IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED

– AND –

IN THE MATTER OF
FINANCIAL MODELS COMPANY INC.

Hearing: January 28, 2005

Ontario Securities Commission Panel:

Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
Robert W. Davis	-	Commissioner
Paul K. Bates	-	Commissioner

Counsel:

Jeffrey S. Leon Jonathan A. Levin David A. Hausman	-	On behalf of the Special Committee of Financial Models Company Inc.
Peter F.C. Howard William Braithwaite Dee Rajpal Timothy M. Banks Quentin Markin	-	On behalf of Stamos Katotakis and 1066821 Ontario Inc.
Ralph Shay Jane Waechter	-	For the Staff of the Ontario Securities Commission
Gordon McKee Christopher A. Hewat Robin Linley	-	On behalf of BNY Capital Corporation
William J. Burden	-	On behalf of William R. Waters and William R. Waters Limited and 1427937 Ontario Inc.
R. Paul Steep Graham Gow	-	On behalf of Financial Models Company Inc.
Norman J. Emblem Michael D. Schafler	-	On behalf of Linedata Services S.A.

REASONS

I. THE PROCEEDING

[1] This proceeding was a hearing on an application by a special committee (the "Special Committee") of directors of Financial Models Company Inc. ("FMC") for orders pursuant to sections 104(1) and 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") based on allegations that the take-over bid of December 29, 2004 (the "Katotakis Offer") by 1066821 Ontario Inc. ("Katotakis Holdco") for all the shares of FMC was (1) not in compliance with Part XX [Take-Over Bids and Issuer Bids] of the Act, and (2) was contrary to the public interest. The hearing was held on January 28, 2005.

[2] The application sought the following orders:

(i) an order under section 127(1) to cease-trade the sale or disposition of any shares of FMC to Katotakis Holdco or Stamos Katotakis (collectively, sometimes "Katotakis") under a shareholder agreement among shareholders of FMC (the "Shareholder Agreement"); or

(ii) in the alternative, an order under section 127(1) to permanently cease-trade the Katotakis Offer;

(iii) an order under section 104 that Katotakis Holdco has not complied with Part XX of the Act (specifically certain provisions of Rule 61-501); and

(iv) an order under section 104 to restrain Katotakis Holdco from contravening Part XX of the Act (specifically certain provisions of Rule 61-501).

[3] We were told that there are applications pending in the Ontario Superior Court of Justice in which the court is being asked to determine whether Katotakis validly exercised his right of first refusal. This issue was not in contention before us.

[4] Katotakis opposed the application before us.

[5] In addition, FMC, BNY Capital Corporation ("BNY"), Linedata Services S.A. ("Linedata"), Dr. William R. Waters ("Dr. Waters"), William R. Waters Limited ("WatersCo"), and 1427937 Ontario Inc., (collectively, with Dr. Waters and WatersCo, "Waters") submitted written submissions and requested "Torstar status" to enable them to make submissions but not to lead evidence or cross-examine witnesses. We granted them "Torstar status".

[6] We received submissions from the Special Committee, Katotakis, staff and the "Torstar" parties.

[7] No witnesses were called.

[8] At the end of the hearing, we announced that we agreed with the submissions of counsel for Katotakis and counsel for staff. Accordingly, we dismissed the application. We stated that we would elaborate our reasons in due course.

II. FACTS

FMC

[9] FMC is a company incorporated pursuant to the laws of Ontario. It is in the business of providing investment management software systems and services. FMC is a Toronto Stock Exchange ("TSX") listed company having a market capitalization of approximately $133 million. FMC is authorized to issue an unlimited number of common shares and an unlimited number of non-voting Class "C" shares (collectively, the "Shares").

