2010 BCSECCOM 494

Icahn Partners LP, Icahn Master Fund LP,
Icahn Partners Master Fund II LP,
Icahn Master Fund Partners III LP, High River Limited Partnership,
Icahn Fund S.àR.L. and Daazi Holding BV
(collectively, "Icahn")

and

Lions Gate Entertainment Corp.

***Securities Act,* RSBC 1996, c. 418**

Panel	Brent W. Aitken	Vice Chair
	Kenneth G. Hanna	Commissioner
	Shelley C. Williams	Commissioner
Date of application	March 24, 2010	
Date of hearing	April 26 and 27, 2010	
Date of decision	April 27, 2010	
Date of summary reasons of the majority	May 6, 2010	
Date of majority reasons for decision	July 26, 2010	
Date of reasons of minority	September 1, 2010	
Appearing		
Mark Gelowitz Allan Coleman Robert Anderson	For Icahn	
Jessica Kimmel Jonathan Lampe Geoff Plant Patricia Taylor	For Lions Gate Entertainment Corp.	
Shawn McColm Gordon Smith Leslie Rose	For the Executive Director	

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Reasons of Minority

I Introduction

¶ 1 My reasons for cease trading the Lions Gate SRP are different from the reasons of the panel majority.

¶ 2 Primarily, I have given greater consideration to the panels' reasoning in the *Pulse* and *Neo* decisions. Although the facts of each case may be distinguishable from the Lions Gate facts, the panels' analysis of the decision factors is highly relevant.

¶ 3 Further, I believe there is some discretion for commission panels to take a broader interpretation of "bona fide shareholder interests" in making public interest decisions. There have been several positive developments in corporate governance and board accountability to shareholders that are supportive of panels taking a broader interpretation, and showing greater deference to the business judgment of target boards.

¶ 4 Finally, I believe that commission decisions have evolved over time to address new circumstances that arise. Commissions make decisions to address the circumstances put before them. Sometimes their decisions set new guidelines for the marketplace. In my view, we saw this in *Pulse* and *Neo*. It is within this context that I have considered the circumstances associated with the Lions Gate SRP.

A. Relevance of *Pulse* and *Neo* decisions

¶ 5 *Pulse* and *Neo* represent a natural evolution of policy interpretation, based on unique circumstances. Like my fellow panel members, I do not believe these decisions stand for the proposition that target boards can "just say no" and

enshrine an SRP. But they do suggest that our analysis should not necessarily end once it has been determined that a target's board is not actively pursuing alternative transactions. Other facts may exist that require further consideration before determining whether it is in the public interest to cease trade an SRP.

¶ 6 In the application before us, the panel majority has concluded that certain factors germane to the *Pulse* and *Neo* decisions are not relevant in the present circumstances, as they should only be considered in the context of an impending alternative offer.

¶ 7 The panel majority bases its analysis on two underlying themes in the long line of decisions by Canadian securities regulators: one, that the only reason a regulator will tolerate an SRP is to give the target board time to discharge its fiduciary duty; and two, the focus of that duty is to improve the existing bid or to find a better one. This has led the panel majority to conclude that if a board is not actively seeking improvements or alternatives to a bid, there is no basis to allow an SRP to continue. In this context, all other decision factors are only relevant for determining whether an SRP should be permitted to stand for a further reasonable period.

¶ 8 The panels in *Pulse* in *Neo* have taken a broader view of the public interest and considered the long term interests of shareholders collectively, as opposed to the rights of shareholders individually. They concluded that, as a general matter, recent and informed shareholder ratification of a rights plan, erected in the face of a hostile takeover bid, is suggestive of a finding that the rights plan is in the bona fide interests of the target shareholders. Their decisions to allow an SRP to stand beyond the expiration of a bid were based on different circumstances that did not exist in prior SRP decisions.

¶ 9 The decision history, and resultant policy interpretation, is highly dependent on the unique fact pattern of any particular case. Therefore, I believe the *Pulse* and *Neo* decision factors warrant further consideration, and I have dealt with these below.

B. SRPs as a temporary measure – evolving decision history

¶ 10 Despite the apparent consistency in application of *Jorex* ("there comes a time when the pill has got to go"), there are important differences between the SRP decisions that have evolved over time as panels have adapted their analysis to reflect the different circumstances of each case. Panels have been careful to reinforce that each case is fact specific, and their decision is based on the unique facts of the case before them. In reference to the principles outlined in NP 62-202, the *Royal Host* panel stated:

> "In applying these principles to the determination of the public interest in a particular case, the challenge we face is finding the appropriate balance between permitting the directors to fulfill their duty to maximize shareholder value in the manner they see fit and protecting the right of the shareholders to decide whether to tender their shares to the bid. We can make this determination only after considering all of the relevant factors in that particular case."

