851 John Street, Markham, Ontario which is owned by an entity related to John Preston and Robert S. Green who are officers and directors of the Company.

- The Company paid to NAPG Equities Inc., a company related to John W.S. Preston, who is an officer and director of the Company, commission fees of approximately $0.8 million (before all expenses, including commissions payable to third party sub-agents) for services received in connection with the Land Fund II.

12. The description of the Special Committee's consideration of the Going Private Transaction includes consideration of the fact that "a substantial portion of the Company's property management contracts were short term and/or in respect of assets owned by entities controlled by John Preston and other related parties and/or dependent upon the continued involvement of certain management personnel". It was for this reason, among others, that the Special Committee concluded that a third party offer for Sterling was unlikely:

> The focus of the Company's business is transaction based and therefore, revenue and profits are more volatile and less predictable than would be the case in a strategy that acquires real estate assets to collect recurring rental income. Because of this factor, the illiquidity of the public trading of the Company's Common Shares and the nature of the ownership of the Company's assets (with the dependency on the active and continuing involvement of key management personnel), the public market price for the Common Shares does not enable the Company to access capital in the public markets on terms that are as favourable as can be accessed in private markets, and, therefore, the costs of remaining a public company outweigh the benefits. [Emphasis added.]

13. The conclusion of the Special Committee in this regard, therefore, is that the extent of the Insiders' interests in the real estate assets and operations of Sterling make a third party offer for the company unlikely. The Special Committee draws this conclusion despite the fact that Sterling's consolidated balance sheet shows cash and cash equivalents of more than $42 million as of December 31, 2006 (an amount almost sufficient to finance an acquisition of the company,

although some of this cash is held by wholly-owned subsidiaries of other entities over which Sterling has control).

14. The Insiders' arrangement agreement with Sterling also provides for a large break fee of $2.1 million payable to the Insiders in the event that the arrangement agreement is terminated by Sterling, a break fee worth 4.6% of the total value of their offer to shareholders. The Insiders also are entitled to change of control payments of approximately $6 million, or 14% of the total value of the transaction to shareholders, which is payable to the Insiders in the event of an unfriendly change of control.

15. ***The Support Agreements***. Prior to obtaining the interim order on March 6, 2007, Sterling issued a press release describing the Support Agreements. They are also described in the Circular. On March 22, 2007, First Capital obtained an order from the Court requiring production of the Support Agreements, and it has now reviewed them.

16. As disclosed in the Circular, security holders currently holding an aggregate of 14,765,964 of the votes attached to the outstanding common shares, "in the money" options and restricted stock units have entered into the Support Agreements with SCI Acquisition agreeing to vote their securities in favour of the Going Private Transaction. The votes attached to these securities are said to represent 60.3% of the outstanding voting rights other than those controlled by SCI Acquisition and its shareholders.

17. The operative provision of the Support Agreements provides, in relevant part, that:

> 2.3 Acquiror [SCI Acquisition] further covenants, acknowledges and agrees that if the Going Private Transaction is terminated prior to the Expiration Date by the acceptance by the Owners [the Insiders], of a superior bid from a third party, then notwithstanding anything herein contained, Shareholder will be entitled, contemporaneously with the Owners and at the same price per Share (and payment terms) as pertain to the Owners, to tender its Shares to such third party in acceptance of such superior bid.

18. Sterling has described the above section as preventing the Support Agreement counterparties from withdrawing their support for the Going Private Transaction or from accepting a bid from a third party unless SCI Acquisition and the Insiders elect to tender to such bid. In other words, the Support Agreements have the following features:

(1) the Support Agreement counterparties have agreed with the Insiders to support and irrevocably vote in favour of the offer to purchase Sterling's common shares for $1.26 per share and have signed an irrevocable proxy to the Insiders to this effect; and

(2) the Support Agreement counterparties may not accept a third-party offer for the Company's shares, even an offer that is superior to the Insider's offer, unless the Insiders also support that offer.

19. ***The interests of the supporting parties.*** The identity of the Support Agreement counterparties is also significant, as they include employees, and others with direct interests in Sterling:

- David Kosoy is a director of Sterling and, along with Mr. Preston of the Insiders, is its Co-Chairman and Co-Chief Executive Officer. David Kosoy owns or controls 21.73% of Sterling's shares, and owns or controls 16.95% of the options to acquire Sterling shares (which options are granted a vote on the Going Private Transaction). David Kosoy was also part of the initial group of Insiders who approached Sterling regarding the Going Private Transaction.