[10] FMC is closely held. Katotakis holds approximately 40.4% of the Shares. Dr. Waters was a co-founder of FMC. Waters holds approximately 20% of the Shares, and BNY, an affiliate of the Bank of New York, holds approximately 22.4% of the Shares. FMC's minority shareholders own 18% of the Shares with 6.7% held by Van Berkom and Associates ("Van Berkom"), 2.9% by Triax Growth Fund Inc. ("Triax"), 3.2% by senior executives of FMC, 3% to 4% by directors and employees of FMC, and 1% to 2% by the public.

Shareholder Agreement

[11] On January 13, 1998, Katotakis, Waters, BNY and F.M.C. Investment Services Limited entered into the Shareholder Agreement to manage their investment in FMC.

[12] The Shareholder Agreement provides each party with rights of first offer and first refusal (the "Offer Rights"). The Offer Rights provide that a party willing to sell Shares (the "Selling Shareholder") must give the other parties a selling notice (the "Selling Notice") setting out the price at which the party is willing to sell (the "Set Price"). If the other parties accept the Selling Notice, the Selling Shareholder must make a take-over bid for all Shares at the Set Price and the parties accepting the Selling Notice are obliged to tender into that take-over bid. If the other parties do not accept the Selling Notice, the Selling Shareholder is free to sell his Shares to third parties at the Set Price or higher.

[13] FMC's final initial public offering prospectus dated July 8, 1998 (the "Prospectus") and its Annual Information Form dated July 19, 2004 (the "2004 AIF") described the Offer Rights as conferring a "mutual right of first refusal" on the parties to the agreement.

Linedata

[14] Linedata is a French corporation that trades on the Nouveau Marché of the Paris Bourse (akin to the TSX Venture Exchange) and provides financial information technology solutions. In August, 2004, Linedata discussed a possible business combination with Katotakis, who was acting on behalf of FMC, whereby Linedata would acquire all of the Shares for cash and Linedata shares.

[15] In mid-October, 2004, Katotakis advised FMC's board of directors that he did not wish to continue the discussions with Linedata. John Vivash ("Vivash"), FMC's chairman, and other members of FMC's board of directors, apart from Katotakis, confirmed to Linedata their interest in pursuing the proposed business combination and formed the Special Committee on November 5, 2004. The Special Committee's mandate was to negotiate and pursue transactions likely to maximize shareholder value and shareholder liquidity in respect of FMC.

[16] By the end of November, 2004, BNY, Waters, Van Berkom and Triax had agreed in principle with Linedata to tendering their Shares into a satisfactory offer by Linedata to acquire all the Shares (the "Linedata Offer").

[17] On December 8, 2004, Katotakis, concerned about the advancing discussions between the Special Committee and Linedata, delivered a requisition requiring FMC to call a shareholders meeting to remove all directors of FMC other than himself. The board of directors called a shareholders meeting for May, 2005.

The Selling Notices

[18] On December 8, 2004, BNY and Waters delivered Selling Notices to Katotakis of their desire to sell all of their Shares at a Set Price of $12.20 per Share. BNY and Waters' decision to sell their Shares was made without prior notice to or consultation with Katotakis. Waters and BNY each waived their rights to purchase each other's Shares.

[19] The Selling Notices allowed for acceptance by Katotakis within 21 days of delivery.

Linedata Offer

[20] On December 20, 2004, the Special Committee, on behalf of FMC, entered into an acquisition agreement with Linedata.

[21] On December 20, 2004, Waters, BNY, and Triax also entered into a soft lock-up agreement with Linedata, and Van Berkom entered into a separate soft lock-up agreement with Linedata, (collectively, the "Lock-up Agreements"). Appropriate public disclosure was then made. The Lock-up Agreements were expressly subject to Katotakis' rights under the Shareholder Agreement.

[22] On December 23, 2004, Linedata made the Linedata Offer by which it offered to purchase all of the issued and outstanding Shares for cash and Linedata shares for an imputed aggregate value of $12.76 per Share.

