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July 10, 2009

DELIVERED

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

Attention: The Secretary to the Commission

Dear Sirs:

MI Developments Inc.

This is an application by Farallon Capital Management, L.L.C., Hotchkis and Wiley Capital Management, LLC, Donald Smith & Co. Inc., Owl Creek Asset Management, L.P., North Run Capital, LP and Pzena Investment Management, LLC on behalf of themselves and funds and entities under their management (collectively, the "Shareholders") to the Ontario Securities Commission (the "OSC") pursuant to sections 104 and 127 of the *Securities Act* (Ontario) (the "Act") for an order denying MI Developments Inc. ("MID") the right to rely on the exemptions contained in Part 5 of Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions ("MI 61-101").

Voorheis & Co. LLP are acting jointly with ThorntonGroutFinnigan LLP as counsel to the Shareholders in connection with this application.

This application arises out of what we believe are violations of MI 61-101 in connection with a proposed reorganization of MID announced on November 26, 2008 and in connection with debtor-in-possession financing and related transactions announced by MID on March 5, 2009 in relation to the voluntary filings made by Magna Entertainment Corp. ("MEC"), a subsidiary of MID, under Chapter 11 of the United States Bankruptcy Code.

The outcome of this application will have a significant impact on MID and its shareholders by determining whether MID is entitled to continue to engage in related party transactions with MEC in reliance on exemptions from MI 61-101 in circumstances where it is clear that MID could not obtain majority of minority approval for any such transactions. We believe that MID's conduct as outlined herein also raises significant public interest and public policy issues that require a prompt hearing by the OSC.

Collectively, the Shareholders (and their affiliates and clients) own or control approximately 37% of the outstanding Class A Subordinate Voting Shares of MID (the "MID Class A Shares").

We understand that, contemporaneously with this application, Greenlight Capital Inc. ("Greenlight"), another shareholder of MID, will also be filing a restated application seeking, among other things, to deny MID the right to rely on the exemptions contained in MI 61-101 in connection with transactions with MEC. This application by Greenlight restates and updates Greenlight's original application dated March 30, 2009, as amended on April 9, 2009, for orders under sections 104 and 127 of the Act. A copy of Greenlight's original application, as amended, is attached hereto as Exhibit 1.

On April 1, 2009, the Shareholders filed an application with the OSC also seeking relief for the matters covered in Greenlight's original application. Shortly thereafter, letters supporting these applications and the need for the requested relief were filed with the OSC on behalf of other MID shareholders (or persons associated with them) that collectively owned or controlled, directly or through their affiliates and investment clients, a further approximately 21.6% of the outstanding MID Class A Shares. Copies of the Shareholders' April 1, 2009 application and these letters are included at Exhibit 2 hereto. In aggregate, the Shareholders, Greenlight and these other shareholders owned or controlled approximately 70% of the outstanding MID Class A Shares.

We understand that Staff of the OSC previously concluded that no hearing before the OSC in respect of the issues raised in the original Shareholder and Greenlight applications was then necessary based in part on the undertaking (the "MID Undertaking") dated May 11, 2009 given by MID to the OSC. The MID Undertaking provides that, in the event that MID makes a bid or enters into an agreement to acquire assets of any MEC Entity (as defined in the MID Undertaking), MID will include in the agreement providing for any such acquisition a termination right allowing MID to terminate the purchase agreement in the event that the OSC determines that minority shareholder approval is required. A copy of the MID Undertaking is included as Exhibit 3 hereto. We believe that, notwithstanding the prior position of OSC Staff regarding the need for a hearing at that time, the Shareholders are entitled to a hearing before the OSC in relation to the matters addressed herein and that it would be contrary to the interests of MID's shareholders generally and to the public interest for such right to be denied on the basis of a private undertaking entered into between MID and OSC Staff.

Part I of this application sets forth selected background information relating to MID. Part II sets forth the reasons why we believe the Shareholders are entitled to a hearing before the OSC in relation to what we believe is the non-compliance by MID with MI 61-101 in connection with the November 2008 and March 2009 related party transactions. Part III examines why the November 2008 and March 2009 related party transactions entered into by MID violated MI 61-101 and why the relief requested by the Shareholders in this application is appropriate.

I. BACKGROUND[1]

MID is an Ontario corporation with its registered and head office located in Aurora, Ontario. MID is a real estate operating company engaged principally in the ownership, management, leasing, development and acquisition of industrial and commercial real estate properties. At March 31, 2009, MID's real estate business held a global portfolio of 105 income-producing properties in nine countries, representing 27.3 million square feet of leaseable area. In addition to its real estate operations, MID holds a controlling equity (54%) and voting (96%) interest in MEC.

MID became a public company in August 2003 as a result of the spin-off of the real estate division of Magna International Inc. ("Magna") to Magna's shareholders. As part of this spin-off, Magna also transferred to MID all of the shares of MEC then owned by Magna. At all times since the 2003 spin-off, MID has been controlled by the Stronach Group (defined below) and has owned controlling equity and voting interests in MEC.

The authorized capital of MID consists of an unlimited number of MID Class A Shares, 706,170 Class B Shares ("MID Class B Shares") and an unlimited number of Preference Shares issuable in series. As at May 7, 2009, MID had 46,160,564 MID Class A Shares and 547,413 MID Class B Shares outstanding.

Each MID Class A Share carries one vote and each MID Class B Share carries 500 votes. MID Class A Shares and MID Class B Shares participate equally as to dividends (except for certain stock dividends) and as to the distribution of assets in the event of a liquidation of MID. The MID Class B Shares may be converted at the option of the holder thereof into MID Class A Shares on a one-for-one basis.

The MID Class A Shares are listed on the Toronto Stock Exchange (the "TSX") and the New York Stock Exchange. The MID Class B Shares are listed on the TSX. MID is a reporting issuer in each of the provinces of Canada.

