IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S. 5, as amended

AND

IN THE MATTER OF
NEO MATERIAL TECHNOLOGIES INC. AND PALA INVESTMENTS HOLDINGS LIMITED AND ITS WHOLLY-OWNED SUBSIDIARY 0833824 B.C. LTD.

MEMORANDUM OF FACT AND LAW OF PALA INVESTMENTS HOLDINGS LIMITED AND 0833824 B.C. LTD.

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A. RELIEF REQUESTED

1. In this application, Pala Investments Holdings Limited ("Pala") and 08338254 B.C. Ltd. ("083") seek an order pursuant to section 127 of the Securities Act (Ontario) (the "Act") in connection with the offer by 083 to purchase for cash up to a maximum of 23 million (or approximately 20%) of the outstanding common shares of Neo Material Technologies Inc. ("Neo") not already held by 083 and its affiliates at a price of $1.40 for each common share (the "Pala Offer").

2. In particular, 083 and Pala seek a permanent order pursuant to subsection 127(1) of the Act that:

(a) trading cease in respect of any securities issued, or to be issued, under or in connection with the First Shareholder Rights Plan (as defined below); and

(b) in the event the Second Shareholder Rights Plan (as defined below) is confirmed by Neo's shareholders at the annual and special meeting of shareholders scheduled for April 24, 2009 ("Neo Special Meeting"), that trading cease in respect of any securities issued, or to be issued, under or in connection with the Second Shareholder Rights Plan and the First Shareholder Rights Plan (collectively, the "Rights Plans").

3. The following are Pala and 083's initial submissions as to why the Ontario Securities Commission (or the "Commission") should grant the requested relief. Pala and 083 are reserving their final submissions until after the Neo Special Meeting.

4. These submissions rely upon the evidence contained in the affidavit of Jan Castro, a director of 083, and the Managing Director of Pala Investments AG, the exclusive advisor to Pala and the affidavit of Dr. Paul Halpern, Toronto Stock Exchange Chair in Capital Markets and Professor of Finance at the Rotman School of Management of the University of Toronto. The facts set out below are taken from the Castro affidavit and attached exhibits.

B. OVERVIEW OF PALA AND 083'S POSITION

5. Pala and 083 submit that it is in the public interest to cease trade the First Shareholder Rights Plan and, if confirmed at the Neo Special Meeting, the Second Shareholder Rights Plan,[1] for the following reasons:

(a) Canadian securities law, which permits partial bids, dictates that the ultimate decision to accept or reject an offer to acquire shares, such as the Pala Offer, should be made by each individual shareholder and not by the directors or management of a target company. The continuation of the Rights Plans would have the effect of denying Neo's shareholders one of their inherent rights of ownership, that is, to decide for themselves whether or not to tender to the Pala Offer.

(b) In the circumstances, the Rights Plans do not serve either of the central purposes of shareholder rights plans under Canadian securities law: to give a board more time to find an alternative value enhancing transaction and to ensure the equal treatment of shareholders. There is no question that Neo's shareholders will have been given sufficient time to consider the Pala Offer and, in any event, Neo's directors are not searching for any alternative value-enhancing transactions. The Pala Offer, which is made to all shareholders at a 27% premium to the closing price prior to announcement of the Pala Offer, is fair and equitable. Further, it is not in the best interests of shareholders to deny them the opportunity to tender their shares to a bid that represents a significant premium.

(c) The Pala Offer is not coercive. As a financial investor, Pala seeks to add value to Neo and, therefore, there is no reason to expect that a discount to Neo's share value will result from Pala's acquisition. In addition, the Neo shares will continue to have the liquidity that they currently enjoy.

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[1] The Second Shareholder Rights Plan took effect on February 12, 2009; however, by its terms, its continued operation is subject to confirmation by Neo's shareholders at the Neo Special Meeting. As a result, if it is not confirmed on April 24, 2009, it provides no impediment to the Pala Offer. The TSX has indicated that it will defer its decision on whether to approve of the Second Shareholder Rights Plan until the earlier of a decision of the Ontario Securities Commission in respect of the matter, or shareholder approval.

(d) The Pala Offer is not part of a strategy to effect a creeping take-over of Neo.[2] As a financial investor, Pala would like to increase its ownership to 40% but not beyond, and sees value in Neo remaining as a Canadian public corporation.

(e) The Minimum Tender Condition (as defined below) or the "majority of the minority" requirement in the Rights Plans serves no purpose other than to create an impediment to bids. Although the Minimum Tender Condition in the First Shareholder Rights Plan nominally permits partial bids, it actually creates perverse circumstances that work to limit shareholders' rights in the context of a partial bid. It is therefore contrary to Neo shareholders' best interests and against the public interest.

(f) The Second Shareholder Rights Plan is a tactical defensive rights plan, or "pill", made in direct response to the Pala Offer. It is identical to the First Shareholder Rights Plan except that it prohibits partial bids entirely. Even if the Second Shareholder Rights Plan receives shareholder approval, it too is bid-inhibiting and serves no purpose other than to ward off all partial bids and further entrench management and the current board. The Second Shareholder Rights Plan, therefore, is contrary to Neo shareholders' best interests and against the public interest.

(g) The Pala Offer was scheduled to initially expire on April 27, 2009. However, Pala agrees to extend the expiry date to May 7, 2009. In addition, in the event the Minimum Tender Condition is met within this timeframe (and if the Rights Plans have not yet been cease traded), Pala will announce that the Minimum Tender Condition has been met and will extend the Pala Offer for another 10 days

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[2] In fact, so long as Pala has increased its ownership of Neo's shares to 30%, then Pala would be willing to enter into a standstill agreement with Neo, or provide an undertaking to the Ontario Securities Commission, to the effect that it will not increase its ownership in Neo beyond 40% of Neo's common shares in any fashion for a 12 month period following the completion of the Pala Offer, except that Pala may participate (*pro rata* or otherwise) in any future Neo financings. In addition, the standstill would provide for a "spring event" (i.e. the automatic termination of the standstill or undertaking) in the event that Neo announces (i) another transaction involving the acquisition by a third party of (x) some or all of Neo's common shares or (y) substantially all of the assets of Neo, whether held directly or indirectly or (ii) any other form of merger, amalgamation, consolidation, or similar transaction involving Neo or any of its subsidiaries. In addition, the standstill would contemplate that Neo's board would be able to waive the application of the standstill at any time consistent with the exercise of its fiduciary duties.

following that announcement. Otherwise, there is no assurance that the Pala Offer will be open beyond May 7, 2009.

(h) If the Rights Plans are cease traded while the Pala Offer is still open, and in order to provide Neo shareholders with a second opportunity to tender their shares to the Pala Offer, Pala undertakes to announce to Neo's shareholders, on the day after the Rights Plans are ceased traded, the number of shares that have been tendered to the bid to that point in time and to then extend the Pala Offer for an additional 10 days or until May 7, 2009, whichever is later.

(i) After the Pala Offer was launched, Neo disclosed for the first time an additional roadblock to the Pala Offer, (and indeed, to any bid), in the form of change of control provisions in certain key employment agreements that could trigger payments of approximately $5 million in the event that any person acquires beneficial ownership of the low threshold of 30% of Neo's common shares. It is unclear whether these provisions were put in place in response to the Pala Offer or have been in place for some time, without having been adequately disclosed to Neo's shareholders. This low threshold, however, particularly if adopted in response to the Pala Offer, serves to entrench management, calls into question the motives of Neo's board, and is, therefore, of great cause for concern.[3]

6. In these circumstances, the public interest dictates that the Rights Plans be ceased traded and that Neo shareholders be given the opportunity to exercise their inherent right of ownership to decide for themselves whether or not to tender to the Pala Offer.

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[3] Further, pursuant to the terms of these employment agreements, these payments may also be triggered in the event that there is a change in the composition of the board occurring at a single meeting of the shareholders such that members of the board prior to such meeting cease to constitute a majority of the board thereafter. This "employee friendly" provision is further indicative of a board that is inclined to take measures to entrench itself.

C. FACTS

Pala Investments Holdings Limited

7. Pala is a U.S. $1.0 billion multi-strategy investment company launched in 2006 and registered in Jersey, Channel Islands. It has a particular focus on mining and resource companies in both developed and emerging markets. Pala is advised on an exclusive basis by Pala Investments AG.

8. Pala's objective, as a financial instead of a strategic investor, is to invest in companies to achieve significant long-term appreciation on invested capital. It focuses on making cornerstone shareholder investments in public companies, or traditional private equity investments in public companies in the mining and natural resources sectors. Pala's goal is to be long-term partners with, and a source of growth capital for, boards and management in the development and implementation of growth plans.

9. Pala has worked successfully in the past with a number of boards and management teams to advance growth strategies and to deliver greater value to shareholders. Two such examples are Anatolia Minerals Development Limited, a TSX-listed company with operations in Turkey ("Anatolia"), and Avoca Resources Limited, an Australian Stock Exchange-listed company with operations in Australia ("Avoca"). In both instances, Pala became a cornerstone shareholder and was invited by each of Anatolia and Avoca to participate on their boards. As a board member, Pala uses its considerable expertise and knowledge to assist companies in actively pursuing growth opportunities and exploring strategic options and potential partnerships. Pala also proved to be a valuable source of financing for both Anatolia and Avoca, as a cornerstone investor in both secondary equity and debt offerings. Testimonials as to the benefits of Pala's involvement as a cornerstone shareholder and/or board member, including Anatolia, Avoca and other companies, are available at www.pala.com\testimonials.html.

