Court File No. CV-09-8396-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

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# REPLY FACTUM OF THE CMI ENTITIES

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June 21, 2010

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# REPLY FACTUM OF THE CMI ENTITIES

## PART I – OVERVIEW OF REPLY

1. This reply factum is filed by Canwest Global Communications Corp. ("**Canwest Global**") and the other Applicants listed on Schedule "A" hereto (the "**Applicants**") and the Partnerships listed on Schedule "B" hereto (the "**Partnerships**" and, together with the Applicants, the "**CMI Entities**") in response to the factum submitted by the recently-constituted *ad hoc* group (the "**Shareholder Group**") of existing shareholders of Canwest Global (the "**Shareholders**"). The factum of the Shareholder Group (the **"Shareholder Group Factum"**) articulates the basis for the Shareholder Group's objections to the CMI Entities' request for an Order permitting the CMI Entities to call the Creditor Meeting to approve the Plan.

2. Unless otherwise defined, capitalized terms in this reply factum bear the same meanings as in the factum of the CMI Entities in support of this motion, which was filed with this Honourable Court on June 16, 2010.

3. The Shareholder Group Factum is a remarkable display of revisionist history which blithely ignores the commercial and practical realities facing the CMI Entities throughout this restructuring, particularly the fundamental underlying reality of their insolvency. The Shareholder Group Factum is also noteworthy for what it does not say, for the issues it

deliberately avoids addressing, and for its attempt to preserve the benefits of certain aspects of the restructuring and the Amended Shaw Transaction that suit the Shareholders' interests, while completely disregarding the aspects that the Shareholder Group does not like.

4. The most telling example is the clear failure to provide evidence that any credible, qualified and fully committed bidder exists that would be prepared to pay and capable of paying the price required to make the Affected Creditors, including the 8% Senior Subordinated Noteholders, whole. Even if the CMI Entities were free to conduct such an auction – which the CMI Entities submit they are not -- no credible, qualified and fully committed bidder exists with an unconditional bid in order to justify the enormous and unprecedented gamble (with the interests of the Affected Creditors, employees, pensioners and the going-concern outcome represented by the Amended Shaw Transaction at stake) that would be involved in reopening and casting aside the restructuring achievements that have already been realized in favour of the proposed ill-defined auction.

5. The CMI Entities are insolvent. They have been in default under their various credit facilities or the note indenture in relation to the 8% Senior Subordinated Notes since the spring of 2009. Mr. Asper himself acknowledges that his efforts to find a viable restructuring transaction began over 16 months ago, and his evidence is a litany of failed attempts with a plethora of would-be partners to put together such a transaction. The best evidence that Mr. Asper can provide comes in the form of vague references in his affidavit to certain media players who declined to participate in the Equity Solicitation. This is a manifestly inadequate basis on which to even entertain the idea of throwing away the Amended Shaw Transaction.

6. The Shareholder Group Factum states on countless occasions that the Shareholder Group simply wants to reopen the restructuring process in favour of an auction for 100% of the equity of "Restructured Canwest Global" in order to "test the market" to ensure that the CMI Entities have obtained the "best price" for their assets. However, there are several fundamental misconceptions and/or deliberate obfuscations in this proposal:

(a) First, the proposed "Restructured Canwest Global" that is referred to in the materials submitted by the CMI Entities is the product of the extensive restructuring initiatives that have been taken during the course of this CCAA proceeding. Without the Approved Shaw Transaction (and subsequently, the

Amended Shaw Transaction) and without the support of the 8% Senior Subordinated Noteholders, this "Restructured Canwest Global" simply does not exist and would not be and is not available for sale. It is therefore disingenuous to imply that somehow it is possible to hold an auction for 100% of the equity of "Restructured Canwest Global", as it is contemplated today, as if the CMI Entities were not bound by the terms of the Approved Shaw Transaction and the Amended Shaw Transaction, and as if the obligations owed to the 8% Senior Subordinated Noteholders did not exist.

(b) Second, the Shareholder Group's proposal is conspicuously silent with respect to what would happen to the Approved Shaw Transaction while this auction is underway. It seems to presuppose that Shaw would simply wait in the wings to see whether its transaction (including the Approved Shaw Transaction under which it obtained its initial equity stake in a restructured Canwest Global) will be trumped by another bidder that will have an unfair advantage in the form of prior knowledge of the price that Shaw was willing to pay. Shaw has already stated in open court that it has no intention of acting as a "stalking horse" in these proceedings. Furthermore, Shaw negotiated for and received a "no shop" provision under the Subscription Agreement.[1]

(c) Third, the Shareholder Group's proposal presupposes that the CMI Entities have the power to require the equity interests that were contractually allocated to the 8% Senior Subordinated Noteholders in the Approved Shaw Transaction to be auctioned. It is the 8% Senior Subordinated Noteholders that have the right to determine whether and to whom their promised equity interests are to be sold, and they owe no duties to the CMI Entities or to the Shareholders in making that determination. This is precisely what occurred in the Amended Shaw Transaction. Were this Honourable Court to require the CMI Entities to hold the proposed auction, it would require them to breach their contractual commitment to the 8% Senior Subordinated Noteholders.

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[1] Affidavit of Thomas C. Strike, sworn February 12, 2010 (the "**February 12th Affidavit**"), paras. 30 to 31, Applicants' Motion Record, Tab 1, p. 176.

(d) Fourth, if the CMI Entities were to metaphorically thumb their noses at Shaw, they would inevitably be exposed to time-consuming, potentially expensive and disruptive litigation with Shaw, and likely with the 8% Senior Subordinated Noteholders as well. If either claim was successful, such a claim would be payable by the CMI Entities at 100 cent dollars because it would arise from a post-filing obligation of the CMI Entities that cannot be compromised under the CCAA. Nowhere does the Shareholder Group address the potential impact of such litigation on the ability of the CMI Entities to run a successful auction and to realize their projected imaginary value from such an auction, let alone the impact of such litigation on the business of the CMI Entities.

7. The Shareholder Group's attempts to impugn the process relied upon to achieve the Amended Shaw Transaction are entirely based on the erroneous characterization of the Amended Shaw Transaction as a new deal. The Amended Shaw Transaction is not a new deal. This Honourable Court approved the Approved Shaw Transaction on the basis that it was fair and reasonable, expressed the view that a commercial resolution of the treatment of the Shareholders Agreement was in the best interests of all concerned, and then, at the request of the CMI Entities and the Monitor, directed the parties to participate in the Mediation designed to resolve these issues. The Mediation resulted in the resolution of the express condition regarding the treatment of the Shareholders Agreement that was clearly part of the Approved Shaw Transaction. The Amended Shaw Transaction implements this resolution pursuant to the parties' amendment rights, resulting (among other things) in Shaw owning all of the equity of a restructured Canwest Global just as would have ensued if Shaw had exercised certain liquidity rights that were expressly contemplated in the definitive documents that were entered into in respect of the Approved Shaw Transaction. Upon achievement of the negotiated solution that was reached at the end of the court-directed Mediation, no reasonably informed Board would have then rejected this solution in favour of a high-risk, speculative auction process that would place the company in breach of its contractual commitments. It is simply incredible that the Shareholder Group would suggest otherwise. There is therefore no legal basis for requiring the CMI Entities to implement a new equity investment solicitation process, for revisiting this Honourable Court's determination that the Approved Shaw Transaction satisfied the *Soundair* test, or for relitigating the fairness of the absence of a "fiduciary out".