Katotakis Offer

[23] On December 29, 2004, Katotakis accepted the Selling Notices entitling him to acquire a further 42% of the Shares of FMC, and, as required by the Shareholder Agreement, launched the Katotakis Offer at the Set Price of $12.20 per Share.

[24] The Katotakis Offer contemplated that a subsequent second stage transaction (the "Follow-on Transaction") would transpire if less than all the Shares were acquired by Katotakis. The Follow-on Transaction could be an amalgamation between FMC and a subsidiary of Katotakis Holdco with Shares not owned by Katotakis being cashed out, or a statutory forced acquisition of Shares not acquired under the Katotakis Offer. An amalgamation would require the approval of holders of at least 2/3 of the Shares, including, under Rule 61-501, a majority of the Shares held by minority shareholders. A statutory forced acquisition would require that not less than 90% of the Shares subject to the Katotakis Offer be acquired under it.

[25] The Katotakis Offer contemplated that Shares acquired by Katotakis from Waters and BNY would be counted in determining minority approval for an amalgamation.

Increased Linedata Offer

[26] On January 29, 2004, Linedata agreed with FMC, Waters, BNY, Triax, and Van Berkom to increase the consideration payable to Shareholders under the original Linedata Offer to an imputed value of $14.65.

III. SUBMISSIONS OF COUNSEL FOR THE SPECIAL COMMITTEE

[27] Counsel for the Special Committee asserted that it was contrary to the public interest and abusive of the capital markets for Katotakis to treat, for the purposes of Rule 61-501, the Shares that would be acquired pursuant to his purported acceptances of the Selling Notices under the Shareholder Agreement, as part of the majority of the minority in calculating the threshold under a Follow-on Transaction.

[28] Furthermore, counsel submitted, Katotakis' reliance on the valuation exemption in paragraph 4 of section 2.4 of Rule 61-501 would be abusive of that exemption. The exemption presupposes that the value of the subject securities is achieved through a competitive auction process.

[29] Next, counsel argued that FMC's public disclosures did not alert shareholders to the

nature or consequences of the Offer Rights or the risk that the exercise of them in the context of a takeover bid and Follow-on Transaction would deprive minority shareholders of any opportunity to realize the benefits of an offer by a third party potential acquirer.

[30] Finally, counsel asserted that by his conduct, Katotakis had acted in a manner contrary to the public interest by engineering a result that deprives FMC shareholders of the opportunity to obtain full value for their Shares through a competitive bidding process. He has taken steps to frustrate the efforts by remaining members of the board to maximize shareholder value. He has sought to usurp that value for himself.

IV. SUBMISSIONS OF KATOTAKIS

Follow-On Transaction is Not Abusive

[31] Counsel for Katotakis argued that there was nothing abusive about Katotakis' conduct. First, none of the transactions provided for were "artificial". Secondly, a Follow-on Transaction would not circumvent the reasonable assumptions or justifiable expectations of FMC shareholders.

[32] He argued that the Katotakis Offer was not unlike any other take-over bid where a significant shareholder had entered into a lock-up. In those circumstances, it is quite customary for the offer to be followed by a Follow-on Transaction at the price paid to the locked-up shareholders.

[33] He observed that an FMC shareholder would reasonably have expected that one party to the Shareholder Agreement could eventually control 82% of the Shares. An FMC shareholder would reasonably have expected either to remain as a minority shareholder or be taken out in a Follow-on Transaction.

[34] He stated that an FMC shareholder would reasonably have expected to receive the same consideration that the significant shareholders would receive in a change of control situation. The minority shareholders would get the benefit of the negotiating power and sophistication of the significant shareholders.

[35] The Katotakis Offer complied in all technical respects with Rule 61-501. The rule was adopted in its current form after a public comment process where the issue of whether shares locked-up should be counted as minority shares in calculating thresholds in a Follow-on Transaction was examined. The rule allows such shares to be included as minority shares.