10. At the date of the Pala Offer, Pala had beneficial ownership of, or exercised control or direction over, 23,640,000 common shares of Neo, representing approximately 20.65% of the 114,487,514 outstanding common shares of Neo. Since that time, Pala has not increased its interest in Neo.

08338254 B.C. Ltd.

11. The offeror, 083, was incorporated on August 29, 2008 under the laws of the Province of British Columbia. It was incorporated for the purpose of acquiring or investing in Canadian businesses, and as of the date of this application, has made no such investment or acquisition. 083's head office and principal place of business is located in the City of Vancouver in the Province of British Columbia.

Neo Material Technologies Inc.

12. Neo is a public corporation continued under the laws of Canada with its principal office located in the City of Toronto in the Province of Ontario. Its shares are listed and posted for trading on the TSX under the symbol "NEM". It is widely-held, with high volume and high liquidity.[4]

13. Neo's public disclosure indicates that it is a producer, processor and developer of neodymium-iron-boron magnetic powders, rare earths and zirconium based engineered materials and applications through its Magnequench and AMR Performance Materials business divisions. Neo is headquartered in the City of Toronto in the Province of Ontario and has approximately 1,300 employees in 15 locations, across 10 countries.

The First Shareholder Rights Plan

14. Neo has a shareholder rights plan dated as of February 5, 2004 (the "First Shareholder Rights Plan").[5] While the First Shareholder Rights Plan nominally allows for partial bids, it does so in a very restricted fashion.

15. The First Shareholder Rights Plan was effective immediately upon approval by Neo's board on February 5, 2004, subject to receipt of all regulatory approvals, including shareholder approval. The necessary shareholder approval was received at the annual and special meeting of

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[4] In the Directors' Circular, Neo refers to Pala's comment in the Pala Offer that Neo shares "have limited trading activity on the TSX". Neo has evidently taken Pala's comment out of context. The comment in the Pala Offer was to the effect that it provides Neo shareholders with immediate liquidity, at a significant premium, for a larger volume of shares in the aggregate than what Neo shareholders would have enjoyed in the absence of the Pala Offer.

[5] Exhibit "A" to the Castro affidavit.

shareholders held June 28, 2004. The First Shareholder Rights Plan was reconfirmed at the annual and special meeting of shareholders held April 18, 2007. Accordingly, it has now been almost two years since the First Shareholder Rights Plan has been considered by Neo's shareholders.[6]

16. The management information circular dated May 11, 2004 (the "May 2004 Circular"),[7] in connection with the confirmation of the First Shareholder Rights Plan, and the management information circular dated March 13, 2007 (the "March 2007 Circular")[8] in connection with its re-confirmation, provide the same summary description of the First Shareholder Rights Plan. The purpose of the First Shareholder Rights Plan is stated by Neo to be:

> [T]o give adequate time for shareholders of the Corporation to properly assess the merits of a bid without undue pressure and to allow competing bids to emerge. The Rights Plan is designed to give the Board time to consider alternatives to allow shareholders to receive full and fair value for their Common Shares. The adoption of the Rights Plan does not affect the duty of the Board to act honestly and in good faith with a view to the best interests of the Corporation and its shareholders.

17. The purpose of the First Shareholder Rights Plan, clearly, is to provide the board time to consider any bid and to consider or pursue alternatives that might further enhance shareholder value. Notably, in the case of the Pala Offer, Neo's shareholders will have had at least 70 days to consider the Offer. Moreover, there is no other bid or value-maximizing alternative

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[6] Since that meeting, a number of significant changes have taken place in the economy and general market outlook. These macroeconomic changes, coupled with changes taking place at Neo (including the upcoming expiration of several of Neo's key patents), have adversely impacted Neo's outlook and prospects, such that the views expressed by its shareholders in April 2007 in respect of the First Shareholders Rights Plan do not necessarily reflect the views the shareholders would hold today, particularly in the face of the Pala Offer. Equally important, Neo's shares have turned over 2.5 times between April 2007 and February 2009 such that its likely that the shareholder base has changed significantly since the First Shareholder Rights Plan was last approved. As noted, Neo's board has refused to place the First Shareholder Rights Plan before its shareholders at the Neo Special Meeting for reconsideration. In Neo's submission, given that the stated purpose of the First Shareholder Rights Plan (i.e. to give adequate time to properly assess the merits of a bid without undue pressure and to allow competing bids to emerge) is no longer being met, it is time for the First Shareholder Rights Plan to go. In that respect, current shareholder approval, while one factor for consideration as to the continued operation of the rights plan, is not the determining factor. The motives behind the refusal to give Neo's shareholders the opportunity to vote against the First Shareholder Rights Plan, however, are discussed in more detail below.

[7] Exhibit "B" to the Castro affidavit.

[8] Exhibit "C" to the Castro affidavit.

transaction on the horizon, and Neo's directors have not taken any steps to entice one, nor have they undertaken any other effort toward maximizing value for Neo's shareholders. On that basis alone, the time has come for the First Shareholder Rights Plan to go.

18. The First Shareholder Rights Plan provides for a massive dilution of shares if a person becomes a beneficial owner of 20% or more of the voting shares unless the acquisition is made through an exempt transaction such as a "Permitted Bid."

19. The May 2004 Circular and the March 2007 Circular discuss a Permitted Bid follows:

> ... A potential bidder can avoid the dilutive features of the Rights Plan by making a bid that conforms to the requirements of a Permitted Bid.
>
> To qualify as a Permitted Bid, a take-over must be made to all holders of Common Shares and must be open for 60 days after the bid is made. If at least 50% of the Common Shares held by persons independent of the bidder are deposited or tendered pursuant to the bid and not withdrawn, the bidder may take up and pay for such shares. The bid must then remain open for a further 10 clear business days on the same terms.[9]
>
> The requirements of a Permitted Bid enable each shareholder to make two separate decisions. First, a shareholder will decide whether the bid or any competing bid is adequate on its own merits. In making this decision, the shareholder need not be influenced by the likelihood that the bid will succeed. If there is sufficient support such that at least 50% of the independently held Common Shares have been tendered, a shareholder who has not already tendered to that bid will have a further 10 business days to decide whether to tender to the bid.

20. To qualify as a Permitted Bid, therefore, a minimum tender condition must be met (among other conditions). This condition requires that at least 50% of the outstanding shares held by shareholders other than the bidder (or entities related to the bidder) must be tendered and not withdrawn in order for the bidder to take up and pay for any of the shares deposited under the offer (the "Minimum Tender Condition"). As a result, if 100% of Neo shareholders tender their shares to the Pala Offer, then approximately 25% of the tendered shares will be taken up by Pala. If, on the other hand, the Minimum Tender Condition is just met, then approximately 50% of the tendered shares will be taken up by Pala.

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[9] Note that the First Shareholder Rights Plan refers to 10 calendar days as opposed to 10 business days.

21. As described below, Pala submits that the Minimum Tender Condition, particularly in the context of a partial bid, serves no useful purpose and produces absurd results. In effect, it forces the long-term shareholder, who wants to remain invested in Neo in order to garner the benefits anticipated to result from Pala's increased ownership, to tender its shares to ensure that the Minimum Tender Condition will be met. Conversely, it forces the short-term shareholder, who wants to sell its shares completely, to remain partially invested due to the proration that will arise from the long-term shareholder who feels compelled to tender its shares.

Background to the Pala Offer

22. Pala became an investor in Neo on July 26, 2007, to gain exposure to a leading producer and processor of rare earth magnetic powders and engineered materials. Since that time, Pala has periodically increased its investment in Neo, such that on October 16, 2008, following a recently announced normal course issuer bid, Pala held or exercised control or direction over 23,640,600 shares, representing approximately 20.46% of the 115,521,000 outstanding shares.

23. As part of its ongoing investment management process, Pala regularly reviews the performance, strategy and outlook of its investment in Neo. Pala also attempts to communicate with Neo's management and has made site visits in the past to discuss Neo's financial and operational results, competitors, market environment and strategic options.

24. In Pala's view, Neo's management has done an excellent job in creating a company with the potential for growth over the longer-term. That said, Pala has extensive experience in the natural resource sector and in working successfully with management teams, as a financial investor and strategic partner, to develop and implement growth plans. Accordingly, and as a result of Pala's belief that Neo must expand and diversify its business now, Pala began to consider the possibility of increasing its ownership interest in Neo and adding long-term value to Neo by becoming a cornerstone shareholder.

25. On February 1, 2009, Pala representatives met with Neo representatives for the purpose of discussing Neo's business and various strategic alternatives, including the possibility that Pala may determine to increase its ownership interest in Neo in the future. At this time, Neo seemed disinterested in this possibility.

26. On February 8, 2009, Pala representatives followed-up with Neo representatives for the purpose of continuing their discussion about strategic alternatives. Neo advised that it intended to appoint legal and financial advisors to consider the matters that had been discussed on February 1, 2009, and that Neo's board would not be in a position to meet with Pala again until February 23, 2009 at the earliest.

Pala's announcement of the intention to make the Pala Offer

27. On February 9, 2009 Pala issued a press release,[10] which was followed by a letter to Neo's management, announcing that, through an indirect wholly-owned subsidiary, it intended to make a premium offer of $1.40 per share in cash to acquire up to a maximum of 23 million of the outstanding common shares of Neo, representing approximately 20% of Neo's shares. This is the offer that was, in fact, launched on February 25, 2009.

28. The Pala Offer represents a 27% premium over the closing price of the Neo common shares on the TSX on February 6, 2009, the last trading day prior to the announcement by Pala of its intention to make the Pala Offer, and a 24% premium over the volume-weighted average trading price of Neo common shares on the TSX during the last 20 days on which it traded prior to such announcement.