MEC is a corporation existing under the laws of the State of Delaware. The registered office of MEC is located in Wilmington, Delaware, and the principal executive office of MEC is located in Aurora, Ontario.

MEC owns or leases horse racetracks in California, Florida, Maryland, Texas, Oklahoma, Ohio, Oregon and Ebreichsdorf, Austria, and operates under a management agreement a racetrack in Pennsylvania that it previously owned. As at December 31, 2008, based on revenues, MEC was North America's number one owner and operator of horse racetracks, and one of the world's leading suppliers, via simulcasting, of live horseracing content to the inter-track, off-track and account wagering markets. Three of the racetracks that MEC owns or operates (Gulfstream

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[1] Information about MID, MEC and the Stronach Group has been derived from public disclosure documents and from letters dated February 5, 2009 and March 27, 2009 to OSC Staff from MID's counsel. These letters are attached as Exhibits 4 and 5 hereto.

Park, Remington Park and Magna Racino™) include casino operations with alternative gaming machines.

MEC also owns and operates AmTote International, a provider of totalisator services to the pari-mutuel industry, XpressBet®, a U.S. national Internet and telephone account wagering system, and MagnaBet™, a European account wagering system. MEC is also a 50% partner with Churchill Downs Incorporated in TrackNet Media Group, a content management and distribution company, and HRTV™, a horse racing television network.

MEC resulted from the reorganization in November 1999 of the non-automotive businesses of Magna, pursuant to which certain horse racing and real estate assets owned by Magna were transferred to MEC. In March 2000, Magna effected a spin-off of a minority interest in MEC to Magna shareholders.

The authorized capital of MEC consists of 310,000,000 shares of Class A Subordinate Voting Stock ("MEC Class A Shares") and 90,000,000 shares of Class B Stock ("MEC Class B Shares"). As at November 25, 2008, MEC had approximately 2,929,000 MEC Class A Shares and 2,923,302 MEC Class B Shares outstanding.

Each MEC Class A Share carries one vote and each MEC Class B Share carries 20 votes. MEC Class A Shares and MEC Class B Shares participate equally as to dividends and as to the distribution of assets in the event of a liquidation of MEC. The MEC Class B Shares may be converted at the option of the holder thereof into MEC Class A Shares on a one-for-one basis.

The MEC Class A Shares were previously listed on the TSX and the NASDAQ National Market, but were recently delisted from both stock exchanges following MEC's Chapter 11 bankruptcy filing. The MEC Class B Shares are not listed for trading. MEC is a reporting issuer in each of the provinces of Canada.

MID beneficially owns all 2,923,302 MEC Class B Shares and 218,116 MEC Class A Shares, representing in the aggregate 54% of MEC's equity securities and 96% of the votes attached to MEC's voting securities.

Frank Stronach is a director and the Chairman of each of MID and MEC. Until April 7, 2009, Mr. Stronach was also the Chief Executive Officer of MEC. Mr. Stronach, the Stronach Trust, 445327 Ontario Limited and Fair Enterprise Limited ("Fair Enterprise") are referred to collectively herein as the "Stronach Group". Mr. Stronach and three other members of his family are trustees of the Stronach Trust. Mr. Stronach is also one of the members of the class of potential beneficiaries of the Stronach Trust. 445327 Ontario Limited is a wholly-owned subsidiary of the Stronach Trust. All of the shares of Fair Enterprise are held by an estate planning vehicle for the Stronach family.

As of November 25, 2008, the Stronach Trust, indirectly through its wholly-owned subsidiary 445327 Ontario Limited, owned 363,414 MID Class B Shares, representing 66.4% of the outstanding MID Class B Shares, 56.8% of the votes attached to MID's voting securities and 0.8% of MID's equity securities.

As of November 25, 2008, Fair Enterprise held 50,000 MID Class A Shares and 20,000 MID Class B Shares. Prior to the purported sale to The Azalea 2008 Trust ("Azalea Trust") discussed below, Fair Enterprise also held 628,570 (or approximately 21.5% of the outstanding) MEC Class A Shares.

As a result of these holdings, the Stronach Group controls MID and, through MID, MEC.

At all material times, the Stronach Group also exercised control or direction over an additional 11,244 MEC Class A Shares and Mr. Stronach held options to purchase 50,000 MEC Class A Shares.

For years, MEC has experienced significant operating losses. According to MID's annual report for the year ended December 31, 2008 (included as Exhibit 6 hereto), MEC has incurred net losses (before the amount attributed to the minority interest) of U.S. $256.1 million, U.S. $68.8 million and U.S. $65.4 million for the years ended December 31, 2008, 2007 and 2006, respectively. As noted above, on March 5, 2009, MEC and certain of its subsidiaries filed voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code in the District of Delaware and were granted recognition of the Chapter 11 proceedings from the Ontario Superior Court of Justice under the *Companies' Creditors Arrangement Act.*

Since its spin-out from Magna in 2003, MID (and the Stronach Group) have entered into a substantial number of related party transactions with or relating to MEC. Since 2003, there have been more than 20 publicly disclosed related party transactions (many with multiple components) between MID and MEC, including multiple loans from MID to MEC which, as at March 31, 2009, aggregated approximately U.S. $375 million (including accrued interest), various loan extensions and amendments, and approximately U.S. $89 million in real estate purchases by MID from MEC. These related party transactions are described at Note 23 to MID's audited financial statements for the year ended December 31, 2008 (contained in MID's 2008 annual report included as Exhibit 6 hereto) and at Note 19 to MID's interim financial statements for the period ended March 31, 2009 (included as Exhibit 7 hereto). To our knowledge, MID did not seek minority shareholder approval or provide its shareholders with an independent valuation in connection with any of these transactions.

MID's shareholders have repeatedly expressed their opposition to these related party transactions and to any further investment by MID in the horse-racing industry. In 2005, Greenlight commenced an oppression proceeding against MID in an attempt to stop further financial support of MEC by MID and for other relief. The Court denied Greenlight the requested relief.

