RESPONDENT'S MEMORANDUM

PART I – FACTS

1. The Respondent AIC Global Holdings (hereinafter "**AIC**") contests the appellant Claude Ravary's (hereinafter the "**Appellant**") appeal as ill-founded;

2. For the sake of brevity, AIC refers to the facts as related by the Respondent, Fonds Mutuels CI Inc. (hereinafter "**FMCI**"), in its brief, and collectively with AIC (hereinafter the "**Respondents**");

3. In addition, AIC fully endorses and supports the Respondent FMCI's legal arguments and authorities in support thereof;

4. Thus, the present brief focuses on this Honourable Court's standard of review in determining the issues at bar, the whole as more fully detailed hereinafter;

PART II – ISSUES IN DISPUTE

5. The main issue in this case is whether the judgment a quo, rendered on the basis of the notice for case management and *de bene esse* application (hereinafter the "**Application**") and in light of the evidence that was submitted in its support, must be reversed. This issue raises the following four questions:

(1) What is the applicable standard of review in the appeal at bar?

6. As the judgment a quo qualifies as a case management measure relating to the conduct of the proceeding, as admitted by all parties, the burden of proof, which lies on the Appellant in appeal, is considerably heavy;

7. Indeed, the Appellant must demonstrate that the judge at first instance committed an error which led to a denial of justice or a blatant injustice (*injustice flagrante*);

8. AIC respectfully submits that the judge at first instance committed no such error, but rather exercised his discretion in accordance with the guiding principles of procedure;

(2) What is the nature of the judgement rendered by the Honourable Louis J. Gouin, on June 30, 2015 (hereinafter "Jugement/Cadre") and under which circumstances can it be modified as the case may be?

9. With regards to this issue, AIC fully endorses and supports FMCI's arguments as laid out in its brief;

(3) Has the judge at first instance rendered an appeal decision by discarding the report and the testimony of M. Auclair, the only evidence submitted by the Appellant in support of its Application? In the negative, is the fate of the present appeal determined?

10. With regards to this issue, AIC fully endorses and supports FMCI's arguments as laid out in its brief;

(4) If the answer of question 3 is affirmative, has the judge at first instance rendered an appeal decision by ruling that the requested information was not relevant nor likely to move the debate forward?

11. With regards to this issue, AIC fully endorses and supports FMCI's arguments as laid out in its brief;

PART III – SUBMISSIONS

(1) The applicable standard of review

A. Preliminary remarks

12. The advent of the *Code of civil procedure*, CQLR c. C-25.01 and its underlying reform has significantly increased the judge at first instance's case management abilities, notably by granting the latter the discretion to order various case management measures in accordance with the guiding principles of procedure;[1]

13. As a corollary, and by deference to the court of first instance's primary mission, the legislator has afforded case management an additional protection, by stating that case management measures relating to the conduct of a proceeding cannot be appealed, unless "a measure or a ruling appears unreasonable in light of the guiding principles of procedure";[2]

14. These guiding principles, laid out at sections 9, 18 and 19 of the *Code of civil procedure*, notably include the principle of proportionality and the orderly conduct of proceedings;[3]

15. In appealing the judgment a quo, the Appellant has submitted to the single judge that his appeal should nevertheless be heard under section 32 of the *Code of civil procedure*;

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1 *Code of civil procedure*, sec. 158.
2 *Ibid*., sec. 32. See also: Commentaires du ministre re: art. 32.
3 *Ibid*., sec. 9, 18, 19.

16. On November 3, 2017, upon a summary review of the file, the Honourable Justice Patrick Healy, CAJ, granted the Appellant leave to appeal on the grounds that the judgment a quo did *appear* unreasonable;

17. Yet, Justice Healy did not rule on the merits of the Appellant's grounds of appeal nor on the validity of the judgment a quo;

18. As such, it is relevant to bear in mind, though Justice Healy's judgment is not binding on this Honourable Court[4], that the Appellant's burden of proof remains whole;

B. The applicable standard of review

19. It is not contested that the judgment a quo qualifies as a case management measure relating to the conduct of the proceeding. As such, the burden of proof which lies on the Appellant in appeal is considerably heavy;

20. Indeed, the Appellant must demonstrate that the judge at first instance committed an error which led to a denial of justice or a blatant injustice (*injustice flagrante*), as this Honourable Court recently reiterated in the decision *Dallaire* c. *Girard*:

> Par ailleurs, la Cour est d'avis que la décision de la juge de première instance en est une de gestion. En cette matière, il faut plus qu'un simple constat d'erreur pour réviser une décision. Cette dernière doit mener à un déni de justice ou à une injustice flagrante comme l'écrivait la juge Thibault dans l'arrêt *Petitgrew c. Bédard Martin.* Ce n'est pas le cas en l'espèce.[5]

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4 *Boyer c. Loto-Québec*, 2016 QCCA 657; *Elitis Pharma inc. c. RX Job inc*., 2012 QCCA 1348, para. 7.