29. Pursuant to the terms of the Pala Offer, if more than 23 million of the outstanding Neo shares are deposited, the shares to be purchased from each depositing shareholder will be taken up on a *pro rata* basis.

30. The Pala Offer, if completed, would bring Pala's aggregate ownership interest to approximately 40% of the issued and outstanding Neo shares.[11] Pala considers this to be an appropriate and desirable level of investment for the following reasons:

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[10] Exhibit "D" to the Castro affidavit.

[11] While, for the reasons expressed, Pala would like to increase its ownership interest to 40% at a maximum, Pala has indicated that if the Minimum Tender Condition is not applicable, then Pala will purchase any shares that are tendered to its bid up to a maximum of 23 million. In that situation and depending on whether shareholders think that the premium is attractive, Pala could end up with a level of ownership well below the 40% that it would like to obtain at this time. As a financial investor, however, Pala is not looking to exercise control over Neo and so would be satisfied with this outcome. Further, if Pala is able to increase its ownership to 30% in this fashion, then it would be willing to enter into the standstill agreement referred to above.

(a) As a financial investor, Pala wants to increase its ownership interest to this level prior to committing its significant resources to improving Neo's long-term outlook. As indicated in Pala's February 9, 2009 press release, Pala is of the view that Neo is at a crossroads in its development and now is the appropriate time for Pala to make this increased investment. In particular, since the majority of Neo's earnings are generated through key patents set to expire in 2014, Pala believes that Neo needs to expand, diversify and develop a growth strategy over the next three to four years. As a cornerstone shareholder with a greater stake in Neo's future, Pala believes its involvement would add to Neo's longer term potential.[12]

(b) At the same time, Pala believes that its ownership in Neo will be maximized if Neo remains as a Canadian public company. Pala believes this to be the case because:

(i) with a liquid market for its securities, Neo's shares can be used as currency for future acquisitions;

(ii) Neo will be able to access the public markets for additional capital to fund future growth opportunities; and

(iii) Neo will retain a heightened level of credibility and prominence in its dealings with foreign governments in the jurisdictions within which it currently does business.

31. The Pala Offer was structured to comply with the Permitted Bid definition contained in the First Shareholder Rights Plan by remaining open for at least 60 days, and, in the event the Minimum Tender Condition is met, then the Pala Offer will remain open for another 10 days from the date of the announcement that 50% had been tendered. At the same time, the Pala Offer

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[12] To date, Neo has been reluctant to engage in discussions with Pala regarding the strategic direction and other matters related to Pala's business. In the event that Pala increases its ownership in Neo, Pala is hopeful that the Neo's board will be more willing to engage in these discussions.

was made explicitly subject to Pala's right to apply to have the First Shareholder Rights Plan cease traded.[13]

32. In a letter to Neo's management dated February 9, 2009,[14] Pala asked Neo to waive the Minimum Tender Condition contained in the First Shareholder Rights Plan. As Pala pointed out in this letter, the continued application of the First Shareholder Rights Plan constituted an obstacle to shareholders' individual choice in connection with the Pala Offer. The prejudicial effect to Neo shareholders of the Minimum Tender Condition in the context of the Pala Offer was highlighted. Waiving the condition would take into account the interests of the short-term shareholder desiring immediate liquidity, as well as the long-term shareholder preferring to remain fully invested in a company strengthened by the addition of a fully invested strategic partner.

33. Neo did not respond to Pala's request that it waive the Minimum Tender Condition. Rather, it took the steps described below.

Neo's response to the announcement – the tactical Second Shareholder Rights Plan

34. On February 12, 2009, in response to Pala's announced intention to make the Offer, Neo issued a press release[15] advising that its board, after "preliminary consultations with its financial and legal advisors", had approved the adoption, without shareholder approval, of a new shareholder rights plan (the "Second Shareholder Rights Plan").[16] The press release states that the Second Shareholder Rights Plan "is in addition to" the First Shareholder Rights Plan. It describes the second plan as being "substantially similar to the First Shareholder Rights Plan,

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[13] In recognition of the benefit to Neo's shareholders arising from having a second opportunity to tender to the Pala Offer with information about the numbers of shares tendered to date, if the Rights Plans are cease traded while the Pala Offer is still open, Pala undertakes to announce to Neo's shareholders, on the day after the Rights Plans are ceased traded, the number of shares that have been tendered to the bid to that point and to then extend the Pala Offer for an additional 10 days or until May 7, 2009, whichever is later.

[14] Exhibit "E" to the Castro affidavit.

[15] Exhibit "F" to the Castro affidavit.

[16] Exhibit "G" to the Castro affidavit.

except that it requires that any take-over offer be made to all Neo shareholders for all of the shares." In other words, it prohibits the Pala Offer, and any other partial bid, from proceeding.

35. The press release states that the purpose of the Second Shareholder Rights Plan is:

> [T]o prevent the acquisition of control of, or a creeping takeover bid for, the Company by means of a partial bid. The [Second Shareholder Rights Plan] requires that any offer to acquire shares of the Company be made to all shareholders for all of their shares to ensure that all shareholders of the Company are treated equally and fairly in connection with any take-over bid for the Company. The [Second Shareholder Rights Plan] is being adopted to discourage discriminatory, coercive or unfair attempts to take over the Company.

36. The adoption of an overlapping rights plan in these circumstances is without precedent in Canada, and, as noted in Neo's own press release, the Second Shareholder Rights Plan was adopted without prior shareholder approval. The Second Shareholder Rights Plan is subject to confirmation by Neo's shareholders at the Neo Special Meeting. Neo's board adopted the Second Shareholder Rights Plan as a defensive tactic, and did so without making any effort to first contact Pala to discuss the Pala Offer (or, at that time, the intended offer). The unprecedented adoption of an overlapping rights plan coupled with other defensive tactics discussed below and the continued lack of any effort on the part of Neo's board to search out an alternative bid or other value-enhancing transaction, ought to be cause for concern to the shareholders and the Commission. These actions are indicative of a desire on the part of management to further entrench themselves and to deny shareholders the opportunity to tender to the Pala Offer as they see fit.

37. Notably, the effect of the Rights Plans is not to generate a better bid, but rather to deny Neo's shareholders the right to sell their shares in response to any offer, unless the Minimum Tender Condition is met. This requirement is highly questionable in light of current securities legislation, prior Commission decisions and National Policy 62-202. In addition, as discussed below, in the context of a partial bid (which would be a Permitted Bid under the First Shareholder Rights Plan), the Minimum Tender Condition produces perverse results that are patently unfair to Neo's shareholders.

Subsequent events

38. On February 17, 2009, Pala issued a press release[17] commenting on the unprecedented nature of Neo's response to the announcement of its intention to launch the Pala Offer. The press release noted that the effect of the Second Shareholder Rights Plan was to deny shareholders the right to decide for themselves whether to take advantage of the Pala Offer, constituted an attempt to circumvent the TSX requirement that amendments to shareholders rights plans be made only with the prior written consent of the TSX, and went against widely-accepted corporate governance guidelines published by shareholder advisory services that shareholders rights plan should not prohibit partial bids outright.

39. Also on February 17, 2009, counsel to Pala wrote to the TSX[18] to request that the TSX enforce compliance with the TSX Company Manual and require Neo to obtain the approval of the TSX prior to adopting the Second Shareholder Rights Plan.

40. By press release dated February 18, 2009,[19] Neo announced the TSX's decision to defer the approval of the Second Shareholder Rights Plan until the earlier of (i) a decision by the appropriate Canadian securities commission regarding the Second Shareholder Rights Plan; and (ii) shareholder ratification of the Second Shareholder Rights Plan.

41. On February 24, 2009 and again on March 6, 2009,[20] for the reasons referred to above, Pala wrote to Neo to request, pursuant to section 137 of the *Canada Business Corporations Act*, that Neo include a resolution in Neo's Special Meeting proxy to reconfirm the First Shareholders Rights Plan. Interestingly, on March 10, 2009,[21] Neo's board declined Pala's request and decided not to put the First Shareholder Rights Plan to shareholders at the Neo Special Meeting, thereby denying them the opportunity to vote against this plan.

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[17] Exhibit "H" to the Castro affidavit.

[18] Exhibit "I" to the Castro affidavit.

[19] Exhibit "J" to the Castro affidavit.

[20] Exhibit "K" to the Castro affidavit.

[21] Exhibit "L" to the Castro affidavit.

Formal launch of the Pala Offer

42. On February 25, 2009, Pala announced that it had formally launched the Pala Offer.[22] The press release states:[23]

> Pala's Offer provides an opportunity for Neo shareholders to gain liquidity now at a significant premium ... Pala is not seeking a majority interest in Neo and, in fact, is prepared to acquire whatever shares are tendered on a *pro rata* basis up to 23 million shares. Pala's Offer is not a creeping takeover, as Neo's board has attempted to characterize it, but rather a straightforward offer to allow interested shareholders to gain immediate liquidity at a premium.

43. The Pala Offer was scheduled to initially expire on April 27, 2009, but Pala has agreed to extend the expiry date to May 7, 2009. In addition, if the Minimum Tender Condition is met within this timeframe (and if the Rights Plans have not yet been cease traded), Pala will announce that the Minimum Tender Condition has been met and extend the Pala Offer for another 10 days following that announcement. Otherwise, there is no assurance that the Pala Offer will be open beyond May 7, 2009.