[36] He submitted that it would be inappropriate for the Commission *de facto* to amend the rule through the use of its public interest jurisdiction to deny Katotakis the ability to count the Shares to be acquired from BNY and Waters (locked-up shareholders, he suggested) as part of

the minority shares for purposes of approval under Rule 61-501.

[37] Given FMC's share ownership structure, he submitted, an FMC shareholder could not have reasonably expected the benefit of an auction for FMC.

[38] Finally, he submitted, an order under section 127 would provide to FMC shareholders an advantage that they did not bargain for and one which they could not have reasonably expected to receive. It would also result in a windfall to each of BNY and Waters, and would unjustifiably free them from their agreement with Katotakis. The Commission should not permit the minority to thwart the legitimate rights of the shareholders under the Shareholder Agreement.

Reliance on the Valuation Exemption of Rule 61-501 is Not Abusive

[39] Counsel for Katotakis argued that Katotakis met the requirements to rely upon the valuation exemption in Rule 61-501. First, at the time Katotakis made his bid on December 29, 2004, the Linedata bid was outstanding. Secondly, Katotakis had no knowledge of any undisclosed material fact. Thirdly, Linedata was given complete access to the information on FMC.

[40] He submitted that Waters and BNY are sophisticated parties who agreed to sell their Shares to Katotakis at a price that they determined. They determined the price without the benefit of a formal valuation.

[41] Katotakis is not required to obtain a formal valuation under the rule. The Special Committee determined that the Katotakis Offer is fair and reasonable. Furthermore, it received advice to this effect from BMO Nesbitt Burns, an independent financial advisor. Accordingly, he argued, additional disclosure to the minority shareholders is not required.

FMC's Disclosure of the Shareholder Agreement Does Not Frustrate Shareholder Expectations

[42] Counsel for Katotakis argued that the Offer Rights have been repeatedly and continually disclosed to the marketplace, specifically by means of the Prospectus, and most recently, by the 2004 AIF. Any shareholder or prospective shareholder of FMC would have reasonably determined that by operation of the Shareholder Agreement, any one of Katotakis, Waters, or BNY could, at some point in the future, acquire at least 70% of the shares of FMC.

V. SUBMISSIONS OF STAFF

[43] Staff submitted that there is no basis for relief under section 104 of the Act as there was no breach of Part XX of the Act or the regulations related to it.

[44] Staff submitted that there is no basis for relief under section 127(1) of the Act as neither the Katotakis Offer nor reliance on the valuation exemption is abusive of the capital markets.

VI. ANALYSIS

The Act and Rule

[45] Section 104(1) of the Act states, in part, the following:

> **104. (1) Application to the Commission** - Where, on the application of an interested person, it appears to the Commission that a person or company has not complied or is not complying with this Part or the regulations related to this Part, it may issue, subject to such terms and conditions as it may impose, an order,
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> …
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> (b) requiring an amendment to or variation of any document used or issued in connection with a take-over bid or issuer bid and requiring the distribution of any amended, varied or corrected document; and
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> (c) directing any person or company to comply with this Part or the regulations related to this Part or restraining any person or company from contravening this Part or the regulations related to this Part and directing the directors and senior officers of the person or company to cause the person or company to comply with or to cease contravening this Part or the regulations related to this Part.

[46] Rule 61-501 states, in part, the following:

> **8.2 Second Step Business Combination** -- Despite subsection 8.1(2), the votes attached to securities acquired under a formal bid may be included as votes in favour of a subsequent business combination in determining whether minority approval has been obtained if
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> (a) the security holder that tendered the securities to the bid was not a joint actor with the offeror in respect of the bid;
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> (b) the security holder that tendered the securities to the bid was not
>
> (i) a direct or indirect party to any connected transaction to the formal bid, or

(ii) entitled to receive, directly or indirectly, in connection with the formal bid

(A) consideration per offeree security that was not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,

