SUPERIOR COURT OF JUSTICE

Judges' Administration
361 University Avenue
Toronto, ON M5G 1T3
Tel: (416) 327-5284
Fax: (416) 327-6209

Fax

To:	E. Patrick Shea	**Fax:**	416-862-7661
To:	Joseph Groia	**Fax:**	416-203-9231
To:	Peter Roy	**Fax:**	416-362-6204
To:	Matthew P. Gottlieb	**Fax:**	416-598-3730
Re:	Unique Broadband Systems Inc.	**Date:**	November 9, 2012

Pages: 6

Attached please find the Endorsement of Mr. Justice Wilton-Siegel in the above-noted matter.

If you do not receive all pages, please call 416-327-5284 and ask to speak to Michele Livingston.

CITATION: Unique Broadband Systems (Re), 2012 ONSC 6366
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-11-09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED and IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *E. Patrick Shea*, for the Applicant, Unique Broadband Systems, Inc.

Joseph P. Groia, for Jolian Investments Limited and Gerald McGoey

Peter Roy, for DOL Technologies Inc. and Alex Dolgonos

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

HEARD: November 8, 2012

ENDORSEMENT

[1] The applicant seeks an order approving a process for marketing the shares of LOOK Communications Inc. ("LOOK") owned by UBS Wireless Services Inc., a subsidiary of the applicant. The proposed sales process is set out in the Eleventh Report of the Monitor, Duff & Phelps Canada Restructuring Inc. (the "Monitor"). The application is opposed on several issues by Jolian Investments Limited and Gerald McGoey (the "McGoey respondents") and by DOL Technologies Inc. and Alex Dolgonos (the "Dolgonos respondents").

[2] The proposed sales process contemplates that two directors of the applicant, Kenneth Taylor ("Taylor") and Victor Wells ("Wells"), will constitute a committee that will have decision-making responsibility for the sales process. It is contemplated that this committee will engage the Monitor to act as its sales agent in marketing the LOOK shares to the public and in managing the negotiation process in respect of offers for the shares. The third director of the applicant, Robert Ulicki ("Ulicki"), has expressed an interest in making an offer for the LOOK shares, either personally or through a corporation related to him. Accordingly, he has not participated in the approval of the sales process and will not participate in any meetings of the board of the applicant pertaining to the sales process or in any meetings of the committee overseeing the sales process.

[3] The McGoey respondents and the Dolgonos respondents (collectively, the "respondents") raise three specific issues which will be addressed in turn.

[4] First, these respondents allege that Ulicki should be prevented by Court order from making an offer for the LOOK shares in the sales process. Ulicki was a director of LOOK from July 2010 to October 2010. In his capacity as a director of the applicant, Ulicki is also aware of expressions of interest made to the applicant prior to a decision being made by the board of the applicant to offer the LOOK shares for sale, as set out in an affidavit that he has filed in connection with this motion. Among other things, in addition to meetings with two prospective investment dealers in May 2012, Ulicki has also reviewed six letters from parties expressing an interest in acquiring the LOOK shares, either directly from the applicant or as part of a partial takeover bid of LOOK or other business combination transaction with LOOK. The timing of this involvement is not clear in respect of all of these third party approaches to the applicant. However, it is clear that, in some if not all instances, Ulicki is aware of the indicative range of values for the LOOK shares proposed by these interested parties.

[5] In considering this matter, the litmus test of the applicant and the Court must be the establishment of a sales process that is likely to maximize the value received by the applicant for its LOOK shares. The respondents allege that permitting Ulicki to participate in the sales process as a prospective purchaser will deter all other interested parties from making an offer. This case has not, however, been established on the record before the Court on this motion.

[6] LOOK is a public company. The progress of the litigation between LOOK and the respondents, among others, is public knowledge. The respondents have not demonstrated that Ulicki has received any information regarding LOOK, either during the short period in which he was a LOOK director or in his capacity as a director of the applicant, that has not been disclosed to the public or is not otherwise available from the litigation record.

[7] The respondents have also failed to demonstrate that the information Ulicki has received to date regarding the parties who have previously expressed an interest in the LOOK shares would deter those parties, or other parties, from making an offer for the LOOK shares. There is no direct evidence before the Court on this issue apart from the respondents' assertion, which amounts to speculation at this stage. Moreover, there is some inherent protection against such an occurrence in the present circumstances. In the event that Ulicki were the only offeror, the applicant would need to satisfy the Court that such circumstances did not reflect a flawed sales process and the decision-making of the directors in persisting with such a sales process would also be subject to review.

[8] I wish to note, however, that in concluding that it is not appropriate for the Court to order that Ulicki should refrain from participating in the sales process, the Court is not determining that Ulicki is entitled to participate in the sales process. That remains a decision of the committee of directors who will oversee the sales process and who have access to more information than was presented to the Court. While section 36 of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "CCAA") does contemplate related parties purchasing assets of a debtor subject to CCAA proceedings, this provision does not establish an automatic right in favour of a related party to participate in a sales process. Ultimately, the committee of Taylor and Wells bears a continuing responsibility to be satisfied that the sales process is conducted in a

manner that will maximize the value to the stakeholders and to demonstrate the integrity of that process when Court approval of a proposed transaction is sought. As part of that responsibility, the committee must be satisfied that Ulicki's participation in the sales process will not, and did not, impair that objective. The decision of the Court is limited to facts before it. The fact that the respondents have failed to satisfy the onus on them to establish evidence that prospective purchasers will be deterred from making an offer for the LOOK shares does not relieve the applicant from its obligation to be satisfied that this will not occur based on the facts before it and any other facts that may subsequently come to the attention of the committee members.