8. As the CMI Entities submit below, the Shareholder Group Factum is rife with inaccuracies and mischaracterizations of the facts, and is based on unsubstantiated express or implied accusations impugning the actions of the Board and the court-directed Mediation process conducted by Chief Justice Winkler. In sum, the Shareholder Group seeks to gamble with the proposed going-concern outcome for the CMI Entities and the recoveries that have been achieved to date for the benefit of the Affected Creditors – whose interests clearly and incontrovertibly have priority over those of the Shareholders in this insolvency proceeding – based on a simple arithmetic exercise suggesting that there might be some additional value to be obtained from an alternate transaction if one could be found, and based on their fantasy that such a transaction might exist if the Approved Shaw Transaction is thrown away. With respect, there is no fairness in this proposal; there is only self-interest on behalf of the members of the Shareholder Group who are effectively seeking to escape the basic proposition that shareholders of a company are intended to bear the risks of insolvency until the creditors are paid in full.

## PART II – RESPONSE TO THE SPECIFIC ALLEGATIONS OF THE SHAREHOLDER GROUP

### No Credible, Qualified and Fully Committed Bidder Has Surfaced

9. The CMI Entities have been under CCAA protection for nine months and have been in default under their credit facilities and 8% note indenture for over fifteen months. The CMI Entities have been exploring strategic alternatives since February 2009.[2] Mr. Asper's own evidence makes it clear that, throughout this period, and in addition to the CMI Entities' efforts, he has also been repeatedly (and unsuccessfully) exploring opportunities to find a viable restructuring transaction for Canwest Global.[3] During that time, other than the Amended Shaw Transaction, no concrete offer for 100% of the equity of Canwest Global has surfaced. It is pure conjecture to claim that an auction at this late stage of the game would miraculously achieve the result that Mr. Asper himself (not to mention the CMI Entities and RBC) has not been able to achieve in over sixteen months.

10. In order to provide a legal basis for any recovery for the Shareholders, it cannot be forgotten that an auction must generate value sufficient to fully satisfy at least (a) the US$458

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2 Asper Affidavit, para. 18, Responding Motion Record, Tab 1, p. 8.

3 Asper Affidavit, para. 18, Responding Motion Record, Tab 1, p. 8.

million owed to the 8% Senior Subordinated Noteholders as of August 31, 2010; and (b) the CDN$110 million (minimum) owed to other Affected Creditors.[4] The Shareholder Group states that an auction would only have to generate as little as an additional $72 million in relation to the Amended Shaw Transaction in order to achieve this goal.[5] However, this claim is fundamentally misconceived for several reasons:

(a) No bidder has offered to purchase the entire position of the 8% Senior Subordinated Noteholders either prior to or during the CCAA proceeding, let alone offering to inject sufficient funds into the CMI Entities to fully satisfy the claims of the other Affected Creditors. Contrary to the assertion of the Shareholder Group, even Shaw has not put up sufficient funds to make the Noteholders whole,[6] and has only committed to providing $38 million (plus additional funding for certain Restructuring Period Claims) towards the claims of the other Affected Creditors.[7]

(b) The aggregate amount attributed to the claims of the other Affected Creditors (*i.e.*, a minimum of $110 million) reflects, in part, compromises that have already been negotiated with certain Affected Creditors based on the implementation of the Plan, which is based on the Amended Shaw Transaction. There is no guarantee that in the absence of the Plan, these Affected Creditors would abide by

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4 At paragraph 11 of the June 14th Affidavit, Mr. Strike notes, among other things, that if the Board did not approve the Amended Shaw deal they would be back to "square one", in that "the CMI Entities would owe approximately US$458.4 million including accrued and default interest (as at August 31, 2010) to the 8% Senior Subordinated Noteholders and at least approximately $110 million to other Affected Creditors (which amount could significantly increase in respect of the unresolved claims as set out in the Monitor's Report through the course of the claims procedure). [Emphasis Added]. See also the cross-examination of Mr. Strike dated June 15, 2010 (the "**Strike Cross-Examination**") wherein he stated that it was his understanding that the value of Affected Claims is "in the neighbourhood of $110 to maybe $150 million after negotiation of settlements, many of which are predicated upon plan approval." (Strike Cross-Examination, Q81, p. 22).

5 Shareholder Group Factum, para. 7.

6 See, for example, Shareholder Group Factum, para. 68. The June 14th Affidavit states that the aggregate amount owing to the 8% Senior Subordinated Noteholders as of August 31, 2010 will be US$458 million. Under the Amended Shaw Transaction, the 8% Senior Subordinated Noteholders are receiving US$440 million. June 14th Affidavit, para. 11(e), Supplementary Motion Record of the Applicants, p. 6.

7 The Shareholder Group does not dispute that the Affected Creditors are not being paid in full, indicating that "between $110 million and $150 million of unsecured claims are being compromised for $38 million": Shareholder Group Factum, para. 69.

the settlement reached.[8] In the absence of such guarantee, the magnitude of the Affected Creditor claims could be significantly higher.

(c) This claim simply ignores the accreting interests under the Shareholders Agreement that were formerly held by Goldman Sachs and that are now held by Shaw, which (among other things) give Shaw certain put rights. Based on the CMI Entities' current forecasts, the value of these rights will be in excess of $900 million in 2011.

11. The most that the Shareholder Group can say is that a bidder might surface if the restructuring efforts of the CMI Entities to date are unravelled and an auction is held. In other words, the Shareholder Group would like the CMI Entities to throw away their "bird in the hand" in the hopes that somewhere, there is another bird "in the bush". However, there is a dearth of credible evidence that another "bird" exists other than some vague references to potential investors in Mr. Asper's self-serving evidence.[9]

12. In particular, there is absolutely no basis in the evidence for the numerous statements in the Shareholder Group Factum that refer to an alternative transaction as practically a *fait accompli*:

(a) "in all likelihood a higher bidder would have emerged"[10];

(b) "such a process is certainly unfair to both Affected Creditors (who will likely be made whole through a value maximization process) and shareholders who have

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8 June 7th Affidavit, para. 78: "If the Amended Shaw Transaction does not proceed, the CMI Entities will be effectively back to "square one", without an Equity Investor in circumstances where Shaw will be standing in the shoes formerly occupied by Goldman Sachs. It also has the potential to re-open many of the claims of Affected Creditors that have now been settled by the CMI Entities as part of this CCAA proceeding, thereby causing the CMI Entities to have to renegotiate those settlements, and could imperil the Further Amended Support Agreement that has been entered into with the members of the Ad Hoc Committee." [Emphasis Added.], Applicants' Motion Record, Tab 1, p. 38. See also Strike Cross-Examination, Q85 to Q87, pp. 23 and 24.

9 Asper Affidavit, para. 65, Responding Motion Record, Tab 1, p. 19.

10 Shareholder Group Factum, para. 1.

been deprived of the residual value that would arise from a value maximization process";[11] [emphasis added]

(c) "an auction would result in all unsecured creditors being made whole and having residual value for shareholders".[12] [emphasis added]

13. Moreover, even where there is a credible "late-breaking" bid that surfaces after a transaction has been entered into at the completion of a comprehensive sales process, the authorities, including the Ontario Court of Appeal's decision in *Soundair*, indicate that commercial certainty and the integrity of the process would be undermined if such transactions are subject to being reopened in favour of the "late-breaking" bid. As Galligan J.A. stated in *Soundair*:

> I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), at p. 11 [C.B.R.]:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.[13]

14. The importance of the integrity of the process was very recently affirmed by the Alberta Court of Appeal in *River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa*, a case cited by the Shareholder Group.[14]

15. These concerns were echoed by Farley J. in *Stelco,* and formed one of the bases for his rejection of the shareholders' objections in that case:

> I also think it fair to observe that not proceeding with the sanction now and indeed starting a brand new search for someone who will think Stelco so worthwhile that it will offer a large amount (with or without onerous conditions) is akin to someone coming to court when a receiver is seeking court approval on a sale – and that someone being allowed to know the price and conditions – and

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[11] Shareholder Group Factum, para. 104.

[12] Shareholder Group Factum, para. 122.

[13] *Soundair, supra* at para. 22.

[14] Shareholder Group Factum at para. 103, citing (2010), 469 A.R. 333 (C.A.) [*River Rentals*] at paras. 18 to 20.