¶ 11 In reference to the series of decisions interpreting the general principles in NP 62-202, the *Royal Host* panel went on to conclude:

> "After reviewing these decisions and the fact patterns on which they were based, we have come to the conclusion that it is fruitless to search for the "holy grail" of a specific test, or series of tests that can be applied in all circumstances. Takeover bids are fact specific; the relevant factors, and the relative importance to be attached to each, will vary from case to case. As a result, a test that focuses on certain factors to the exclusion of others will almost certainly be inappropriate in some of the cases to which we attempt to apply it."

¶ 12 While it is true that all of the SRP decisions prior to 2007 have consistently limited an SRPs duration to some reasonable period of time, these cases all involved circumstances where there were competing bids underway, or the target boards were actively pursuing alternative transactions. There was a fairly similar fact pattern amongst the cases, which caused panels to focus largely on whether an SRP should be allowed to stand for a further period to allow target directors additional time to fulfill their fiduciary responsibilities. The fact patterns generally included the following:

- Most SRPs had not been approved by shareholders; where shareholder approval had been obtained, that approval was granted when shareholders were unaware the company was in play, and did not have a particular bid to consider.
- The stated purpose of the SRPs was to ensure target boards had sufficient time to pursue transactions that would maximize shareholder value and this was generally the basis on which shareholders had granted their prior approval.
- Target boards generally asked to have their SRPs remain outstanding for a finite period of time, either to allow the board to complete its auction process as contemplated under its SRP, or to equalize the timing of multiple competing bids.

¶ 13 With this fact pattern, it was inevitable that commission panels placed the greatest emphasis on whether an alternative offer was likely to materialize within a reasonable period. Other factors were only relevant to consider within this context. Where target boards attempted to leave an SRP in place for a purpose other than its stated intention, panels took exception. For example, when a target board attempted to leave an SRP in place for one bid, but not another competing bid (as in *Jorex*), the panels rightly concluded that shareholders should decide between the bids, not the directors.

¶ 14 Prior to *Pulse* and *Neo*, commission panels had never been asked to consider circumstances where the target board was not actively taking steps to find alternative transactions. They also had never been presented with a case where:

- A target board adopted a tactical rights plan that was not directed at gaining time to seek out alternative bidders, but instead, was intended to prevent "creeping takeovers" and to discourage discriminatory, coercive or unfair takeovers
- Shareholders were explicitly advised that the tactical rights plan was aimed at preventing a particular bid and were provided with full details of the offer
- There was evidence of shareholder support for the tactical SRP; shareholders approved it with full knowledge of its implications for the expiring offer
- The target board believed the bid to be coercive and unfair, and was requesting the SRP to be allowed to stand beyond the expiry of the bid

¶ 15 Faced with all of these circumstances, the *Pulse* and *Neo* panels decided that it was not in the public interest to cease trade the plans at that particular time and allowed the plans to stand beyond the expiration of the bids.

¶ 16 This is quite different than allowing a pill to remain outstanding permanently and allowing directors to decide what offers can proceed. If any of the unique circumstances were to change (for instance, a bidder changes its offer terms, another offer emerges, or more shareholders express opposition to the SRP at a later date), another application could be brought forward for the panels to consider at any time.

¶ 17 In my view, the *Pulse* and *Neo* decisions provide a broader interpretation of the guidelines in NP 62-202, and reinforce the need to appropriately weigh all relevant facts in making public interest decisions.

¶ 18 This view was recently reinforced by the panel in *1478860 Alberta Ltd.* 2009 ABASC 448, who stated:

> "This Commission, and our counterparts elsewhere in Canada, have said that we will intervene to constrain or block some defensive tactics – including shareholder rights plans – in certain circumstances…….In some circumstances this has meant that a shareholder rights plan will be terminated and an outstanding bid allowed to go forward without that impediment, with the target shareholders free to decide whether to tender to that bid. It must be stressed, though, that this is not an invariable outcome: each such case is heavily dependent on its facts."

C. Decision factors requiring further consideration

Protection of shareholder interests

¶ 19 As outlined in NP 62-202, the primary objective of the takeover bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. In making SRP decisions, commission panels have generally interpreted this to mean the protection of an individual shareholder's right to accept or reject a bid. However, in determining the public interest, I agree with the *Pulse* and *Neo* panels that commissions can take a broader view and, in appropriate circumstances, also consider the collective long term interests of shareholders as a whole.