- Henry Bereznicki owns or controls 570,900 Sterling shares. Mr. Bereznicki is the president of Sterling's western division. According to the Circular, he also owns indirectly 30% of the assets owned by the company's Phoenix Division, with Sterling owing the remaining 70%. As at December 31, 2006, $6.6 million had been advanced by Sterling to the Pheonix Division.

- Kimco Realty Corporation ("Kimco") owns or controls 720,500 Sterling shares. According to Sterling's most recent annual report, Kimco and Sterling are partners in a 1.2 million retail development in Montreal. In 2003, Sterling and Kimco, in a joint venture, acquired the 238,000 square foot power centre in Vaughan, Ontario, for $36.45 million.

- Richard Levinsky is the President of Sterling Realty Services Inc., a wholly-owned subsidiary of Sterling. Sterling purchased the subsidiary from Mr. Levinsky in 2003. Mr. Levinsky owns or controls 348,173 Sterling shares.

C. Joint Actors

20. The offensiveness of the Support Agreements lies in their irrevocability and the veto they confer on SCI Acquisition over any competing bid, even one that is superior to its own. Entering into a support agreement may not make parties *per se* joint actors, particularly where, as is usually the case, there is a fiduciary out for the supporting party. Here, however, the effect of the Support Agreements is that the Insiders, through the assistance of the Support Agreement counterparties, have the power to preclude Sterling's shareholders from accepting an offer for their shares for more than $1.26 because such an offer is bound to fail without the approval of the Insiders. There is no fiduciary out for the Support Agreement counterparties. The supporting parties have delegated to SCI Acquisition all decision-making with respect to their interest in Sterling. The interests of the Insiders and the interests of the Support Agreement counterparties are therefore aligned.

21. As is evident from the discussion of the identity of some of the Support Agreement counterparties, their interests are in many cases economically aligned with the Insiders and therefore their interests conflict with those of the remaining minority shareholders. Moreover, because the Insiders are themselves conflicted, this puts the all supporting parties in a conflict, or at least a possible conflict with other minority shareholders. Certainly with respect to any

competing bid, the interests of the Insiders and the supporting parties are aligned because SCI Acquisition has absolute control over how the parties will vote in respect of a competing offer.

22. What follows is a discussion of the relevant legal framework regarding joint actors, and an application of that framework to the Support Agreements and the Going Private Transaction. In summary, the Going Private Transaction, as structured, offends the minority voting requirements of Rule 61-501. In First Capital's submission, SCI Acquisition and the counterparties are joint actors for the purposes of Rule 61-501, and the votes of the latter should be excluded from the minority for purposes of approving the Going Private Transaction.

23. The Going Private Transaction is a business combination subject to Rule 61-501. A going private transaction is an extraordinary transaction involving the end of the public life of an issuer where a shareholder's interest in the issuer may be expropriated without that shareholder's consent. These types of transactions — particularly those involving insiders — warrant the highest degree of vigilance from the Commission. There is an inherent conflict of interest and information advantage in such a transaction. That inherent conflict is exacerbated in this case given the nature and extent of the Insiders' interests, and the need to safeguard the interests of minority shareholders is even greater. As the Commission observed in *Re Sears Canada Inc.*, "[i]t is understandable that all bidders, including inside bidders, will want to successfully complete their bid at the lowest price reasonably possible in the circumstances. In fact, it is to be expected that parties will act rationally and in their own economic interests. For this very reason, minority shareholders cannot be expected to look at the insider making the bid to protect their rights and interests."[2]

24. Part 8 of Rule 61-501 operates as a key procedural safeguard to protect the interests of minority shareholders in the context of a going private transaction. It provides for the determination of who can vote with the minority and reflects the guiding principle that, to the extent possible the minority voting on the merits of the business combination should exclude shareholders whose independence from the controlling shareholder has been or may be compromised.

25. Subsection 8.1(2) of Rule 61-501 provides that in determining minority approval for a business combination, an issuer shall exclude the votes attached to affected securities that, to the knowledge of the issuer or any interested party or their respective directors or senior officers, after a reasonable inquiry, are beneficially owned or over which control or direction is exercised by, among other persons, an interested party or a "joint actor" with an interested party.

26. The issue of whether parties are joint actors, such that they should be excluded from the minority, is a question of fact.[3] Resolution of this question depends on the circumstances of the

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[2] *Re Sears Canada Inc.*, August 8, 2006 decision of the Commission, available on the Commission website ("*Sears*").