> then being able to make an offer for a price somewhat higher. (I reiterate that here we do not even have an offer or a price.) I do not see that such a procedure would be consistent with the principles laid out in [*Soundair*].[15]

16. Like in *Stelco,* the Shareholder Group in the present case would require the CMI Entities to put their continuing viability at risk by rejecting the Amended Shaw Transaction in the absence of any identifiable, credible, qualified and fully committed bidder. Even if this course of action were possible (which it is not), it would strike a blow to commercial certainty both in the context of this proceeding and in CCAA proceedings generally, as well as undermining the integrity of the Equity Solicitation. Apart from anything else, any potential bidder would have a "leg up" based on the prior knowledge of the price that Shaw was prepared to pay and that the 8% Senior Subordinated Noteholders were prepared to accept.[16] This would be manifestly unfair to Shaw, which has invested considerable time and capital in the CMI Entities' restructuring initiatives since the Approved Shaw Transaction, including in the preparation of the Plan. Furthermore, there is no assurance that either Shaw or the 8% Senior Subordinated Noteholders would accept those prices again.

## "Restructured Canwest Global" Does Not Exist

17. The Shareholder Group Factum is permeated with references to "Restructured Canwest Global", a concept which is, tellingly, not defined, as it does not exist. The CMI Entities submit that these references are fundamentally misleading in the circumstances and give the false impression that the Restructured Canwest Global that would result from the Recapitalization Transaction, which will have benefitted from the Further Amended Support Agreement and the Approved Shaw Transaction, is the "Restructured Canwest Global" that could be put up for auction. This position is simply misconceived and based on a logical impossibility.

18. The CMI Entities submit that the improvements in the performance of their businesses that have occurred during this CCAA proceeding are largely attributable to the liquidity provided by the 8% Senior Subordinated Noteholders and to the stability created by the Approved Shaw Transaction. Without these two fundamental pieces of the puzzle, there would be no potential for a "Restructured Canwest Global" and it is misleading to proceed on the basis

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15 *Stelco, ibid.* at para. 21.

16 See *River Rentals, supra* at para. 20.

that any bidder in an auction for 100% of Canwest Global could (or should) obtain the benefits of these contributions to the health of the CMI Entities, especially when the proposed auction is premised on violating the contractual commitments of the CMI Entities to both the 8% Senior Subordinated Noteholders and Shaw. A Restructured Canwest Global will only come into existence when the Amended Shaw Transaction is consummated.

19. The Shareholder Group is effectively seeking to have it both ways. In other words, they seek to benefit from the "upside" created by the Amended Support Agreement and the Approved Shaw Transaction, at the same time as they seek to destroy both in order to conduct an auction of 100% of the equity of "Restructured Canwest Global". Moreover, they simply do not address how this auction is to be conducted in relation to equity that has been committed to other parties -- *i.e.*, Shaw, which has been promised at least 20% of the equity and 80% of the votes of a restructured Canwest Global in the Approved Shaw Transaction, and the 8% Senior Subordinated Noteholders (that are contractually committed to transfer to Shaw the equity interests that were contractually allocated to them under the Amended Support Agreement and the Shaw Support Agreement).[17]

20. The Shareholder Group is also "cherry-picking" from the restructuring achievements that have been realized to date, seeking to keep the aspects that they favour (*e.g.* the full release of all litigation involving Goldman Sachs, which cannot now be undone), while rejecting the aspects that they do not like. These arguments simply do not recognize the fact that the release was obtained as a *quid pro quo* for the entire package of rights negotiated with Shaw. It would be fundamentally unfair and commercially unreasonable to preserve the release while depriving Shaw of the other benefits negotiated in the process of obtaining the release, including the acquisition of the equity interests of the 8% Senior Subordinated Noteholders in Restructured Canwest Global.

## Mr. Asper's Alleged "Reliance" on Shareholder Recovery

21. Mr. Asper places considerable emphasis on "reliance", indicating that he consented to (or did not object to) the sale of the CMI Entities' interest in Ten Holdings and to

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[17] The Monitor supports the position of the CMI Entities that they have never been in a position to conduct an auction for 100% of the equity of Restructured Canwest Global in the manner contemplated by the Shareholder Group. See Monitor's Fifteenth Report, para. 64.

the CCAA filing on the strength of the 2.3% equity interest allocated to the Shareholders in the original Support Agreement. This interpretation of the facts is creative, to say the least. It suggests that Mr. Asper had a meaningful right to consent or to withhold consent to both of these steps that should be taken into account in this proceeding.

22. Mr. Asper is both a shareholder and a former director and officer of Canwest Global. As a shareholder, he was and is free to pursue his own economic interests, to the extent that the law allows. The corollary of this principle is that, as an equity holder, Mr. Asper and all other Shareholders are required by law to bear the risks of insolvency until the Affected Creditors of the CMI Entities have been paid in full.

23. The sale of the CMI Entities' interest in Ten Holdings and the CCAA filing were the result of decisions of the Board, and there was no requirement in either case for shareholder approval. As a director and officer of Canwest Global, any decision by Mr. Asper with respect to the sale of the CMI Entities' interest in Ten Holdings and the CCAA filing was required to be made in the best interests of Canwest Global, not on the basis that he, in his personal capacity as shareholder, would potentially be entitled to receive his portion of 2.3% of the equity of a restructured Canwest Global. To suggest otherwise is tantamount to an admission that Mr. Asper did not in fact make his decisions in his directorial capacity in accordance with his duties, which surely cannot be his intention.

24. Quite simply, therefore, any allegation of "reliance" by Mr. Asper in his directorial capacity upon the recovery for Shareholders must be rejected. In any event, it has been clear to all parties since the Filing Date that such shareholder recovery was conditional.[18] It defies belief that the members of the Shareholder Group did not take this conditionality into account in making whatever decisions were made by them in relation to their equity holdings.

25. Equally, there is no basis for the statement in the Shareholder Group Factum that "it was not open to the Noteholders, Goldman Sachs and Shaw" to take away the contemplated

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[18] See for example June 7th Affidavit, para. 74: "Accordingly, it was agreed among the CMI Entities and the members of the Ad Hoc Committee prior to signing the original Support Agreement that, if a recapitalization transaction as then contemplated was implemented, the Shareholder Recovery would come out of the recovery otherwise allocable to the 8% Senior Subordinated Noteholders (*i.e.*, by contract) such that the Shareholder Recovery would not dilute the recovery for Affected Creditors which was capped at 18.5% of the equity of a restructured Canwest Global.", Applicants' Motion Record, Tab 1, p. 37; see also June 14th Affidavit, para. 22.

shareholder recovery.[19] This statement fundamentally ignores the conditionality of that recovery and its dependence for its legal viability on the agreement by the 8% Senior Subordinated Noteholders to forego some of their own recoveries to allow for shareholder recovery.

26. The Shareholder Group Factum conveniently fails to mention the prohibition in the CCAA on the ability of equity claimants to recover payment under a plan where the creditors are not being paid in full. This omission is significant in that the only legal means of achieving the recovery contemplated under the Approved Shaw Transaction – which also did not provide for payment of Affected Creditors in full – was through the agreement of the 8% Senior Subordinated Noteholders to dilute their own recoveries. The Shareholder Group did not object to the Approved Shaw Transaction, and in fact, freely concedes that it was the product of a thorough canvas of the market.[20]

## Amended Shaw Transaction Is Not a New Deal

27. The Shareholder Group's submissions regarding the application of the *Soundair* test are predicated on their erroneous characterization of the Amended Shaw Transaction as a new deal.[21] This characterization is the product of a fundamental misunderstanding of the relationship between the Approved Shaw Transaction and the Amended Shaw Transaction.