Neo's response to the Pala Offer

44. On February 26, 2009, Neo issued a press release[24] indicating that it had received the Pala Offer and asking its shareholders to wait for its board to make a recommendation before making a decision with respect to the Pala Offer.

45. On March 10, 2009, Neo issued a press release[25] announcing that, as detailed in a circular prepared by the board and dated March 9, 2009 (the "Directors' Circular")[26] its board had unanimously determined that the Pala Offer was inadequate from a financial point of view to the shareholders of Neo (other than Pala) and unanimously recommended that the Neo shareholders

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[22] Exhibit "M" to the Castro affidavit.

[23] Exhibit "N" to the Castro affidavit.

[24] Exhibit "O" to the Castro affidavit.

[25] Exhibit "P" to the Castro affidavit.

[26] Exhibit "Q" to the Castro affidavit.

reject the Pala Offer. Neo has given various reasons for recommending against tendering to the Pala Offer, and while Pala disagrees with those reasons and views the Pala Offer as a tremendous opportunity for interested Neo shareholders, Pala recognizes, unlike Neo, that it is ultimately for the shareholders to decide whether or not to tender to the Pala Offer.

46. Importantly, Neo's directors have not reacted to the Pala Offer in the manner that Neo's shareholders would have expected. Instead of taking advantage of the 70 day timeframe, Neo's board has not taken any steps to entice other bids or to seek out other value-enhancing alternative transactions that might benefit Neo's shareholders. Rather, it has put up roadblocks to the Pala Offer, and any other future partial offer, by adopting the tactical Second Shareholder Rights Plan, and by either making amendments to, or for the first time disclosing, the change of control provisions in certain key employment agreements (as discussed below).

The Neo Special Meeting Circular

47. On March 30, 2009, Neo filed its Notice of Annual and Special Meeting of the Shareholders and Management Information Circular (the "Neo Special Meeting Circular"),[27] along with its Annual Information Form and form of proxy, in connection with the Neo Special Meeting. In the Neo Special Meeting Circular, Neo discloses for the first time that certain key employment agreements contain change of control provisions that could trigger payments to executives of approximately $5 million in the event any person becomes the beneficial owner of more than 30% of Neo's common shares. This low threshold had not previously been disclosed by Neo.[28] Moreover, it is not apparent from Neo's disclosure when this provision was entered into and, in particular, whether it was entered into in direct response to the Pala Offer. Regardless, this provision has the effect of inhibiting bids and entrenching management. The *bona fides* and motives of Neo's board in connection with the Pala Offer must be closely scrutinized as a result.

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[27] Exhibit "R" to the Castro affidavit.

[28] See, for example, pages 17 - 20 of the Notice of Annual Meeting of the Shareholders of Neo Materials Technologies Inc. and Management Information Circular dated March 26, 2009 at Exhibit "S" to the Castro affidavit. Also, as noted above, these payments may also be triggered in the event that there is a change in the composition of the board occurring at a single meeting of the shareholders such that members of the board prior to such meeting cease to constitute a majority of the board thereafter.

48. The Neo Special Meeting Circular is equally surprising in another respect. On page 11, Neo states:

> It was the expressed intention of the Board that the existing Rights Plan would prohibit the acquisition of more than 20% of the Common Shares in such a manner (which includes a partial bid). In the Board's view, the existing Rights Plan does not effectively prohibit partial offers as it was intended to do and the adoption of the New Rights Plan is indeed to *give effect to the intention of the Board and Shareholders by prohibiting partial bids.* [emphasis added]

49. Interestingly, in the excerpt above, Neo purports to speak to the intentions of its shareholders, namely, that by approving the First Shareholder Rights Plan in 2004 and 2007 Neo's shareholders were intending to prohibit partial bids. (At the same time, however, Neo's board has refused to give the shareholders an opportunity to vote against the First Shareholder Rights Plan at the Neo Special Meeting.) If Neo's board truly intended to ban partial bids at the time it approved the First Shareholder Rights Plan, then presumably as an experienced and legally represented board, it would have done so. More likely, Neo's board elected not to prohibit partial bids outright (instead making it very difficult for them to proceed by requiring that the Minimum Tender Condition be met) as to do so would have meant the loss of support of ISS/RiskMetrics.[29] ISS/RiskMetrics did, in fact, support the First Shareholder Rights Plan in 2007 (and in 2004), no doubt adding to the level of support of Neo's shareholders for the First Shareholder Rights Plan, which Neo now touts as having been at 90% of votes cast at the 2007 meeting. Now that Neo's board finds itself faced with a partial bid (and one that could qualify as a Permitted Bid) that it does not want to be made to its shareholders, it seems to be trying to position itself to argue, in the event that the Second Shareholder Rights Plan is not approved, that in voting for the First Shareholder Rights Plan in 2004 and 2007, Neo shareholders were voting against partial bids, regardless of how they vote in 2009. In addition, the assertion that the First Shareholder Rights Plan was intended to prohibit partial bids also serves as an ostensible

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[29] ISS was founded in 1985 with the goal of promoting good corporate governance in the private sector and raising the level of responsible proxy voting among institutional investors and pension fund fiduciaries. In 1986, ISS launched its Proxy Advisory Service to assist institutional investors to fulfil their fiduciary obligations with comprehensive proxy analysis. ISS was acquired by RiskMetrics in January 2007. The ISS/RiskMetrics voting guidelines are used extensively in Canada by institutional shareholders in voting on shareholder proposals and legal advisors in advising public companies on good governance. These guidelines recommend that shareholders vote against rights plans that prohibit partial bids.

justification of the board's actions in adopting the Second Shareholder Rights Plan in direct response to the Pala Offer. The difficulty with Neo's position, however, is that the First Shareholder Rights Plan does not (and by Neo's own admission does not) prohibit partial bids. Accordingly, there is simply no reasonable basis for the assertion that a vote for the First Shareholder Rights Plan in 2007 was equivalent to a vote against all partial offers.

Pala proposes no more than 32% ownership and ISS/RiskMetrics recommends against the Second Shareholder Rights Plan

50. By letter dated April 8, 2009,[30] as a potential means of addressing the stated concern of Neo's board that Pala was seeking to control Neo, Pala wrote to Neo's board to propose to limit the Pala Offer to a maximum of 13.8 million shares, representing an additional 12% of the issued and outstanding shares of Neo (the "Pala Proposal"). If this number of shares were tendered to the Pala Offer, then Pala would own no more than 32% of Neo's shares, and Pala would not have legal or effective control over Neo.

51. The Pala Proposal is consistent with what Pala has indicated throughout, namely, that its goal has never been to achieve a position of legal or effective control over Neo. Rather, Pala's simple goal is to increase its ownership stake in Neo as it believes Neo has significant growth opportunities in the future if properly capitalized upon.

52. The Pala Proposal was made subject to Neo (i) waiving the application of the First Shareholder Rights Plan and taking any other actions advisable or necessary to effect such waiver; and (ii) removing from the agenda at the Neo Special Meeting the confirmation of the Second Shareholder Rights Plan so that that plan and all outstanding rights would terminate and be void and of no further effect.

53. The Pala Proposal was made open for acceptance until 6:00 p.m. (Toronto time) on Tuesday, April 14, 2009, and without prejudice to Pala's position that the Rights Plans are contrary to the best interests of Neo's shareholders and to the public. Neo's board declined the Pala Proposal and continues to resist the Pala Offer being made to its shareholders. Accordingly, Pala continues to pursue an interest in 40% of Neo.

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[30] Exhibit "T" to the Castro affidavit.

54. Also on April 8, 2009, ISS/RiskMetrics issued its recommendations in respect of the proposals being put to Neo's shareholders at the Neo Special Meeting (the "ISS/RiskMetrics Report").[31] As expected, ISS/RiskMetrics recommended that shareholders vote AGAINST the approval of the Second Shareholder Rights Plan on the basis that it prohibits partial bids, which ISS/RiskMetrics stated "are integral to rights plans in Canada since Canadian take-over bid legislation is premised on the right of shareholders to determine for themselves the acceptability of any bid for shares, partial or otherwise". ISS/RiskMetrics also noted that it was "highly unusual" for a company to have two rights plans in place.

D. SUBMISSIONS ON THE LAW

55. Pala and 083 submit that the Commission should exercise its public interest jurisdiction under section 127 of the Act to cease trade the First Shareholder Rights Plan and, in the event it is confirmed by Neo's shareholders, the Second Shareholder Rights Plan. The reasons in support of this submission are set out below.

The legal framework for take-over bids: Shareholders have the right to decide

56. Canadian securities law provides a framework for the fair conduct of a take-over bid in an open and even-handed manner and achieves the primary purpose of protecting the target's shareholders by:

(a) ensuring that shareholders have the information they need to make an informed decision to accept or reject the offer;

(b) ensuring that all shareholders have sufficient time to consider the information and make a reasoned decision; and

(c) requiring that all shareholders are treated equally in price and *pro rata* participation.[32]

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[31] Exhibit "U" to the Castro affidavit.

[32] David Johnston & Kathleen Doyle Rockwell, *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2006) at 286-287; *Re 1153298 Alberta Ltd.* (2005), A.S.C.D. No. 1004 (A.S.C.) at para. 43.

57. Section 1.1(1) and (2) of National Policy 62-202 describes the take-over bid provisions of Canadian securities legislation as follows;

> (1)The Canadian securities regulatory authorities recognize that take-over bids play an important role in the economy by acting as a discipline on corporate management and as a means of reallocating economic resources to their best uses ...[33]
>
> (2)The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the *bona fide* interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed choice. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.