[3] Section 1.1 of Rule 61-501 provides in relevant part that:

> "Joint actors", when used to describe the relationship among two or more entities, means persons or companies "acting jointly or in concert" as defined in Section 91 of the Act, with necessary modifications where the term is used in the context of a transaction that is not a take over bid..."

case. This approach to the term "joint actor" was reinforced by the Commission when it first proposed the term, stating that users of the Rule should not look solely to the Act for the interpretation of the term.[4] The Commission should also have regard to the scheme and object of the Act and the intention of the legislature. In short, the Commission should give a broad, purposive interpretation to the term joint actor, as it might apply in a particular case. This purpose is the protection of the rights of minority shareholders through ensuring that voting in respect of a business combination is based on the merits of that proposal.

27. In this respect, in responding to comments received on the proposed January 2004 amendments to Rule 61-501, Staff of the Commission stated:

> In the case of a business combination, where a majority of security holders can force the minority to relinquish their securities against will, **it is important that this majority be comprised, to the extent possible, of security holders who are voting solely on the merits of the business combination.**[5] (Emphasis added.)

28. And, in its Notice of Amendments to Rule 61-501, in a passage cited with approval in the recent *Sears* case, the Commission elaborated on Staff's comments and the expectation that those voting be as free from conflicts as possible.

> ...when a majority vote of security holders can force the minority to relinquish their securities against their will at a price they may regard as inadequate, **it is reasonable to require that the security holders comprising the majority be as free from conflicts as possible so that their interests are aligned with those of the minority.**[6] (Emphasis added.)

For its part, Subsection 91(1) of the *Securities Act* (the "Act") provides in relevant part that:

> ...it is a question of fact as to whether a person or company is acting jointly or in concert with an offeror and, without limiting the generality of the foregoing, the following shall be presumed to be acting jointly or in concert with an offeror:
>
> 1. Every person or company who, as a result of any agreement, commitment or understanding, whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, acquires or offers to acquire securities of the issuer of the same class as those subject to the offer to acquire.
>
> 2. Every person or company who, as a result of any agreement, commitment or understanding, whether formal or informal, with the offeror or with any other person or company acting jointly or in concert with the offeror, intends to exercise jointly or in concert with the offeror any voting rights attaching to any securities of the offeree issuer. (Emphasis added.)

[4] *Request for Comments, OSC Rule 61-501 - Insiders Bids, Issuer Bids, Business Combinations and Related Party Transactions*, (2003), 26 O.S.C.B. 1827 at 1836

[5] *Notice of Proposed Amendments to Rule 61-501 - Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions and Companion Policy 61-501CP* (2004), 27 O.S.C.B. 550 at 566

[6] *Notice of Amendments to Rule 61-501* (2004), 27 O.S.C.B. 4483 at 4486.

29. Similarly, in Delaware, the presence of a "majority of the minority" minimum on a tender condition in a going private transaction plays an important role in whether the Court will engage in a stringent entire fairness review or a lesser standard of review. Vice Chancellor Strine of the Court of Chancery of Delaware stated the following in the context of defining the minority:

> Requiring the minority to be exclusive of stock holders whose independence from the controlling stock holder is compromised is the better legal rule (and result).[7]

30. Part 8 of Rule 51-501 presumes that the interests of security holders acting jointly with an interested party are aligned with that party and in potential conflict with the interested minority shareholders and that the independence of a joint actor may be compromised by its relationship with the interested party. Here, in the case of the supporting parties this concern is directly engaged given the supporting parties own interests, and the fact that they have aligned their interests with the Insiders. Consequently, the interests of the Support Agreement counterparties diverge from those of the minority shareholders, and their vote should not determine the result of the Going Private Transaction for the other minority shareholders.

D. Deal Protection Measures

31. A support agreement that is in the nature of a hard lock-up agreement is not, *per se*, improper. The Support Agreements entered into by the Insiders are, however, in the nature of an absolute lock-up: they guarantee for the Insiders the success of their Going Private Transaction. They not merely prohibit a successful auction for Sterling, they prohibit the success of any process to maximize shareholder value without the consent of the Insiders.

32. Most significantly, SCI Acquisition has entered into the Support Agreements not as outsiders making an arms-length offer for Sterling, but as Insiders of the corporation who are conflicted with respect to the Going Private Transaction. The nature and extent of the Insiders' conflicts is evident from the discussion in Part B, above. In this context, the Support Agreements are being utilized as deal protection measures by the Insiders. By gaining complete control over the shares of the Support Agreement counterparties, they are able to discourage any other offers from emerging, and guarantee *ab initio* that a superior proposal cannot succeed without their consent.

