SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

361 University Avenue
Toronto, ON M5G 1T3

Telephone: (416) 327-5284 Fax: (416) 327-5417

FAX COVER SHEET

Date: February 12, 2013

TO:	FAX NO.:
Melvyn L. Solomon, Raffaelo Sparano	416-947-0079
E. Patrick Shea, C. Cole	416-862-7661
Geoff R. Hall	416-868-0673
Joseph Groia, Gavin Smyth	416-203-9231
Peter Roy	416-362-6204
S. Michael Citak	416-366-4183
Simon Bieber and Julia Wilkes	416-351-9196
Aubrey Kauffman	416-364-7813
Brett D. Moldaver	416-860-6922
Matthew P. Gottlieb	416-598-3730

FROM: Michele Livingston, Secretary to The Honourable Mr. Justice H.J. Wilton-Siegel

TOTAL PAGES (INCLUDING COVER PAGE): 23

MESSAGE: Endorsement
Unique Broadband Systems Inc.

CITATION: Unique Broadband Systems (Re), 2013 ONSC 676
COURT FILE NO.: CV-11-9283-CL
DATE: 2013-02-12

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: *Melvyn L. Solomon, Geoff Hall* and *Raffaelo Sparano*, for the Applicant, Niketo Co. Ltd.

E. Patrick Shea and *Clifford Cole*, for the Debtor, Unique Broadband Systems, Inc.

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

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

Peter Roy, for DOL Technologies Inc. and Alex Dolgonos

S. Michael Citak, for Douglas Reeson

Simon Bieber and *Julia Wilkes*, for Henry Eaton and Robert Ulicki

Aubrey Kauffman, for Peter Minaki

Brett D. Moldaver, for Stellarbridge Management Inc.

HEARD: January 31 and February 1, 2013

ENDORSEMENT

[1] The applicant, Niketo Co. Ltd. (the "applicant" or "Niketo"), sought an order, among other things, authorizing Niketo, as a creditor of Unique Broadband Systems Inc. ("UBS"), to file with the Court a plan of arrangement or compromise with respect to UBS, approving the classification of the affected creditors under the proposed plan, and directing UBS and the Monitor to call, hold and conduct separate meetings of the classes of affected creditors to vote upon a resolution to approve the proposed plan. I previously advised the parties on February 4, 2013 that the application was denied and that written reasons would follow. These are the written reasons for the denial of the application.

Background

The Parties

[2] UBS is a public corporation incorporated in Ontario under the *Business Corporations Act*, R.S.O. 1990, c. B. 16 (the "OBCA"). The shares of UBS are listed on the TSX Venture Exchange (the "TSXV"). There are currently 102,747,854 UBS shares outstanding. UBS Wireless Services Inc. is a wholly-owned subsidiary of UBS.

[3] LOOK Communications Inc. ("Look") is a public corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[4] The principal asset of UBS consists of a share position in the capital of Look comprising 29,921,308 subordinate voting shares and a further 27,868,478 multiple voting shares (collectively, the "Look Shares"). The Look Shares represent approximately 39.2% of the equity and approximately 37.6% of the votes attached to all outstanding shares in the capital of Look. In addition, UBS has accumulated tax losses (the "Tax Losses"), the value of which depends upon the ability of UBS to acquire a new business having income that would be sheltered by the Tax Losses.

[5] Niketo is a corporation incorporated in Cyprus. It is a wholly-owned subsidiary of NWT Uranium Corporation ("NWT"), a mining exploration and development corporation whose shares are listed on the Frankfurt Exchange. The shares of NWT are also listed on the TSXV, but trading in the shares was halted on January 14, 2013 by order of the Investment Industry Regulatory Organization of Canada. The circumstances giving rise to this halt trade order are not on the record.

[6] Niketo owns 19,805,323 shares in the capital of UBS. It acquired such shares in two transactions on or about December 9, 2012 and January 7, 2013 from 2064818 Ontario Inc. ("206") and 6138241 Ontario Inc. ("613"), both of which are owned by Alex Dolgonos ("Dolgonos"), the former chief technology officer of UBS. These shares represent approximately 19% of the outstanding shares of UBS. Niketo has also taken an assignment of a claim in the amount of $6,149.48 asserted against UBS by the former solicitors for UBS. By doing so, Niketo satisfied the requirement of creditor status in respect of UBS.

[7] On January 9, 2013, NWT announced that Niketo would make a takeover bid for 49% of the outstanding shares in the capital of Look. Although no formal announcement has been made, Niketo advised the Court that the takeover bid will not proceed.

The Triggering Event – The Contested Election of UBS Directors in 2010

[8] At a special meeting of the shareholders of UBS held on July 5, 2010, a new board of directors, consisting of Grant McCutcheon ("McCutcheon"), Henry Eaton ("Eaton") and Robert Ulicki ("Ulicki"), was elected pursuant to section 122 of the OBCA to replace the former directors, consisting of Gerald McGoey ("McGoey"), Douglas Reeson ("Reeson") and Louis Mitrovich ("Mitrovich"). The election of these new directors had been the subject of a proxy contest between the existing management and the dissident shareholders who supported the election of the new directors.

