

September 13, 2010

Filed via epass

Robert A. Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario
K1A 0N2

Dear Mr. Morin:

**Re: Broadcasting Notice of Consultation CRTC 2010-551, Item 4
Application No. 2010-0150-3 – Fight Media Inc.**

We act as counsel to Fight Media Inc. (“FMI”). This letter is filed in response to the interventions filed on or about September 2, 2010 by the parties listed on the attached Intervention Distribution List (the “Interveners”).

The interventions are from four parties (and/or their counsel) that are engaged in ongoing civil litigation before the Ontario Superior Court of Justice (the “Court”) against The Fight Network Inc. (“Fight Network”) or its principals. We have carefully reviewed each of these interventions and they share a common defect. None of the interventions raise issues that are relevant to the exercise of the Commission’s jurisdiction under the *Broadcasting Act*, nor do the Interveners raise credible regulatory policy concerns relevant to the Commission’s consideration of the regulatory merits of the Application before it. Indeed, the Interveners are using the Commission’s intervention process to argue the merits of their respective civil litigation claims, based on assertions that are in dispute both as to their factual basis and as to the legal implications of the facts, if proven. In our submission, the arguments raised by the Interveners are outside the purview of the Commission’s jurisdiction under the *Broadcasting Act* and are most properly dealt with by the Court through the judicial process, with the benefit of the evidentiary and procedural protections provided through that process.

The only ownership-related issue directly related to the Application currently before the Commission is that raised in the intervention by Gary Luftspring, counsel to George Burger, Spotlight Television Inc. and The Hillsdale Family Trust (collectively, the “Burger Entities”), as well as Rue Patrix Holdings Inc. and Divided Sky Holdings Inc..

In July 2010, the Burger Entities filed an application with the Court in which they are claiming, *inter alia*, their entitlement to a 7.61% ownership interest in FMI or the new Category B licence being applied for by FMI, with the remaining 92.39% to be held by FMI. If the Application before the Commission is approved, Ed Nordholm and Loudon Owen will exercise effective control of FMI through the ownership of the majority of the voting shares of FMI. If the Burger Entities succeed in

Court, effective control of FMI will not change, as all that is in dispute is a 7.61% interest in either FMI or the proposed Category B licence. We note that the Commission's prior approval would not be required for the transfer of a 7.61% voting interest from Ed Nordholm and Loudon Owen to the Burger Entities, in the event that the Burger Entities are successful in the litigation. It is important for the Commission to appreciate that this litigation was just commenced and the Statement of Claim was served on the defendants in late August, just days before interventions were due to be filed with the Commission. The litigation commenced by the Burger Entities is highly complex and will likely go on for at least two years. It would not be in the public interest if the Commission were to permit a recently launched civil action over an extremely small minority ownership interest to detract from its consideration of the proposed Application.

The other ownership-related litigation before the Court involves a dispute raised by Michael Garrow and his ex-wife Andrea McCarthy over the ownership of 43% of the voting shares of TFN Global Inc.¹ ("TFN Global"), the parent company of the current licensee, Fight Network.² It is important for the Commission to understand that this dispute deals with share ownership of the current licensee's parent company and has nothing whatsoever to do with the FMI ownership structure that is before the Commission for approval. If the Garrow/McCarthy ownership litigation is successful, Mayhem Media Corp. ("Mayhem Media") would continue to own the remaining 57% voting shares of TFN Global. If this ownership litigation by Garrow/McCarthy is unsuccessful, the claim would be extinguished and Mayhem Media would continue to hold 100% of the voting shares of TFN Global. Thus, the determination of the Court in the Garrow/McCarthy application will not impact on the joint effective control of TFN Global by Edwin Nordholm and Loudon Owen, the owners of Mayhem Media.

In either event, the resolution of the Garrow/McCarthy litigation would not impact the current Application before the Commission. As we have previously noted, the Application currently before the Commission is for the issuance of a new Category B specialty service licence to an entirely different entity (FMI) than that involved in the Garrow/McCarthy litigation (TFN Global). If the Commission approves FMI's Application, the existing licence that is indirectly held by TFN Global via Fight Network will not be transferred to FMI; instead a new licence will be issued to FMI. It will be up to the Board of TFN Global to determine what should be done with the existing Category B licence held by Fight Network.

The CRTC has to assess the Application before it based on whether it is compliant with the *Broadcasting Act* and all CRTC rules and regulations. We submit that it is. There is no question that this case involves nasty and protracted litigation. However, the issues raised by the Interveners are beyond the purview of the Commission and are already the subject matter of various applications to the Court. This is the wrong forum in which to address these civil litigation claims.