Notwithstanding shareholder opposition, MID has continued to enter into related party transactions with MEC. These transactions have resulted in massive value destruction for MID and its shareholders. The closing price of MID's Class A Subordinate Voting Shares on the TSX has declined from a high of Cdn. $43.46 on February 20, 2007 to Cdn. $9.33 on July 9, 2009. MEC is now insolvent. The MEC Class A Shares, which once traded as high as Cdn. $185 per share (split-adjusted) on the TSX, are now valueless. The loans currently outstanding from MID to MEC

(aggregating approximately U.S. $375 million as at March 31, 2009) now equate to approximately 100% of MID's market capitalization.

During the approximately six years since MID's spin-off from Magna, MID has experienced significant and unusual turnover in its directors and senior officers – over 10 directors have resigned or declined to stand for re-election and three Chief Executive Officers and two Chief Financial Officers have resigned. MEC has experienced a similarly high turnover – 14 directors and at least three Chief Executive Officers (including Mr. Stronach). We believe these resignations (or decisions to not stand for re-election) reflect undue and inappropriate influence and pressure from the Stronach Group in the decision making processes at MID and MEC.

On November 26, 2008, MID announced a corporate reorganization (the "November Restructuring") and MID entered into a transaction agreement dated November 26, 2008 (included as Exhibit 8 hereto) with MEC, the Stronach Trust, 445327 Ontario Limited and Fair Enterprise to implement the November Restructuring. The November Restructuring contemplated a multi-stage transaction, including immediate transactions involving (i) the making of a new loan (the "New Loan") by MID to MEC of up to U.S. $125 million to fund MEC's operations and to provide financing for MEC's application for a Maryland slots licence and related construction, and (ii) MID extending the maturity dates and repayment deadlines (the "Loan Extensions") of certain amounts due under approximately U.S. $312 million of its existing loans to MEC which amounts were otherwise to become due on December 1, 2008. The balance of the November Restructuring, which included a substantial issuer bid and the purchase of selected real estate assets by MID from MEC, was to be implemented following MID shareholder approval. Copies of the November 26, 2008 press release and the related material change report of MID dated December 3, 2008 are included as Exhibit 9 hereto.

On November 25, 2008, just one day before the public announcement of the November Restructuring, Fair Enterprise, a member of the Stronach Group, entered into an agreement with Azalea Trust (the "Azalea Agreement") with respect to the purported sale by Fair Enterprise of 628,570 MEC Class A Shares to Azalea Trust. Under the Azalea Agreement, the purchase price of U.S. $886,284 was payable by Azalea Trust through the issuance of a non-interest bearing two-year promissory note (the "Azalea Note") to Fair Enterprise. Under the Azalea Note, the sole recourse of Fair Enterprise was against the MEC Class A Shares that had ostensibly been sold by it and the proceeds thereof. In other words, the risk of economic loss remained with Fair Enterprise. Under the Azalea Agreement, Azalea Trust was obliged to sell the MEC Class A Shares as soon as practicable after November 25, 2008 and in an orderly fashion when permitted to do so under applicable securities laws and to apply the net proceeds of sales to the repayment of the Azalea Note. A copy of Azalea Trust's filing dated December 5, 2008 with the United States Securities and Exchange Commission (the "SEC") on Form 13D, which includes a copy of the Azalea Agreement and the form of Azalea Note, is included as Exhibit 10 hereto.

On January 22, 2009, Greenlight sent a letter to OSC Staff requesting that the OSC intervene to require that MID reverse the immediate transactions under the November Restructuring and not proceed with them pending a majority of the minority vote by the holders of MID Class A Shares on the grounds that MID had failed to comply with the provisions of MI 61-101 regarding related party transactions. A copy of Greenlight's letter is included as Exhibit 11 hereto. On

February 5, 2009, Davies Ward Phillips & Vineberg LLP ("DWPV"), counsel to MID, wrote to OSC Staff (Exhibit 4 hereto) and stated:

> "We respectfully submit that, contrary to Greenlight's assertions, the [New Loan and the Loan Extensions (collectively, the "November Loan Transactions")] did not require approval by MID's minority shareholders pursuant to [MI 61-101]. In particular, we submit that:
>
> - The minority approval requirement of MI 61-101 did not apply to MID in respect of the November Loan Transactions as the downstream transaction exemption in section 5.1(g) of MI 61-101 was available to MID.
>
> - Furthermore, in addition to the availability of the downstream transaction exemption:
>
>   (a) the minority approval requirements of MI 61-101 would not have applied to MID in respect of the New Loan as the 25% of market capitalization exemption in section 5.1(g) of MI 61-101 was available to MID in respect of the New Loan; and
>
>   (b) the Extensions would not have been related party transactions under MI 61-101 as they were made pursuant to the existing terms of the relevant loans and for a period of only four months (subject to acceleration...) and, as such, were not material amendments contemplated by paragraph (l) of the definition of related party transaction."

Greenlight's counsel responded to DWPV's February 5, 2009 letter by way of a letter dated March 3, 2009, confirming Greenlight's view that the downstream transaction exemption and the 25% of market capitalization exemption were not available to MID in connection with the New Loan and the Loan Extensions. A copy of this letter is included as Exhibit 12 hereto.

On February 18, 2009, MID announced that the portion of the November Restructuring that was to be implemented following shareholder approval would not proceed. MID said it was unlikely to be able to arrange new debt financing associated with the November Restructuring. By that time, MID had already made significant advances to MEC under the New Loan, of which approximately U.S. $49.2 million was then outstanding, and had extended the maturity dates and the repayment deadlines of certain amounts due under its other loans to MEC pursuant to the Loan Extensions. A copy of the February 18, 2009 press release is included as Exhibit 13 hereto.