¶ 20 The takeover bid regime is designed to establish a clear and predictable framework for the conduct of takeover bids in a manner that achieves three shareholder protection objectives, being equal treatment of all shareholders, provision of adequate information to shareholders, and ensuring an open and even handed bid process. Nothing in the takeover bid regime prohibits defensive measures taken by a target board in a genuine attempt to fulfill their fiduciary duty, provided those measures are not abusive of shareholder rights. In referring to defensive actions that might be taken by a target board, Paragraph 1.1(3) of NP 62-202 states:

> The Canadian securities regulatory authorities have determined that it is inappropriate to specify a code of conduct for directors of a target company, in addition to the fiduciary standard required by corporate law. Any fixed code of conduct runs the risk of containing provisions that might be insufficient in some cases and excessive in others. However, the Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns.

¶ 21 The policy is explicit in referring to "prior shareholder approval" as an alleviating factor to consider. This necessarily implies that there are certain circumstances where regulators, in determining the public interest, may weigh the collective interests of an approving shareholder majority against the individual rights of a dissenting minority.

¶ 22 Until *Pulse* and *Neo*, commission panels had only considered shareholder approval in the context of deciding whether to allow additional time for a target board to fulfill its fiduciary duties. Any restriction of individual shareholder rights was limited to a reasonable period of time in which the board attempted to generate a better offer.

¶ 23 In the *Pulse* decision, the panel considered these conflicting shareholder interests, and in those particular circumstances, concluded that the "very recent and informed *Pulse* shareholder approval, given in the absence of any imminent alternatives to the Offer, demonstrated that the continuation of the [SRP beyond the bid expiry] was in the bona fide interests of the *Pulse* shareholders."

¶ 24 The *Neo* panel agreed with the *Pulse* decision and then sought to further rationalize a broader interpretation of shareholder interests.

¶ 25 I agree with the panels' decisions to take a broader interpretation of shareholder interests. However, I would go further and say, even with shareholder approval, it is still necessary to demonstrate a compelling case for placing the collective interests of a shareholder group over the rights of individual investors. Factors that may influence a panel's decision to allow an SRP to stand beyond the expiration of a bid include: the level of shareholder support or opposition to an SRP, the extent to which an SRP protects shareholders' rights and conforms to their expectations, and the degree to which shareholders require protection from an expiring offer.

Exercise of fiduciary duty by target directors–panel reluctance to interfere

¶ 26 There have been significant developments in the corporate governance landscape since the *Jorex* decision in 1991, which may influence how a panel considers a target board's fiduciary duty and balances that duty with the shareholders' right to decide whether to tender their shares to a bid.

- Corporate governance standards have improved, with boards facing much greater scrutiny of their decisions and being held more accountable for their actions.

- Shareholder activism has increased dramatically, with investors becoming much more vocal and engaged, and boards becoming more responsive to investor issues.
- Shareholder rights plans have generally evolved in purpose and design, presumably in response to the influence and activism of institutional investors. "New generation" plans contain more standardized and shareholder friendly provisions sought by institutional investors and curtail the overall level of discretion afforded to boards in interpreting and administering the plans.

¶ 27 All of these changes are relevant as they have created an environment where boards are acutely aware of their duty to act in the best interests of the corporation, and may seek shareholder approval of a tactical SRP in order to fulfill their fiduciary responsibilities. They may even solicit shareholder feedback prior to designing the plan. It is within this context that the *Pulse* and *Neo* panels were more reluctant to interfere with a board decision, particularly one that was ratified by a fully informed shareholder vote.

¶ 28 The panel majority holds the view that any reluctance Canadian securities regulators have to interfere with a board's discharge of its fiduciary duty is founded solely on the practice of target boards seeking enhancements or alternatives to an offer. Unless a target board is actively taking steps to that end, the SRP can no longer serve a purpose, and there is no basis for allowing the SRP to continue.

¶ 29 However, when a target board adopts an SRP aimed specifically at a particular bid, provides its shareholders with full information regarding the SRP and its effects on the bid, and receives overwhelming support from its shareholders in the face of the bid, it may be appropriate to conclude that the continuance of an SRP is in the public interest, notwithstanding the fact there may be no alternative offers forthcoming.