¹ Formerly known as Blackout Communications Inc.

² Michael Garrow is alleging that as a result of an (unproven) default by Mayhem Media Corp. on a Promissory Note and Share Pledge Agreement entered into with his former wife, Andrea McCarthy, Mayhem is required to transfer 2,000,000 Class A shares of TFN Global to Michael Garrow, as the beneficial owner nominated by Andrea McCarthy.

The Interveners, in particular Mr. Burger's counsel, have made a number of astounding assertions of fact that are not based on any evidence and are unproven. As an example of the misleading information being provided to the Commission, in his submission, Mr. Burger's counsel, Mr. Luftspring, included what he asserts is the form of Participation Agreement executed by Mr. Burger in connection with the Bridge Loan advanced by Mayhem Media to TFN Global (as described in our June 30, 2010 letter). In fact, the document filed by Mr. Luftspring is not the form of Participation Agreement executed by Mr. Burger. The actual Participation Agreement executed by Mr. Burger is attached hereto as Schedule A for the Commission's reference. It is executed by Mr. Burger personally and makes no reference to the Hillsdale Family Trust or any other trust. The Participation Agreement executed by Mr. Burger and the other participants in the Bridge Loan expressly addresses in section 6 the authorities to be obtained by Mayhem Media in the event of default by TFN Global and enforcement of the Bridge Loan. Section 6 of the Participation Agreement was negotiated at length between the parties. Upon default of the Bridge Loan by TFN Global, Mayhem Media complied with its obligations under section 6 of the Participation Agreement. Moreover, the enforcement plan to foreclose on TFN Global and to contribute the foreclosed collateral to FMI was consented to by the requisite minority investors in the Bridge Loan, in accordance with section 6 of the Participation Agreement.

The Exchange Agreements referred to in Mr. Luftspring's submission have been filed with the Commission as part of this Application. It is evident that the release provisions in the Exchange Agreements extend to all of the directors and officers of TFN Global and its subsidiaries, and not just to Mr. Burger, as implied by Mr. Luftspring. It should be noted that all of the other investors in the Bridge Loan have agreed to the terms and conditions of the reorganization and exchange transactions. Only the Burger Entities, which represent a very small minority of the investors in the Bridge Loan, have elected to pursue their rights as holders of a participation interest of TFN Global. The legal rights and remedies available to Mr. Luftspring's clients arising from that decision are complex and disputed matters to be determined by the Court in the ongoing civil litigation proceeding.

Likewise, the submissions by Brian Sobie, Michael Garrow and their counsel assert that the Applicants have engaged in delays at Court, while nothing could be farther from the truth. It is our understanding that notwithstanding inquiries by Mayhem Media's litigation counsel, at no point did Michael Garrow, Brian Sobie or their counsel seek Mayhem Media's compliance with the Court schedule or otherwise indicate their intention to move the matter forward. To the contrary, the plaintiffs' counsel in that litigation has been engaged through the summer in periodic settlement discussions with Mayhem Media's litigation counsel, with a view to concluding the litigation without incurring further costs. To facilitate these discussions, Mayhem Media's litigation counsel has provided the plaintiffs' counsel with the financial and other disclosure that they have requested, contrary to the assertions in Mr. Garrow's intervention. On or about August 12, 2010 Messrs. Nordholm and Owen learned that Mr. Garrow had filed a consumer proposal under the *Bankruptcy and Insolvency Act* and that all litigation involving Mr. Garrow had been stayed. Since that date, Mayhem Media's counsel has been advised by the bankruptcy administrator that the stay did not extend to this litigation but a settlement offer made by Mayhem Media to Mr. Garrow remains outstanding. We just learned this evening that counsel for the plaintiffs in that matter have removed themselves from the record and were unable to advise whether any counsel will be appointed in their stead. Therefore, this litigation will be subject to even further delays.

Similarly, while counsel for Brian Sobie and Ken Blum claim that their clients are unable to collect on their judgements in their respective wrongful dismissal and breach of services agreement claims (which are entirely outside the Commission's purview), they fail to advise the Commission that the issue is not that Fight Network is refusing to pay their clients *per se*, but that their clients are unsecured creditors, who must stand in line behind secured creditors of Fight Network, as required under bankruptcy and insolvency law.