On March 4, 2009, Voorheis & Co. LLP, as counsel to the Shareholders (and, at that time, Greenlight), sent a letter to the directors of MID complaining about the history of related party

transactions between MID and MEC and the value destruction associated with those transactions. The letter also stated that the "facts lead [MID's] shareholders to overwhelmingly conclude that MID's investment strategy with respect to its investment in MEC is unduly influenced by Mr. Stronach's personal interests in horse racing and not by the interests of MID." The letter stated that Voorheis & Co. LLP had been instructed to consider the remedies available to MID shareholders in the circumstances, including holding MID's directors accountable for their conduct in approving recent related party transactions with MEC and seeking appropriate relief for the resulting damage done to MID and its shareholders. A copy of this letter is included as Exhibit 14 hereto. The Shareholders have not yet made a decision to proceed with the legal proceedings contemplated in this letter.

As noted above, on March 5, 2009, MID announced that MEC and certain of its subsidiaries had filed petitions for relief under Chapter 11 of the United States Bankruptcy Code. A copy of this press release is included as Exhibit 15 hereto. This press release stated that MID, through a wholly-owned subsidiary, had agreed to provide a six-month secured debtor-in-possession financing facility to MEC (the "DIP Financing") in the amount of U.S. $62.5 million. (The amount of the DIP Financing was subsequently reduced to U.S. $38.4 million.) MID also entered into an agreement with MEC to purchase MEC's relevant interests associated with certain specified assets (the "Stalking Horse Bid"). MID's aggregate offer price for the assets subject to the Stalking Horse Bid was approximately U.S. $195 million. Neither the DIP Financing nor the Stalking Horse Bid was contemplated by MID to be subject to minority shareholder approval or the independent valuation requirements of MI 61-101.

By a letter dated March 11, 2009 to OSC Staff, Greenlight's counsel stated, among other things, that they believed that no exemption from MI 61-101 was available for the DIP Financing and the Stalking Horse Bid. A copy of this letter is included as Exhibit 16 hereto.

On March 20, 2009, counsel to Greenlight wrote to MID's counsel and suggested that the April 3, 2009 U.S. Bankruptcy Court hearing (involving approval of the DIP Financing and the Stalking Horse Bid) should be postponed until the OSC has concluded its review of the MI 61-101 issues and any related proceedings before the OSC had been completed. A copy of this letter is included as Exhibit 17 hereto.

On March 24, 2009, counsel to MID responded to Greenlight's counsel and stated among other things, "MEC requires additional funding under the DIP Financing in order to fund its ongoing operations and avoid a fire-sale liquidation process and is, therefore, not prepared to postpone the consideration by the Court of the Final Dip Order on April 3" and "MID believes it has complied with MI 61-101 in connection with the DIP Financing and the Stalking Horse Bid and it will vigorously defend any proceedings commenced in respect of these matters." A copy of this letter is included as Exhibit 18 hereto.

On March 27, 2009, Fair Enterprise and Azalea Trust entered into a forgiveness agreement and mutual release releasing each other from all claims under the Azalea Agreement and the Azalea Note. No press release or early warning report was filed by Fair Enterprise or Azalea Trust in relation to these developments. The forgiveness agreement and mutual release are described at paragraph 13 of a "Limited Objection" filing dated May 5, 2009 by Azalea Trust in the

MEC United States Bankruptcy Court proceedings included as Exhibit 19 hereto. The forgiveness agreement and mutual release appear to have been entered into so as to allow MID to argue that Fair Enterprise was not a beneficial owner of, and did not exercise control or direction over, the 628,570 MEC Class A Shares then "owned" by Azalea Trust.

Also on March 27, 2009, counsel to MID stated in a letter to OSC Staff (Exhibit 5 hereto) that the "Stronach Group does not beneficially own or exercise control or direction over the MEC Class A Shares held by the Azalea 2008 Trust". MID's counsel also stated in this letter:

> "We respectfully submit that, contrary to Greenlight's allegations, the DIP Financing and the Stalking Horse Bid did not require approval by MID's minority shareholders under [MI 61-101]. In particular, we submit that:
>
> - The minority approval requirements of MI 61-101 did not apply to MID in respect of either transaction as the downstream transaction exemption in section 5.1(g) of MI 61-101 was available to MID. To the knowledge of MID, after reasonable inquiry, no related party of MID, other than a wholly-owned subsidiary of MID, beneficially owned or exercised control or direction over, other than through its interest in MID, more than 5% of any class of equity or voting securities of MEC.
>
> - Furthermore, in addition to the availability of the downstream transaction exemption:
>
>   - the minority approval requirements of MI 61-101 did not apply to MID in respect of the DIP Financing as the 25% of market capitalization exemption in section 5.7(a) of MI 61-101 was available to MID in respect of the DIP Financing; and
>
>   - the minority approval requirements of MI 61-101 did not apply to MID in respect of the Stalking Horse Bid as the substantial majority of the Stalking Horse Bid is in substance the realization by MID on existing security for existing loans (and the realization on existing security is not a "related party transaction" under MI 61-101), and the 25% of market capitalization exemption in section 5.7(a) of MI 61-101 was available to MID in respect of the balance of such transaction."

On April 20, 2009, MID announced that it and MEC had agreed to terminate the Stalking Horse Bid but expressed continued interest in acquiring horse racing assets from MEC.

MID also announced that it had amended the terms of the DIP Financing to, among other things, reduce the principal amount available from U.S. $62.5 million to U.S. $38.4 million. A copy of this April 20, 2009 press release is included as Exhibit 20 hereto.

As noted above, on or about May 11, 2009, MID provided the OSC with the MID Undertaking (see Exhibit 3 hereto). The Shareholders were not involved in negotiating the MID Undertaking with OSC Staff or MID.

Following the delivery by MID of the MID Undertaking, we understand that OSC Staff determined that no hearing of the issues raised in the original applications filed by the Shareholders and Greenlight was necessary at that time, in part on the basis of OSC Staff's receipt of the MID Undertaking.