58. Canadian securities regulators recognize, in adopting National Policy 62-202, that while defensive tactics may sometimes be legitimately used by a target company as a means of maximizing shareholder value, it is inappropriate for the target to adopt defensive tactics "that are likely to deny or limit severely the ability of shareholders to respond to a take-over bid or to a competing bid".

59. The implementation of, or reliance upon, a rights plan is a common defensive tactic used by the management of a target company, as the effect of such a plan is to prevent a take-over bid from succeeding without the board's approval. Consistent with National Policy 62-202, however, the Commission has held that while rights plans may perform a useful function, they are "rightly scrutinized with suspicion".[34] If a plan is not put into place before a particular bid becomes evident, it will very likely be considered a tactical plan directed at the bid. Tactical plans generally will not be found to be in the best interest of shareholders.[35] A rights plan will be

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[33] See also the discussion in paragraph 16 of the Halpern affidavit concerning the benefits to having a financial investor with a sufficiently large holding of shares to incur the costs associated with monitoring management.

[34] *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 (O.S.C.) at para. 52.

[35] *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 (O.S.C.) at paras 63 and 64.

set aside as an improper defensive tactic where it is being used to prevent shareholders of a target corporation (other than for a limited period of time for legitimate purposes) from exercising their fundamental right to determine whether to tender to an offer to acquire their shares.[36]

60. The guidance provided by ISS/RiskMetrics 2008 Canadian Voting Guidelines is that shareholders should only support rights plans that are limited to two specific purposes (i) to give the board more time to find an alternative to value enhancing transactions, and (ii) to ensure the equal treatment of all shareholders.

All shareholders rights plans must ultimately be set aside

61. The fundamental question underlying a decision to dissolve or maintain a rights plan is whether it is likely to enhance, limit or deny shareholders the ability to respond to a take-over bid.[37] This requires the regulators, with a view to the *bona fide* interests of the shareholders of the target company, to balance management's ability to generate competing bids if given more time against the danger that an existing bid will disappear unless the rights plan is dissolved. The question becomes not if, but when the rights plan will be set aside.

62. The jurisdiction of the Commission lies in its obligation to protect the public interest. The Commission stated as follows in *Re Jorex*:[38]

> For us, the public interest lies in allowing shareholders of a target company to exercise one of the fundamental rights of share ownership – the ability to dispose of shares as one wishes – without undue hindrance from, among other things, defensive tactics that may have been adopted by the target board with the best of intentions, but that are misguided or, as here, have outlived their usefulness
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> ...
>
> ... we have every confidence that the shareholders of a target company will ultimately be quite able to decide for themselves, with the benefit of the advice

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[36] *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 (O.S.C.) at para. 53; *Re Canadian Jorex Ltd. and Mannville Oil & Gas Ltd.* (1992), 15 O.S.C.B. 257 (O.S.C.) at 266.

[37] *Re Tarxien Corp.* (1996), 19 O.S.C.B. 6913 (O.S.C.) at 6919.

[38] *Re Canadian Jorex Ltd. and Mannville Oil & Gas Ltd.* (1992), 15 O.S.C.B. 257 (O.S.C.) at 266 and 267.

> they received from the target board and others, including their own advisors, whether or not to dispose of their shares and, if so, at what price and on what terms. To us the public interest lies in allowing them to do just that.

63. In considering the *bona fide* interests of Neo's shareholders, the Commission must be mindful not to thwart the ability of shareholders to exercise their fundamental rights of ownership to sell their shares as they see fit.[39] Pala's directors may make recommendations, but they cannot take steps to usurp the fundamental rights of ownership. As the Commission stated in *Re Cara Operations*:

> While it may be important for shareholders to receive advice and recommendations from the directors of the target company as to the wisdom of accepting or rejecting a bid, and for directors to be satisfied that a particular bid is the best likely bid under the circumstances, in the last analysis the decision to accept or reject a bid should be made by the shareholders, and not by the directors or others.[40]

64. In Royal Host and the subsequent cases that have followed it,[41] the Commission has set out a non-exhaustive list of factors potentially relevant to the determination of when a rights plan must go:

(a) whether shareholder approval of the rights plan was obtained;[42]

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[39] *Re 1153298 Alberta Ltd.* (2005), A.S.C.D. No. 1004 (A.S.C.) at para. 45.

[40] *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 (O.S.C.) at para. 53.

[41] *Re Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819 at 7828. Also see for example *Re Falconbridge Ltd.* (2006), 29 O.S.C.B. 6783 (O.S.C.), *BGC Acquisitions Inc. and Argentina Gold Corp.* (1990) L.N.B.C.S. 55 (B.S.C.) and *Re Lac Minerals* (1994), 17 O.S.C.B. 4963 (O.S.C.)

[42] *Re Falconbridge Ltd.* (2006), 29 O.S.C.B. 6783 (O.S.C.) at para. 46. Also see the Commission's statement in *Cara Operations* at para. 65 that shareholder approval does not necessarily mean that a rights plan should stand:

> If a plan does not have shareholder approval, it generally will be suspected as not being in the best interest of shareholders; however, shareholder approval by itself will not establish that a plan is in the best interest of shareholders.

Further, caution is warranted when considering or attempting to interpret shareholder approval of a rights plan as there is no evidence as to why the shareholders approved the plan. Certainly in this case, shareholder approval of either Rights Plan can fairly be characterized primarily as an effort on the part of shareholders to put the board in a better position to generate competing bids (as has typically been the purpose of rights plan in Canada), which it has not done.

(b) when the plan was adopted;

(c) whether there is broad shareholder support for the continued operation of the plan;

(d) the size and complexity of the target company;

(e) the other defensive tactics, if any, implemented by the target company;

(f) the number of potential, viable offerors;

(g) the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;

(h) the likelihood that, if given further time, the target company will be able to find a better bid or transaction;

(i) the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;

(j) the length of time since the bid was announced and made; and

(k) the likelihood that the bid will not be extended if the rights plan is not terminated.

65. The list of factors is not exhaustive as take-over bids are fact specific. The relative importance to be attached to each factor will vary from case to case. The key issue in determining whether it is time for the rights plan to go is whether the plan at issue will facilitate an unrestricted auction of the corporation or will deprive the shareholder of their fundamental right to tender their shares to the offer.[43]

66. Ordinarily, the target company bears the burden of proof. As stated in *Re Samson*:[44]

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[43] *Re Royal Host Real Estate Investment Trust* (1999), 22 O.S.C.B. 7819 at 7828; *Re Falconbridge Ltd.* (2006), 29 O.S.C.B. 6783 (O.S.C.) at paras. 34 and 35.

[44] *Re Samson* (1999), 8 A.S.C.S. 1791 (A.S.C.) at pg. 3 (QL); *Re 1153298 Alberta Ltd.* (2005), A.S.C.D. No. 1004 (A.S.C.) at para. 52.

> The first part of the test is whether ... there appears to be a real and substantial probability that, given a reasonable period of further time, the board of the target corporation can increase shareholder choice and maximize shareholder value ... The burden normally falls upon the target. If the target meets that burden, then the burden falls upon the applicant. The applicant must either a) counter the evidence of the target by showing that there is no real or substantial possibility, or that the time requested is not reasonable; or b) show ... "some other compelling reason requiring the termination of the plan is in the interests of shareholders.

67. In addition, if, in the face of a take-over bid, directors act in a manner that raises serious questions as to whether they are acting solely in the best interest of the shareholders, then the onus of establishing that the rights plan is in the best interest of the shareholders may be "significantly increased".[45]

Partial bids are permissible and must be considered on a case-by-case basis

68. There is no prohibition in Ontario securities law, or elsewhere in Canada, against partial bids. To the extent a partial bid constitutes a take-over bid for the purposes of Part XX of the Act, it must be conducted in accordance with the established regime, however, there is no requirement that a take-over bid must be for all of the issued and outstanding shares not already owned by the bidder. In keeping with this legislative framework, ISS/RiskMetrics recommends that shareholders vote against rights plans that do not permit partial bids,[46] as do seasoned institutional investors such as OMERS and the Ontario Teachers' Pension Plan.[47]

69. A common criticism that is frequently levelled against partial bids is that they are coercive by nature because they can place the independent shareholders into an undesirable minority position, from both a share value perspective and as an exploited minority shareholder.

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[45] *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 (O.S.C.) at para.66.

[46] As stated above, ISS/RiskMetrics has recommended that Neo's shareholders vote against the Second Shareholder Rights Plan on the basis that it does not permit partial bids, which are "integral" to rights plans in Canada. Further, ISS/RiskMetrics "believes that the acceptability of a given bid is a matter best decided by shareholders through the tender process". As ISS/RiskMetrics points out, "in some cases, shareholders may welcome a significant new shareholder on the company register, while the board may not."

[47] *RiskMetric s Governance Services 2009 Canadian Voting Guidelines: Poison Pills; ISS/RiskMetrics Report; OMERS Enterprise Proxy Voting Guidelines* dated May 20, 2008; *Ontario Teachers' Pension Plan 2009 Corporate Governance Policies and Proxy Voting Guidelines.*

The Commission has considered partial bids and these particular criticisms of them in the context of certain poison pill proceedings. In *Re Ivanhoe*,[48] the Commission acknowledged that partial bids could be coercive and allowed the shareholder rights plan that had been put into place in direct response to the partial bid to remain in place for approximately another month, at which time an order would be issued to automatically cease trade the plan. Subsequently, in *Re Chapters*,[49] the Commission considered whether a pill put into place by Chapters in the face of a partial bid by Trilogy could stay in place until a subsequent bid for all the outstanding shares, made by a white knight, could be made to Chapters' shareholders. The Commission qualified its decision in *Re Ivanhoe* and stated that while in that case it had agreed "in general" with the view that partial bids were coercive, "one cannot conclude from this that the inherently coercive nature of partial bids is a matter of settled law or Commission policy." As such, Chapters "cannot simply rely on Ivanhoe as establishing the principle that partial bids are *ipso facto* coercive." The Commission ultimately cease traded the rights plan.

