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July 13, 2009

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/Mesdames:

Re: Restated Application by Greenlight Capital, Inc. to the Ontario Securities Commission (the "Commission") pursuant to sections 104 and 127 of the *Securities Act* ("Act")

Re: Violations of Multilateral Instrument 61-101 ("MI 61-101")

I. Introduction

Greenlight's Application

We are counsel to Greenlight Capital, Inc. ("**Greenlight**"). Greenlight is a significant independent shareholder of MI Developments Inc. ("**MID**"), an Ontario-incorporated reporting issuer that is controlled by Frank Stronach through a trust.

On March 30, 2009, Greenlight applied under sections 104 and 127 of the Act for relief including a declaration that certain related party transactions recently entered into by MID with its subsidiary Magna Entertainment Corporation contravene MI 61-101. In those transactions, MID advanced loans to, or attempted to purchase assets from, MEC without the approval of the minority shareholders of MID (**"Minority Approval"**). No exemptions from MI 61-101 were available. MID acquiesced in artificial transactions so it could purport to rely on the downstream transaction exemption ("**Downstream Transaction**"). The contraventions by MID of MI 61-101 were, in Greenlight's submission, deliberate and repeated and they were accompanied by other securities law violations.

Greenlight seeks an order restraining MID from entering into additional transactions (**"Additional Transactions"**) with MEC which purport to rely upon exemptions in MI 61-101. Greenlight does so because, as early as September, MID has publicly reserved the right to buy certain assets of MEC, by participating in a planned auction of MEC's racing and

gambling assets. If MID becomes a stalking horse bidder in August, a winning bidder may be selected by the Bankruptcy Court in Delaware (the "**Bankruptcy Court**") on September 8. If MID purchases those assets without Minority Approval, that transaction will contravene MI 61-101. For any transactions with MEC, the Commission should also deny MID access to exemptions from MI 61-101 due to MID's historical non-compliance with MI 61-101 and the artificial and illegal manoeuvres devised so MID could purport to rely on MI 61-101exemptions. As recently as June 29, 2009, 2191273 Ontario Inc. (the "**Azalea Trust**") purported to effect a sale of MEC Class A Shares on terms so commercially improbable that they could only have been intended to enable MID to claim the Downstream Exemption in relation to Additional Transactions.

MID has delivered an undertaking (the **"MID Undertaking"**) in relation to Additional Transactions. There is nothing in the MID Undertaking obliging MID to submit Additional Transactions to Commission scrutiny, to consult in advance with the Commission Staff about its reliance on exemptions, or to prevent MID from entering into the Additional Transactions until issues of past non-compliance with MI 61-101 have been disposed of at a hearing. Due to the impending auction of MEC's assets, the holding of a hearing on this application is urgent. Accordingly, Greenlight seeks a hearing before the Commission as soon as possible.

This letter restates and updates Greenlight's original application dated March 30, 2009 (the "**Original Application**" or "**Application**") which was further amended on April 9, 2009 by our letter of that date. We understand that in addition to this restated application (the "**Restated Application**"), other minority public shareholders of MID holding, together with Greenlight, sufficient votes to deny any required Minority Approval filed their own application on July 10, 2009 seeking similar relief to that sought herein.[1]

II. MID Transactions that have already contravened MI 61-101

Since November 2008, in violation of MI 61-101, MID has embarked upon a series of connected related party transactions with its subsidiary, MEC:

(a) MID made new loans (the **"Loans"**) to MEC in an aggregate amount of US$125 million in connection with the now abandoned reorganization under a Transaction Agreement dated November 26, 2008 (the **"Transaction Agreement"**);[2]

(b) MID extended the maturities of certain amounts due under US$312 million of loans owed by MEC to MID (the "**Loan Extensions**") in connection with the now-abandoned reorganization;

[1] Exhibit Book, Tab 1.A
[2] Exhibit Book, Tab 4.B

(c) MID provided US$38.4 million of financing (the "**DIP Financing**") under the DIP credit agreement (the "**DIP Credit Agreement**") entered into as part of MEC's voluntary bankruptcy proceedings ("**MEC Bankruptcy**" or "**Bankruptcy Proceedings**"); and

(d) MID entered into a Stalking Horse Purchase Agreement dated March 5, 2009 (the "**Stalking Horse Agreement**") to acquire certain racing assets (the "**Stalking Horse Assets**") from MEC for an aggregate purchase price of US$194.8 million (the "**Stalking Horse Bid**") as part of the MEC Bankruptcy. While the Stalking Horse Bid was withdrawn on April 20, 2009, MID publicly expressed continued interest in acquiring the Stalking Horse Assets and has reserved the right to acquire other MEC assets as well.[3]

III. Orders Requested

Greenlight applies for:

1. an order that MID has not complied with MI 61-101 with respect to the transactions engaged in pursuant to the Transaction Agreement and the DIP Credit Agreement;

2. an order restraining MID and its affiliates from engaging, whether under the Transaction Agreement, in connection with any Additional Transaction or otherwise, in any of the following activities without complying with MI 61-101, including, without limitation, the requirement for Minority Approval:

   (a) advancing any further MID funds, either directly or indirectly, through one or more subsidiaries to MEC or any of its subsidiaries;

   (b) agreeing to any extensions or amendments of any loan agreement with MEC or any of its subsidiaries; and

   (c) purchasing or committing to purchase any assets or securities of MEC or its subsidiaries;

3. an order that exemptions contained in MI 61-101 not be available in respect of the Transaction Agreement, the DIP Credit Agreement or an agreement in respect of any Additional Transaction (an "**Additional Transaction Agreement**") (such agreements being herein collectively referred to as , the "**Agreements**") or any of them, or any agreement, proposal or transaction referred to therein; and

4. such further and other relief as the Commission shall determine to be appropriate.

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[3] Exhibit Book, Tab 2.G.

IV. Parties

Greenlight

5. Greenlight is a New York-based investment management firm founded in 1996. Greenlight has had a very significant investment in MID since the spin-out of MID in 2003. Together with its affiliates, Greenlight manages approximately US$5 billion in assets and owns 5.6 million MID Class A Shares (as defined below), representing approximately 12% of the outstanding MID Class A Shares and approximately 11% of all MID's outstanding shares.

6. Greenlight is among the largest public shareholders of MID. Like other public shareholders, Greenlight has suffered significant harm since the Loan transactions under the Transaction Agreement and the DIP Financing under the DIP Credit Agreement were undertaken. Greenlight and the other MID shareholders will suffer further harm if any Additional Transaction is not made subject to prior Minority Approval.

MID[4]

7. MID is an Ontario corporation with its head office in Aurora, Ontario. MID is a real estate operating company engaged in the ownership, management, leasing, development and acquisition of industrial and commercial real estate properties. In addition to its real estate operations, MID holds controlling equity (54%) and voting (96%) interests in MEC.

8. 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 shareholders. As part of that transaction, Magna also transferred to MID all of the shares of MEC then owned by Magna.

9. MID was spun off with the Stronach Group (as defined below) as its controlling shareholder. Since that time, MID has been controlled by the Stronach Group. In addition, the Stronach Group has owned controlling equity and voting interests in MEC.

10. The authorized capital of MID consists of an unlimited number of Class A Shares (the "**MID Class A Shares**"), 706,170 Class B Shares ("**MID Class B Shares**") and an unlimited number of Preference Shares issuable in series. As of May 14, 2009, there

[4] The information about MID, MEC and the Stronach Group is derived from a letter dated February 5, 2009 to the Commission delivered by MID's counsel in connection with these proceedings (the "**MID February Letter**") (Exhibit Book, Tab 1.B).

were 46,160,564 MID Class A Shares, 547,413 MID Class B Shares and no Preference Shares issued and outstanding.