On June 29, 2009, Azalea Trust sold the 628,570 MEC Class A Shares subject to the Azalea Agreement to 2210456 Ontario Inc. for Cdn. $7,500. A copy of Azalea Trust's filing dated July 2, 2009 with the SEC on Form 13D describing this sale is included as Exhibit 21 hereto.

II. <u>RIGHT TO A HEARING</u>

This application is made pursuant to subsections 104(1) and 127(1) of the Act.

Subsection 104(1) of the Act provides in part as follows:

> "*104.(1) Application to the Commission* - On application by an interested person, if the Commission considers that a person or company <u>has not complied with, or is not complying with, a requirement under this Part or the regulations</u> related to this Part, the Commission may make an order,
>
> ...
>
> (c) directing any person or company to comply with a requirement under this Part or the regulations related to this Part;
>
> (d) restraining any person or company from contravening a requirement under this Part or the regulations related to this Part". [Emphasis added]

Subsection 127(1) of the Act provides that:

> "*127.(1) Orders in the public interest* - The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders;
>
> ...

> 3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order".

Under subsection 104(1) of the Act, an interested person may apply to the OSC for an order where the OSC considers that a person or company has not complied with, or is not complying with, a requirement under Part XX of the Act (Take-Over Bids and Issuer Bids) or the regulations relating to Part XX. The OSC is authorized to make specific forms of orders including requiring compliance with or restraining contravention of Part XX.

Section 1(1) of the Act defines "regulations" as follows:

> " 'regulations' means the regulations made under this Act and, unless the context otherwise indicates, includes the rules".

The non-compliance that is the subject matter of this application is a breach of MI 61-101. Therefore, any non-compliance with MI 61-101 gives rise to a right of an interested person to apply to the OSC for an order of the type specified in subsection 104(1) of the Act.

Under subsection 104(1) of the Act, there is a duty on the OSC, upon receiving an application, to consider whether there has been conduct which would give rise to the need for it to exercise its discretion to make one of the enumerated orders.

Under subsection 127(1) of the Act, the OSC is given authority to make any one of a broad range of enumerated orders if, in its opinion, it is in the public interest to make the order.

It is clear from the Ontario Securities Commission Rules of Procedure (the "Rules") that an application may be brought under sections 104 and 127 of the Act by an applicant other than OSC Staff. Rule 1.1 defines an "application" as follows:

> " 'application' includes an application:
>
> (a) by Staff pursuant to section 127 of the Act;
>
> ...
>
> (f) pursuant to section 104 and/or section 127 of the Act in connection with take-over bids, issuer bids and mergers and acquisitions transactions".

See also Rules 2.4 and 16.1(1) (which specify the manner in which certain applications pursuant to sections 104 and 127 of the Act are to be initiated by persons other than OSC Staff) and Rule 16.2 (which requires the Secretary of the OSC, once all of the specified documents for an application have been filed, to establish the schedule for the filing of a response and a reply and to give notice of the time and place for the hearing of the application).

We also note that subsection 127(4) of the Act provides that "No order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act.*" The exceptions to a hearing under the *Statutory Powers Procedure Act* (the "SPPA") are dealt with under section 4.5 – Decision not to process commencement of proceeding and section 4.6 – Dismissal of proceeding without hearing. Each of these provisions require that notice be given of an intention to deny the right to a hearing.

Section 4.5 of the SPPA deals with technical defects in the documents relating to the commencement of the proceeding. Section 4.5(2) of the SPPA requires notice to be given to the "party who commences a proceeding" if the tribunal or administrative staff intend to invoke this provision. Section 4.6 of the SPPA deals with the proposed dismissal of a proceeding without a hearing on the basis that it is frivolous, vexatious, is commenced in bad faith, there is a lack of jurisdiction, or it is considered that some aspect of the statutory requirements for bringing a hearing have not been met. If the OSC (not the administrative staff) intend to dismiss on the basis of section 4.6 of the SPPA, there is a requirement under section 4.6(2) to give notice to the party who commences the proceeding and, under section 4.6(3), to provide an opportunity for such party to make written submissions in response.

Since subsection 127(4) of the Act incorporates by reference section 4 of the SPPA and provides for a right to a hearing, it is consistent with the Rules in showing that an applicant other than OSC Staff may apply for relief under section 127. This interpretation is also consistent with the purposes of the Act set out in section 1.1 of the Act which are:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in the capital markets.

This is also consistent with subsection 64(1) of the *Legislation Act, 2006* (Ontario), which provides that "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

Therefore, we believe that this application is properly brought before the OSC and that the Shareholders have a right to a hearing even if OSC Staff, once it reviews and considers this application, has a different view.

III. VIOLATIONS OF MI 61-101 AND REASONS FOR THE REQUESTED RELIEF

The November Restructuring (including the New Loans and the Loan Extensions) and the DIP Financing/Stalking Horse Bid announced on March 5, 2009 are both "related party transactions" for purposes of MI 61-101. The definition of "related party transaction" in paragraph 1.1 of MI 61-101 states in relevant part as follows:

> "'related party transaction' means, for an issuer, a transaction between the issuer and a person that is a related party of the issuer at the time the transaction is agreed to, whether or not there are also other parties to the transaction, as a consequence of which, either

through the transaction itself or together with connected transactions, the issuer directly or indirectly

(a) purchases or acquires an asset from the related party for valuable consideration,

...

(j) borrows money from or lends money to the related party, or enters into a credit facility with the related party,

...

(l) materially amends the terms of an outstanding debt or liability owed by or to the related party, or the terms of an outstanding credit facility with a related party,". [Emphasis added]

We believe it is clear that the New Loans and the Loan Extensions made as part of the November Restructuring must be considered as "connected transactions" to the other elements of the November Restructuring, and that the DIP Financing and the Stalking Horse Bid are also "connected transactions". The term "connected transactions" is defined in paragraph 1.1 of MI 61-101 as follows:

"'connected transactions' means two or more transactions that have at least one party in common, directly or indirectly, ... and

(a) are negotiated or completed at approximately the same time, or

(b) the completion of at least one of the transactions is conditional on the completion of each of the other transactions". [Emphasis added]

Section 2.7 of the Companion Policy to MI 61-101 states that the OSC "may intervene if [it] believe[s] that a transaction is being carried out in stages or otherwise divided up for the purpose of avoiding the application of a provision of [MI 61-101]."