33. While the arrangement agreement contains a fiduciary out provision for Sterling, that provision is ineffectual in light of the nature of the Support Agreements. That is so because, even if the Special Committee determined that a new offer was a superior proposal, that superior proposal cannot succeed without the consent of the Insiders. The Insiders have, in their capacity as bidders, rendered the fiduciary out provision redundant.

34. The Delaware Supreme Court considered voting agreements that operated as an absolute lock-up in *Omnicare*. In that case, two directors of the target company entered into voting

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[7] *Pure Resources, Inc. (Re)*, 909 A. 2D 421 (Del. Ch. 2002) at 24

agreements, as shareholders, with one of two arms-length bidders. The voting agreements operated as an absolute lock-up and, together with a merger agreement without a fiduciary out provision, guaranteed the success of the favoured bidder over any other. The majority in *Omnicare* observed that the voting agreements were the lynchpin of the deal protection measures implemented by the board, and that they were "coercive" and "preclusive". They were coercive because they were aimed at forcing upon the shareholders a management-sponsored offer, and they were preclusive because they fundamentally restricted the ability of another offer to be accepted.

35. The Support Agreements work in a similar fashion to the impugned voting agreements in *Omnicare.* The Support Agreements are coercive in that they are aimed at forcing on Sterling's shareholders the offer made by the Insiders, and they are preclusive because they fundamentally restrict the ability of another offer to be accepted by Sterling's shareholders. The Supreme Court of Delaware's conclusion in *Omnicare* is applicable here: the Support Agreements are "preclusive and coercive in the sense that they accomplished a *fait accompli.*"

36. As deal protection measures, the Support Agreements offend the principles animating National Policy 62-202: "Take-Over Bids -- Defensive Tactics."[8] NP 62-202 states that "the Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights." NP 62-202 bases this policy on the following principles:

> The Canadian securities regulatory authorities consider that unrestricted auctions produce the most desirable results in take-over bids and they are reluctant to intervene in contested bids. However, they will take appropriate action if they become aware of defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid.

37. NP 62-202 concludes that "[t]actics that are likely to deny or limit severely the ability of the shareholders to respond to a take-over bid or a competing bid may result in action by the Canadian securities regulatory authorities." The principles animating NP 62-202 are directly applicable to the Support Agreements and the Going Private Transaction. In the circumstances of the Going Private Transaction, the Support Agreements are a tactic that aims to protect the Insiders' deal. They deny or limit severely the ability of minority shareholders to respond to a competing offer for Sterling, including a takeover bid or other arrangement proposal.

38. As deal protection measures, the Support Agreements work in concert with the large break fee and the large change of control payments, both of which are payable to the Insiders in the event that another offer is accepted.

39. With respect the break fee in particular, it protects the Insiders by providing compensation, but it also protects the Insiders' deal because it increases the cost of a transaction

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[8] (1997), 20 O.S.C.B. 3525 ("NP 62-202").

to a rival by requiring the rival to top the previous bid by at least the amount of the break fee. The concern with break fees as deal protection measures is that while they protect one deal, they may also deter other, better deals from emerging. It is therefore possible that break fees, like other deal protection measures or defensive tactics generally, can be misused and can operate to preclude a better offer from emerging.

40. The Five Year Review Committee considered the use of break fees and concluded that, while there was no clear rule respecting the size of break fees, there are circumstances in which it is appropriate for the Commission to exercise its public interest jurisdiction in respect of a break fee:

> Break fees are not in and of themselves offensive; it depends upon the purpose for which they are being used. The Commission can, and should, exercise its public interest jurisdiction in appropriate circumstances. Although we are of the view that there may be situations where, based on the facts surrounding the negotiation of a particular break fee, the Commission's public interest jurisdiction may be engaged, we do not believe that every use of break fees should be subject to a single regulatory standard.[9]

41. In *CW Shareholdings Inc. v. WIC Western International Communications Inc.*, the Court identified a three-part test to consider the reasonableness of break fees. Break fees will be reasonable where:

(a) they are necessary to induce a competing bid to come forward;

(b) the competing bid represents a better value for the shareholders; and

(c) "the break fee represents a reasonable commercial balance between its potential negative effect as an auction inhibitor and its potential positive effect as an auction stimulator".[10]

42. In this case, the 4.6% break fee fails to meet this test. There is no indication in the Circular that the break fee was necessary to induce the Insiders' bid, and the break fee of 4.6% is unreasonably high by reference to acceptable levels; for example, the break fee approved by the Court in *CW Shareholdings* (where there were competing offers) was 2.6%. The large break fee in this case operates, together with the Support Agreements, as an "auction inhibitor" to protect the Insiders' offer, and not an "auction stimulator."