¶ 30 The *Pulse* and *Neo* panels have concluded that a shareholder rights plan may be adopted for the broader purpose of protecting the long-term interests of the company and the shareholders as a whole. In *Neo*, the panel stated:

> "We echo the statements of the commission in Regal, in finding that so long as the rights plan continues to allow the target's management and board the opportunity to fulfill their fiduciary duties, the plan continues to serve a purpose……we are not convinced that the time has come to cease trade the plan."

¶ 31 I agree with the findings of the *Neo* panel that allowing a target board time to pursue alternative value-enhancing transactions is not the only legitimate purpose for a shareholder rights plan. A target board may incorporate other valid shareholder protections into an SRP that reflect the collective will of the shareholders. In these cases, shareholders will continue to have the right to decide whether to tender to any offer that is structured in accordance with the permitted bid provisions of the SRP.

¶ 32 However, an SRP cannot continue to serve a legitimate purpose if it unduly restricts a shareholder's right to tender to an offer by imposing unreasonable impediments in the permitted bid provisions or granting unreasonable decision making powers to the target board at the expense of shareholders.

Relevance of Shareholder Approval

¶ 33 The panel majority holds the view that "shareholder approval is not relevant where there are no alternatives to the bid and the target board has no intention of seeking any." They also raise concern that shareholder approval was treated as a determinative factor in *Pulse* and *Neo*, which in their view is difficult to reconcile with prior decisions.

¶ 34 However, the decisions prior to *Pulse* and *Neo* involved a much different set of circumstances under which shareholder approval was considered. In cases where target boards received prior shareholder approval of a rights plan, that approval had always been obtained at a regularly scheduled annual meeting of the shareholders, and not in the face of a take-over bid. In those cases, shareholder approval had limited value in determining the public interest, particularly if the vote had occurred several years earlier. It was difficult to determine whether shareholders would continue to support maintaining an SRP after an offer had been made and was about to expire.

¶ 35 *Pulse* and *Neo* involved a unique set of facts, where the target directors adopted a tactical SRP and received shareholder approval during the course of the bid. In deciding whether to approve the SRP, shareholders were equipped with "an extraordinary amount of information", including full details of the offer and the recommendation of the target directors. In both cases, shareholders knew, or ought to have known, there was no "real and substantial possibility of an imminent auction."

¶ 36 Despite the lack of impending offers, both panels found there was sufficient shareholder support for continuing the SRPs. The *Neo* panel characterized the level of shareholder support as "overwhelming". The panels based their findings on their own interpretation of shareholder vote results.

¶ 37 In *Pulse*, there was a relatively low level of shareholdings voted at the shareholder meeting (56%). Of the votes cast, 75% were voted in favour of the plan, resulting in a situation where the plan was effectively ratified by significantly less than a majority of the shareholdings. A large number of votes were cast late, which the panel also considered in its analysis. Including late votes, 64% of shareholdings were voted with a 78% approval rate, resulting in 50% of the total shareholdings cast in favour of the plan.

¶ 38 On the face of it, these voting results are not consistent with a finding of "overwhelming" shareholder support. In my view it is not sufficient to simply interpret the level of affirmative votes cast as being determinative of the overall level of shareholder support for an SRP. Additional analysis is required to establish the value of the voting results as meaningful evidence. Other evidence may also need to be considered in conjunction with the shareholder vote to ascertain shareholder wishes.

¶ 39 In *Pulse*, the panel noted there was little evidence of any significant shareholder opposition to the plan other than the offeror. Less than 2% of the independent votes cast represented dissenting shareholders. Further, no independent shareholders expressed opposition to the plan at the hearing. Instead, three institutional shareholders provided letters supportive of the plan in the face of the offer. In addition, a leading proxy advisory firm was also supportive of the plan and expressed the following view:

> "Given the company's commitment to amend the plan to conform to 'new generation' plans, ISS believes that the plan will provide the board and management with the right to act in a takeover bid situation without diminishing shareholders' control so they may sufficiently safeguard their interests. Our guidelines support rights plans that allow shareholders to decide who will own the company, with the board and management offering assistance in advice and negotiations. We believe that this plan will be structured to facilitate that goal."

¶ 40 In *Neo*, there was much higher voter turnout with 83% of shareholdings voted at the meeting. The record indicated that this was the highest voting level in five years. The panel noted that 81% of the independent votes cast were in favour of the plan and 19% against. However, this figure excludes the 20% shareholdings of the offeror which were also voted against the plan. If the offeror's shareholdings are included, it appears that the voting results would have been approximately 61% in favour and 39% against. This means that the plan was effectively ratified by slightly less than 50% of the total shareholdings, which is similar to the result in *Pulse*.