5 *Dallaire c. Girard*, 2017 QCCA 1560, para. 12; *Pettigrew c. Bédard Martin*, 2015 QCCA 1537, para. 30.

21. AIC respectfully submits that the judge at first instance committed no such error, but rather exercised his discretion in accordance with the guiding principles of procedure, the whole as more fully detailed hereafter;

C. The judge at first instance's discretion

22. The particular facts of this case are relevant and must be considered.

23. Indeed, as the judge at first instance underlined in his judgment, this file has been ongoing for thirteen (13) years, yet the Appellant would now have it move backwards to obtain a new impetus;[6]

24. In his judgment, the judge at first instance explained the long duration of this file and characterized the position of the Appellant as an exploratory search for evidence at the discovery stage in the following terms:

> Le Tribunal a eu la nette impression que le Demandeur était encore au stade de son enquête de départ, d'exploration, alors que 13 années se sont écoulées depuis le dépôt de la première procédure reliée à l'Action collective![7]

25. As a result, the judge at first instance described the position of the Appellant as a procedural "back and forth" exercise, being time consuming and further compared the Appellant's case to an ongoing and perpetual file;

26. Accordingly, the judge at first instance reiterated that this "back and forth" exercise has lasted long enough. In fact, he made similar remarks in the Jugement/Cadre

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6 Judgment *a quo* at para. 14.
7 Judgment *a quo* at para. 16.

relating to the extensive duration of the file and to the fact that this class action did not even proceed on the merits yet, and this, back in June 2015:

> Le Tribunal est d'avis que 'ce jeu de ping-pong juridique' a assez duré et qu'il est inacceptable qu'un recours collectif, déposé le 25 octobre 2014 et autorisé le 17 septembre 2010 (le 'Jugement d'autorisation'), n'ait pas encore procédé au fond.[8]

27. The judge at first instance added that the numerous never-ending proceedings are affecting the file to the extent that the administration of justice was **not being served properly** and promptly, as clearly indicated in the Jugement/Cadre:

> […] il n'en demeure pas moins que ce dossier est constitué et composé de procédures à n'en plus finir et, plus que jamais, les parties, sans exception, doivent faire la preuve, d'une discipline certaine afin d'assurer une saine administration de la justice et faire en sorte que justice soit rendue, dans les circonstances, dès que possible.[9]

28. Bearing in mind the principle of proportionality, the orderly conduct of proceedings, as well as the rights of other litigants to obtain justice within a reasonable delay, the judge at first instance rightly refused to redefine the very foundations of the Appellant's class action;

29. Therefore, the judge at first instance made no error of fact or law in exercising his discretion to dismiss the Appellant's motion to have the Jugement/Cadre revisited;

30. Furthermore, the Appellant suffers no denial of justice or blatant injustice in having its motion dismissed. The case will now resume in accordance with the parameters set forth in the Jugement/Cadre, which was rendered nearly three years ago and

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8 Minutes of trial and Superior Court Judgment (Gouin, J.), June 30, 2015, p. 2, **Appellant Memorandum (hereinafter "A.M."), vol. 1, p. 272.**

9 Minutes of trial and Superior Court Judgment (Gouin, J.), June 30, 2015, p. 2, **A.M., vol. 1, pp. 272-273.**

which was never appealed from. In this regard, it is worth citing the Honourable Justice Pelletier in the case of *Décarel inc. v. Construction Grondin et Fils inc*.:

> [7] En l'espèce, le juge saisi de l'affaire en a préalablement assumé la gestion particulière (article 151.1 et sq C.p.c.). Dans ce cadre, il a prononcé divers jugements interlocutoires non susceptibles d'appel qui ont cerné le débat. Or, l'amendement sollicité in extremis lors de l'instruction a pour conséquence pratique d'élargir la contestation à un point tel que les parties ne pourront vraisemblablement procéder qu'en réunissant l'affaire à un autre dossier manifestement plus complexe. Sous ce rapport, l'amendement remet en question des jugements interlocutoires antérieurs contre lesquels la requérante ne pouvait se pourvoir.
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> [8] À mon avis, le juge a raison d'affirmer que la demande est tardive et qu'elle a pour effet de contourner deux jugements ayant balisé le débat.[10]
>
> [Our emphasis]

31. It should be stressed that the judge at first instance, having personally case-managed this class action for nearly four (4) years now, is in the best possible position to make a determination as to the impact of his judgment on the Appellant's substantive rights;

32. As a consequence, and considering that this class action has been ongoing for thirteen (13) years now, the decision of the judge at first instance to dismiss the Appellant's Application should be awarded the highest degree of deference;

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10 *Décarel inc. c. Constructions Grondin et Fils inc*., 2011 QCCA 1051, paras. 7 and 8.

33. In *La Procureure générale du Québec v. Entreprises W.F.H. ltée*, the Honourable Justice Forget reiterated that the discretion exercised by the judge at first instance must be significantly inappropriate to justify an intervention of the Court of Appeal:

> Or, en matière de discrétion, l'appelante doit démontrer, *prima facie* à ce stade, que la discrétion a été exercée d'une manière nettement inappropriée puisqu'une Cour d'appel est toujours réticente à réviser l'exercice d'un pouvoir discrétionnaire.[11]

34. This is especially so in the context of a class action. As an illustration, in the decision *Imperial Tobacco Canada Ltd.* c. *Létourneau*[12], the Honourable Justice Wagner, then at the Court of Appeal, stated that allowing an appeal of an interlocutory motion in the context of a complex class action should solely be considered in exceptional cases:

> Je rappelle que la permission d'appeler d'un jugement interlocutoire dans le contexte de la gestion d'un recours collectif d'envergure demeure exceptionnelle. Elle ne peut être accordée à la légère. Une telle autorisation risque dans certains cas de perturber le bon déroulement de l'instance et de retarder l'objectif ultime du tribunal qui est de rendre justice.[13]

35. As a consequence, AIC respectfully submits that the present appeal commands the highest degree of deference with regards to the judge at first instance's judgment a quo and this Honourable Court should not review his decision;

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11 *Québec (Procureure générale) c. Entreprises W.F.H. ltée*, 2000 CanLII 30087 (QC CA), para. 12.

12 *Imperial Tobacco Canada Ltd. c. Létourneau*, 2011 QCCA 1614; *Fédération étudiante collégiale du Québec (FECQ) c. Québec (Gouvernement du)*, 2012 QCCA 1311, paras. 7 and 22; *Google Canada Corporation c. Elkoby*, 2016 QCCA 1171, paras. 10, 11 and 28.

13 *Imperial Tobacco Canada Ltd. c. Létourneau, 2011 QCCA 1614*, para. 8.

36. AIC respectfully submits that there is nothing exceptional in this case justifying the intervention of this Honourable Court. To the contrary, the judge at first instance exercised his discretion in accordance with the guiding principles of procedure, having regard to the proper administration of justice, by ensuring *inter alia* the orderly conduct of the file:

> **19**. Subject to the duty of the courts to ensure proper case management and the orderly conduct of proceedings, the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits.
>
> They must be careful to confine the case to what is necessary to resolve the dispute, and must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.
>
> They may, at any stage of the proceeding, without necessarily stopping its progress, agree to settle their dispute through a private dispute prevention and resolution process or judicial conciliation; they may also otherwise terminate the proceeding at any time.[14]
>
> [Our emphasis]

37. The Appellant is simply attempting to obtain another kick at the can, many years after having instituted the proceedings, having now realized that he is unable to proceed with an economically-viable action within the framework of his own class action;

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14 *Code of civil procedure*, sec. 19.

38. The only new element presented by Appellant is a couple of basic expert reports that compile calculations, with no more, and which the Judge in first instance dismissed, in his entire discretion, as unhelpful and irrelevant.

PART IV – CONCLUSIONS

THE RESPONDENT ASKS THE COURT OF APPEAL TO:

DISMISS the appeal;

CONDEMN the Appellant to pay costs both at first instance and on appeal.

Montréal, January 30, 2018

Borden Ladner Gervais

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