We also believe that the Loan Extensions which formed part of the November Restructuring (which Loan Extensions involved extending certain amounts due under approximately U.S. $312 million of loans) fall within the language of the definition of paragraph (l) of the definition of related party transaction (i.e., "materially amends the terms of an outstanding debt or liability by or to the related party, or the terms of an outstanding credit facility with the related party"). If these Loan Extensions were not granted, it appears that MEC would have been required to initiate bankruptcy proceedings. This fact was acknowledged in the letter dated February 5, 2009 (Exhibit 4 hereto) to OSC Staff from MID's counsel which stated: "MID believes that absent the

November Loan Transactions and the extension of the MEC Senior Bank Facility, MEC would have had to initiate bankruptcy proceedings as a result of the repayment obligations then due...".

The Loan Extensions are the economic equivalent of new loans. If the amounts then due under the initial loans were repaid and the monies advanced again, there would be no question that the transaction was a related party transaction. To accomplish the same economic result by extending the loans rather than repaying it and re-loaning it should not produce a different result for purposes of MI 61-101 (even if the right to do so was contained in the original loan documents). Further, we believe that the fact that the Loan Extensions were for only four months cannot be said to make them not material in circumstances where it is evident that the consequence of not extending the loans would have been the initiation of bankruptcy proceedings by MEC.

We also believe it is clear from the definition of "connected transactions" that the DIP Financing and the Stalking Horse Bid are connected transactions. The DIP Financing and Stalking Horse Bid were each an integral part of MEC's bankruptcy proceedings and were entered into at the same time for the purpose of collectively preserving the value of MID's secured loans to MEC. Further, it was an event of default under section 9.1(g) of the debtor-in-possession credit agreement (the "DIP Credit Agreement") dated as of March 6, 2009, pursuant to which MID provided the DIP Financing to MEC through a wholly-owned subsidiary (the "MID Lender"), if, among other things, a bid procedures and sale motion was not filed, or a sale order was not obtained, by specified dates in the Delaware Bankruptcy Court in connection with the sale of MEC's assets each in form and substance acceptable to the MID Lender. A copy of the DIP Credit Agreement is included as Exhibit 22 hereto. As a result, under the DIP Credit Agreement, the MID Lender effectively had a veto over asset sales out of the MEC bankruptcy proceedings. This veto covered not only the MEC assets subject to the Stalking Horse Bid, but also any other assets that MEC wished to sell. We note that, pursuant to a waiver and first amendment to the DIP Credit Agreement dated as of April 22, 2009 (included as Exhibit 23 hereto), section 9.1(g) of the DIP Credit Agreement was amended and restated to effectively remove this veto right (i.e., such that an event of default occurred only if MEC did not obtain a bid procedures order of the Bankruptcy Court, in form and substance reasonably acceptable to the MID Lender, on or before May 4, 2009).

Paragraph 5.1 of MI 61-101 provides for the downstream transaction exemption in the context of related party transactions as follows:

> "*5.1 Application* - This Part does not apply to an issuer carrying out a related party transaction if
>
> ...
>
> (g) the transaction is a downstream transaction for the issuer".

The term "downstream transaction" is defined in paragraph 1.1 of MI 61-101 as follows:

> "'downstream transaction' means, for an issuer, a transaction between the issuer and a related party of the issuer if, at the time the transaction is agreed to
>
> (a) the issuer is a control person of the related party, and
>
> (b) to the knowledge of the issuer after reasonable inquiry, no related party of the issuer, other than a wholly-owned subsidiary entity of the issuer, beneficially owns or exercises control or direction over, other than through its interest in the issuer, more than five per cent of any class of voting or equity securities of the related party that is a party to the transaction;".

The majority of the minority and independent valuation requirements of MI 61-101 also do not apply in circumstances where the 25% of market capitalization exemption is available:

> "5.5 .... (a) *Fair Market Value Not More Than 25% of Market Capitalization* - at the time the transaction is agreed to, neither the fair market value of the subject matter of, nor the fair market value of the consideration for, the transaction, insofar as it involves interested parties, exceeds 25 per cent of the issuer's market capitalization, and for this purpose
>
> ...
>
> (iii) if the transaction is one of two or more connected transactions that are related party transactions and would, without the exemption in this paragraph (a), require formal valuations under this Instrument, the fair market values for all of those transactions shall be aggregated in determining whether the tests for this exemption are met".

See paragraphs 5.5(a) and 5.7(1)(a) and 5.7(2) of MI 61-101 which provide for the 25% of market capitalization exemption.

We believe that the downstream transaction exemption was not available to MID in relation to either the November Restructuring or the DIP Financing/Stalking Horse Bid. The Azalea Trust transaction was entered into on November 25, 2008, one day prior to the announcement of the November Restructuring. In our view, the Azalea Trust transaction was an artificial transaction implemented at the last minute in an attempt to make the downstream transaction exemption technically available. We also believe the Azalea Trust transaction was a sham and did not involve

a *bona fide* sale by Fair Enterprise of the 628,570 MEC Class A Shares to Azalea Trust. Rather, the economic risk associated with the ownership of these shares remained with Fair Enterprise at all times and was never effectively transferred to Azalea Trust. There are other aspects of the Azalea Trust transaction which we believe confirm our view that this transaction was not a *bona fide* sale including that no interest was payable on the two-year Azalea Note and that the Azalea Agreement contained requirements on how the MEC Class A Shares were to be "sold" by the new "owner". The subsequent transactions relating to the Azalea Trust including the forgiveness agreement and mutual release entered into on March 27, 2009 and the sale of these MEC Class A Shares to 2210456 Ontario Inc. on June 29, 2009 also in our view further confirm the Azalea Trust transaction's lack of economic substance.