[9] Second, the respondents seek the appointment of representatives to the committee of the applicant overseeing the sales process. This relief is denied for a general reason as well as reasons specific to each of McGoey and Dolgonos.

[10] The principal reason is that the respondents' request is inconsistent with the concept of a debtor-in-possession under the CCAA. Under CCAA proceedings, absent special circumstances, the debtor, rather than any third party, remains responsible for, and in control of, the debtor's business and any sale of its assets as part of an eventual reorganization. That control rests with the directors of the debtor. The respondents have failed to establish any special circumstances in this case that compel a different arrangement. As a related matter, it is unclear to whom such representatives would owe a duty. The only reasonable basis would be to impose the duties of directors upon any such representative. Such an arrangement would only make sense, however, if there were reason to doubt that the current committee members were unable to fulfil their functions without further assistance. In this case, the committee members, Taylor and Wells, are acknowledged to be independent directors. They are experienced business people. They are also advised by legal counsel. There is no suggestion that they will be influenced in some manner by Ulicki. There is no evidence that they are unable to perform the necessary oversight function without further assistance.

[11] In addition, McGoey is a contingent creditor but not a shareholder to any material extent in the applicant. There is no evidence that this interest is affected in any way by the sales process. The McGoey respondents believe any sale would be at a gross undervalue at the present time and seek a representative to, among other things, attempt to convince the applicant not to proceed with the sales process. However, special circumstances specific to a creditor, or a class of creditors, must be demonstrated before the Court would give consideration to the appointment of a representative. In this case, it would be premature to consider whether such circumstances exist until the claims of the McGoey respondents are quantified in the applicant's claims process. Even then, the mere fact of being the largest unsecured creditor is, by itself, insufficient to justify such relief. In addition, the McGoey respondents have a potential conflict in that, as defendants in the litigation commenced by LOOK, they may have an interest in the identity and intentions of any purchaser of the applicant's controlling interest in LOOK. If the proposed purchaser were unacceptable to McGoey, they might also have an additional reason for preventing such a sale. For these reasons specific to the McGoey respondents, it would be inappropriate to appoint a representative of the McGoey respondents to the committee overseeing the sales process.

[12] While Dolgonos is entitled to protection in respect of the conduct of the sales process as a shareholder, he approved the selection and appointment of Taylor and Wells pursuant to a settlement of his litigation against the applicant. As these parties form the present committee, he

has already had a significant say in the composition of the committee overseeing the sales process. He has failed to demonstrate circumstances entitling him to a personal representative on the committee. There is no reason to conclude that the independence of these two directors has been compromised since their appointment such that the shareholders generally require a representative on the committee to protect their interests. The fact that Dolgonos is a large, if not the largest, shareholder of the applicant does not give him any greater rights in respect of a proposed sale. Moreover, the Dolgonos respondents are also defendants in the action commenced by LOOK. As such, the same issue of a potential conflict of interest as was addressed in respect of the McGoey respondents arises in respect of the Dolgonos respondents.

[13] Third, the respondents challenge the intended engagement of the Monitor as the applicant's sales agent in lieu of the engagement of an investment dealer. There are two separate but related issues here – the identity of the applicant's sales agent and the manner of its remuneration.

[14] There is a reasonable basis for the appointment of the Monitor as the sales agent in the present circumstances. The evidence is that it is probable that the proposed transaction is too small to attract the interest of an investment banking firm unless a substantial success fee were paid. In these circumstances, the applicant considers it appropriate to engage the Monitor on a fee-for-service basis. The record states that the Monitor has experience in similar transactions and access to investment banking expertise from an affiliate. There is nothing in the record that contradicts this evidence. There is also nothing in principle that prevents a court-appointed monitor under the CCAA from also acting as a sales agent if there are good business reasons for doing so.

[15] With respect to remuneration, the applicant's decision to go with a fee-for-service arrangement is supportable in the present circumstances, given the magnitude of any success fee that would be required by an investment dealer. It is important to note that the applicant has the ability, and the responsibility, to control the extent of the Monitor's activities as sales agent, and its consequential fees, as the sales process unfolds. There is therefore a basis for ensuring that the sales agency fees stay within the parameters contemplated in the alternative scenarios of success or failure of the sales process. Further, the Monitor's fees remain subject to Court approval at a future date, at which time the creditors have the right to comment on the reasonableness of the services provided and the related fees.

[16] Accordingly, I conclude that the applicant's decision to engage the Monitor as its sales agent in respect of the proposed sales process is reasonable in the present circumstances.

[17] The applicant's proposed sales process, as described in the Monitor's Eleventh Report is therefore approved. For clarity, such approval does not, however, constitute the granting by the Court at this time of any approvals or exemption orders that may be required under corporate or securities legislation in respect of any proposed transaction that may result from such sales process.

[18] In addition, the stay of proceedings in the Initial Order of this Court dated July 5, 2011 is hereby extended to February 1, 2013 to permit completion of such sales process.

[19] If the parties are unable to agree on costs, they shall have thirty days from the date of this Endorsement to submit a costs outline and to make written submissions not exceeding five pages in length.

Wilton-Siegel J.

Date: November 9, 2012