11. Each MID Class A Share carries one vote and each MID Class B Share carries 500 votes at all meetings of shareholders, other than meetings of another class or series. MID Class A Shares and MID Class B Shares participate equally as to dividends (except for stock dividends, in respect of which MID may declare a simultaneous stock dividend payable on MID Class A Shares in MID Class A Shares and payable on MID Class B Shares in MID Class A Shares or MID Class B Shares) 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. MID Class A Shares are convertible into MID Class B Shares on a one-for-one basis, at the option of the holder, upon (a) an offer being made for MID Class B Shares where by reason of applicable securities legislation or stock exchange requirements, the offer must be made to all holders of MID Class B Shares and (b) no equivalent offer being made for MID Class A Shares, with such conversion right being exercisable solely for purposes of permitting the holders of MID Class A Shares to tender to such offer.

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

MEC

13. MEC is a Delaware corporation with a registered office in Wilmington, Delaware and its principal executive office in Aurora, Ontario.

14. 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. Based on revenues, MEC is North America's number one owner and operator of horse racetracks, and is a leading supplier, via simulcasting, of live racing content to the growing inter-track, off-track and account wagering markets. Three of the racetracks that MEC owns or operates (Gulfstream Park, Remington Park and Magna Racino™) include casino operations with alternative gambling machines.

15. MEC owns and operates AmTote International, a provider of totalisator services to the pari-mutuel industry, XpressBet®, a US 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.

16. 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.

17. 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 of December 15, 2008, there were approximately 2,928,455 MEC Class A Shares and 2,923,302 MEC Class B Shares issued and outstanding.

18. Each MEC Class A Share carries one vote and each MEC Class B Share carries 20 votes at all meetings of stockholders. MEC Class A Shares and MEC Class B Shares participate equally as to dividends and as to 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.

19. On March 5, 2009, MEC and certain of its subsidiaries filed voluntary petitions for relief in the Bankruptcy Court pursuant to the MEC Bankruptcy. The MEC Class A Shares were listed and traded on the TSX and the NASDAQ National Market ("**NASDAQ**") but were delisted earlier in 2009 as a result of the MEC insolvency. The MEC Class B Shares are not listed for trading. MEC is a reporting issuer in each of the provinces of Canada.

20. 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.

21. As of the commencement of the MEC Bankruptcy, the loan balance of MEC loans from MID including accrued interest stood at approximately US$372 million, representing about 75% of MEC's US$500 million of secured debt outstanding at that date.[5]

Stronach Group

22. Frank Stronach, the Stronach Trust, 445327 Ontario Limited and Fair Enterprise Limited ("**Fair Enterprise**") are referred to collectively as the "**Stronach Group**".

[5] See MID press release of March 5, 2009 for the loan balance and para 12 of MEC's March 5, 2009 motion for post-petition financing for total secured debt as of March 5, 2009 (Exhibit Book, Tabs 2.D and 5.A).

All of the shares of Fair Enterprise are held by an estate planning vehicle for the Stronach family.

23. Mr. 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.[6]

24. 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.

25. 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 MID Class B Shares, 56.8 % of the votes attached to MID's voting securities and 0.8% of MID's equity securities.

26. As of November 25, 2008, Fair Enterprise held 50,000 MID Class A Shares and 20,000 MID Class B Shares, representing in the aggregate 3.1% of the votes attached to MID's voting securities and 0.15% of MID's equity securities.

27. On November 25, 2008, Fair Enterprise purported to dispose of all 628,570 MEC Class A Shares that it held to the Azalea Trust by entering into a share purchase agreement (the "**Azalea Trust Agreement**") and accepting a non-recourse promissory note in payment for the shares Fair Enterprise sold.[7]

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

29. The Stronach Group also exercised control or direction over 11,244 MEC Class A Shares (0.4% of the MEC Class A Shares) comprised of:

    (a) 10,327 MEC Class A Shares held by the Employees Deferred Profit Sharing Plan (US) of Magna. Mr. Stronach is one of the trustees of this plan, but is not a beneficiary. Magna, which is also controlled by the Stronach Group through multiple voting shares, generally has the right to direct the disposition and voting of these shares.

    (b) 917 MEC Class A Shares held by 865714 Ontario Inc. 865714 Ontario Inc. is a separate vehicle incorporated for the acquisition of Magna shares and the sale thereof to the management team of Magna. Magna generally has the right to direct the disposition and voting of these shares.

[6] MEC press release of April 7, 2009. Exhibit Book, Tab 2.E.
[7] Exhibit Book, Tab 4.A.

30. Mr. Stronach also holds options to purchase 50,000 MEC Class A Shares. The Stronach Group claims it does not beneficially own such MEC Class A Shares for purposes of MI 61-101.

V. Chronology through May 2009

History prior to November 2008

31. MEC has been losing money, in good economic times and bad, ever since it became a subsidiary of MID in August 2003. Originally MID had no loans to MEC.[8] Then, as MEC ran out of cash, MID first tried to privatize MEC, and then when that failed, MID lent money to MEC, over minority shareholder objections.[9] It did so supposedly to "protect" its equity investment in MEC, an investment which is now nearly worthless.

32. As of November 25, 2008, the day before the Loans were made, MID had project loans with MEC of approximately US$194.5 million and bridge loans with MEC of approximately US$117.7 million for a total of US$312.2 million, which represented well over 50% of MID's market capitalization for purposes of MI 61-101 according to the MID February Letter.[10]

33. By November 2008, MEC had been in serious financial trouble for several years and the value of MID's investment in MEC had fallen over 95% from its 2005 value. MEC lost an average of over US$100 million per year in the financial years 2005, 2006 and 2007. In 2008, MEC lost about US$294 million.[11]

34. The Loans and Loan Extensions forming part of the Transaction Agreement were driven by the fact that by December 1, 2008, US$257.7 million of MEC loans were maturing[12] and could not be repaid without MID's help. MEC has been unsuccessful in repaying any portion of these maturing loans, in achieving its business plan or in lowering the extent of its financial dependence on MID. Yet MID steadily increased its exposure to MEC as a creditor since 2004.

35. MID's stock price had dropped about 75% since 2005, from over US$30 in 2005 to US$8.43 on November 25, 2008 and US$8.40 as of July 10, 2009, the date of this Restated Application. During that period, MID's Board of Directors has failed to

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[8] See MID final prospectus, August 18, 2003 at pp F-62-63 which lists five related party transactions but does not mention any with MEC (Exhibit Book, Tab 3.C).
[9] See, for example, MID management information circular April 4, 2005 at pp 28-35 (Exhibit Book, Tab 3.D).
[10] See para 5.2.1 of the MID February Letter (Exhibit Book, Tab 1.B).
[11] MEC motion for post petition financing, para. 28 (Exhibit Book, Tab 5.A).
[12] Paras 2.6 and 2.7 of the MID February Letter (Exhibit Book, Tab 1.B).

identify any financial alternatives for MEC and allowed MID to fund MEC's ever-increasing losses.

36. Greenlight was involved in an oppression proceeding between 2005 and 2008 in an attempt to stop financial support of MEC by MID and to attempt to have other measures implemented to allow MID to operate as a conventional real estate company separate and apart from MEC. Though its litigation was unsuccessful, Greenlight's concerns about MID's support for MEC's business have been amply vindicated by recent events and by repeated expressions of MID public Class A shareholder support for the separation of MID and MEC, for putting an end to MID's role as lender of last resort to MEC and stopping any future asset purchase and funding transactions between MID and MEC.

The November 2008 Transaction Agreement

37. The reorganization transaction proposal was announced by press release dated November 26, 2008.[13] The press release announced what was called a "reorganization proposal" involving a "three-stage transaction" which included: (i) MID making available to MEC the Loans and Loan Extensions; (ii) subsequent shareholder approval for the reorganization proposal; and (iii) the Stronach Group purchasing further MEC shares from MID, and MEC being given the option to repay all of its indebtedness to MID through an exchange of MEC equity for debt held by MID.