In all of the litigation described by the Interveners, only the Court has the jurisdiction to determine the true facts of the case and to make whatever orders are necessary to protect the interests, if any, of the Interveners, if they are able to establish their cases. There is nothing to stop the Interveners from making the same claims presented to the CRTC to the Court, and to seek injunctive relief from the Court. To date, they have either chosen not to do so, or have withdrawn prior applications to the Court for injunctive relief. The Interveners are attempting to use the Commission's process to unfairly discredit the applicants on the basis of claims that are largely unproven and to gain an advantage in the litigation they have commenced. They are looking for a CRTC shortcut to provide a remedy that they could not get in court without properly presenting and proving their cases. This is an improper use of the Commission's process and the Commission should recognize it for what it is: a transparent attempt to obtain a *de facto* injunction via the regulatory process. As such, it constitutes an abuse of process.

The Interveners are also alleging that Mayhem Media has somehow acted in contravention of CRTC policies by directing broadcasting distribution undertakings ("BDUs") to direct their affiliation payments to FMI. As detailed in the Bridge Loan Agreement filed with the Commission in 2007, as collateral for the Bridge Loan, Mayhem Media obtained a security interest in all of the assets of TFN Global and Fight Network – this excludes Fight Network's current Category B licence but includes the cash flows of Fight Network. Since TFN Global is in default with respect to the Bridge Loan, Mayhem Media, in its capacity as a creditor under section 65 of the *Personal Property Security Act*, has foreclosed on the collateral that was secured to it by Fight Network. This is no different than a bank realizing on its security interest in the event of a default on a bank loan. The ability of Mayhem Media to realize on its security in the event of default on the Bridge Loan was a possibility that the minority shareholders were aware of at the time they consented to the Bridge Loan Agreement and recapitalization transaction. In addition, as noted above, the enforcement plan to foreclose on TFN Global and to contribute the foreclosed collateral to FMI was consented to by the requisite minority investors in the Bridge Loan, in accordance with section 6 of the Participation Agreement attached hereto.

As we have previously noted, the CRTC is the master of its own jurisdiction. Simply because an action is before the Court does not prevent the CRTC from issuing its determination in the current Application. No harm would be brought to the Interveners if the CRTC approves the Application. The Court has ample jurisdiction to provide whatever relief it considers fit if the Interveners are able to establish their claims. However, the same is not true if the Commission accedes to the requests of the Interveners and denies or postpones its determination on FMI's Application.

As the Commission is aware, The Fight Network specialty service is in financial distress and has been for some time, which is the very reason that led to the restructuring application in 2007 and the current Application. The Commission's consideration of the Application has already been delayed once for over five months, while the Commission considered the very same issues currently being

reargued by the Interveners. The Fight Network specialty service cannot withstand any further delays in securing stable financing or else the future of the service will be in jeopardy.

In their submissions, Brian Sobie and Michael Garrow raise questions about whether Fight Network is indeed in financial distress based on their misreading of The Fight Network's financial filings with the Commission. As the Commission is aware, The Fight Network's annual returns show that the service has experienced significant negative PBIT margins since its launch in 2006 and continues to be in a precarious financial state. While The Fight Network has managed to stay on air, this has only been possible because it continues to receive financial support from Mayhem Media and its investors. The ongoing instability of the service is affecting its relationships with BDUs, with many either holding back subscription revenues or paying them into Court to be held in escrow until The Fight Network's ownership issues are resolved. The small amount of revenue that is being received is barely enough to cover rent, salaries and transmission costs. In addition, trade creditors are accumulating and so far have only extended credit with the expectation that the current Application will be approved by the Commission in the very near future. This situation cannot continue indefinitely. The uncertainty is highly disruptive to the business and an impediment to raising capital to invest in production and programming. Although The Fight Network has constrained its spending largely within the envelope of its subscription revenue, it has recently been forced to abandon some of its content and its subscription growth has become stagnant (even declining in some markets) as a result.

FMI appreciates the Commission's attention to this matter and looks forward to revitalizing The Fight Network so that it may continue to provide its valued service to subscribers and realize its full potential.

A copy of this reply has been served on each of the parties on the Intervention Distribution List, in accordance with the *CRTC Rules of Procedure*.

Yours very truly,

Goodmans LLP



Robert Malcolmson

Att.

cc: Intervention Distribution List
Gary Luftspring (counsel to the Burger Entities) – gluftspring@rickettsharris.com
Michael Garrow - mikegarrow@live.com
Brian Sobie - sobietv@yahoo.ca
Matthew Fisher (counsel to Michael Garrow & Brian Sobie) – mfisher@leckerslaw.com
Ernst Ashurov (counsel to Ken Blum) – ernst@ernstashurovlaw.com