28. The linchpin of the Amended Shaw Transaction is the resolution of the outstanding issues regarding the Shareholders Agreement and the ongoing litigation with Goldman Sachs. This resolution satisfies an express condition in the Approved Shaw Transaction, which was publicly disclosed to this Honourable Court and to all parties concerned, and which has been an outstanding issue in this restructuring since the date of the CCAA filing (and before). As stated by this Honourable Court in the Shaw Approval Reasons:

> I continue to be of the view that a commercial and negotiated resolution is in the best interests of all concerned. I have approved the Shaw Definitive Documents

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19 Shareholder Group Factum, para. 2.

20 Shareholder Group Factum, paras 4 and 101.

21 The Shareholder Group states at para. 92 of their factum that the Amended Shaw Transaction is "an entirely different deal."

> and ancillary relief. The parties must now move forward and have a reasonable dialogue.[22]

29. The purchase of the equity interests of Restructured Canwest Global which were contractually allocated to the 8% Senior Subordinated Noteholders does not change anything. It has been abundantly clear since the Filing Date that the 8% Senior Subordinated Noteholders were entitled to receive the majority of the equity of the proposed Restructured Canwest Global under the Original Recapitalization Transaction. Rather than go through the formulaic exercise of converting their debt claims to equity and then transferring their equity positions to an outside buyer (such as Shaw), as the 8% Senior Subordinated Noteholders would have been entitled to do upon the implementation of a plan of compromise or arrangement, the 8% Senior Subordinated Noteholders effectively agreed in advance to transfer those positions to Shaw.

30. The ability of the 8% Senior Subordinated Noteholders to transfer their equity interests to Shaw was expressly contemplated in the provisions dealing with liquidity rights in the definitive documents in relation to the Approved Shaw Transaction. These liquidity rights were disclosed in the Affidavit of Thomas C. Strike sworn February 12, 2010, and approved by this Honourable Court.[23] There is no basis upon which the CMI Entities could compel the 8% Senior Subordinated Noteholders to reject Shaw's offer in this regard and allow an auction of their interests to be conducted. The 8% Senior Subordinated Noteholders, as Affected Creditors whose claims are not being paid in full, did not owe a duty to the CMI Entities not to accept this offer and/or to pursue a better offer, nor did they owe any such duty to the Shareholders.

31. In fact, the determination of the 8% Senior Subordinated Noteholders to effectively transfer their equity interests to Shaw was a transaction between Shaw and the 8% Senior Subordinated Noteholders in relation to which the CMI Entities were not entitled to any input because they <u>had already agreed</u> in a court-approved transaction that the 8% Senior Subordinated Noteholders were entitled to receive a majority of the equity of Restructured Canwest Global and had no right to control what the 8% Senior Subordinated Noteholders determined to do with that interest. There is therefore no basis to impugn the actions of the CMI

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22 *Shaw Approval Reasons,* para. 47, Applicants' Motion Record, Tab F, p. 220.

23 These liquidity rights were expressly provided for in a schedule to the Subscription Term Sheet which was disclosed to this Honourable Court prior to approval of the Approved Shaw Transaction: see February 12th Affidavit, para. 44, Applicants' Motion Record, Tab D, p. 181.

Entities in "sitting and waiting", or to accuse the CMI Entities of improperly allowing the equity of a restructured Canwest Global to be negotiated away.[24] Moreover, there is no legal basis upon which this Honourable Court could second-guess the determination by the 8% Senior Subordinated Noteholders, in their business judgment, with respect to the value that they were prepared to accept for their interests, particularly given the fact that they are not recovering the full value of their claims.

32. In any event, the amendment of the Approved Shaw Transaction to reflect the transfer of the interests of the 8% Senior Subordinated Noteholders to Shaw, which was effectively contemplated in the liquidity provisions of the documentation already approved by this Honourable Court, and to reflect the satisfaction of the express condition to the Approved Shaw Transaction regarding the rights of Goldman Sachs under the Shareholders Agreement, does not transform the Amended Shaw Transaction into a "new" deal that must be subjected anew to the rigours of the *Soundair* test. It is for this reason that the CMI Entities properly rely on this Honourable Court's earlier findings in the Shaw Approval Reasons that the elements of the *Soundair* test have been satisfied. In particular, the CMI Entities are not obliged to throw open the doors and run an entirely new process, nor is there any need to re-evaluate this Honourable Court's earlier determination that the Approved Shaw Transaction satisfied the *Soundair* criteria, despite the absence of a "fiduciary out".

## Auction Neither Feasible Nor Legally Required

33. The situation in this CCAA proceeding is fundamentally different from the situation in the cases cited by the Shareholder Group for the proposition that an auction is virtually the only means by which the market can be tested. All of the cases cited by the Shareholder Group are clearly distinguishable primarily on the basis that, in the case at bar, the CMI Entities followed a court-sanctioned Equity Solicitation and subsequently, a court-directed Mediation to resolve certain outstanding litigation issues which were business-critical in the restructuring of the CMI Entities' business.

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[24] Shareholder Group Factum, para. 9.

(a) *Re Boutique Euphoria Inc.*,[25]: the debtor was using a "stalking horse" bid process to sell assets (stores) that it had the unrestricted ability to sell. The Court's criticism of the process in that case related to the Monitor's failure to establish that the stalking horse bid was the best bid in the circumstances and its focus on one potential bidder without canvassing the market at all. By contrast, the CMI Entities ran the Equity Solicitation before selecting Shaw, and this process was sanctioned by this Honourable Court. It was made clear in Court on February 19th that Shaw did not want to be a "stalking horse" and the Approved Shaw Transaction was approved on that basis.

(b) *Laurentian Bank of Canada v. World Vintners Corp.*:[26] the Shareholder Group indicates that this case establishes a "presumption" in favour of an auction.[27] However, the relevant language is taken entirely out of context by the Shareholder Group. In that case, which involves a receivership sale, the secured creditors delayed in seeking a court-appointed receiver until the debtor was completely out of money and then sought to sell the company to management on a crisis basis with only two days' notice. The Court simply indicated on the facts of that case that the sale should be delayed for six days to see if additional offers would surface. This case is therefore manifestly different from the current proceeding in which a transaction has been selected and fully negotiated following a lengthy Equity Solicitation.

(c) *Pente Investment Management Ltd. v. Schneider Corp.*:[28] again, the quotation relied upon by the Shareholder Group in this case for the proposition that an auction is required is taken out of context and given more weight than the language of the case supports.[29] In the first place, the quotation applies in a situation where "there are several bidders". In this case, the Shareholder Group

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25 2007 QCCS 7129.

26 (2002), 35 C.B.R. (4th) 144 (Ont. S.C.J.).

27 Shareholder Group Factum, para. 96.

28 (1998), 42 O.R. (3d) 177 (C.A.).

29 Shareholder Group Factum, para. 97, citing *Pente* at para. 63.

has not identified any other credible, qualified and fully committed bidders. Furthermore, and in any event, the CMI Entities ran the Equity Solicitation, and selected Shaw from among the potential bidders that surfaced in that process.

(d) *Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership*:[30] this case dealt with a situation in which the former equity holders were seeking to retain their equity ownership under a plan without contributing any consideration for this retention, in a situation in which creditors were not being paid in full. In that context, the US Supreme Court simply suggested that "exposure to the market" was necessary, without mandating any particular form that such exposure should take. In any event, this case is deserving of little weight in light of the significantly different legislative environment in which it was decided.

34. In fact, the situation facing the CMI Entities is very similar to the situation facing the debtor company in *Soundair*, in which the Ontario Court of Appeal indicated that a full auction was not required. In advocating for an auction, the Shareholder Group seeks to distinguish *Soundair* on the basis that it involved the sale of a "peculiar and esoteric asset", in contrast with a situation involving the sale of a "commercially viable asset that is likely to attract multiple bidders"[31]. At the same time, they describe the business of the CMI Entities as a "unique and extremely important asset".[32]

35. The business of the CMI Entities is operated in a highly regulated environment, in which restrictions are imposed on foreign ownership. Furthermore, the CMI Entities began the CCAA process with significant restrictions on its ability to conduct an auction of 100% of the equity of Canwest Global. These restrictions arose from its commitment to allocate a portion of the equity to its Affected Creditors which was, among other things, the *quid pro quo* for the agreement by the 8% Senior Subordinated Noteholders to provide the liquidity required for the CMI Entities to operate during the CCAA proceeding.