(B) a collateral benefit, or

(C) consideration for securities of a class of equity securities of the issuer if the issuer had more than one outstanding class of equity securities, unless that consideration was not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities;

(c) the business combination is being effected by the offeror that made the formal bid, or an affiliated entity of that offeror, and is in respect of the securities of the same class for which the bid was made and that were not acquired in the bid;

(d) the business combination is completed no later than 120 days after the date of expiry of the formal bid;

(e) the consideration per security that the holders of affected securities would be entitled to receive in the business combination is at least equal in value to and is in the same form as the consideration that the tendering security holders were entitled to receive in the formal bid; and

(f) the disclosure document for the formal bid

(i) disclosed that if the offeror acquired securities under the formal bid, the offeror intended to acquire the remainder of the securities under a statutory right of acquisition or under a business combination that would satisfy the conditions in paragraphs (d) and (e),

(ii) contained a summary of a formal valuation of the securities in accordance with the applicable provisions of Part 6, or contained the valuation in its entirety, if the offeror in the formal bid was subject to and not exempt from the requirement to obtain a formal valuation,

(iii) stated that the business combination would be subject to minority approval,

(iv) identified the securities, if known to the offeror after reasonable inquiry, the votes attached to which would be required to be excluded in determining whether minority approval for the business combination had been obtained,

(v) identified each class of securities the holders of which would be entitled to vote separately as a class on the business combination,

(vi) described the expected tax consequences of both the formal bid and the business combination if, at the time the bid was made, the tax consequences arising from the business combination

(A) were reasonably foreseeable to the offeror, and

(B) were reasonably expected to be different from the tax consequences of tendering to the bid, and

(vii) disclosed that the tax consequences of the formal bid and the business combination may be different if, at the time the bid was made, the offeror could not reasonably foresee the tax consequences arising from the business combination

[47] Section 127(1) of the Act states, in part, the following:

127. (1) Orders in the public interest – The Commission may make one or more of the following orders if in its opinion it is in the pubic interest to make the order or orders:

…

> 2. An order that trading in any securities by or of a person or company cease permanently or for such period as specified in the order.

Discussion

[48] Counsel for the Special Committee did not allege that the Katotakis Offer does not technically comply with the conditions set out in section 8.2 of the Rule 61-501.

[49] As there is no breach of Rule 61-501, there is no basis for an order under section 104 of the Act.

[50] Orders in the public interest under section 127(1) of the Act may be appropriate when there is abuse. In the take-over bid context, this could occur where a transaction is artificial and defeats the reasonable expectation of investors.

[51] The Ontario Court of Appeal has stated:

> As I read the Commission's decision, it is that the transaction is abusive in two ways. First, it is artificial. Second, it was contrived to circumvent the coat-tail, and thus frustrate the intention of its well-intentioned proponents and confound the justifiable expectations, or in Mr. Kieran's words, the "reasonable assumptions" of investors and others in the market-place.
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> *C.T.C. Dealer Holdings Ltd.* v. *Ontario Securities Commission* (1987), 59 O.R. (2d) 79 at 104 (Div. Ct.) (*C.T.C. Dealer*).

[52] See also *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 (*Canadian Tire*).

[53] In *Canadian Tire*, the Commission stated:

> Participants in the capital markets must be able to rely on the terms of the documents that form the basis of daily transactions. And it would wreak havoc in the capital markets if the Commission took to itself a jurisdiction to interfere in a wide range of transactions on the basis of its views of fairness through the use of the cease trade power under section 123 [now 127]…The Commission's mandate under section 123 is not to interfere in market transactions under some presumed rubric of insuring fairness.
>
> The Commission was cautious in its wording in *Cablecasting* and we repeat that caution here. To invoke the public interest test of section 123, particularly in the absence of a demonstrated breach of the Act, the regulations or a policy statement, the conduct or transaction must be clearly demonstrated to be

> abusive of shareholders in particular, and of the capital markets in general. A showing of abuse is something different from, and goes beyond, a complaint of unfairness. A complaint of unfairness may well be involved in a transaction that is said to be abusive, but they are different tests. Moreover, the abuse must be such that it can be shown to the Commission's satisfaction that a question of the public interest is involved. That almost invariably will mean some showing of a broader impact on the capital markets and their operation.