We also believe that the 25% of market capitalization exemption was not available for the November Restructuring because the fair market value of the subject matter of the November Restructuring was greater than 25% of the market capitalization of MID calculated in accordance with MI 61-101 (25% of MID's market capitalization was U.S. $146,496,486 according to the letter dated February 5, 2009 submitted to OSC Staff on behalf of MID, included as Exhibit 4 hereto). In our view, all aspects of the November Restructuring including both the New Loan (U.S. $125 million) and the Loan Extensions (related to approximately U.S. $312 million of underlying loans) forming part of the initial portion of the November Restructuring, together with the proposed asset purchases and other aspects of the subsequent stages of the November Restructuring, are connected transactions and should be aggregated for purposes of calculating whether the 25% market capitalization threshold has been met.

Similarly, the aggregate amount of the DIP Financing (initially U.S. $62.5 million) and the amount of the Stalking Horse Bid (approximately U.S. $195 million), as connected transactions which form part of the March 2009 transactions, also exceeded 25% of the market capitalization of MID calculated in accordance with MI 61-101 (25% of MID's market capitalization was U.S. $71,918,269 according to the letter dated March 27, 2009 submitted to the OSC on behalf of MID, and included at Exhibit 5 hereto).

We believe that MID knew that the 25% market capitalization exemption may not be available. Otherwise it would not have bothered with the sham Azalea Trust transaction at the last minute in order to be able to rely, as it now seeks to do, on the downstream transaction exemption.

We believe that the manner in which the November Restructuring and the DIP Financing/Stalking Horse Bid were implemented was abusive of the requirements of MI 61-101. In both cases, significant loans were immediately made by MID to MEC, without any requirement for shareholder approval, as part of bigger transactions. The loans were actually made contemporaneously with (or shortly after) the public announcement effectively ensuring that the monies would be advanced and no steps could effectively be taken to reverse the making of the loans. We believe that public corporations in Ontario should not be allowed to implement significant related party transactions on the basis that funds can be immediately injected free from the related party transaction requirements so long as the balance of the transaction over the 25% threshold is subject to shareholder approval.

Since the 2003 spin-out of MID, MID has entered into over 20 publicly disclosed related party transactions with MEC which have resulted, as at March 31, 2009, in approximately U.S. $375 million (including accrued interest) of loans made to a corporation which is now in bankruptcy proceedings. These loans amount to approximately 100% of the market capitalization of MID as at July 9, 2009. Hundreds of millions of dollars have been invested in MEC by MID since 2003, with MID taking the position that all such transactions are exempt from the protections of MI 61-101 (or similar predecessor regulations).

We also believe that the downstream transaction exemption was not available to MID in connection with either the November Restructuring or the DIP Financing/Stalking Horse Bid as a result of the technical manoeuvring effected by MID with respect to the Azalea Trust transaction. In our opinion, this is not a *bona fide* transaction, but rather a technical attempt by MID to squeeze itself within the downstream transaction exemption in a manner that does an injustice to MI 61-101. We believe that MID's attempted reliance on the downstream transaction exemption is abusive of the capital markets and squarely brings into play the oft quoted language of the OSC that applicable securities laws should not be interpreted with the "sophisticated gloss of technicality" to entitle shareholders to take advantage of exemptions from securities law requirements and obligations that would otherwise be applicable.

We believe that the Azalea Trust transaction is abusive in two ways. Firstly, it is artificial and not a *bona fide* sale transaction. Secondly, it was contrived to allow MID to technically rely on the downstream transaction exemption and thus frustrate the intention of the underlying philosophy of the related party transaction provisions of MI 61-101 and undermine the reasonable expectations of investors and other capital market participants.

Further, almost by definition, representatives of the Stronach Group must have known on November 25, 2008 about the material terms of the November Restructuring (which was announced on November 26, 2008). Members of the Stronach Group were, in fact, parties to the November 26, 2008 transaction agreement. In entering into this transaction agreement, MID allowed members of the Stronach Group to utilize for their own benefit material undisclosed information relating to MID and MEC to allow MID to attempt to technically take advantage of an exemption from MI 61-101 and avoid the provisions designed to protect and enhance shareholder interests. Rather than facilitating the use of corporate information for the benefit of all of its shareholders, MID allowed its corporate information to be used for the benefit of the Stronach Group and to the detriment of MID's minority shareholders.

As the OSC stated in *Re Federal Commerce & Navigation Ltd.*, [1981] 1 O.S.C.B. 20(c) at page 25(c):

> "In conclusion, the decision of the Commission has been based upon an interpretation of the provisions of the By-law arrived at in the light of the Commission's understanding of the philosophy and the intent behind the rules established by those provisions. In restating the basic tenets or general principles discussed in the Kimber Report, the Commission wishes forcibly to draw to the attention of the public that, although technical interpretation is necessary, it is the

> expectation of the Commission that the participants in the capital markets of this province will be guided by the basic philosophy and rationale from which the securities laws of this province were developed. The sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province. Technical interpretations that run contrary to these basic philosophies and principles will not be acceptable to the Commission."

We also do not believe that the execution of the MID Undertaking should prevent MID from having to answer for its non-compliance with MI 61-101. Apart from the fact that there are many related party transactions that could be entered into between MID and MEC that are not caught by the MID Undertaking, we believe that the effect of the MID Undertaking will be for MID to negotiate privately with OSC Staff to ensure that OSC Staff agrees that any proposed related party transaction is exempt from MI 61-101. We believe that the capital markets deserve transparency and that capital market participants such as MID should be required to answer for what we believe are violations of MI 61-101.