38. The steps referred to in the press release of November 26, 2008 were contained in the Transaction Agreement.[14] The Transaction Agreement is contained in a single document signed by MID, MEC, the Stronach Trust, 445327 Ontario Limited and Fair Enterprise. Under that agreement, MID states that a reorganization proposal, which it defines as the "Transaction" is to be concluded on the terms set out in a term sheet attached to the Transaction Agreement as Schedule A.

39. Under the Transaction Agreement, MID agreed to grant MEC up to US$125 million of new Loans, and agreed to extend, by way of the Loan Extensions, the maturity of certain amounts due under US$312 million of loans from MID to MEC which amounts were to become due on December 1, 2008.

40. In the Transaction Agreement, the Loans and Loan Extensions were not made subject to advance Minority Approval. However, the other components of the proposed reorganization were made subject to such an approval. Under the Transaction Agreement, if the other reorganization components were not approved by a Minority

[13] Exhibit Book, Tab 2.A.
[14] Exhibit Book, Tab 4.B.

Approval, the Loans were accelerated and the Loan Extensions would have had to be reversed.[15]

41. On February 18, 2009, MID announced that it was not proceeding with the reorganization proposal announced on November 26, 2008. MEC also announced that it had been informed by MID that it would not be proceeding with that reorganization proposal.[16]

42. The immediate consequence of the withdrawal of the reorganization proposal was that MEC sought bankruptcy protection in the United States and Canada.[17] The net result of the Transaction Agreement was that, between November 26, 2008 and March 5, 2009, a further US$52 million was lent to MEC by MID without any Minority Approval.

Azalea Trust Agreement

43. On November 25, 2008, just one day before the public announcement of the Transaction Agreement, Fair Enterprise entered into the Azalea Trust Agreement with the Azalea Trust for the purported sale by Fair Enterprise of 628,570 MEC Class A Shares. Under this agreement:

(a) The purchase price was entirely paid and satisfied by the delivery by Azalea Trust of a two-year promissory note carrying no interest. Under the promissory note, the sole recourse of Fair Enterprise was against the MEC Class A Shares purportedly being purchased, and the proceeds thereof;

(b) Pursuant to a covenant in the Azalea Trust Agreement (the "**Orderly Sale Covenant**"), Azalea Trust was obliged to "sell the MEC Class A Shares that it purchased as soon as practicable after November 25, 2008 and in an orderly fashion when permitted to do so under applicable securities laws" and was to apply the proceeds of sale to the repayment of the promissory note; and

(c) The promissory note provided that in the event of default, which included any failure of Azalea Trust to perform any obligation under the share purchase agreement (including the Orderly Sale Covenant), the promissory note immediately came due and Fair Enterprise was entitled to exercise remedies, including, without limitation, the right to immediately foreclose on the shares or cause them to be sold.

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[15] See MID's November 26 press release and para 1(c) of Schedule A of Transaction Agreement (Exhibit Book, Tabs 2.A and 4.B).

[16] MID February 18, 2009 press release and MEC February 18, 2009 Press Release (Exhibit Book, Tabs 2.B and 2.C).

[17] MID press release of March 5, 2009 (Exhibit Book, Tab 2.D).

Attempts to Undo the Azalea Trust Agreement and Restore Downstream Exemption

44. On March 27, 2009, Fair Enterprise and Azalea Trust entered into an agreement (the "**Forgiveness Agreement**") and mutual release, releasing each other from all claims under the Azalea Trust Agreement and the promissory note. These facts were buried in a Bankruptcy Court filing.[18] No press release or early warning report was filed by Fair Enterprise or Azalea Trust in relation to these developments.

45. As of May 5, 2009, more than five months after the Azalea Trust Agreement was entered into, the Azalea Trust had not sold any of the MEC Class A Shares that it purportedly "purchased" from Fair Enterprise. On that day, Azalea Trust made a filing in the Bankruptcy Court seeking permission to sell such shares. Azalea Trust purported to sell all of its MEC Class A Shares on June 29, 2009 to a newly incorporated Ontario corporation[19] for nominal consideration of $7,500. The purported sale appears to have been effected so that MID can claim the so-called "downstream transaction" (the "**Downstream Exemption**") is available in respect of Additional Transactions.[20]

The March 2009 DIP Credit Agreement and Stalking Horse Agreement

46. On March 5, 2009, MID issued a press release in relation to the MEC Bankruptcy. In that press release, MID announced that it or its subsidiaries were providing both the DIP Financing and also the Stalking Horse Bid for the Stalking Horse Assets.[21]

47. Under the DIP Credit Agreement, MID agreed, through its wholly owned subsidiary MID Islandi sf. (the "**MID Lender**"), to provide the DIP Financing to MEC in the amount of US$62.5 million.[22]

48. Under the Stalking Horse Agreement, MID agreed to purchase the Stalking Horse Assets from MEC for an aggregate purchase price of US$194,795,000.[23] The ultimate price paid for the Stalking Horse Assets was to be determined at the

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[18] para 11 of a "Limited Objection" filing dated May 5, 2009 by Azalea Trust in the MEC Bankruptcy Court Proceedings (Exhibit Book, Tab 5.B).

[19] Schedule 13D filing by Azalea Trust dated June 30, 2009 (Exhibit Book, Tab 3.E).

[20] The Downstream Exemption is available for a related party transaction between a parent and a subsidiary if no other related party of the issuer owns more than 5% of the equity or voting securities of the subsidiary. As explained in para 73, because of the highly unusual sale terms, Fair Enterprise's holdings of MEC Class A shares exceeded this threshold even after the purported sale to Azalea Trust. Though its MEC Class A Shares are now worthless, Azalea Trust purported to sell them on June 29, 2009.

[21] MID March 5, 2009 press release (Exhibit Book. Tab 2.D).

[22] MID press release dated March 5, 2009, DIP Credit Agreement, para. 2.1 (Exhibit Book, Tabs 2.D and 4.C).

[23] Stalking Horse Agreement, paras 1.2 (definition of "Purchase Price") and 2.4. (Exhibit Book Tab 4.D). In the MID press release dated March 5, 2009, p. 2 the Purchase Price as stated to be US$195 million (Exhibit Book Tab 2.D).

conclusion of an auction of these assets held by the Bankruptcy Court.[24] This purchase price constituted 68% of MID's market capitalization on March 5, 2005 calculated for purposes of MI 61-101.[25]

49. On March 17, MEC filed a motion in the MEC Bankruptcy to sell certain assets of MEC not covered by the Stalking Horse Bid (the "**Other MEC Assets**").

50. Various objections were raised to the Stalking Horse Bid. On April 3, 2009 the Stalking Horse Agreement was amended to provide for the ability of MID to terminate the Stalking Horse Bid if the Commission determined that approval of MID's minority shareholders was required.[26]

51. On April 20, 2009, MID issued a press release announcing that it had withdrawn the Stalking Horse Bid and terminated the Stalking Horse Agreement in response to objections made by a number of parties in the MEC Bankruptcy.[27] Included in its press release was the statement that "... MID will continue to evaluate whether to bid on MEC assets during the course of the Chapter 11 sales process."

52. On April 20, 2009, MID also announced that the terms of the DIP Credit Agreement had been amended. Among other things, the amendment:

    (a) extended the maturity from September 6, 2009 to November 6, 2009 in order to allow for a longer marketing period in connection with MEC's asset sales;

    (b) reduced the principal amount available from US$62.5 million to US$38.4 million. The reduction was attributable to the fact that interest on the pre-petition indebtedness owed by MEC and its subsidiaries to the MID Lender would accrue during the MEC Bankruptcy rather than being paid currently in cash; and

    (c) provided that MEC had until the week of May 4, 2009 to file a motion on the bid procedures relating to the asset sales.

53. The final terms of the debtor-in-possession financing facility were considered and approved by the Bankruptcy Court on April 20.

