For hearing before the Honourable Mdm. Justice Cheng at 9.30am on 16 February, 2008

RE: HCCW NO. 12345 OF 2006

RESPONDENTS' CLOSING SUBMISSIONS

I. The application

1. P applied under s.168A of the Companies Ordinance for an order by this Honourable Court to restore P's shareholding in the Company and for R1 and R2 to purchase the shares on the basis that the Company be valued at HK$10 million.

2. Alternatively, P applied under s.177 of the Companies Ordinance for an order by this Honourable Court that it is just and equitable to wind up the Company.

II. Section 168A - order that transfer of shares be set aside and purchased at fair value

3. It is well established in *Re Taiwa Land Investment Co. Ltd. [1981] HKLR 277* that for an order to be made under this section, the affairs of the company have to conducted both unfairly and prejudicial to the interests of the petitioning member. The entire factual matrix is taken into account.

4. P alleges 4 factors contributing to his allegation that the affairs of the company had been conducted unfairly prejudicial against him:

   (a) that $1,000,000 was misappropriated;

   (b) that there were unexplained discrepancies in the Company's accounts;

   (c) that the value of the Company was misrepresented to him; and

   (d) that his shares were wrongfully transferred based on an erroneous valuation.

5. It is submitted that the affairs of the Company had not been conducted unfairly, nor prejudiced against the interests of P, as is explained below.

Alleged misappropriation of $1,000,000

6. It is submitted that there was no misappropriation of the Company's funds as alleged. The alleged 'misappropriation' was in fact a rounded reimbursement of R1's entertainment expenses which was used to entertain the Company's business connections.

   See ¶8 of R1's Affirmation at p.3.

7. In any case, the very nature of the expenses incurred and that they were incurred in a country where receipts are not forthcoming implies that receipts were not available every time. What receipts had been available at the time are already exhibited.

   See the receipts in Exhibit ET-1 at pp.89-90.

8. R1's reimbursement of his entertainment expenses were expected by the parties and has been expressly authorised by the directors in the material board meetings.

   See ¶7 of R1's Affirmation on p.3 and the board meeting minutes in Exhibit ET-2 at p.92.

9. The relatively large amount of the reimbursement may seem prima facie suspicious, but is explained by R1 as a bulk reimbursement of expenses incurred over the course of a year. From the books, it can be seen that P himself had been reimbursed for entertainment expenses in the amount over $150,000 per month. It would therefore not unreasonable for R1, being the active businessman in the PRC to rack up a year's expenses totalling to about $1,000,000. The rounded figure is explained by R1 as being the result of the unavailability of receipts but is nevertheless close to the amount he spent on entertainment.

   See ¶10 of R1's Affirmation at p.4; and the list of expenses incurred by Popmart Factory throughout December 2005 in Exhibit ET-3 on p.96.

10. The fact that R1's $1,000,000 reimbursement was 3 times more than previous years' reimbursements has been explained on the basis that "officials and middlemen have become progressively greedier".

   See the transcripts of trial on p.107, at [J].

11. P contends that there was a "specific agreement between the parties that R1 was to restrict his spending to only what was 'absolutely necessary'." However, P has not put forward any expense that was not "absolutely necessary" and it is difficult to quantify the extent of entertainment required in any given case.

12. P must have known the extent to which entertainment expenses can reach in China for he himself had entertained on occasion, spending relatively large amounts of money which was reimbursed by the Company. It is curious that P seeks to complain against conduct which is necessary for the Company's growth and in which P has indulged himself. Furthermore, P has never denied that 'entertainment', in its myriad forms, was necessary for the development and growth of the Company's business.

See ¶¶12-14 of R1's Affirmation at pp.4-5; and the expense accounts for Popmart Factory for the month of December 2005 in Exhibit ET-3 at p.96.

Alleged erroneous exchange rate

13. It is submitted that this is not a ground upon which P can complain. At the material time, the Company needed Zooropa Corp. to supply it with 'Grade A(2)' quality pulp to manufacture music packaging in time for the summer of 2006. To entice them to sell to the Company rather than other companies, the Company paid Zooropa in Euros.

14. The markedly different exchange rate was used in the accounts in view of the appreciation in the Euro currency between March 2006 and July 2006.

See ¶15(a) of R1's Affirmation at p.5.

15. Given that the respondents had no private interests in this transaction and that use of Euros was necessary for the Company to succeed in purchasing the pulp from Zooropa, the transaction cannot be said to be unfair or prejudicial to P, who has not contested R1's explanation.