The MID Undertaking only applies to asset transactions. It does not apply to new loans or loan extensions. We believe that it is highly likely that MID will make additional loans or amend its existing loan agreements or loan documents in a material way or attempt to purchase assets from MEC within the MEC bankruptcy proceedings. MID has already shown a pattern of announcing and contemporaneously implementing new loans or loan amendments involving MEC in purported reliance upon exemptions from MI 61-101 in circumstances where MID's shareholders are left to deal with these transactions after the fact and after the transactions have already been at least partially implemented. There is nothing, including the MID Understanding, currently preventing MID from continuing that pattern of conduct with respect to new loans or loan amendments involving MEC, other than whatever requirements may apply under Chapter 11 of the United States Bankruptcy Code.

We are also concerned that the June 29, 2009 sale of the MEC Class A Shares from Azalea Trust (which were originally owned by Fair Enterprise) is intended to allow MID to again take advantage of the downstream transaction exemption. We do not believe that MID should be permitted to rely on this exemption unless and until the issues raised in this application are considered by the OSC.

We also believe that negotiations with respect to future related party transactions in which MID shareholders have a vested interest, where the interests of those shareholders have been so badly abused for many years, should not take place privately and away from the shareholders who have brought these issues to the OSC.

Following the complaints by Greenlight and the Shareholders (1) the Stalking Horse Bid was terminated, (2) Azalea Trust entered into the forgiveness agreement and mutual release with Fair Enterprise to try and undo the Azalea Agreement, (3) the DIP Credit Agreement was amended to effectively remove the MID Lender's veto over asset sales by MEC, (4) the MEC Class A Shares

"sold" to Azalea Trust have been sold to an apparent third party, and (5) MID has entered into the MID Undertaking with a view to avoiding a hearing for its conduct.

MID has, in our opinion, violated the law and, after it was caught, altered its transactions and then entered into the MID Undertaking in an attempt to avoid having to answer publicly and in real time for its conduct. In our view, market participants who violate the law or seek to rely on technical interpretations that are abusive of Ontario's securities laws ought not to be allowed to simply carry on after they are found out so long as they give an undertaking to OSC Staff.

We also believe there are significant policy issues present in this case including whether OSC Staff should be empowered to permit market participants such as MID to avoid public hearings relating to their misconduct simply on the basis of privately negotiated undertakings with OSC Staff.

In the current circumstances, including the MEC bankruptcy proceedings in which MID has a significant interest, we believe that it is not in the public interest for these issues to be dealt with in private by OSC Staff in a manner that effectively denies the Shareholders their right to a hearing under sections 104 and 127 of the Act.

It is also both reasonably required, and in the public interest, for all MID shareholders to have a clear understanding now as to whether MID, in light of its prior non-compliance with MI 61-101, is nevertheless entitled to continued reliance on the exemptions contained in MI 61-101. Investment decisions by MID shareholders must be made in real-time, and MID has made repeated public statements to the effect that it is continuing to evaluate whether to bid on MEC assets. The Shareholders have a right to know as they are making investment decisions whether the OSC will permit MID to continue to rely on the exemptions contained in MI 61-101 so as to be able to complete related party transactions that would otherwise almost certainly be blocked by MID's shareholders.

We believe that the issues surrounding non-compliance by MID with MI 61-101 in connection with the November Restructuring and the DIP Financing and the Stalking Horse Bid should be determined in a public forum in real time as the bankruptcy proceedings of MEC evolve and that the OSC should rule publicly on what relief, if any, should be granted to protect the shareholders of MID in respect of such non-compliance.

Where corporations or individuals have conducted themselves in a manner contrary to the public interest, or relied on exemptions in an abusive manner, the OSC has in the past ordered the denial of exemptions. See, for example, *Re Bruce Orsini and Andrew Tulk* (1991), 14 O.S.C.B. 4820.

In *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600, the OSC stated at pages 1610-1611:

> "... Under sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets - - wholly or partially, permanently or temporarily,

> as the circumstances may warrant - - those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all. And in so doing, we may well conclude that a person's past conduct has been so abusive of the capital markets as to warrant our apprehension and intervention, even if no particular breach of the Act has been made out. Equally, however, even if there has been a technical breach of the Act, we may well conclude that, in the circumstances, no sanction is necessary to protect the public interest."

And at page 1618:

> "Certain exemptions are available, of course, from the strict requirements of Part XIX. These are set out in section 92 of the Act. Generally speaking, these exemptions are available in circumstances in which it is reasonable to expect that the purpose of Part XIX will be carried out even if formal compliance with all of its provisions is not required. Where the strict terms of an exemption are met, and the policy objectives of Part XIX are nonetheless fully carried out, this Commission will have no basis for intervening in a bid. But where the policy objectives of Part XIX are not carried out, then this Commission will not hesitate to intervene in a bid even if the strict terms of an exemption have been met."

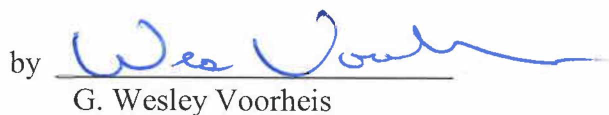
Similarly, the potential availability of a remedy in court or the potential commencement by the Shareholders of litigation against MID should not deter the OSC from acting if there has been abuse of the capital markets. In *Re Cablecasting Limited*, [1978] O.S.C.B. 37, the OSC stated beginning at page 41:

> "... it seems clear to the Commission that the availability of some other remedy does not preclude it from granting an application such as this ... to conclude that availability to the applicant of a remedy in the courts ousts the jurisdiction of the Commission would, in our view, be inconsistent with the principles of The Securities Act. If a clear abuse of investors is demonstrated, the Commission should not be forced to rely on a single minority shareholder to initiate legal proceedings on behalf of all."

For the reasons discussed herein, the Shareholders request that the OSC hold a hearing to consider whether an order should be issued denying MID the right to rely on the exemptions contained in Part 5 of MI 61-101 as a result of what we believe is non-compliance with the requirements of MI 61-101. We have enclosed our cheque in payment of the required filing fees.

Yours very truly,

VOORHEIS & CO. LLP

by 
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