54. On May 4, 2009, the Bankruptcy Court approved a bid procedures order with respect to the Other MEC Assets. In a press release issued by MID on May 8, 2009, MID

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[24] MID press release dated March 5, 2009, p. 2; Stalking Horse Agreement para 3.1 (Exhibit Book, Tabs 2.D and 4.D).
[25] MID March 24 Letter (the "**MID March 24 Letter**") – Schedule entitled "MID Market Capitalization for February 2009 for Transactions entered into in March 2009" (4 x US$71,918,269) (Exhibit Book, Tab 1.D).
[26] MID April 3, 2009 press release (Exhibit Book, Tab 2.F).
[27] MID April 20, 2009 press release (Exhibit Book Tab 2.G).

said it would not attempt to purchase the Other MEC Assets unless it determined later that the Other MEC Assets were being sold at "fire sale prices".[28] MID could submit a bid for Other MEC Assets on or around August 7, 2009. The Bankruptcy Court will approve the winning bidder at a sale hearing on September 8, 2009.[29]

MID Delivers the MID Undertaking

55. On May 21, 2009, MID delivered the MID Undertaking to the Staff providing certain assurances in relation to Additional Transactions with MEC.[30]

VI. Submissions as to Violation of Section 76 and Part V of MI 61-101 and Relief Sought

A: The Transaction Agreement, including the Loans and Loan Extensions, violates MI 61-101

56. The Transaction Agreement, and the Loans and Loan Extensions contained therein, are clearly a single, integrated "related party transaction". MID and MEC are each "related parties" vis-à-vis the other because one is controlled by the other and each is an affiliate of the other.[31]

57. The Loans and Loan Extensions were granted without first obtaining Minority Approval[32] or complying with the other requirements of Part V of MI 61-101. While MI 61-101 contains exemptions from these requirements, none of the exemptions was available.

58. Further, although the Transaction Agreement contemplated the unwinding of the Loans and Loan Extensions in the event that the MID minority shareholders voted against the reorganization plan, this was mere window dressing. MID never meant to reverse the Loans if the reorganization was not approved. This is clear from paragraph 3.7 of the MID February Letter, written almost two weeks before the reorganization was abandoned. In that letter, MID admits that the Loans could not be reversed.

59. Since MID knew that the Loans could not be reversed even if Minority Approval was not obtained, there was a deliberate non-compliance with MI 61-101.

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[28] MID May 8, 2009 press release (Exhibit Book, Tab 2.H) and May 4 Bid Procedures Order ("**Other MEC Assets Order**") (Exhibit Book, Tab 5.D).

[29] See Other MEC Assets Order at pp 6 (Exhibit Book, Tab 5.D).

[30] Exhibit Book, Tab 1.C.

[31] MI 61-101, definition of "related party" in section 1.1 MEC is a person of which MID is a control party under para. (c) of the definition of "related party". The definition of "related party transaction" in section 1.1 of MI 61-101 extends to loans (para. (j)) and amendments to loans (para (l)) of the definition.

[32] MID Press Release of November 26, 2008 (Exhibit Book, Tab 2.A).

The 25% Exemption was Not Available

60. One of the potential exemptions available to MID under MI 61-101 was the 25% Exemption (the "**25% Exemption**"). That exemption requires the value of the "subject matter of the transaction" to be less than 25% of the market capitalization of MID.

61. All of the transactions contemplated by the Transaction Agreement must be considered as a single transaction. Indeed, the parties to that transaction used the singular "transaction" in the title of the agreement. They incorporated into that single agreement the Loans and the Loan Extensions, and they referred to the whole reorganization proposal set forth in an attached Term Sheet, including the Loans and Loan Extensions, as "the Transaction".

62. The Loans, the Loan Extensions and other parts of the proposed reorganization are so intertwined and related to and dependant upon each other that they all had to be put into one agreement. In fact, the failure to proceed with certain parts of the reorganization (e.g. the Loans and Loan Extensions) could have prevented later parts from ever occurring. The result of one part of the reorganization (the failure of the shareholder vote) would cause other parts to be affected (the Loans becoming due early). In addition, if the other parts of the reorganization were approved, the terms of the Loans themselves would have been modified to permit MEC to repay them with shares of MEC equity instead of cash.

63. Treating each of the Loans and Loan Extensions as separate transactions is not only contrary to the Transaction Agreement itself, but it is also contrary to the wording and purpose of MI 61-101 which is intended to promote fairness and which should extend to all aspects of a particular transaction not merely those that MID determined should be subject to a Minority Approval.

64. MI 61-101 and the Companion Policy make the present exercise of understanding and applying the word "transaction" even clearer. In drafting MI 61-101, securities regulators were very conscious of the danger of the potential separation of transactions with the intention that the regulation of related party transactions could be avoided. Accordingly, MI 61-101, Section 1.1 defines "connected transactions" to mean:

> "Two or more transactions that have at least one party in common, directly or indirectly, other than transactions related solely to services as an employee, director or consultant, and (a) are negotiated or completed at approximately the same time, (b) the completion of at least one of the transactions is conditional on the completion of each of the other transactions;"

Section 5.5(a)(iii) of MI 61-101 requires the fair market value of all connected transactions to be aggregated in determining whether the 25% Exemption applies.

65. To assist in correctly identifying the subject matter of the transaction, MI 61-101 invites an analysis of whether multiple "connected transactions" (including concurrently negotiated transactions with one or more common parties) ought fairly to be viewed as separate or should be aggregated so that the protections of MI 61-101 are not lost.[33]

66. Clearly, if the Transaction Agreement and the Loans and Loan Extensions are not part of one transaction (as it is submitted they are), then the Transaction Agreement – which is one agreement – and the Loans and Loan Extensions – which are found in that one agreement – are "connected transactions". They were negotiated at the same time (and indeed are contained in the same document) and have parties in common. That alone is sufficient for them to be "connected transactions". Moreover, both were needed to be put in place before December 1, 2008 because, without both, the MEC Bankruptcy would have been inevitable in December 2008. MID has admitted as much in the MID February Letter.[34]

67. Companion Policy 61-101CP threatens enforcement action where a transaction is "divided" to avoid MI 61-101:

> "...we may intervene if we believe that a transaction is being carried out in stages or otherwise divided for the purposes of avoiding the application of a provision of the instrument".[35]

The Companion Policy also recognizes that each step in a series of two or more interrelated steps will be regulated as a single transaction by MI 61-101.[36] Moreover, the Companion Policy points to the importance of the time at which the legally binding commitment to proceed with the transaction is made.[37] In the present instance, the Transaction Agreement and Section 3 thereof relating to the Loans and Loan Extensions, were entered into at the same time and must be considered a single transaction, or at the very least, connected transactions.

68. Since the Loans and Loan Extensions must be viewed as a single transaction, then the 25% Exemption is not available[38] and Minority Approval should have been obtained.

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[33] See section 1.1 of MI 61-101 – definition of "connected transactions".
[34] MID February Letter para. 3.6 (Exhibit Book, Tab 1.B).
[35] CP 61-101 at para. 2.7.
[36] Companion Policy 61-101CP, Section 2.7(2).
[37] Companion Policy 61-101CP, Section 2.8.
[38] The new Loan (US$125 million) and the Loan Extensions (including extensions of the Bridge Loan (US$117.7 million) and US$100 million of the Gulfstream Facility (see the MID February Letter para 2.6)

The Downstream Exemption Was Not Available

69. MID and Fair Enterprise had so little confidence in their ability to utilize the 25% Exemption in connection with the Transaction Agreement that they had to come up with an alternative exemption theory at the last minute. The alternative theory that MID and Fair Enterprise resorted to was that the Downstream Exemption would be available if they put in place the Azalea Trust Agreement.[39]

70. However, as explained below, the last minute timing and artificiality of the agreement by which MID and Fair Enterprise purported to bring themselves within the Downstream Exemption disentitled MID from relying on it to circumvent the Minority Approval requirement for the Loans and the Loan Extensions.