70. As noted in the *Five Year Review Committee Report* dated March 31, 2003, decisions of the Commission in *Re Ivanhoe* and *Re Chapters* "suggest a willingness on the part of the regulator to continue to allow partial bids, but to deal with allegations of coercion in the context of such bids on a case-by-case basis." The Committee invited comment on whether there should be a regulatory change in Ontario, considered the limited comments received, and concluded that there was no need for legislative change in this area.[50]

71. The importance of dealing with allegations of coercion on a case-by-case basis is underscored by the theory that a partial bid is particularly beneficial to shareholders when it is being made by a financial investor.[51] In widely-held companies, shareholders must delegate decision-making to management who may not have significant holdings in the corporation. This

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[48] *Re Ivanhoe III Inc.* (1999), 22 O.S.C.B. 1327 (O.S.C.).

[49] *Re Chapters Inc.* (2001), 24 O.S.C.B. 1064 (O.S.C.); *Re Chapters Inc.* (2001). 24 O.S.C.B. 1657 (O.S.C.)

[50] It is also important to note that Canadian securities laws provide additional statutory protections to minority shareholders to guard against, and offer a remedy for, any abuse of corporate power by a majority or controlling shareholder. These far-reaching protections include fiduciary duty obligations on directors, the oppression remedy, and Multilateral Instrument 61-101 Protection of Minority Shareholders in Special Transactions.

[51] See the discussion in paragraphs 11, 15-17 of the Halpern affidavit.

delegation can lead to what has been referred to as the "agency problem" or the "separation of ownership from control." In this situation, management can make decisions that increase their benefits at the expense of shareholders and it is not in any one shareholder's interest to incur the costs to monitor management since they bear the full cost but receive only a *pro rata* share of the benefits. One solution to the agency problem is to have a shareholder that has a sufficiently large holding of shares so that it is in its best interest to incur the monitoring costs. To the extent that this shareholder is expected to improve operations and cash flows of the corporation, the share price will increase. This type of financial investor will look for increased returns through dividends and capital gains as the shares are ultimately sold.

72. In addition, Professor McIntosh of the University of Toronto observed in his article 1983 article *The Poison Pill; A Noxious Nostrum for Canadian Shareholders*,[52] that the evidence:

> ...appears to demonstrate beyond any reasonable doubt that two-tier and partial offers are not the villains the proponents of poison pills make them out to be. Quite the opposite conclusion may be drawn; these types of bids are a boon to shareholders, and defeating them results in very real losses to shareholders.
>
> It may well be, in fact, that partial and two-tier offers are simply convenient bogeyman for managers to drag out of the closet in order to justify resistance tactics. ... The myth of the coercive bid may be a convenient one for threatened managers, but it is not one that accurate reflects reality.

73. Rather than being villainous, partial bids, like any or all bids, may serve to attract competing bids by drawing attention to the target and increasing the availability of current information about the target, or may otherwise spur target management to find a better value proposition for shareholders. Any initial bid has the potential for setting in motion a chain of events that will bring value to shareholders.[53]

74. Finally, while recognizing the need to review allegations of coercion in the context of a partial bid on a case-by-case basis, a review of a significant number of the partial bids for public companies that have been launched in Canada since December 21, 1999 and about which

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[52] (1989) 15 Can. Bus. L. 293. Despite having been written in 1989, this article remains widely cited, including in Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson, 2004) at 297.

[53] Halpern affidavit, para. 13.

information is publicly available suggest the need to critically examine the bald assertion that partial bids are, by their nature, coercive. The chart attached as Schedule "A" hereto, which provides a summary of these bids, indicates certain benefits accrued to shareholders including (i) significant premiums being offered to shareholders ranging from 7.3% - 57.0% for a one month premium and a one day premium ranging from 1.0% - 58.1%, and (ii) value enhancing transaction for shareholders resulting from a white knight bidder, an increase to partial bid premium, or partial bid amended to be an any and all bid. These benefits would not have been available to shareholders had the partial bids been prevented from proceeding as a result of the improper use of a shareholder rights plan by the target's board. Further, the failure or partial success of some of these partial bids suggests that the shareholders to whom these partial bids were made did not feel coerced or compelled to tender to the partial bid.

E. SUBMISSIONS ON THE APPLICATION OF THE LAW TO THE FACTS

75. Pala and 083 submit that the continued application of the First Shareholder Rights Plan and, if it is approved by Neo's shareholders, the Second Shareholder Rights Plan, deprive Neo's shareholders of their fundamental rights of ownership – to tender their shares to the Pala Offer. It is therefore in the public interest for the Commission to cease trade these Rights Plans.

There is no basis in law to deny shareholders the right to tender their shares to the Pala Offer

76. Under Canadian securities law and consistent with prior decision of the Commission, there is no basis to deny Neo shareholders the right to tender their shares to the Pala Offer simply because it is a partial bid. Absent exceptional circumstances (which do not exist here), regulatory bodies such as the Commission ought to support the current regulatory landscape, which permits partial bids and dictates that the shareholders, and not the board of directors or the majority of the minority, should have the right to decide whether to tender shares to a premium offer. If the Commission fails to cease trade the Rights Plans in this case, then, effectively, it will be inappropriately amending Canadian corporate and securities laws.

There is no reasonable prospect of an alternative bid or transaction

77. In determining whether a rights plan should be aside, the target company bears the initial burden of justifying the plan by proving that "there appears to be a real and substantial

possibility that, given a reasonable period of further time, the board of the target corporation can increase shareholders choice and maximize shareholder value."[54] When the directors' conduct suggests they are motivated by considerations other than the best interests of shareholders (as is the case here), the onus to justify a shareholder rights plan is "significantly increased".[55] In essence, where directors are buying time to generate competing bids, a shareholder rights plan may be valid for a period of time. Where directors are outright preventing bids or endeavouring to entrench themselves, a shareholder rights plan is invalid.[56]

78. Typically, when a target company is put into play, its directors begin the process of attempting to maximize shareholder value by engaging financial advisors which then take steps to set up a data room and contact prospective purchasers with a view to enticing a competing full bid or partial bid. Alternatively, directors may obtain a valuation of the shares in an effort to obtain a higher bid from a single bidder, or may make an issuer bid at an increased premium to shareholders. A rights plan can be effectively used to permit the directors the time they need to make these events happen.

79. In this case, however, despite a considerable amount of time having elapsed since the launch of the Pala Offer, Neo's board has not identified any alternative bids or transactions, or the possibility thereof, or even any attempts having been made on the part of the board to entice a competing bid, or to pursue any type of alternative transaction. In the absence of a "real and substantial interest" and no evidence that there is any possibility, let alone any "reasonable" possibility of a competing bid, there is no reason to keep the Rights Plans in place.

80. The circumstances surrounding the Pala Offer can be distinguished from the facts in the *Re Pulse Data* case where the Alberta Securities Commission (the "ASC") (which decision does not, in any event, represent securities law in Ontario) dismissed the offeror's application to cease trade the rights plan despite the absence of a potential competing offer. In particular:

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[54] *Re MDC Corporation and Regal Greeting & Gifts Inc.* (1994), 17 O.S.C.B. 4971 (O.S.C.) at 4979; *Re Samson* (1999), 8 A.S.C.S. 1791 (A.S.C.) at pg. 3 (QL)

[55] *Re Cara Operations Ltd.* (2002), 25 O.S.C.B. 7997 (O.S.C.) at para. 66

[56] Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson, 2004) at 303

(a) The bid in Pulse Data offered a premium of only 3.3% as compared to the 27% premium offered in the Pala Offer.

(b) The offerer, Seitel, was a strategic instead of a financial investor.

(c) The Seitel offer permitted Seitel to waive the minimum tender condition under the Seitel offer (which required that 66 2/3% of the Pulse Data shares be tendered) and take up and pay for any number of Pulse Data Shares that may be deposited under the Seitel offer and not withdrawn. This threshold was significantly higher than the 50% minimum tender condition required by the rights plan. Further, Seitel indicated an intention to waive its minimum tender condition causing heightened concern that it was positioning itself to effect a creeping takeover. In contrast, the Pala Offer is capped at 40% ownership in Neo.

(d) The rights plan in Pulse Data was supported by ISS/RiskMetrics whereas, in this case, ISS/RiskMetrics has publicly recommended against the Second Shareholder Rights Plan on the basis that it does not allow for partial bids.

(e) The ASC's decision to leave the rights plan in place was highly influenced by its finding that there was no evidence that the rights plan was being improperly used by the target to entrench management. Given the low threshold in the change of control provisions and the adoption of the tactical Second Shareholder Rights Plan, the Ontario Securities Commission cannot take the same comfort here.

(f) The level of support of shareholder approval in Pulse Data of the rights plan was 98.6%, excluding the offeror. Here, however, as of the date of this application, Pala is advised that more than 1.8 million Neo shares have already been tendered to the Pala Offer, despite the fact that the Pala Offer still remains open for several more weeks, meaning that the level of support will necessarily be less than in Pulse Data.