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30 526 U.S. 434 (1999).

31 Shareholder Group Factum, para. 95.

32 Shareholder Group Factum, para. 7.

36. Ultimately, Canwest Global did run an auction (the Equity Solicitation) in relation to the equity interest that it was empowered to sell.[33] Contrary to the suggestion of the Shareholder Group, this was not a "lop-sided" auction in which different bidders were privy to different information.[34] Even the Shareholder Group appears to accept that the Equity Solicitation "thoroughly canvassed the market".[35] This equity interest has now been effectively transferred to Shaw, which was also entitled to exercise certain liquidity rights in relation to the purchase of other equity interests, including those to which the 8% Senior Subordinated Noteholders were entitled. There is simply no basis for another auction.

37. Although the Shareholder Group's submissions seek to obfuscate the implications of their request for an auction for 100% of the equity of Canwest Global, the inescapable implication of this request is that the Shareholder Group seeks to "blow off" the clear contractual commitments that were made to the 8% Senior Subordinated Noteholders and that allowed the CMI Entities to reach the stage they are at today, with the sole objective of pursuing only the Shareholder Group's own economic interests. The Monitor's Report filed in connection with the CMI Entities' motion is abundantly clear with respect to the consequences of such a course of action. In particular,

(a) due to the blocking vote held by the Ad Hoc Committee, no CCAA plan of compromise or arrangement can be approved by the creditors of the CMI Entities without support of the Ad Hoc Committee[36];

(b) upon an event of default under the Use of Cash Collateral and Consent Agreement, the Ad Hoc Committee can obtain an assignment of the Irish Holdco Notes[37]; and

(c) an assignment of the Irish Holdco Notes to the Ad Hoc Committee would frustrate the viability of any proposed plan of arrangement which does not have

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33 The conclusion is supported by the Monitor. See para. 68 of the Monitor's Fifteenth Report.

34 Shareholder Group Factum, para. 126.

35 Shareholder Group Factum, para. 101.

36 Monitor's Fifteenth Report, para. 27.

37 Monitor's Fifteenth Report, para. 28.

the support of the Ad Hoc Committee and jeopardize the CMI Entities' liquidity and ability to operate on a going concern basis.[38]

38. Since the Shareholder Group proposes an auction of 100% of the equity of Canwest Global, they clearly contemplate "blowing up" the Approved Shaw Transaction as well, as that is the only means by which the portion of the equity that has been committed to Shaw would be available for auction. The Shareholder Group's request should be given a resounding and definitive rejection.

## Goldman Sachs' Interests Had to Be Addressed

39. The Shareholder Group claims that it would have been possible for the CMI Entities to conduct an auction of 100% of the equity of Canwest Global without disclaiming the Shareholders Agreement.[39] This claim presupposes that there was a market for such a transaction and that such a transaction would have generated sufficient value, despite the fact that any purchaser would have been burdened with the implications of the significantly above-market put rights under the Shareholders Agreement.

40. Throughout the Shareholder Group Factum, there are claims that the requirement to deal with the Shareholders Agreement was not "business critical".[40] Quite frankly, the basis for this claim defies comprehension and is an egregious example of revisionist history. It has been abundantly clear throughout this CCAA proceeding that the rights accruing to Goldman Sachs under the Shareholders Agreement had to be addressed. The basis for the need to deal with the Shareholders Agreement arises from the terms of the Shareholders Agreement itself, and in particular, the disparity between the value of those terms and the current economic market. As the CMI Entities stated in November 2009:

> The Shareholders Agreement, and in particular the rates of return and put/call valuation formulae embodied therein, reflect the fact that the acquisition of the Specialty TV Business was made at the very peak of the market in 2007. For the purpose of determining the equity the GS Parties are to receive as a result of the Combination Transaction, the Shareholders Agreement contemplates compound annual rates of return on the GS Parties' investment of between 15% and 25%.

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38 Monitor's Fifteenth Report, para. 29.

39 Shareholder Group Factum, para. 8 and paras. 139 to 141.

40 Shareholder Group Factum, paras. 137 to 138.

> The exercise prices for the put and call rights are determined using an Equity Value (as further defined in the Shareholders Agreement) based upon 12x Combined EBITDA (less net indebtedness). Based on the CMI Entities' recent experience canvassing prospective investors, and based on advice from the CMI Entities' financial advisor, the Shareholders Agreement no longer reflects "market" terms.
>
> As is made clear in the Initial Order Affidavit, the CMI Entities have been aggressively pursuing a refinancing or recapitalization transaction since their initial default on CMI's then senior secured credit facility in February 2009. CMI and its financial advisor, RBC Capital Markets (as described in the Initial Order Affidavit) approached a large number of potential investors to discuss potential refinancing or recapitalization transactions in early 2009. Based upon my own experience, and what I have been told by RBC Capital Markets, during those discussions prospective investors made it clear, among other things, that if the CMI Entities were going to be able to successfully refinance or recapitalize themselves, they would have to address the Shareholders Agreement in a way that would reflect the commercial realties of the dramatically different economic environment that exists now, versus the environment that existed when the Specialty TV Business was acquired in 2007.[41] [Emphasis Added]

41. In this regard, the assertion by the Shareholder Group that the sole purpose of the desire to compromise the interests of Goldman Sachs was to enhance value for the 8% Senior Subordinated Noteholders' equity position in restructured Canwest Global is simply incorrect.[42]

42. Moreover, the need to address the issues under the Shareholders Agreement, including the ongoing litigation with Goldman Sachs in relation to the 4414616 Transaction, has also been recognized on several occasions by this Honourable Court.[43] It has also been recognized by the Monitor, who stated that "the consistently stated position of [Goldman Sachs]

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41 Affidavit of Thomas C. Strike, sworn November 24, 2009, paras. 46 and 47. See also June 7th Affidavit, para. 37, Applicants' Motion Record, Tab 1, p. 24: "The CMI Entities and all of their stakeholders had known for many months that, as part of the CMI Entities' restructuring efforts, the Shareholders Agreement would need to be amended and restated or otherwise addressed. As early as February 2009, it became clear to management of the CMI Entities that if the CMI Entities were going to be able to successfully refinance or recapitalize themselves, they would, among other things, have to address the Shareholders Agreement in a satisfactory manner, partially as a result of the commercial realities of the dramatically different economic and financial market environment compared to the environment that existed when the Specialty TV Portfolio was acquired by CW Investments from Alliance Atlantis in 2007. The CMI Entities' balance sheet and liquidity challenges and certain covenant restrictions under the note indenture governing the 8% Senior Subordinated Notes that prevented CMI from completing the Vend-In Transaction without first refinancing or repaying the 8% Senior Subordinated Notes or obtaining the consent of the requisite majority of the 8% Senior Subordinated Noteholders also necessitated the renegotiation of the Shareholders Agreement." [Emphasis Added.]

42 Shareholder Group Factum, para. 8.

43 *Shaw Approval Reasons*, para. 47. See also *Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 (S.C.J.) at para. 52.

prior to the Mediation was that they wanted their fundamental contractual rights pursuant to the [Shareholders Agreement] respected".[44] The Monitor further noted that:

> Following approval of the Original Shaw Transaction, the largest remaining obstacle to a successful going concern restructuring of the CMI Entities was the dispute relating to the Shareholders Agreement which had to be dealt with in a manner satisfactory to the CMI Entities, Shaw and the Ad Hoc Committee.[45]

43. It is even more fanciful to contemplate that the CMI Entities should have refused the required consent to transfer the Goldman Sachs shares in CW Investments to Shaw and run an auction for the equity of Canwest Global with Goldman Sachs still in place.[46] Quite apart from anything else, it would be commercially absurd for the CMI Entities to have refused such consent to the implementation of a negotiated resolution of a contentious issue that had been a roadblock to a successful restructuring for the past sixteen months.