71. The Downstream Exemption is not available to MID if a "related party" of MID owns more than five per cent of any class of voting or equity securities of MEC. Fair Enterprise is a related party of MID because it is a "control person" of MID.[40] Immediately before entering into the Azalea Trust Agreement, Fair Enterprise held 628,570 MEC Class A Shares representing 21.5% of the MEC Class A Shares and 10.7% of MEC's total outstanding shares.[41] A holding by Fair Enterprise of this magnitude in MEC made the Downstream Exemption unavailable as Fair Enterprise held more than 5% of the shares of MEC. While the MID February Letter implies that the Azalea Trust Agreement documented a *bona fide* sale, the publicly available facts demonstrate the contrary for several reasons.

72. First, the Azalea Trust Agreement was effected on November 25, 2008, just one day before the Transaction Agreement was announced. This fact must be regarded as very significant. There is only one apparent motive for the Azalea Trust Agreement, and that is to attempt to put the Downstream Exemption in place for the Loans and the Loan Extensions, which exemption would not have been available if the MEC Class A Shares remained in Fair Enterprise's hands.

73. Second, the Downstream Exemption is not available because the Azalea Trust Agreement was not a *bona fide* sale of Fair Enterprise's holdings of MEC Class A

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together amount to US$342.7 million. This far exceeds MID's own calculation of 25% of its market capitalization of US$146,496,486 million for purposes of MI 61-101 (MID February Letter para 5.2.1).

[39] Section 5.1(g) and Section 1.1 of MI 61-101.

[40] See para. (a) of the definition of "related party" in MI 61-101. The term "control person" is not defined in MI 61-101 but is defined in section 1(1) of the *Securities Act* (Ontario) ("OSA") to include a member of a "combination of persons" that in total hold a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer. Fair Enterprise as a member of the Stronach Group fits this definition. The MID February Letter concedes in paragraphs 1.17 and 1.22 that Fair Enterprise is a member of the Stronach Group and that the Stronach Group controls MID. (Exhibit Book Tab 1.B).

[41] See Share Purchase Agreement between Fair Enterprise and Azalea Trust, p. 14 of (Exhibit Book, Tab 4.A).

Shares to an arm's length third party purchaser. That fact is evident from the following features of the Azalea Trust Agreement:

(a) Azalea Trust agreed not to retain any profit from the Azalea Trust's sale of the MEC Class A Shares it received from Fair Enterprise, but rather to donate any such profits to charity[42]. In a *bona fide* arm's length sale, the profit from the investment would be important, and indeed the only commercial rationale, for the purchaser. There was no economic rationale for Azalea Trust to enter into this transaction on this basis. The only possible reason for the Azalea Trust to enter into the transaction was so that MID could claim the Downstream Exemption;

(b) The promissory note given by the Azalea Trust to Fair Enterprise as payment for the shares is non-recourse to Azalea Trust, except as to the realization from the shares. This means that if the sale proceeds were insufficient to permit the Azalea Trust to repay the note, Azalea Trust would have no further liability, and Fair Enterprise would suffer the loss. So the Azalea Trust had no economic interest or market risk in the MEC shares whatsoever. It was Fair Enterprise which had the sole risk after the purported sale in relation to the MEC Class A Shares;

(c) Fair Enterprise accepted payment for the MEC Class A Shares by way of a non-interest bearing note which was not due for two years. In an arm's length sale, the seller would at least expect to receive a commercially reasonable interest rate on the unpaid balance pending retirement of the note; and

(d) The Azalea Trust is required to sell the shares into the market as promptly as possible pursuant to the Orderly Sale Covenant. Again, there is no purpose or rationale for the Azalea Trust to acquire and dispose of the MEC Class A Shares on this basis. This is a very unusual provision to include in what was represented by Fair Enterprise as a bona fide third party transaction. Usually, the method and timing of any subsequent sale is left in the discretion of the purchaser.

74. In essence, Fair Enterprise never really disposed of the MEC Class A Shares because the Azalea Trust Agreement left Fair Enterprise with the same risks of ownership as if it had not sold the shares. Greenlight submits that the Azalea Trust Agreement is inconsistent with a genuine sale to an arm's length purchaser, and that Fair Enterprise continued to exercise control or direction over the MEC Class A Shares after the sale

[42] This understanding is not included in the agreement but was summarized in a public filing executed by MID and Fair Enterprise. See item 4 of Schedule 13D/A of November 28, 2008 (Exhibit Book, Tab 3.A).

just as it did before the sale. Accordingly, this artificial transaction does not permit MID to qualify for the Downstream Exemption.

75. Even if the Azalea Trust Agreement was an effective disposition of Fair Enterprise's MEC Class A Shares, which it is submitted it was not, Fair Enterprise resumed actual or effective ownership of those shares almost immediately after the Azalea Trust Agreement was consummated.

76. It appears that the Azalea Trust defaulted on its obligation to sell the MEC Class A Shares, since according to available public filings, it has not yet sold any of the MEC Class A Shares pursuant to the Orderly Sale Covenant, even though the agreement was entered into over six months ago. This default gave Fair Enterprise the immediate ability to either foreclose on the MEC Class A Shares or force their sale.

77. Therefore, for purposes of MI 61-101[43], upon the default, Fair Enterprise once again acquired ownership of and control or direction over all of the MEC Class A Shares that it purported to sell to the Azalea Trust and should have reported that fact in an early warning report under s. 102.1 of the Act.

78. This artificiality was only reinforced by Fair Enterprise's March 27, 2009 release and forgiveness of Azalea Trust's obligation under the Forgiveness Agreement. Since the consideration paid for the MEC Class A Shares was a non-recourse promissory note, why would an arm's length vendor grant such a concession to an arm's length purchaser? There is no explanation except that the original sale was a sham and, once Azalea Trust defaulted under the Azalea Trust Agreement, Fair Enterprise needed to somehow reverse the default by Azalea Trust so it could assert that Fair Enterprise was no longer owner of the shares.

79. MID's counsel asserted in its letter dated March 27, 2009 (the "**MID March 27 Letter**") that the "Stronach Group does not beneficially own or exercise control or direction over MEC Class A Shares held by the Azalea 2008 Trust". Inexplicably, no mention was made in that letter to the Commission of the Forgiveness Agreement that was entered into **that very same day**.

80. Concerned that the Forgiveness Agreement might not be sufficient to restore the Downstream Exemption, the Azalea Trust then decided to seek permission from the

[43] Under Section 7 of the Azalea Share Purchase Agreement (Exhibit Book, Tab 4A pp. 14-21), Azalea Trust covenanted to sell the purchased shares "as soon as practicable" and it appears from Tab 5.B of the Exhibit Book not to have sold any. By a date shortly after November 26, 2008, Azalea Trust was in default of its sale covenant. This default automatically and immediately accelerated the debt under the terms of the promissory note delivered by Azalea Trust. The default gave Fair Enterprise the immediate right to foreclose the title of Azalea Trust. For purposes of the Act, from the date of that default, Fair Enterprise was deemed to have acquired control or direction and beneficial ownership of the shares for purposes of the Downstream Exemption (see s.1.6(2) of MI 61-101 read with s. 90 of the Act).

Bankruptcy Court to sell its MEC Class A Shares. This decision was taken by Azalea Trust after Azalea Trust had been released from its obligations to sell the shares. In true Alice in Wonderland fashion, Azalea Trust purported on June 29, 2009 to sell all of its MEC Class A Shares for nominal consideration at a time when it was not obliged to sell and the shares were essentially worthless. That any arm's length purchaser would seek to purchase equity shares in a bankrupt company is highly improbable. It is inconsistent with an arm's length transaction that the same lawyers who represented Mr. Stronach in his securities filings should prepare the latest public filings.[44] The only possible motivation for such a sale by Azalea Trust would have been to unlock the Downstream Exemption for MID.

81. The Forgiveness Agreement was crucial to MID's position that Azalea Trust was not in default and that Fair Enterprise was not a beneficial owner of and did not exercise control or direction of the MEC Class A Shares. The Forgiveness Agreement was another sham which MID was not prepared to disclose to the regulator. MID relied upon the Forgiveness Agreement on March 27, 2009 as a basis to deny Fair Enterprise's beneficial ownership of the MEC Class A Shares.