¶ 41 *Neo* differs from *Pulse* in that there is some evidence of opposition to the plan by independent shareholders, albeit a minority. Approximately 19% of the independent votes cast represent dissenting shareholders. No independent shareholders provided evidence of support or dissent at the hearing. However, there was evidence that several institutional shareholders had voted for the plan, despite their normal policy of voting against rights plans that ban partial bids. The panel noted that shareholders had also gone against the advice of the proxy advisory firm ISS, who had recommended that its clients vote against the plan. The panel interpreted this to be further evidence of informed shareholder approval.

¶ 42 In my view, additional shareholder evidence was required in *Neo* before making any conclusions on the level of shareholder approval. Without evidence of the views of independent shareholders, it is difficult to determine the basis for which shareholder support is being granted, or whether that support might change upon expiration of the bid.

¶ 43 Arguably, strong shareholder approval of an SRP adopted in the face of a take-over bid is powerful evidence of alignment between board actions and the bona fide interests of shareholders. If an "overwhelming" majority of fully informed shareholders approves a tactical plan, with little or no evidence of shareholder opposition, it is much more difficult to conclude that continuance of the SRP is not in the public interest. To cease trade a plan under these circumstances, would be going against the will of a large majority of shareholders.

D. Application of Decision Factors to the Icahn Bid and the Lions Gate SRP

¶ 44 The Lions Gate circumstances are consistent with *Pulse* and *Neo* circumstances, in the following key ways:

- Lions Gate adopted its tactical SRP to discourage creeping, coercive, or unfair takeovers, and sought shareholder approval of its SRP on that basis.
- Shareholders were explicitly advised that the SRP was adopted in response to the Icahn offer and were provided with full details of the SRP and the offer.
- The Lions Gate board believed the Icahn bid to be coercive and financially inadequate and shared that view with its shareholders. The board determined that the SRP is necessary to protect the long term interests of the corporation and its shareholders as a whole.
- The board chose not to put the company in play, but rather continue to pursue its current business strategy in order to maximize shareholder value.

Shareholder Support for the SRP

¶ 45 Where Lions Gate is distinguishable from *Pulse* and *Neo* is that shareholder approval for the tactical SRP was not obtained prior to the Icahn bid expiry. However, the bid had been set to expire two business days prior to the scheduled shareholder vote.

¶ 46 Although I believe Icahn was likely to extend the bid, I was not persuaded that it was in the public interest to delay our decision until after the shareholder vote. In my view, the shareholder vote was not likely to provide any new evidence regarding the wishes of the shareholders.

¶ 47 Nonetheless, the panel was provided with initial proxy results to consider at the hearing. Based on these results, there appeared to be a significant level of shareholder support for the SRP, as well as a meaningful level of opposition. As in *Pulse* and *Neo*, the shareholder approval was likely "fully informed" given the extensive information that had been provided to shareholders and the high level of institutional shareholdings.

¶ 48 However, the level of shareholder support was not "overwhelming". Approximately 63% of the shares had been voted to date, of which 61% were in favour of the SRP, and 39% were against it. A large portion of the votes cast represented the shareholdings of Icahn and the Lions Gate directors. Excluding these shareholdings, only 39% of independent shareholdings had been voted, with 75% in favour of the SRP, and 25% against it.

¶ 49 In fact, the actual voting results from the special shareholders meeting held shortly after the hearing were less supportive. With a 90% voting level, and a 56% approval rate, the plan was subsequently ratified by approximately half of the total shareholdings. This result was similar to *Pulse* and *Neo*. However, the level of shareholder opposition was much higher for Lions Gate, with 42% of independent shareholdings voted against the plan (versus 2% in *Pulse*, and 19% in *Neo*).

¶ 50 Unlike in *Pulse*, no independent shareholders provided evidence at the hearing. Other than providing initial proxy voting results, Lions Gate did not provide any evidence of having canvassed its shareholders to ascertain their wishes. Without this information, it was unclear on what basis approving shareholders were prepared to provide their support for the plan. For instance, shareholders may have approved the SRP as a temporary measure to give the board leverage in negotiating with Icahn, but may not have been supportive of leaving the plan in place indefinitely if those efforts failed.

¶ 51 Given the concentrated institutional holdings of Lions Gate shares, it would have been easy to ascertain the views of one or more of the institutional shareholders.