Undocumented July 2006 travelling expenses

16. P noted in his 1st affirmation that these expenses were recorded without any particulars. R1 has explained in his affirmation that this was in respect of a U2 concert which some Satellite Recordings colleagues wanted to go. Given that P himself had attended the concert with R1 and the Satellite Recordings staff at the time, he surely would have appreciated the background of the travelling expenses.

See the photo showing P within in Exhibit ET-4 at p.98 and ¶15(b) of R1's Affirmation at p.5.

17. As P had participated in this expenditure, which was not denied, and as it was necessary to keep the Company's clients entertained, this expenditure cannot be said to be unfair or prejudicial to P.

Alleged misappropriation of shares

18. P alleged that the meeting on 13 August 2006 was a board meeting whereby the respondents misrepresented the value of the Company to him as $10 million and that was the value upon which he agreed to sell his 35% shareholding.

19. It is submitted that there no agreement that the Company was to be valued at $10 million, although R1 may have said words to the effect that the Company was worth between $5 and $10 million.

See ¶19 of R1's Affirmation on p.20.

20. Even if there was a director's meeting, it would be unreasonable for P to use any price quoted in casual discussion without reference to the accounts of the Company. Furthermore, the question of the Company's valuation could not have been resolved because there was no vote on the matter. P could not reasonably have voted given that he did not know what the Company should be valued at. The respondents did not vote on the matter.

See the voting requirements in §89 of the Company's Articles of Association (the "Articles"), Exhibit BC-1 on p.45.

21. In any event, even if R1 had understated the Company's value to P's prejudice, it would not be unfair to P because as a member and director of the Company, he had the power to inspect the accounts of the company and should reasonably have done so in all prudence. After all, P was not forced to sell his shares in the Company.

Transfer of shares not approved of in writing by all shareholders

22. It is provided in §21 of the Articles that "Shares in the Company shall not be transferred unless written consent is obtained from all members of the Company."

See §21 of the Articles at Exhibit BC-1 on p.32.

23. It is conceded that no evidence has been filed showing written consent by any of the shareholders regarding the transfer of shares. However, the fact that all members of the Company, including P, had consented to the oral agreement displaced the requirement for written consent and therefore this irregularity cannot be used as a ground to void the share transfer.

See *Re Express Engineering Works Ltd. [1920] 1 Ch 466* at p.470.

24. It is submitted that this act of non-compliance is not an act of misappropriation of P's shares, nor was it unfair or prejudicial to P because P himself had agreed that the shares be transferred on the basis of the oral agreement on 13 August 2006 only and had not complained in any document of this non-compliance with the Articles.

III. Section 177 - just and equitable winding up

Existence of a quasi partnership

25. It is well established that a breakdown of a 'quasi partnership', may be an instance where it is just and equitable to wind up a company.

26. It is well established by *Ebrahimi v Westbourne Galleries Ltd. [1973] AC 360* that a company formed on the basis of a quasi partnership has, inter alia, the following requisites:

    (a) It is an association formed on the basis of a personal relationship involving mutual confidence;

    (b) There was an agreement or some understanding that the shareholders shall participate in the conduct of the business; and

    (c) There is a restriction on the transfer of a member's interest in the company.

    It is conceded that the Company was formed and was operating, at the time up to the Petition, on the basis of a quasi partnership.

Breakdown of quasi partnership

27. It is submitted that there has been no breakdown of any quasi partnership, and even if there had been a breakdown, it was caused by P himself.

28. The affairs of the company had been conducted properly in accordance with the Company's Memorandum of Association (the "Memorandum") and its Articles. It is submitted that merely because P now does not approve of the scale of entertaining performed by R1 on behalf of the Company, such an allegation of mismanagement which is neither prejudicial nor unfair to P does not entitle him to pray for the Company to be wound up, as courts are slow to intervene in the business of companies. How much entertainment a business needs for its associates is surely a business decision so long as it is not unreasonably incurred, and there has been no suggestion either that such entertainment expenses have been unreasonably incurred; or that R1 had breached his fiduciary duties in entertaining the Company's business associates.

    > "There can be no unfairness to the petitioners in those in control of the company's affairs taking a different view from theirs on such [business] matters."

    See *Re Elgindata (No.1) [1991] BCLC 959* at 994B.

Other grounds

29. Other grounds where courts have held it just and equitable to wind up a company have been: (i) where the majority had been precipitated sufficiently grave misconduct; and (ii) where the conduct of management warrants investigation.

 See *Re San Imperial Corporation Ltd. (No.2) [1980] HKC 463;* and *Re Comtowell Ltd. [1988] 2 HKLRD 463*.

30. As has been submitted previously, there has been no misconduct precipitated by the respondents to speak of, and further, the decision of how much entertainment should be incurred is a management one that is for the Company, less for the courts to make.