## No Basis for Impugning the Board's Actions

44. The Shareholder Group seeks to revisit this Honourable Court's determination in February 2010 that the Approved Shaw Transaction should be accepted despite the absence of a "fiduciary out."[47] This entire discussion is, at the very least, predicated on their erroneous characterization of the Amended Shaw Transaction as a new deal, rather than as a contemplated amendment to the Approved Shaw Transaction. The CMI Entities submit that the Amended Shaw Transaction is a permitted amendment to the Approved Shaw Transaction and that it did not provide any scope for transforming Shaw into a "stalking horse". It is therefore not incumbent upon the CMI Entities in this motion to provide evidence that consideration was received for agreeing to "give up" the "fiduciary out", as the Shareholder Group suggests.[48]

45. However, the implications of the Shareholder Group's request for an auction of 100% of the equity of Canwest Global, which presumably includes that portion of the equity that has already been committed to Shaw under the Approved Shaw Transaction, are far more

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44 Monitor's Fifteenth Report, para. 46.

45 Monitor's Fifteenth Report, para. 42.

46 Shareholder Group Factum, paras. 7 and 8.

47 Shareholder Group Factum, paras. 106ff.

48 Shareholder Group Factum, para. 108.

extensive. By including this portion of the equity in their proposed auction, they are seeking to mount a collateral attack on this Honourable Court's determination that the lack of "fiduciary out" under the Approved Shaw Transaction did not render the Approved Shaw Transaction unfair or unreasonable. This Honourable Court's approval of the Approved Shaw Transaction has not been appealed.[49] It is not therefore open for review in this proceeding and the Shareholder Group's evidence on this point should simply be disregarded.

46. In any event, the Shareholder Group simply cannot escape from the implications of the Canadian case law, including the decisions in *Ventas*, to the effect that a "fiduciary out" is not a prerequisite to the compliance with a corporate board's fiduciary duties to the company.[50]

47. Despite some fuzzy language in the Shareholder Group Factum, it cannot be forgotten that it is a fundamental principle of Canadian law that directors' fiduciary duties are owed to the company and not to the shareholders.[51] As the Supreme Court of Canada has held:

> The interests of shareholders, those of the creditors and those of the corporation may and will be consistent with each other if the corporation is profitable and well capitalized and has strong prospects. However, this can change if the corporation starts to struggle financially. The residual rights of the shareholders will generally become worthless if a corporation is declared bankrupt. Upon bankruptcy, the directors of the corporation transfer control to a trustee, who administers the corporation's assets for the benefit of creditors.
>
> Short of bankruptcy, as the corporation approaches what has been described as the "vicinity of insolvency", the residual claims of shareholders will be nearly exhausted. While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.

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49 The application for leave to appeal by Goldman Sachs was abandoned following the Mediation.

50 The Shareholder Group acknowledges this law in paragraph 113 of their factum and recognizes that U.S. law to the contrary simply does not apply in Canada. The *Omnicare* case cited by the Shareholder Group has never been cited with approval in Canadian case law and in the face of the positive statements that have been made in cases such as *Ventas*, there is no basis for importing U.S. legal principles into this case by the back door. The relevant portion of the *Ventas* decision is cited in the factum of the CMI Entities in this motion.

51 See *Peoples Department Stores Inc. (Trustee of) v. Wise,* 2004 SCC 68, [2004] 3 S.C.R. 461 [*Peoples*] at para. 42: "Insofar as the statutory fiduciary duty is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximization of the value of the corporation: see E. M. Iacobucci, "Directors' Duties in Insolvency: Clarifying What Is at Stake" (2003), 39 Can. Bus. L.J. 398, at pp. 400- 1."

> The directors' fiduciary duty does not change when a corporation is in the nebulous "vicinity of insolvency". That phrase has not been defined; moreover, it is incapable of definition and has no legal meaning. What it is obviously intended to convey is a deterioration in the corporation's financial stability. In assessing the actions of directors it is evident that any honest and good faith attempt to redress the corporation's financial problems will, if successful, both retain value for shareholders and improve the position of creditors. If unsuccessful, it will not qualify as a breach of the statutory fiduciary duty. [emphasis added][52]

48. The Board made its decision to accept the Approved Shaw Transaction and to accept the Amended Shaw Transaction once fully negotiated based on its informed business judgment that this transaction is in the best interests of the company.[53] There is no basis for asserting that the Board did not consider the interests of the Shareholders in this process. The mere fact that the contemplated recovery for the Shareholders is not included in the Amended Shaw Transaction is not evidence that the Shareholders' interests were not taken into account. In fact, the evidence is to the contrary. The Board, the CMI Entities and the CMI CRA did advocate for shareholder recovery.[54]

49. The implications of the Shareholder Group's position are that the Board should have sacrificed a transaction from a credible, qualified and fully committed bidder that would represent a significant step forward in the ability of the company to emerge from insolvency protection on the sole basis that the Shareholders did not benefit from such a transaction. The Shareholder Group would have the Board make this enormously risky decision despite the fact that the Affected Creditors were not being paid in full, despite the fact that the Shareholders' interests are at the bottom of the "priority" ladder in this insolvency proceeding, and despite the fact that the rejection of the Amended Shaw Transaction and the conduct of an auction for 100% of the equity of Canwest Global would place the company in breach of at least two pre-existing contractual commitments, thereby potentially exposing the company to time-consuming, complex litigation that could result in a post-filing damages claim that would be payable at 100

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52 *Peoples, supra* at paras. 44 to 46.

53 Strike Cross-Examination, Q75, p. 19.

54 June 7th Affidavit, para. 46, Applicants' Motion Record, Tab 1, p. 27.

cent dollars.[55] With all due respect, no reasonably informed and responsible board of directors would make such a decision.

## No Basis for Alleging Breach of Securities Laws

50. The CMI Entities do not dispute that the *Securities Act* (Ontario) requires all material changes to be disclosed in a timely manner. The Shareholder Group tellingly omits half of the definition of "material change" from their factum, however. The relevant parts of the full definition reads as follows:

> "material change",
>
> (a) when used in relation to an issuer other than an investment fund, means,
>
> (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any securities of the issuer; or
>
> (ii) a decision to implement a change referred to in subsection (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board or such other persons acting in a similar capacity is probable...[56] [emphasis added]

51. Clause (ii) is the relevant portion of the definition for the purposes of this submission because the "change" in question is the decision to adopt and implement the Amended Shaw Transaction. This section specifically refers to decisions that are made by the board of directors, or by senior management in circumstances where board approval is probable. By definition, prior to board approval for a transaction and where such approval is not yet probable, a material change has not occurred.

52. The Shareholder Group acknowledges that disclosure requirements for material changes under the *Securities Act* (Ontario) arise only when there is a substantial likelihood that a transaction that would represent a material change will occur[57]. Even the case law cited by the

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55 Section 19(1)(b) of the CCAA only permits claims that relate to "debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the ... [the CCAA filing date]" to be compromised in a plan. The Approved and Amended Shaw Transactions are obligations entered into after the CCAA filing date.

56 Section 1(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended.

57 Shareholder Group Factum, para. 131, citing *Re AiT Advanced Information Technologies Corp. Inc.* (2007), 40 B.L.R. (4th) 242 (O.S.C.) [*AiT*]

Shareholder Group recognizes that the commitment of one party to proceed with a transaction, at a point at which it is still outside the control of the other party to implement the transaction, does not require disclosure because it has not reached a sufficient level of certainty.[58] The risks of premature disclosure have been specifically acknowledged in the TSX Company Manual:

> While the policy of the Exchange is that all material information must be released immediately, judgment must be exercised by company officials as to the timing and propriety of any news releases concerning corporate developments, since misleading disclosure activity designed to influence the price of a security is considered by the Exchange to be improper. Misleading news releases send signals to the investment community which are not justified by an objective examination of the facts, and may detract from the credibility of the company. Announcements of an intention to proceed with a transaction or activity should not be made unless the company has the ability to carry out the intent (although proceeding may be subject to contingencies) and a decision has been made to proceed with the transaction or activity by the board of directors of the company, or by senior management with the expectation of concurrence from the board of directors. Disclosure of corporate developments must be handled carefully and requires the exercise of judgment by company officials as to the timing of an announcement of material information, since either premature or late disclosure may result in damage to the reputation of the securities markets. [59][Emphasis Added.]