E. The Public Interest Jurisdiction

43. The Applicants submit that the Support Agreement counterparties and the Insiders are joint actors. In addition, the Support Agreements are being utilized as deal protection measures, the effect of which is to discourage other offers and to prevent a better offer for Sterling from

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[9] *Five Year Review Committee Final Report: Reviewing the Securities Act (Ontario),* (March 21, 2003) at §18.3.

[10] (1998), 39 O.R. 3d 755 at para. 51 (S.C.J.) ("*CW Shareholdings*").

succeeding. On either basis, the Support Agreements engage the Commission's public interest jurisdiction and warrant intervention in the Going Private Transaction.

44. Section 127 of the Act creates a very broad public interest jurisdiction. Under s. 127 of the Act, the Commission may make an order if in its opinion it is in the public interest to do so. An order made under s. 127 may also be subject to such terms and conditions as the Commission may impose, as set out in s. 127(2).

45. The Supreme Court of Canada dealt with the nature of the s. 127 jurisdiction in *Committee for the Equal Treatment of Asbestos Minority Shareholders. v. Ontario (Securities Commission).*[11] The Supreme Court confirmed the breadth of the public interest jurisdiction:

> Section 127(1) of the Act provides the OSC with the jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. The legislature clearly intended that the OSC have a very wide discretion in such matters. The permissive language of s. 127(1) expresses an intent to leave it for the OSC to determine whether and how to intervene in a particular case.

46. The exercise of the public interest jurisdiction does not require a breach of the Act, as established by the Commission in *Canadian Tire Corp.*,[12] and confirmed by the Courts on appeal. In *Canadian Tire Corp.,* the Commission also set out the circumstances in which it would exercise its public interest jurisdiction in the absence of a breach:

> There are ... situations which call for regulatory intervention to prevent an abusive transaction that will have a deleterious effect on a class of investors in particular, or on the capital markets in general. In those cases, the Commission would not be acting in accordance with the power and responsibility vested in it by the Legislature if it did not use its cease trade power under section 123.
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> * * * *
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> ... the Commission should act to restrain a transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the Act, the regulations or a policy statement. Such occasions may be rare, but the power is there in section 123 and it ought to be used in appropriate circumstances.

47. In *Sears*, the Commission held that even if the support agreements in question in that case had not provided a collateral benefit within the meaning of the Act, there would nonetheless have

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[11] [2001] 2 S.C.R. 132.

[12] (1987), 10 O.S.C.B. 857.

been grounds for intervention on the basis that the support agreements were contrary to the public interest. In this case, even if the Support Agreement counterparties are not joint actors within the meaning of Rule 61-501 and the Act, there is still a basis for the Commission to intervene and exercise its public interest jurisdiction. For the reasons set out above, the Going Private Transaction is a transaction that requires the intervention of the Commission, and the exercise of its public interest jurisdiction.

E. Relief Requested

48. The Applicants request the following relief from the Commission pursuant to s. 127(1) and (2) of the Act:

(a) an order cease trading the Going Private Transaction unless:

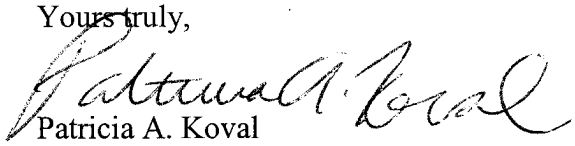
(i) the Going Private Transaction is approved by a majority of the minority with the common shares and other securities controlled by the Support Agreement counterparties not counted as part of the minority; and

(ii) there is appropriate public disclosure reasonably in advance of the shareholders meeting of the majority of the minority approval requirement, the exclusion from the minority of the common shares and other securities controlled by the Support Agreement counterparties, and the reason for that exclusion; and

(b) such other orders as counsel may request and the Commission thinks fit.

49. A cheque in respect of the application fee is enclosed.

Yours truly,



Patricia A. Koval

c: Naizam Kanji/Erin O'Donovan
Ontario Securities Commission

Richard Sutin
Ogilvy Renault LLP (Counsel to the Special Committee)

Stephen Infuso
Fogler, Rubinoff LLP (Counsel to Sterling Centrecorp Inc.)

Eliot Kolers
Stikeman Elliott LLP (Counsel to SCI Acquisition Inc.)

James C. Tory, Crawford Smith & Andrew Gray
Torys LLP