Remedy of last resort

31. It is submitted that s.180(1A) of the Companies Ordinance implies that an order to wind up the Company is an order of last resort and it would neither be fair nor just in this case for this Honourable Court to so order.

32. It is submitted that it would be unreasonable for P to insist on winding up the Company especially since the respondents have agreed to buy out P's shares, albeit at fair value. Furthermore, the Company remains a going concern, continues to do profitable business and is not paralysed by any management deadlock.

Acquiescence by P

33. It is well established that the just and equitable principles under s.177(f) are principles of equity and are therefore amenable to the doctrines of equity. Equity aids the vigilant, not those who slumber on their rights.

34. It is submitted that P knew the extent of the entertainment expenses incurred by R1 – the submissions herein at ¶¶7, 9 and 12 are repeated. It is noted especially that P had nowhere in his documents protested against the fact that he had no objection against R1's entertainment expenses in the PRC.

35. P had not complained of the matters relied on in this present case until his Petition on 30 December 2006 – some 6 months from the conduct of primary concern. P had not even raised the issue during the meeting on 13 August 2006, as can be seen from the purported minutes of the meeting drafted by P himself.

 See the purported board meeting minutes at Exhibit BC-8 on p.104.

IV. Valuation of shares

36. The general rule is that the valuation date for shares in such a petition should be the date on which the shares are ordered to be purchased. Any departure from the general rule is subject to the overriding requirement that the valuation be fair on the facts of the particular case.

    See *Profinance Trust SA v Gladstone [2002] 1 WLR 1024* at 1041, ¶60.

37. Notwithstanding the validity of the share transfer, if this Honourable Court is minded to order that the respondents purchase P's shares, it is submitted that in the present case, a departure from the general rule is warranted and that the most appropriate valuation date is 31 August 2006. This is because the oral agreement made in the hotel on 13 August 2006 provided that transfer of the shares would be effected on the initial payment of the price, i.e. on 31 August 2006. It was also agreed that the transfer of shares and variation of membership in the Company would be effected upon full payment of the transfer price.

    See P's First Affirmation at ¶18 on pp.5-6.

38. It would be fair to value the shares as per the agreement between P, R1 and R2, because P would have expected the payment for his shares to equal the value of the Company on the date of the purchase and not on any previous or future date. This is based on the premise that P had erroneously expected that the Company would be valued at $10 million when the transfer of shares took effect.

39. If this Honourable Court is disinclined to depart from the general rule, it is submitted that the said shares be valued at $6.5 million or such value as may be determined by independent professional valuers as at the date of judgment.

    See the future estimated value of the Company at Exhibit BC-5 on p.81.

40. It is submitted that P's valuation report shown in Exhibit BC-7 on p.102 (P's Valuation Report) should not be used because it does not include any of the items incurred in the PRC by R1. This was admitted by P in the trial in which he explained that R1's expenses were not authorised by the Company. However, the board meeting minutes shown in Exhibit ET-2 at pp.92-94 and 104 indicate that R1's expenses were expressly and unanimously approved of by the board.

41. Furthermore, P's Valuation Report for August 2006 differs markedly from the balance sheet accounts for July 2006 prepared by the same accountants, *Hui and Chu*. The net asset value of the Company in P's Valuation Report is some $10.4 million whereas the net asset value in the balance sheet just 1 month before

as of July 2006 is $4.8 million. It is difficult to conceive how the Company can double its assets in just 1 month and it is submitted that P's Valuation Report is unreliable.

> Contrast P's valuation report in Exhibit BC-7 on p.102 with the July 2006 balance sheet in Exhibit BC-4 on p.79.

V. Conclusion

42. Given the foregoing, the respondents humbly ask this Honourable Court to exercise its discretion to: (i) reject P's petition voiding the share transfer and compelling R1 to purchase P's shares in the Company; (ii) if a buyout order is made, order the said shares to be valued at no later as of 31 August 2006, or as of the date of the buyout order; and (iii) reject P's petition praying for the Company to be wound up on the just and equitable ground.

Dated this 3rd day of February, 2008

Cliff Lui

Counsel for the Respondents

For hearing before the Honourable Mr. Justice [•] at 9.30am on 26 January, 2008

RE: HCCW NO. 12345 OF 2006

RESPONDENT'S LIST OF AUTHORITIES

1. *Re Express Engineering Works Ltd. [1920] 1 Ch 466*
2. *Re Elgindata (No.1) [1991] BCLC 959*
3. *Profinance Trust SA v Gladstone [2002] 1 WLR 1024*

Dated this 3rd day of February, 2008

Cliff Lui

Counsel for the Respondents