53. The date on which Board approval for the Amended Shaw Transaction was obtained was May 2, 2010.[60] The news release disclosing the Amended Shaw Transaction was issued before the market opened on May 3, 2010, following confirmation that the relevant agreements had been executed and delivered by all parties, and the material change report was filed on May 3, 2010.[61] Prior to approval of the Board on May 2, 2010 and the execution and delivery of the Definitive Documentation on May 3, 2010, there was no deal that could have been disclosed. Given the state of flux of the ongoing negotiations prior to that date, any such disclosure before completion of negotiations and before obtaining Board approval would have been vague and potentially misleading.

54. The fact that the Chairman of the Board had a conversation with representatives of the Ad Hoc Committee on April 26, 2010 concerning shareholder recovery does not change the fact that the Definitive Documentation in respect of the Amended Shaw Transaction was not

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58 *AiT, ibid.* at paras. 216 to 224.

59 TSX Company Manual, section 419.

60 Confidential Answers to Undertakings given at the Cross-Examination of Thomas C. Strike, dated June 15, 2010, Q92.

61 Strike Cross-Examination, Q94, p. 25.

agreed upon and Board approval was not obtained until May 2, 2010. All that was achieved as a result of the Mediation was a "framework" for resolving the outstanding issues among the parties.[62] Until it was clear that the Definitive Documentation could and would be entered into, there was no legal requirement to disclose it as a material change, and in fact, any such disclosure would have been premature and therefore improper. Quite simply, there is no basis for "concern" that the Board did not fulfill its duties in this regard, let alone a basis for impugning the fairness or integrity of the Board's actions or the process overall.

## Response to Specific Paragraphs of Shareholder Group Factum

55. The facts surrounding the sale of the CMI Entities' interest in Ten Holdings and the increase in the value of the shares of Ten Holdings since the sale in late September 2009 are simply irrelevant to these proceedings, except to the extent that this sale was the means by which the liquidity was generated to allow the CMI Entities to operate during this CCAA proceeding and to achieve a going-concern outcome through the Amended Shaw Transaction. The critical role that these proceeds played in the very survival of the CMI Entities is obfuscated by characterizing them as providing a "bridge, if necessary, to equity injection."[63]

56. Similarly, it is incorrect to characterize the Equity Solicitation as directed towards finding an equity investor to "partner with the Aspers".[64] The Equity Solicitation was designed to satisfy one of the conditions in the Support Agreement – namely, the need to find a "Canadian" investor in Restructured Canwest Global to comply with regulatory requirements. None of the marketing materials in the Equity Solicitation were predicated on the need for such investor to enter into a partnership with the Asper Family. By the same token, however, there was also no prohibition in the Equity Solicitation that would have precluded any potential investor from partnering with the Asper Family if it had desired to do so. The simple fact, as detailed in Mr. Asper's affidavit, is that no viable transaction involving the Asper Family has emerged after sixteen months of trying.[65]

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62 Monitor's Fifteenth Report, para. 45.

63 Shareholder Group Factum, para. 34.

64 Shareholder Group Factum, para. 37.

65 As Strike stated on cross-examination: "Q. Similarly, there was a prohibition against any communications with the Aspers? A. No, that was not the case. I believe RBC made it known to all of the parties that they were

57. There is nothing nefarious about the fact that greater recovery for the Affected Creditors was negotiated using as leverage the refusal of Shaw and the 8% Senior Subordinated Noteholders to provide a recovery for the Shareholders.[66] The Affected Creditors are not being paid in full, even taking into account the enhanced recovery that was negotiated as part of the Amended Shaw Transaction. In any event, the evidence of Mr. Strike on cross-examination was clear that higher recoveries for the Affected Creditors were being negotiated anyway, because the initial proposal for such recoveries under the Amended Shaw Transaction was lower than the recoveries that had been originally contemplated.[67]

58. There is no basis for alleging that the Amended Shaw Transaction was a "manifestly improvident bargain" by reference to the allegedly improving fortunes experienced by the CMI Entities since the Equity Solicitation.[68]

(a) First, the future prospects of the business of the CMI Entities are simply irrelevant unless the CMI Entities can successfully emerge from the CCAA process as solvent entities. Such emergence depends on compromising its outstanding liabilities to the Affected Creditors, which cannot be done in the absence of the Amended Shaw Transaction. The Shareholder Group does not come forward with any credible, qualified and fully committed party that is prepared to write a cheque for these amounts.

(b) In any event, at least some of the improving fortunes of the CMI Entities are attributable to steps that were taken as part of the restructuring. The Shareholder Group itself notes that the success in relation to the programming purchases occurred in May 2010. [69] At that time, the Approved Shaw Transaction had

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soliciting that the Aspers had up to $15 million to contribute. An invitation was made to the various investors that if they wanted to speak to the Asper family about that that they would get the introduction by the company. None of the prospective investors in the solicitation process I've seen took the company or the Aspers up on that invitation. Q. To your knowledge? A. To my knowledge." [emphasis added] (Strike Cross-Examination, Q26-27, pp. 7-8).

66 Shareholder Group Factum, para. 66.

67 Strike Cross-Examination, Q76 to Q78, pp. 19 and 20.

68 Shareholder Group Factum, para. 71.

69 Shareholder Group Factum, para. 74.

significantly stabilized the operations of the CMI Entities. It is commercially absurd to contemplate that the CMI Entities would take the benefits of the restructuring achieved to date and then disregard the key obligations that they entered into in order to obtain those benefits.

(c) Finally, the Ontario Court of Appeal in *Soundair* expressly stated that the providence of a sale transaction must be evaluated based on the evidence that the receiver (in this case, the company) had at the time the transaction was accepted, and that it is not appropriate to evaluate this question with the benefit of hindsight.[70] In February 2010, when the Approved Shaw Transaction was entered into, the Board, the Special Committee, RBC, the CMI CRA and the Monitor were all of the view that it was the best transaction available, given the information possessed at that time. This Honourable Court also recognized at the time that the CMI Entities needed to enter into a transaction on the basis that the CMI Entities did not have unlimited time within which to conduct the equity solicitation process.[71] The Amended Shaw Transaction is <u>not</u> a new deal. Information received after the Approved Shaw Transaction was entered into simply cannot be a basis for questioning the providence of this transaction.

59. The valuation evidence provided by the Shareholder Group is a pure arithmetic exercise and even the Shareholder Group acknowledges that the role of this Honourable Court in this hearing <u>is not</u> to determine the actual value of a restructured Canwest Global.[72] The Shareholder Group acknowledges that the evidence of Mr. Glenn Bowman is not an opinion on the accurate EBITDA number.[73] Mr. Bowman's evidence is also fundamentally flawed in that it

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70 *Royal Bank* v. *Soundair Corp.* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 21: "When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision."

71 *Shaw Approval Reasons*, para. 45, Applicants' Motion Record, Tab F, p. 219.

72 Shareholder Group Factum, para. 79.

73 Shareholder Group Factum, para. 82.

entirely ignores the existence of the Shareholders Agreement and any effect that it would have on an auction.