82. In Section 1.5 of the MID March 27 Letter, MID also claimed that the Downstream Exemption was available because Mr. Stronach had told MID that the Stronach Group did not beneficially own more than 5% of MEC shares.[45] Mr. Stronach's answer did not dispose of the matter. It left unaddressed the peculiar features of the Azalea Trust Agreement. The details of the Azalea Trust Agreement were set out in public filings that were made with the United States Securities and Exchange Commission (the "**SEC**"). MID had knowledge of those documents. Therefore, MID had knowledge that the Azalea Trust Agreement was artificial and this rendered the Downstream Exemption unavailable.

Fair Enterprise's Purported Sale of the MEC Class A Shares Offends the Insider Trading Rules

83. The purported sale by Fair Enterprise of its MEC Class A Shares was undertaken one day before the public announcement of a material transaction[46] between MID and MEC. Accordingly, it was prohibited under the insider trading rules applicable to Fair Enterprise pursuant to section 76 of the Act.

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[44] The law firm Akerman Senterfitt LLP ("**Akerman**") acted for Azalea Trust and 2210456 Ontario Inc ("**221**") in the 13D filing effected in relation to the June 29 sale by Azalea Trust to 221. See Exhibit Book Tab 3.E for the 13D filing). As shown in the Exhibit Book, Tab 3.B, a supplemental disclosure filing made in the Bankruptcy Court by the Akerman law firm reveals that this firm represented both Frank Stronach and his estate planning entities and the Azalea Trust in the earlier purported sale of the MEC Class A Shares.

[45] Exhibit Book, Tab 1.E.

[46] The materiality of the transaction is conceded in the MID February Letter at paragraph 3.6 where it is explicitly said that in the absence of the Immediate Transactions, "MEC would have had to commence bankruptcy proceedings." (Exhibit Book Tab 1.B).

84. Fair Enterprise is an entity that has at various times been represented in public securities filings as being under the control of Frank Stronach or his immediate family members.[47] As Chairman and director of MID and Chairman and former Chief Executive Officer[48] of MEC and because of his association with Fair Enterprise, Mr. Stronach knew of Fair Enterprise's involvement in the reorganization proposal. This knowledge is reflected in the Schedule 13D dated November 28, 2008 that was filed with the SEC.[49]

85. Even viewed separately from Frank Stronach, Fair Enterprise was a person in a special relationship with MID by virtue[50] of being a party to the Transaction Agreement dated November 26, 2008 under which it agreed, as a member of the Stronach Group, to subscribe for shares of MID as a step in implementing the proposed reorganization and through which it directly became privy to details of the proposed reorganization.[51]

86. As the insider trading law was violated in connection with the Azalea Trust sales, the Loans and Loan Extensions should not have been allowed to proceed on public interest grounds alone. By purporting to arrange the sale of its MEC shares and by doing so in a way that violated the insider trading prohibition, Fair Enterprise was acting with MID in an effort to circumvent the requirements of MI 61-101 and the Minority Approval. This attempted end run was an abusive manoeuvre.

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[47] During the period from March 14, 2000 through March 27, 2003, Fair Enterprise acquired 3,682,515 MEC Class A Shares on the open market for an aggregate purchase price of $16,107,473. These shares totalled approximately 7.5% of MEC's outstanding Class A Shares. As disclosed in contemporaneous public filings, all of the shares of Fair Enterprise were held by Bergenie Anstalt, an estate planning vehicle for the Stronach family, and "Mr. Frank Stronach share[d] control or direction over the shares."

Fair Enterprise did not increase (or decrease) its ownership of MEC Class A shares until September 2007, when it entered into a subscription agreement in which it agreed to invest $20 million in MEC by way of a private placement of MEC Class A Shares. The transaction closed on or about October 29, 2007, at which time Fair Enterprise obtained 8,888,888 MEC Class A Shares. With the shares it had previously held since 2003, Fair Enterprise owned 12,571,403 shares, or approximately 21.6% of the Class A shares of MEC, after this private placement (subsequently, the shares had a 20-for-1 reverse split).

[48] He was CEO of MEC until April 7, 2009, well after the sale under the Azalea Trust Agreement was consummated.

[49] Exhibit Book, Tab 3.A.

[50] Fair Enterprise qualifies as a "special relationship person" for purposes of s.76(5) of the OSA through the execution of the Transaction Agreement by virtue of being an affiliate of a "party to a reorganization" (which would be true of any of the members of the Stronach Group) or by virtue of engaging in a "business activity" with MID and other parties to the reorganization. Fair Enterprise may also qualify as a special relationship person as an "insider" pursuant to the deemed ownership rules applicable to affiliates of certain Stronach Group members or simply by virtue of its membership in the Stronach Group.

[51] Exhibit Book, Tab 4.B.

B: The DIP Credit Agreement and the Stalking Horse Agreement violated MI 61-101

87. For many of the same reasons described above, the DIP Credit Agreement and the Stalking Horse Agreement should be considered as one transaction for purposes of MI 61-101.

88. The DIP Credit Agreement and the Stalking Horse Agreement are connected components of a "related party transaction" for the purpose of MI 61-101. Both were integrated into the MEC Bankruptcy and were entered into on the same date. Both were described in MID's press release of March 5, 2009 as having "the intent of preserving the value of our secured loans to MEC".[52] As noted below, this "connectedness" will also extend to any Additional Transaction Agreement. This is because the next related party transaction entered into between MID and MEC as part of the MEC Bankruptcy will clearly have its origins in the abandoned Stalking Horse Agreement. MID (through MID Lender, the MID subsidiary that is the lender under the DIP Credit Agreement) will continue, in its capacity as a secured creditor, to hold a veto over any competing third party asset sale proposal which it considers to be effected at an inadequate price.[53]

89. MID and MEC clearly intended to use the DIP Credit Agreement and the Stalking Horse Agreement for the purpose of guaranteeing that MID is the purchaser of the Stalking Horse Assets.

90. First, it is an event of default under Section 9.1(g)(i) of the DIP Credit Agreement if (a) a bid procedures motion seeking the appointment of MID as the stalking horse bidder in the auction of MEC's assets was not filed with the Bankruptcy Court by March 9, 2009, or (b) a bid procedures motion or sale order was filed in the Bankruptcy Court in connection with the sale of MEC's assets that was not acceptable to the MID Lender.[54] If MID was not the ultimate purchaser of the assets it wanted to buy from MEC, then MID Lender would have been entitled to withdraw the DIP Financing.[55] This gave MID, through the MID Lender, its wholly-owned subsidiary, an absolute veto over any person other than MID purchasing the assets MID wanted. Consequently, the DIP Financing and the Stalking Horse Bid were inseparably intertwined.

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[52] Exhibit Book, Tab 2.D.
[53] Exhibit Book, Tab 4.E.
[54] Exhibit Book, Tabs 4.C and 4.D.
[55] Despite MID's misleading statement in paragraph 3.4.2 of the MID March 27 Letter, the DIP Financing can be terminated by MID at any time if MID is not the purchaser of the Stalking Horse Assets pursuant to the Stalking Horse Agreement due to the fact that MID Lender can declare a default under Section 9.1(g) of the DIP Credit Agreement (Exhibit Book, Tab 1.E).

91. Second, the MEC debt that MID wished to use to "credit bid" under the Stalking Horse Agreement was not an "allowed claim" in the Bankruptcy Proceedings and could not lawfully be used by MID to purchase the Stalking Horse Assets. MID and MEC attempted to solve this problem through the DIP Credit Agreement by having MEC grant to MID and MID Lender in s. 2.13 of the agreement a full release of any claims relating to such MEC debt.[56] The release was intended to permit such debt to become an "allowed claim". The Bankruptcy Court never approved the release. On this basis too, the DIP Credit Agreement and the Stalking Horse Bid were inseparably intertwined.