[54] In addition to the *C.T.C. Dealer* test, the Commission intervenes under its public interest jurisdiction where the intervention would further the policy aims of the Commission in a situation where, for technical reasons, the law otherwise permits a transaction that abuses policy aims. See: *Re H.E.R.O. Industries Ltd.,* (1990), 13 O.S.C.B. 3775 (*H.E.R.O.*). However, the Commission has stated that caution should be exercised where intervention in the public interest would amount to an amendment of existing policies. See: *Canadian Tire* at 932.

[55] In *Re British Columbia Forest Products Limited* (1981), 1 O.S.C.B. 116C at page 120C, the Commission shed light on the protection due to majority shareholders:

> However, the Commission's responsibility and duty is not only to the minority security holders but to the capital markets as a whole and to all participants therein whether majority or minority security holders. Accordingly, just as the Commission must be vigilant to protect minority security holders so too it must be vigilant not to abuse the rights of majority security holders…There must be confidence in the marketplace for holders of large blocks of securities as well as holders of small blocks of securities.

[56] We find that no facts or evidence before us suggest any artificiality to the various transactions, nor any intention or engineering by Katotakis to defeat the reasonable expectations of the shareholders. Indeed, the evidence disclosed that Vivash himself believed that FMC shareholders could have reasonably expected Katotakis to seek to conduct a subsequent going private transaction.

[57] Furthermore, we do not consider the previous disclosure of FMC of the Offer Rights to have contained material omissions that would reasonably have misled investors.

[58] As for shareholders' expectations as to an auction, Katotakis did not frustrate an auction. FMC was never in "play" for an auction. FMC could not be in play for an auction unless and until there were Selling Notices delivered under the Shareholder Agreement which were not accepted.

[59] In applying the test in *H.E.R.O,* we find that the Katotakis Offer is formulated in

accordance with and meets the requisite criteria of the expressed policy of the Commission.

[60] While the passages quoted from *Canadian Tire* indicate that more than unfairness should be required before the Commission exercises its public interest jurisdiction to interfere with a transaction in the absence of a breach of securities laws or published policies, we have difficulty characterizing the case at hand as unfair, let alone abusive. Both the Shareholder Agreement and Rule 61-501 have been a matter of public record; and capital market participants, including Katotakis, are entitled to rely on those instruments.

[61] With respect to the Shareholder Agreement, there are no grounds for us to remove or interfere with Katotakis' contractual rights in order to favour the interests of the minority. Waters and BNY were not forced to enter into the Shareholder Agreement, and the exercise of Katotakis' rights *qua* shareholder under corporate law is not improper.

[62] In the absence of abuse, it is neither practical nor fair for the Commission to enter into an analysis of the personal reasons for shareholders to carry out transactions in their shares, and to use that analysis as a basis for overriding the clear provisions of a Commission rule. A desire to be free of a contractual commitment is not a basis to invoke the jurisdiction of the Commission.

[63] Furthermore, in responding to the Selling Notices in the manner originally contemplated by the Shareholder Agreement, Katotakis Holdco was not initiating a transaction that was purposefully designed to exploit a loophole in the shareholder protections contained in a company's charter (as alleged in *Canadian Tire*) or in securities legislation (as alleged in *H.E.R.O.*). Katotakis did not participate in the setting of the timing of the Selling Notices, nor in the establishing of the price at which those Shares would be offered to him, nor in the terms and conditions of the offers. As such, we cannot agree with counsel for the Special Committee that the Shares subject to the Offer Rights would be "forcibly" acquired in the take-over bid.