The three largest investors (after Rachesky and Icahn) account for 21% of the total shareholdings. The views of these fully informed, knowledgeable, and independent shareholders are necessary for the panel's proper consideration of any voting results. In my view it would be inappropriate for the panel to allow the SRP to continue to stand beyond the Icahn bid's expiry, without having heard evidence from shareholders regarding their interests. As illustrated in *Pulse* and *Neo*, interpretation of voting results can be challenging if interpreted on their own without the proper context.

¶ 52 Based on the foregoing, the level of shareholder support for the SRP is not conclusive. With evidence of a material opposition to the SRP, and no direct evidence from shareholders regarding their wishes, it is not possible to conclude whether continuance of the SRP is in the bona fide interests of the shareholders. It is necessary to further consider the impact that leaving the SRP in place would have on shareholder rights.

Extent to which the SRP protects shareholder rights

¶ 53 Proxy advisory firms were split on their views regarding the Lions Gate SRP. Two firms were recommending shareholder approval, but two firms were not.

¶ 54 ISS Advisory Services provided the most useful analysis of the SRP, focusing on several provisions that were inconsistent with new generation plans. Of primary concern, was the board's discretion to increase the plan's triggering threshold from 20% to 24.9%. This two-tier trigger may permit defensive issues of securities to be made to a person that the board favours over an offeror, thereby enabling the board to decide which transactions are ultimately able to proceed.

¶ 55 Given that Lions Gate had recently filed a shelf registration in March 2010 permitting the issue of up to $750 million in shares, it would be open to the directors to issue shares to one or more existing shareholders to defeat a take over bid, including a permitted bid. Clearly this is not consistent with the well established principle that shareholders get to decide which bids are acceptable, not directors. I agree with ISS that the Lions Gate SRP grants too much decision making power to the board at the expense of shareholder rights.

¶ 56 I also have concerns with the minimum tender condition contained in the permitted bid provisions of the SRP. Although the condition is a standard "majority of the minority" requirement, it is problematic in light of the current Lions Gate shareholdings. Given the large ownership positions held by the two largest shareholders, it would be very difficult for the Icahn offer to succeed, even if structured as a permitted bid. In these circumstances, I believe the minimum tender condition contained in the SRP is too high of a barrier and will serve to act as an unreasonable impediment to a fair tender process.

¶ 57 The *Pulse* panel also considered the impact of the same minimum tender condition contained in the *Pulse* SRP. However, in those circumstances the *Pulse* panel determined the condition to be reasonable. It noted that "the Offeror itself had set a significantly higher threshold [as a condition to its offer], a threshold it professed to have no intention of waiving." So long as the offeror did not waive its minimum tender condition, the SRP did not stand in the way of the bid. A permitted bid was also more likely to succeed in the *Pulse* circumstances, as the *Pulse* shareholders held much smaller ownership positions that were less likely to be an obstacle.

***Protection required by shareholder*s**

¶ 58 I agree with the panel majority that the Icahn bid is not coercive, and is not a compelling reason to allow the SRP to continue to stand. The offer was made for all shares, to all shareholders, in accordance with securities laws. Further, it provided an opportunity for non-tendering investors to fully exit their positions during the 10 day subsequent offering period. The offer price may have been opportunistic, but it was not evidence of coercion.

¶ 59 Although the Lions Gate board asserts that the SRP is necessary to protect the long term interests of the company and the shareholders, none of the shareholders presented any evidence at the hearing to indicate that they supported this view. This is distinguishable from *Pulse*, where shareholders filed letters of support for continuing the plan in the face of the offer.

E. Conclusion

¶ 60 In my view, the continuance of the Lions Gate SRP, would unduly restrict a shareholder's fundamental right to tender to an offer. The SRP confers too much discretion to the board at the expense of shareholders. The permitted bid provisions, together with the large ownership positions held by the directors and officers also act as an unreasonable impediment to the success of the current offer.

¶ 61 Further, the level of shareholder support for the SRP is not sufficient to warrant restricting shareholder rights in these circumstances. There is evidence of a material level of shareholder opposition to the SRP, and no shareholders presented evidence in support of maintaining the SRP beyond the Icahn bid expiry.

¶ 62 The evidence is not suggestive of a finding that continuance of the SRP is in the bona fide interests of the shareholders. Without stronger evidence regarding the

collective wishes of the shareholders, there is no basis to allow the SRP to continue. For all of these reasons, I have decided to cease trade the Lions Gate SRP.

¶ 63 September 1, 2010

¶ 64 For the Commission

Shelley C. Williams
Commissioner