60. The Shareholder Group criticizes the CMI Entities for not leading expert evidence to refute Mr. Bowman's report regarding the fair market value of the "media assets" of Canwest Global.[74] However, the CMI Entities submit that no responding expert report was required because, by his own admission, Mr. Bowman failed to bring any expertise to bear on the exercise.[75] The Shareholder Group also conveniently fails to note the following admissions made by Mr. Bowman during his cross-examination:

(a) he did not speak with management of the CMI Entities prior to accepting the EBITDA calculations provided to him by Mr. Asper;[76]

(b) he has no basis to challenge Mr. Strike's evidence regarding the manner in which the CMI Entities have chosen to amortize programming costs in 2010;[77]

(c) his EBITDA calculation does not reflect any minority ownership interests;[78]

(d) corporate costs should be deducted from the EBITDA calculation if they are being incurred;[79]

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74 Shareholder Group Factum, para. 81.

75 Mr. Bowman admitted during his cross-examination that he simply performed a "calculation" based solely on information provided to him by his client and that his "calculation" cannot even be used as a formal opinion or recommendation (Bowman Cross-Examination, Q34-36 & 95-104, p. 8 and 24-25).

76 Bowman Cross-Examination, Q32-34, p. 8.

77 Bowman Cross-Examination, Q46, p. 11. During re-examination, Mr. Strike testified that the CMI Entities' management made the conscious decision in 2010 to apply and consume its Canadian programming, and therefore amortize those programming costs, skewing to the back six months of the year. The effect of that decision is that more programming costs will be incurred in the last six months of 2010, which will result in proportionally lower EBITDA (Strike Cross-Examination, Q152-153, p. 41).

78 Bowman Cross-Examination, Q50-51, p. 12.

79 Bowman Cross-Examination, Q63, p. 16. At paragraph 84 of the Shareholder Group Factum, the Shareholder Group criticizes Mr. Strike for making "no effort" to independently verify the estimate of corporate costs and not knowing its constituent parts. The Shareholder Group ignores Mr. Strike's testimony that the $7 million estimate was based "on management's judgement of what those ongoing [corporate] costs would be" and that he had no reason to doubt that judgement (Strike Cross-Examination, Q150-151, p. 40).

(e) a purchaser of a business is not going to pay for a cash flow that it is not entitled to;[80]

(f) selecting EBITDA multiples is a "matter of differing opinions" and is "not a precise science";[81]

(g) the price that a potential purchaser might be prepared to offer for a company that is insolvent would be different than one that is not under any compulsion to transact.[82]

61. Despite the obvious frailties of Mr. Bowman's evidence, the Shareholder Group takes the position that this Honourable Court should rely on this evidence – which is manifestly different from the projections made by the CMI Entities' management -- to justify reopening the restructuring process in violation of the contractual commitments of the CMI Entities to the 8% Senior Subordinated Noteholders and to Shaw, potentially gambling away any recoveries already achieved for the Affected Creditors. The Shareholder Group conveniently ignores the fact that the equity of Canwest Global is worth nothing unless someone is prepared to pay the at least $568 million required to satisfy the outstanding liabilities of the CMI Entities to their creditors. The Shareholder Group similarly ignores the accreting interests under the Shareholders Agreement that were formerly held by Goldman Sachs and that are now held by Shaw, which (among other things) give Shaw certain put rights. Based on the CMI Entities' current forecasts, the value of these rights will be in excess of $900 million in 2011 when the put rights are exercisable.[83] It is a matter of common sense that any bidder in an auction would have to take these rights into account.

62. Contrary to the allegation of the Shareholder Group, the CMI Entities did not submit that the threshold for approving the Amended Shaw Transaction is "low".[84] The threshold for granting an order calling a meeting to vote on a plan of compromise or arrangement

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80 Bowman Cross-Examination, Q73, p. 19.

81 Bowman Cross-Examination, Q87, p. 23.

82 Bowman Cross-Examination, Q111, p. 27.

83 Cross-Examination of Peter Buzzi, dated June 15, 2010, Q42 to Q43, p. 14.

84 Shareholder Group Factum, para. 92.

is low, a proposition which is well-established in the CCAA case law, some of which is cited in the factum of the CMI Entities.

63. Furthermore, the Shareholder Group accuses the CMI Entities of suggesting that the Shareholders' interests are "irrelevant" in a CCAA restructuring.[85] This is a deliberate misinterpretation of the position of the CMI Entities. The CMI Entities do state that shareholder interests are at the bottom of the "priority" ladder in an insolvency, which cannot be disputed because it is a matter of law. The Shareholders' interests quite simply cannot drive the outcome of this proceeding. The evidence is clear that the CMI Entities sought to reinstate the contemplated shareholder recovery, but in the face of the unwillingness of Shaw, the Ad Hoc Committee and the Monitor to support such recovery, there was no basis on which this could have been a "deal breaker".

64. The Shareholder Group erroneously states that the "only party who will suffer if this transaction is rejected is Shaw".[86] This statement is simply wrong. It is predicated on the entirely unsupported assumption that an auction would generate sufficient value to satisfy over $568 million owed to the Affected Creditors. If no bidder surfaces that could satisfy this condition, the Approved or Amended Shaw Transaction will no longer be available and the CMI Entities and their employees, suppliers and Affected Creditors will be significantly harmed. The Monitor has expressed the clear view that any new auction process would be conducted in a hostile creditor environment, and that it could result in operational difficulties, including issues in relation to the CMI Entities' large studio suppliers, as a result of the continued uncertainty regarding the outcome of the CCAA proceeding.[87]

65. For all of the reasons articulated above, therefore, the CMI Entities submit that the objections of the Shareholder Group should be dismissed in their entirety, and this Honourable Court should grant the requested Order authorizing the CMI Entities to call the Creditor Meeting and accepting the filing of the Plan.

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85 Shareholder Group Factum, para. 122.

86 Shareholder Group Factum, para. 129.

87 Monitor's Fifteenth Report, para. 69.

## PART III – NATURE OF THE ORDER SOUGHT

66. The CMI Entities therefore request an Order substantially in the form of the draft Order attached to the Second Supplementary Motion Record dated June 16, 2010.

Lyndon A.J. Barnes

Jeremy Dacks

Shawn T. Irving

## Schedule "A"

## Applicants

1. Canwest Global Communications Corp.
2. Canwest Media Inc.
3. MBS Productions Inc.
4. Yellow Card Productions Inc.
5. Canwest Global Broadcasting Inc./Radiodiffusion Canwest Global Inc.
6. Canwest Television GP Inc.
7. Fox Sports World Canada Holdco Inc.
8. Global Centre Inc.
9. Multisound Publishers Ltd.
10. Canwest International Communications Inc.
11. Canwest Irish Holdings (Barbados) Inc.
12. Western Communications Inc.
13. Canwest Finance Inc./Financiere Canwest Inc.
14. National Post Holdings Ltd.
15. Canwest International Management Inc.
16. Canwest International Distribution Limited
17. Canwest MediaWorks Turkish Holdings (Netherlands)
18. CGS International Holdings (Netherlands)
19. CGS Debenture Holding (Netherlands)
20. CGS Shareholding (Netherlands)
21. CGS NZ Radio Shareholding (Netherlands)
22. 4501063 Canada Inc.
23. 4501071 Canada Inc.
24. 30109, LLC
25. CanWest MediaWorks (US) Holdings Corp.

## Schedule "B"

## Partnerships

1. Canwest Television Limited Partnership
2. Fox Sports World Canada Partnership
3. The National Post Company/La Publication National Post

## Schedule "C" - List of Authorities

*Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 (S.C.J.)

## Schedule "D" - Statutory References

**Definitions**

**2. (1) In this Act,**

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

**Compromises to be sanctioned by court**

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

**Payment — equity claims**

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

**Claims that may be dealt with by a compromise or arrangement**

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the Bankruptcy and Insolvency Act or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the Bankruptcy and Insolvency Act, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C., 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP., AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICANTS

**Court File No: CV-09-8396-00CL**

***Ontario***

**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

Proceeding commenced at Toronto

# REPLY FACTUM OF THE CMI ENTITIES

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