(g) The "unique circumstances" that were present in *Re Pulse Data*, namely in terms of the "very recent and informed Pulse Shareholder approval, given in the absence of any imminent alternatives to the Offer", do not exist in this case as it pertains

to the First Shareholder Rights Plan. The First Shareholder Rights Plan is stale and, despite Pala's request, Neo has refused to put the first plan before its shareholders at the Neo Special Meeting.

81. In addition, the decision in *Re Pulse Data* is troubling in many respects and, in Pala's respectful submission, wrongly decided. The ASC's decision has, in effect, amended existing securities legislation by requiring bids (whether partial or otherwise) to be supported by the majority of the minority and gone against many years of poison pill precedent. If new requirements are to be put into place then this is for the legislature or regulators to decide, on a global, rather than *ad hoc*, basis.

The Partial Offer is fair, equitable and not coercive

82. There is nothing unfair, inequitable or coercive about the Pala Offer. By the time the bid expires, it will have been open for at least 70 days, the length of time required for a bid to qualify as a Permitted Bid under either Rights Plan, and more than enough time for Neo and its shareholders to properly and adequately consider the Pala Offer. Also, Pala has indicated that following an announcement by Pala that it has obtained the Minimum Tender Condition (and if the Rights Plan have not yet been cease-traded), it will give those shareholders who have not already tendered to the bid a further 10 days to decide whether to tender with knowledge that their shares will be taken-up in some amount.

83. The Pala Offer provides Neo shareholders with an attractive premium to the market price of the Neo shares prevailing prior to the announcement of the intention to make the Pala Offer. The Pala Offer of $1.40 cash represents a 27% premium to the closing price of the shares on the TSX on the last trading day prior to the announcement, and represents a premium of approximately 24% over the volume-weighted average trading price on the TSX during the last 20 days on which it has traded prior to the announcement.[57] The Pala Offer is made to all

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[57] Neo has complained that the Pala Offer is "opportunistically" timed to take advantage of a recent period during which share prices generally have declined as a result of the current global economic crisis. As the Alberta Securities Commission noted in *Re Samson*, "there is nothing improper about that. It is normal for hostile take-over bids to be opportunistic but that, in itself, does not make them coercive and in this case we find that the Samson bid was not coercive." Further, the Commission noted that "like prior shareholder approval, coerciveness is a powerful but not necessarily conclusive factor to be considered in applying the *Regal* test."

shareholders of Neo who ought to determine for themselves whether to take advantage of significant liquidity at a significant premium. As noted in *Re Cara*, in the last analysis the decision to accept or reject this 27% premium bid, particularly given the current economic climate, should rest with Neo's shareholders and not be blocked by Neo's board.

84. Further, for the reasons expressed above, it is too simplistic to say that partial bids are, as alleged by Neo on page 11 of the Neo Special Meeting Circular, "by their nature" coercive. Neo states its position in that respect as follows:

> A partial bid structure is, by its very nature, coercive because it forces Shareholders to make a decision as to whether to accept an offer (and in respect of how many Common Shares), sell into the market, or reject such offer and maintain their position without knowing whether and to what extent other Shareholders will accept the offer and without the ability to know the price at which the Common Shares (which are not tendered or are returned to shareholders as a result of proration) will trade after such offer. Shareholders are confronted with the increased uncertainty as to the future value (in part as a result of uncertainty as to the plans of the acquirer and discounts applied by the market to "controlled" companies) and the reduced liquidity of the Common Shares that are not acquired under the partial bid. Since the post-partial bid market price and number of Shareholders tendering to a partial bid will not be known with any certainty, Shareholders are forced to make an investment decision with incomplete information.

The two criticisms levied by Neo, namely that there will be a reduction in the liquidity of Neo shares after completion of the Pala Offer, and that there will be a discount to Neo shares as a result of Pala assuming a control position without having paid a premium for that control, are addressed below.

i) Neo's shares will remain highly liquid

85. Neo shares will continue to actively trade if the Pala Offer is successful given the large shareholder base of Neo and its high liquidity As noted in the Director's Circular, Neo ranked in the top 10 of TSX companies in terms of total volume traded and states that the shares turned over 1.7 times in 2008. Over 70 million shares will remain in the public float if 23 million shares are tendered.

ii) No reason to expect a discount to Neo's shares

86. There is no evidence to suggest that Neo shares will be discounted because it has a shareholder that holds 40% of the outstanding shares. To the contrary, the share price may well trade up as a result of Pala's involvement as a financial investor (rather than a strategic buyer or a consolidator or a competitor).[58] As a financial investor, Pala will, at some point in the future, need to provide an attractive return on investment for its own shareholders. As such, Pala will have great motivation to do as it says – to increase Neo's long-term growth and value – in order to provide its own shareholders with a premium on their investment. In that sense, Pala's interests are closely aligned with the interests of Neo's other shareholders. Further, the addition of Pala as a cornerstone investor reduces Neo's vulnerability to an unsolicited bid prior to or during the implementation of any growth strategies and, as a financial investor, there is no reason to think that Pala would not tender its shares to future bid.

87. While Pala believes that the share price will increase as a result of its involvement, it recognizes that it is simply not possible to predict with any degree of certainty how the market will react to the Pala Offer, and, in any event, what other facts may cause the share price to rise or fall. What is clear, however, is that Neo's shareholders should be permitted the opportunity to assess the circumstances and decide for themselves whether or not to tender to the Pala Offer.

The Pala Offer is not a "creeping" takeover

88. As explained above, as a financial investor, Pala would like to increase its ownership interest in Neo to 40% but not beyond and believes that its investment in Neo will be maximized if Neo continues to conduct business as a widely-held Canadian corporation. Consistent with this position, Pala has indicated that it is willing to take-up any shares that may be tendered to the Pala Offer if the Minimum Tender Condition is waived. In making this offer, Pala

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[58] Halpern affidavit, paras. 11, 15-17, 28.

recognizes that it may not attain the 40% level of ownership that it wants, however, Pala is not interested in obtaining control over Neo and, therefore, would be satisfied by this result.[59]

89. Further, as stated above, so long as Pala has increased its ownership of Neo's shares to 30% then Pala would be willing to enter into a standstill agreement with Neo, or provide an undertaking to the Commission, to the effect that it will not increase its ownership of Neo shares beyond 40% of Neo's common shares in any fashion for a 12 month period following the completion of the Pala Offer except that Pala may participate (*pro rata* or otherwise) in any future Neo financings. In addition, the standstill would provide for a "spring event" (i.e. the automatic termination of the standstill or undertaking) in the event that Neo announces (i) another transaction involving the acquisition by a third party of (x) some or all of Neo's common shares or (y) substantially all of the assets of Neo, whether held directly or indirectly or (ii) any other form of merger, amalgamation, consolidation, or similar transaction involving Neo or any of its subsidiaries. In addition, the standstill would contemplate that Neo's board would be able to waive the application of the standstill at any time consistent with the exercise of its fiduciary duties.

90. It should be clear to all shareholders, therefore, that Pala has no intention of effecting a creeping take-over of Neo.

The Minimum Tender Condition is unfair to Neo's shareholders, particularly in the context of the Pala Offer

91. As mentioned above, in Pala's submission, the Minimum Tender Condition is unfair to minority shareholders. It cannot be in the best interest of shareholders to deny them the opportunity to tender their shares to a premium offer. Further, there is no authority in corporate and securities law for the proposition that majority shareholders are entitled to prevent minority shareholders from tendering their shares to a take-over bid. To keep the Rights Plans in place in the absence of a competing bid would be a change in the landscape of securities regulation such

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[59] Further, on April 8, 2009, consistent with its stated position that its goal is not to achieve a position of legal or effective control, Pala proposed to limit the Pala Offer to a maximum of 13.8 million shares, or no more than 32% of Neo's shares.

that shareholders would lose the benefit of "clear and consistently applied" rules of the game.[60] As noted in *Re Cara Operations*, it is important to know there is consistency in the rules going forward, in order to provide shareholders with opportunities to realize their investments.

92. In addition, the Minimum Tender Condition is bid-inhibiting simply because it establishes a threshold of support that is so high that it dissuades potential bidders from even attempting to meet it.[61] Also, in the event that a partial bid is actually made, the Minimum Tender Condition inhibits other follow-on bidders to the detriment of Neo's shareholders.[62]

93. Moreover, in the context of the Pala Offer, the application of the Minimum Tender Condition produces absurd results that are patently unfair to Neo's shareholders.[63] In particular:

(a) A long-term Neo shareholder who supports Pala increasing its ownership in Neo and becoming a cornerstone shareholder by way of the Pala Offer, and who therefore does not want to sell its shares, may feel compelled to tender its shares so that Pala can be certain to meet the Minimum Tender Condition.

(b) In the absence of the Minimum Tender Condition that necessarily causes a long-term shareholder to be concerned about Pala's ability to meet the required minimum tender threshold, that shareholder would have been able to hold onto all of its shares in order to enjoy the benefits of having Pala as a more heavily invested shareholder.

(c) A short-term Neo shareholder who supports the Pala Offer as an opportunity to liquidate all of its shares at a premium will tender all of them, but, due to the long-term shareholder having been forced to tender and the proration that will necessarily result, will not be able to liquidate all of its shares.

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[60] *Re Cara Operations* (2002), 25 O.S.C.B. 7997 at paras. 57 -59.

[61] Halpern affidavit, para. 41.

[62] Halpern affidavit, para. 41.

[63] Halpern affidavit, paras. 33-41.

(d) In the absence of a minimum tender condition, that short-term shareholder seeking liquidity will have a greater likelihood of liquidating all of its shares as a result.