92. Third, despite the withdrawal of the Stalking Horse Bid, the DIP Credit Agreement still gives the MID Lender the right to veto any sale. Without the DIP Financing, MID claims that the MEC Bankruptcy would be converted into a Chapter 7 liquidation.[57] In a Chapter 7 liquidation, a bankruptcy trustee and not MEC would conduct an auction of MEC's assets.[58] MEC is using the DIP Financing to ensure that MID and MEC retain control over the auction so that MID can become the ultimate purchaser of the Stalking Horse Assets.

93. In summary, the DIP Credit Agreement and the Stalking Horse Agreement were inseparably intertwined. Through the DIP Credit Agreement, MID secured control over the MEC asset sale process and that control persists to this day.

94. Accordingly, the DIP Agreement and the Stalking Horse Agreement constituted one "transaction" or at the very least "connected transactions" for the purposes of MI 61-101. Since MID and MEC are each "related parties", these agreements constitute a related party transaction which requires compliance with MI 61-101. For these reasons, the value of the DIP Financing and Stalking Purchase Agreement or its successor need to be aggregated to determine whether any exemptions from MI 61-101 are available.

95. MID calculated 25% of its market capitalization at March 5, 2009 for MI 61-101 purposes as US$71,918,269.[59] Clearly the value of the DIP Financing and the Stalking Horse Bid was very much higher since the DIP Financing (US$38.4 million) and Stalking Horse Bid (US$194,795,000) together involved over US$223 million, and accordingly the 25% Exemption was not available.

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[56] Exhibit Book, Tab 4.C.

[57] Paragraph 3.4 of the MID March 27 Letter (Exhibit Book, Tab 1.E).

[58] Despite MID's statement in paragraphs 2.29.4 and 2.29.6 of the MID March 27 Letter that a Chapter 7 liquidation is a "fire sale" and that a Chapter 7 sale will yield less than a sale by MEC, there is no basis for any of these statements (Exhibit Book, Tab 1.E).

[59] MID March 24 Letter-Schedule (Exhibit Book, Tab 1.D).

96. Nor was the Downstream Exemption available. As described above, the purported sale of MEC shares to the Azalea Trust was artificial: Fair Enterprise continues to be the real or effective owner of more than 5% of the MEC Class A Shares. It would be contrary to the public interest that after mounting a sham transaction, MID should be able to access the Downstream Exemption.

97. Finally, in the MID March 24 Letter, MID acknowledged that it would not be seeking to use the bankruptcy exemption in section 5.5(f) of MI 61-101 (the "**Bankruptcy Exemption**") in connection with the DIP Financing or the Stalking Horse Bid. Therefore, since no exemptions are available, MID should not be permitted to fund any additional amounts under the DIP Credit Agreement without first obtaining Minority Approval as required under MI 61-101.

C: The Stalking Horse Agreement itself violated MI 61-101

98. The Stalking Horse Agreement involved the purchase of racing assets by MID, or one of its subsidiaries, from MEC or one or more of its subsidiaries, for an aggregate purchase price of US$194,795,000. This amount clearly exceeded 25% of MID's market capitalization as of March 5, 2009, the date on which the Stalking Horse Agreement was entered into by MID. In addition, as stated above, the DIP Credit Agreement and the Stalking Horse Agreement were connected components of the MEC Bankruptcy whose values must be aggregated.

99. Since the purchase price for the assets in the Stalking Horse Agreement was US$194,795,000, and by MID's own calculation, 25% of MID's market capitalization for purposes of MI 61-101 in the MID March 24 Letter was only US$71,918,269, the 25% Exemption from MI 61-101 was not available for the Stalking Horse Agreement.

100. MID asserts that credit bidding in the Stalking Horse Agreement was not a related party transaction for purposes of MI 61-101 because, in substance, MID is merely realizing on its existing security, not entering into a new transaction. This is wrong for several reasons.

101. First, there was no exemption for MID from the requirements of MI 61-101 for "merely realizing on existing security." In any event, MID was entering into a new transaction to acquire the Stalking Horse Assets for the very reason that it was unable to enforce the existing security due to the stay of creditor proceedings imposed by the Bankruptcy Court. MID needed the new transaction which used the existing loans as currency to pay the purchase price for the Stalking Horse Assets.

102. Second, contrary to MID's assertion in the MID March 27 Letter,[60] MID was not merely realizing on existing security.[61] Some of the assets that MID was seeking to

[60] Page 2 of the MID March 27 Letter (Exhibit Book, Tab 1.E).

acquire did not form part of the security previously granted under the loans.[62] In addition, some of the assets forming the proposed security did not even exist yet. For example, the Stalking Horse Assets were to include the reorganized stock of several different MEC subsidiaries.[63] These interests were only to exist after a plan of reorganization for MEC is confirmed in the MEC Bankruptcy.

103. Third, once again, MID was attempting to divide the transaction in such a way as to avoid complying with MI 61-101. Under the overall transaction, MID would still have acquired MEC assets in what is clearly a related party transaction. No amount of slicing and dicing could alter that reality.

104. In addition, for the same reasons as described above, the Downstream Exemption and Bankruptcy Exemption were not available for the Stalking Horse Agreement.

105. Although MID may claim otherwise, the mere entering into of the Stalking Horse Agreement by MID was a related party transaction that would have caused irreparable harm and should have required Minority Approval.

106. Despite MID's assertions,[64] MID would have been irrevocably bound to purchase the Stalking Horse Assets if the Bankruptcy Court approved the Stalking Horse Agreement on April 3, 2009.[65] The April 3 amendment to the Stalking Horse Agreement entitled MID to terminate that agreement. If the Commission had required MID to seek Minority Approval, however, the terms of the Stalking Horse Agreement nonetheless required MID to purchase the Stalking Horse Assets without any Minority Approval[66] if a hearing could not be held by the Commission before closing.

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[61] MID admits that this is not a foreclosure on the assets in paragraph 2.29.3 of the MID March 27 Letter (Exhibit Book, Tab 1.E).

[62] These assets include Lone Star Park, Amtote International, ExpressBet. See MID March 27 letter, paras 2.18 and 3.9.1 (Exhibit Book Tab 1.E).

[63] These assets include Reorganized GPRA Thoroughbred Stock, Reorganized Golden Gate Fields Stock, Reorganized Gulfstream Stock and the Reorganized Land Holdings Stock, each as defined in the Stalking Horse Agreement. Section 2.1 of the Stalking Horse Agreement (Exhibit Book, Tab 4.D).

[64] In paragraph 2.18 of the MID March 27 Letter, MID makes the misleading claim that MID is only obligated to buy the Stalking Horse Assets "[i]f and only if, MID is the winning bidder in the auctions…". This is not true. MID would have become legally bound to purchase the Stalking Horse Assets if the Bankruptcy Court had approved the Stalking Horse Agreement on April 3, 2009 (Exhibit Book, Tab 1.E).

[65] While technically true that MID might have been outbid for the Stalking Horse Assets at the auction, given MID's control over the process through the DIP Credit Agreement, as described above, and the bidding procedures established by MID and MEC, it was extremely unlikely that any bidder would have outbid MID for the Stalking Horse Assets.

[66] In addition, there were provisions of the Stalking Horse Agreement that became effective immediately upon signing and did not depend on whether or not MID is the ultimate winner at the auction. For example, even if MID were not the winning bidder, MEC would have to pay all of MID's expenses in connection with the

107. As with the Transaction Agreement, MID's actions in entering into the DIP Credit Agreement and the Stalking Horse Agreement only reinforced the egregious nature of MID's non-compliance with MI 61-101 by providing for Minority Approval for future steps in the transaction while omitting Minority Approval when it was required. Under the Transaction Agreement, almost US$80 million was advanced to MEC without Minority Approval by way of the Loans. As if to underline MID's high-handed conduct, each of the Transaction Agreement and the Stalking Horse Bid contemplated a later Minority Approval or forbearance but only after the cash injections had occurred and the damage arising from cash injections to MEC had become irreversible.[67]

108. Though the Stalking Horse Agreement has been withdrawn, MID has clearly asserted its interest in undertaking Additional Transactions with MEC to acquire some or all of the Stalking Horse Assets and the Other MEC Assets.[68]

109. Greenlight submits for the reasons set forth above that in light of its past, deliberate and repeated contraventions of MI 61-101, the exemptions under that instrument should be denied to MID in connection with any Additional Transaction and that any and all Additional Transactions should be subject to Minority Approval of the MID shareholders. If MI 61-101 is to be effective in safeguarding minority shareholder rights, Greenlight submits that it is essential that the Commission issue a timely ruling on MID's past contraventions of MI 61-101 and their consequences before any of the Additional Transactions are entered into.