[64] We agree with counsel for Katotakis and counsel for staff, that the Shareholder Agreement is, for these purposes, tantamount or functionally equivalent to a "hard" lock-up agreement which crystallized on December 29, 2004 when the Selling Notices were accepted.

The Valuation Exemption

[65] Section 2.4(1) of Rule 61-501 outlines the requirement of an inside bidder to obtain an independent, formal valuation of the target's shares unless an exemption is available.

[66] Section 2.4(1) of Rule 61-501 states, in part:

> (1) Section 2.3 [the requirement for formal valuation] does not apply to an offeror in connection with an insider bid in any of the following circumstances:

…

4. Auction – If

(a) the insider bid is publicly announced or made while

(i) one or more formal bids for securities of the same class that is the subject of the insider bid have been made and are outstanding.

(ii) one or more proposed transactions are outstanding that

(A) are business combinations in respect of securities of the same class that is the subject of the insider bid, or

(B) would be business combinations in respect of securities of the same class that is the subject of the insider bid, except that they come within the exception in paragraph (e) of the definition of business combination,

and ascribe a per security value to those securities,

(b) at the time the insider is made, the offeree issuer has provided equal access to the offeree issuer, and to information concerning the offeree issuer and its securities, to the offeror in the insider bid, all offerors in the other formal bids, and all parties to the proposed transaction described in clause (a)(ii), and

(c) the offeror, in the disclosure document for the insider bid,

(i) includes all material information concerning the offeree issuer and its securities that is known to the offeror after reasonable inquiry but has not been generally disclosed, together with a description of the nature of the offeror's access to the issuer, and

(ii) states that the offeror does not know, after reasonable inquiry, of any material information concerning the offeree issuer and its securities other than information that has been disclosed under clause (i) or that has otherwise been generally disclosed.

[67] Counsel for the Special Committee referred us to *Re Bruce Orsini et al.* (1991), 14 O.S.C.B. 4820 (*Orsini*) for the proposition that in determining whether the public interest has been contravened, the Commission ought to consider whether a respondent has sought to rely on an exemption in a manner that is abusive of that exemption.

[68] Counsel for the Special Committee also referred us to *Re Maple Leaf Sports & Entertainment Ltd.* (1999), 22 O.S.C.B. 2027 (*Maple Leaf*) which held that requirements for disclosure of sufficient information to allow investors to make informed choices represent a fundamental underpinning of the regulation of the capital markets by the Commission.

[69] At the time the Katotakis Offer was publicly announced on December 29, 2004, the Linedata Offer for the same securities was outstanding.

[70] FMC provided equal access to information to both Katotakis and Linedata.

[71] Katotakis disclosed in its take-over bid circular that it had no knowledge of any undisclosed material fact with respect to FMC.

[72] Taking into account *Maple Leaf*, we see no requirement for additional disclosure. As an insider, Katotakis is under no obligation to provide shareholders with his "belief and expectations" as to share value. Based on the facts, Katotakis meets the criteria set out in section 2.4 of Rule 61-501 for the exemption from the formal valuation requirement.

[73] Counsel for the Special Committee asserts that an "auction" is required for use of the valuation exemption. The word "auction" is used in the heading that precedes the exemption set forth in subsection 2.4(1)4 of Rule 61-501. The *Interpretation Act*, R.S.O. 1990, c. I.11, s.9 provides that headings of an act form no part of the act and are deemed inserted for convenience reference only. We have determined that we should not rely on the term "auction" in the heading in interpreting the exemption.

[74] Our decision aside, we note that corporate law gives minority shareholders in a Follow-on Transaction, through dissent rights, protection, if necessary, to be paid fair value for their shares.

Dated at Toronto this 22nd day of February, 2005.

"Paul Moore"
Paul M. Moore

"Robert Davis"
Robert W. Davis

"Paul K. Bates"
Paul K. Bates