Pala has no present intention to extend the Pala Offer

94. As stated, the Pala Offer is currently scheduled to expire on May 7, 2009. In the circumstances, Pala has no present intention to extend the bid unless the Rights Plans are cease traded.

95. Pala acknowledges the benefit to Neo's shareholders arising from having a second opportunity to tender to the Pala Offer with information about the number of shares tendered to date. Accordingly, Pala undertakes to announce to Neo's shareholders, on the day after the Rights Plans are ceased traded, the number of shares that have been tendered to the bid to that point and to then extend the Pala Offer for an additional 10 days or until May 7, 2009, whichever is later.

The additional defensive tactics adopted by the Neo directors serve to entrench management

96. In addition to implementing the Rights Plans, Neo's board has adopted other defensive tactics that are cause for concern. In particular, with a view to positioning itself to resist the Pala Offer in the event that the Second Shareholder Rights Plan is not approved, Neo's board has asserted that both the board and the shareholders actually intended the First Shareholder Rights Plan to prohibit partial bids. In addition, Neo's management and board have implemented change of control provisions in certain executive employment agreements, which necessarily deter parties from seeking control of Neo and risk triggering these provisions at a potential cost to the corporation of approximately $5 million.

97. Pala submits that these actions on the part of Neo's board, taken in the face of the Pala Offer, were done with a view to dissuading Pala from continuing with its bid regardless of whether the Rights Plans are ceased traded. This conduct strongly suggests that Neo's board is motivated by considerations other than the best interests of shareholders. Applying the decision in *Re Samson*, they are therefore under a significantly higher onus to justify the continuation of the Rights Plans.

F. CONCLUSION

98. The time has come for the First and Second Shareholder Rights Plans to go. There will be no other bid for Neo. Pala seeks to be a value-added financial investor in Neo and is offering a significant premium over the pre-announcement trading price of the Neo shares as well as the opportunity to share in the future growth in value of Neo. The public interest dictates that Neo shareholders be given the opportunity to participate in the Pala Offer, having had a sufficient amount of time and the opportunity to consider the terms of the bid and the recommendations of Neo's board. The public interest dictates that it is now time to let the Pala Offer proceed, and without the restrictions imposed by the Rights Plans, so that Neo's shareholders can exercise their rights of ownership and decide for themselves if they want to tender to the Pala Offer.

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Summary of Certain Partial Bids in Canada – December 21, 1999 – 2009

	Failed Partial Bids					Acquired by White Knight		Successful Partial Bids						Partial Success		
Target	Waratah Coal Inc.	Royal Laser	Innova Exploration	Humpty Dumpty Snacks Foods Inc.	Chapters Inc.	Fairmont Hotels	Gulfstream Resources	Catalyst Paper	Mindready Solutions Inc.	Consolidated Properties Ltd.	Cominco	Centrefund	Aliant Inc.	IAT Air Cargo Facilities Income Fund	Sierra Systems	Revenue Properties
Bidder	Mineralogy Pty Ltd.	Jaguar Financial	Sputnik Group	Dominion Citrus Ltd.	Trilogy Retail Enterprises/ Future Shop	Icahn Partners	Roc Oil Company	Third Avenue Management	4173422 Canada Inc.	Aspen Properties Ltd.	Teck	Gazit	BCE Inc.	FrontFour Capital Group LLC	Crescendo Partners	Acktion
Announcement Date	10-2008	08-2008	10-2006	11-2002	12 – 2000	12-2005	04-2001	07-2006	04- 2004	09-2000	06-2000	06-2000	12-1999	06-2008	09-2002	11-2000
Result	Partial Bid Rejected – Subsequently bid for all of company (successful)	Bid Expired – Minimum condition not met	Bid Expired – condition not met	Unsuccessful	Increased offer for all shares other than the shares locked up by Future Shop	Acquired by White Knight	Acquired by White Knight	Success	Success	Success	Success	Success	Success	Partial Success	Partial Success	Partial Success
PREMIUM PERCENTAGE AND BID DATA																
Offer Price	$1.41	$0.80	$6.75	$3.40	$13.00	US$40.00	$1.10	$3.30	$1.17	$0.38	$25.00	$12.00	$27.50	$7.40	$6.60 - 7.75	$2.50
Revised Offer Price	$1.60	$0.63	n/a	n/a	$17.00	n/a	n/a	n/a	n/a	n/a	n/a	$13.25	n/a	n/a	$7.75	$2.60
Partial Bid Premium																
1-day	1%	33.3%	12.5%	58.1%	43% - 97%[8]	3.1%	37.5%	18.3%	(19.7%)	0.0%	20.5%	43.7%	22.0%	9%	0.0%-12.9%	28.2%
1-month	(23%)	15.9%	13.4%	41.7%	57%	18.8%	11.1%	31.0%	(22.3%)	11.8%	7.3%	42.9%	21.1%	10%	(2.2%)-14.8%	22.0%
3-month	(58%)	23.1%	17.0%	23.6%	50%	7.4%	(9.1%)	0%	(37.0%)	26.7%	14.7%	44.6%	23.3%	10%	(9.0%)-6.9%	25.0%
% initially owned	19%	18%	20%	5%	9.5%	10%	0%	20%	0%	5%	45%	10%	41%	10%	4%	9%
% offer for	31%	32%	15%	50%	40.6%	41%	40%	18%	67-71%	30%	5%	72%	12%	40%	14%	41%
% acquired	**81%**	**0%**	**0%**	**1%**	**61%**	**n/a**	**n/a**	**18%**	**71%**	**29%**	**5%**	**72%**	**12%**	**35%**	**2%**	**31%**
White Knight Premium to Partial Bid	n/a	n/a	n/a	n/a	n/a	12.5%	140.9%	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a

	Failed Partial Bids					Acquired by White Knight		Successful Partial Bids						Partial Success		
Target	Waratah Coal Inc.	Royal Laser	Innova Exploration	Humpty Dumpty Snacks Foods Inc.	Chapters Inc.	Fairmont Hotels	Gulfstream Resources	Catalyst Paper	Mindready Solutions Inc.	Consolidated Properties Ltd.	Cominco	Centrefund	Aliant Inc.	IAT Air Cargo Facilities Income Fund	Sierra Systems	Revenue Properties
POST BID TRADING VOLUMES[1]																
Pre-Bid 3-mon	416,700	n/a	n/a	21,523	31.902	n/a	n/a	375,731	19,505	62,816	208,004	62,644	78,902	7,581	3,620	31,173
Post-Bid 3-mo	5,851	n/a	n/a	11,744	15,712	n/a	n/a	422,273[3]	9,965	23,472	183,198	15,826	169,625	3,491	6,345	45,150
Post-Bid 6-mo	n/a[2]	n/a	n/a	9,464	n/a[9]	n/a	n/a	411,857[3]	7,168	20,813	241,509	13,868	123,820	3.675	4,974	36,042
Post-Bid 9-mo	n/a[2]	n/a	n/a	7,584	n/a[9]	n/a	n/a	331,554[3]	8,444[4]	32,343	253,073[5]	10,673	108,683	n/a[6]	5,064	40,377[7]
POST BID PRICE DATA																
Post-Bid 3-mo	$1.55	n/a	n/a	$3.12	$8.41	n/a	n/a	$3.36	$1.66	$0.34	$19.88	$9.42	$33.44	$5.12	$7.99	$2.11
Post-Bid 6-mo	n/a[2]	n/a	n/a	$2.95	n/a[9]	n/a	n/a	$3.53	$1.66	$0.32	$21.15	$9.24	$34.87	$4.50	$8.10	$2.14
Post-Bid 9-mo	n/a[2]	n/a	n/a	$2.95	n/a[9]	n/a	n/a	$3.49	$1.97[4]	$0.30	$22.33[5]	$9.38	$35.83	n/a[6]	$7.87	$2.23[7]
Coercive?	Revised bid for remaining 81% stake. Enhanced value transaction resulted	Bid expired – Shareholders not coerced to tender	Bid expired – condition not met	Shareholders not coerced to tender	Enhanced value transaction resulted as a result of white knight participation	Enhanced value transaction resulted	Enhanced value transaction resulted	Liquidity and share price maintained post bid	Bid for majority; lock-up with Nurun (majority s/h with 67% stake)	Shareholders not coerced to tender	Remaining 50% acquired for $28.27 one year later	Successful in acquiring a 82% stake	Share price and liquidity improved post partial bid	Shareholders not coerced to tender	Shareholders not coerced to tender	Liquidity maintained post bid

.) Trading Volumes are based on average daily trading volumes.
!) Waratah Coal transaction closed on January 5, 2009. Only 3 months of post transaction data is available.
i) Catalyst average daily volume figures exclude March 14, 2007, when Catalyst announced the appointment of a new CEO and April 10, 2007, when it announced the acquisition of the Snowflake mill from AbitibiBowater.
l) Mindready completed a private placement on December 2, 2004 and announced acquisition of Radical Systems on March 1, 2005.
i) Cominco - based on 8-month data as Cominco and Teck subsequently announced their merger on April 30, 2001.
i) IAT Air Cargo closed on August 29, 2008. Only 6 months of post transaction data is available.
') Revenue Properties - based on 8-month data as shares of Revenue Properties increased significantly shortly thereafter on the announcement regarding the acquisition of its convertible debentures.
l) Chapters – 97% is the premium to the 20 day trading period prior to announcement based on the increased $17.00 offer price.
)) Chapters – January 20, 2001, Trilogy increased bid to $17.00 and for all shares not previously locked up. Chapters and Indigo subsequently agreed to merge on June 13, 2001.