110. It is urgent that the Commission consider this application and deal with the Transaction. So far as the Transaction Agreement and the financing under the DIP Credit Agreement are concerned, the Commission may find it difficult to undo the violations of MI 61-101 given MEC's financial condition and protection of the Bankruptcy Court. At least with respect to any Additional Transaction, the Commission now has the opportunity to effectively stop MID's conduct in midstream before it causes additional harm and continues to flaunt the Commission's rules.

D: MID's conduct violates the policy and purpose of MI 61-101

111. The conduct of MID between November 2008 and March 2009 does not simply raise issues concerning the words of MI 61-101. Rather, it raises serious issues of illegality and artificiality which engage public interest considerations.

Stalking Horse Bid. Also, immediately upon signing, MID essentially took control over the Stalking Horse Assets since MEC agreed not to take any action with respect to the assets unless MID consented, including amending or terminating any existing leases or contracts.

[67] See Transaction Agreement, Schedule A para c (Exhibit Book, Tab 4.B at p. 116) and MID March 5, 2009 press release (Exhibit Book, Tab 2.D at p. 62).

[68] Exhibit Book, Tab 2.G (April 20 Press Release).

112. MID's attempt to parse the Transaction Agreement to get around the wording of the 25% Exemption, and its attempt to use the Azalea Trust Agreement, entered into in violation of insider trading laws, to get around the wording of the Downstream Exemption, must be recognized for what they are. The Commission has previously decided that artificial transactions that are used as devices to skirt the affirmative requirements of the Act should be stopped by using the remedies contained in the Act, including section 127.[69]

113. The artificiality and illegality issues do not simply affect the Transaction Agreement. They also taint the DIP Credit Agreement, the Stalking Horse Agreement and the Additional Transactions. The artificiality of the Azalea Trust Agreement and the June 29 sale by Azalea Trust should not open the way to a further purported reliance by MID on the Downstream Exemption. Artificiality alone would justify an order under section 127[70] as will associated illegality[71] (such as insider trading and illegal informing under our facts) or an attempted end-run of the law.[72]

114. MID's actions have caused and will cause severe harm to MID and its shareholders. All of this has been done by related parties without any Minority Approval required under Section 5.4 of MI 61-101.

115. It is submitted that in all the circumstances, the Commission should exercise its public interest power to restrain the attempts by MID and those acting with it to thwart or circumvent the policy behind MI 61-101.

E: The Additional Transactions should not be implemented in reliance on an exemption from MI 61-101.

116. It is a matter of public record that MID is contemplating Additional Transactions. For example, MID could elect to bid for other MEC Assets as early as August 7, 2009. Since it knows that the minority shareholders are opposed to these transactions, MID will have to rely on exemptions from MI 61-101 to mount the Additional Transactions.

117. Based on the MEC assets that were the subject of the Stalking Horse Bid, the magnitude of the Additional Transactions may exceed the value allowed under the 25% Exemption. In an implicit acknowledgement that the 25% Exemption is not available, MID is clearly targeting the Downstream Exemption. In an attempt to line

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[69] *Re Bruce Orsini and Andrew Tulk* (1991), 14 OSCB 4820 (improper use of prospectus exemptions) (Exhibit Book, Tab 7.A); *Re Hudbay Minerals Inc.* (2009), 32 OSCB 1089 (Exhibit Book, Tab 7.B); Section 2.1 of the Act.

[70] *Re Financial Models Co.*, [2005] Carswell Ont. 748 at para 50 (Exhibit Book, Tab 7.C).

[71] *Re Sears Canada Inc.*, [2006] Carswell Ont. 6954 at para 306 (Exhibit Book, Tab 7.D).

[72] *Re H.E.R.O. Industries Ltd.* (1990), 3 O.S.C.B. 3775 at 3795 (Exhibit Book, Tab 7.E).

up that Exemption, Fair Enterprise and Azalea Trust have entered into the Forgiveness Agreement and Azalea Trust sought permission on May 5, 2009 to effect a "sale" of the shares and has purportedly taken all steps required of it by the Bankruptcy Court in order to sell the shares.[73] The Downstream Exemption is a self-policing exemption. MID can purport to rely upon it without obtaining pre-approval by the Commission. It is significant that the Azalea Trust has already taken steps to sell the MEC Class A in an attempt to engage and rely upon the Downstream Exemption.

118. There are numerous reasons why it would be in the public interest for the Commission to deny the Downstream Exemption to MID under s.127(5) of the Act:

(a) Fair Enterprise has, with MID's knowledge, structured the Azalea Trust Agreement as a sham transaction as described in paragraphs 69 to 86;

(b) Fair Enterprise violated the insider trading rules under the Act when it entered into and performed the Azalea Trust Agreement;

(c) Azalea Trust did not perform the Orderly Sale Covenant. As a result, the realization rights of Fair Enterprise crystallized over the MEC Class A Shares it purported to sell. Those rights make Fair Enterprise an owner of MEC Class A Shares for purposes of the Act. The size of Fair Enterprise's holding of MEC Class A Shares disqualified MID from relying on the Downstream Exemption.

(d) In an attempt to cancel Fair Enterprise's status as a beneficial owner and to try to revive the Downstream Exemption, Fair Enterprise entered into a second sham transaction through the Forgiveness Agreement. That Agreement purported to extinguish Fair Enterprise's only meaningful commercial rights under the Azalea Trust Agreement;

(e) The transparent artificiality of the Forgiveness Agreement in turn compelled the Azalea Trust to seek permission to sell worthless shares at the very time any obligation to sell had been extinguished. The terms of the June 29 sale do not pass any test of commercial believability: valueless shares with respect to which there is no obligation to sell are transferred for very little consideration to a purchaser with no incentive to buy and hold the shares. The only explanation for the transaction is that it is aimed at reviving MID's ability to rely on the Downstream Transaction.

[73] See Exhibit B, section 5(f) of the Share Purchase Agreement between Azalea Trust and 221 (Exhibit Book, Tab 3.E).

119. An adverse finding in relation to these repeated and deliberate examples of non-compliance with MI 61-101 would clearly justify an exemption denial order under section 127. An exemption denial order will put an end to MID's ability to pursue Additional Transactions without Minority Approval. Such an order would be called for since MID has been the instigator of these manoeuvres.

120. Unless a hearing is held as soon as practicable and issues of non-contravention with MI 61-101 settled, and despite the assurances it has given in the MID Undertaking, MID may enter into the Additional Transactions on a timetable for completion that makes it difficult or impossible to properly explore the issues presented by this Restated Application at a hearing.

F: Remedies

121. The remedies sought by Greenlight under Sections 104 and 127 of the Act are set forth in Part II of this letter. Each of them is intended to require compliance with the Minority Approval provisions of MI 61-101 and to stop MID's ongoing conduct which is contrary to MI 61-101.

122. It is urgent that the Commission take immediate steps to hold a hearing and determine whether to deny MID access to the exemptions under MI 61-101 in connection with any Additional Transactions. At least with respect to those, the Commission has the opportunity to take effective action before they are acted upon. Greenlight urges the Commission to do so.

We would be pleased to discuss this letter with you at your convenience. We require a hearing before the Commission under Sections 104 and 127 of the Act in relation to the matters set forth herein.

Yours very truly,
Rene Sorell
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