[9] On July 6, 2010, UBS advised Look that it had the support of shareholders of Look possessing sufficient votes to effect a change of control of the board of directors of Look. UBS requested that the then-current board of Look resign and appoint a replacement slate of directors proposed by UBS, which included McCutcheon, Eaton, Ulicki, Laurence Silber ("Silber") and David Rattee ("Rattee"), without calling a special meeting of shareholders.

[10] On July 20, 2010, all five Look directors resigned and McCutcheon, Eaton and Ulicki were appointed directors of Look to replace them. On July 21, 2010, McCutcheon was also appointed the chief executive officer of Look, replacing McGoey who had previously served in that position pursuant to the provisions of a management services agreement between UBS and Look which has since expired. Silber and Rattee were subsequently elected directors of Look on July 27, 2010. Ulicki resigned from the board of directors of Look on October 29, 2010.

[11] McCutcheon, Eaton and Ulicki were re-elected as directors of UBS at the annual general meeting of UBS shareholders on February 25, 2011.

The Litigation Involving UBS and Look Commenced After the Contested Election of Directors

[12] UBS had previously retained Jolian Investments Inc. ("Jolian"), a corporation controlled by McGoey, pursuant to an agreement dated January 1, 2006 (the "Jolian Agreement") to obtain his services as chief executive officer of UBS. The Jolian Agreement was terminated by Jolian after the election of McCutcheon, Eaton and Ulicki as the directors of UBS, based both on the failure to elect McGoey to the UBS board and on "change of control" provisions in the Agreement. Jolian then commenced an action against UBS claiming amounts totalling approximately $8.6 million (the "Jolian Action"). The Jolian Action is being defended by UBS in the CCAA claims process described below, in which UBS also seeks a determination that the Jolian Agreement is void or unenforceable.

[13] UBS had also previously retained DOL Technologies Inc. ("DOL"), a private corporation owned by Dolgonos, pursuant to an agreement dated July 12, 2008 (the "DOL Technology Agreement") to obtain his services as the chief technology officer of UBS. The DOL Technology Agreement was also terminated by DOL after the election of McCutcheon, Eaton and Ulicki as the directors of UBS, based on "change of control" provisions in the Agreement. DOL then commenced an action against UBS claiming amounts totalling approximately $7.6 million (the "DOL Action"). In addition, on December 22, 2010, 206, in its capacity as a shareholder, commenced an oppression action against, among others, UBS, and each of McCutcheon, Eaton and Ulicki, in their capacities as directors of UBS (the "Oppression Claim"). The DOL action and the Oppression Claim were also defended by UBS in the CCAA claims process described below prior to the settlement referred to below.

[14] In the Jolian Action and the DOL Action, Jolian, McGoey, DOL and Dolgonos brought motions seeking confirmation of their right to an advancement of funds in respect of the legal costs of pursuing their respective claims and defending the UBS counterclaims against them. UBS resisted such relief and sought an order requiring the parties to return certain retainers previously advanced by UBS to counsel for such parties. By order dated April 11, 2011 (the "Marrocco Order"), Marrocco J. held that these parties were entitled to an advancement of funds

as more particularly specified therein. UBS appealed this order to the Court of Appeal but has since abandoned the appeal. It has not, however, advanced or paid any of the amounts mandated in the Marrocco Order.

[15] Lastly, on July 6, 2010, Look commenced an action against Dolgonos, DOL, McGoey and Jolian, among others, seeking damages based on allegations of breach of fiduciary duty and negligence (the "Look Action"). The Look Action relates to certain restructuring awards paid by Look in 2009, for which Look seeks recovery.

The CCAA Proceedings

[16] As a result principally of the Jolian Action and DOL Action, UBS concluded that its cash flow was insufficient to pay its debts as they fell due and, accordingly, that it was insolvent. Whether UBS was also insolvent on a balance sheet basis depended upon the outcome of the litigation described above, principally the Jolian Action and the DOL Action.

[17] UBS sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") pursuant to an initial order of the Court dated July 5, 2011 (the "Initial Order"). RSM Richter Inc. was initially appointed the monitor in the CCAA proceedings. Duff & Phelps Canada Restructuring Inc. was subsequently substituted for RSM Richter Inc. and has acted as the monitor (the "Monitor") since December 2011.

The Claims Process Order in the CCAA Proceedings

[18] Pursuant to an order dated August 4, 2011, the court approved a claims process for the determination of all claims against UBS. The claims process has been conducted by the Monitor. The following claims have been filed in this claims process.

[19] First, and most important, Jolian asserted a claim in the amount of $10,122,688, plus taxes, interest, professional fees and expenses, which is disputed by UBS (the "Jolian Claim"). This represents the claims in respect of the Jolian Action. The principal components of this claim are: (1) a deferred bonus in the amount of approximately $1.2 million previously awarded in 2009 by the board of directors of UBS but not paid; (2) an award of approximately $600,000 in respect of the former UBS share appreciation rights plan; and (3) damages for wrongful dismissal. A trial of the Jolian Claim is scheduled to commence on February 18, 2013.

[20] In addition, Jolian and McGoey have filed contingent claims pertaining to their respective rights of reimbursement and indemnification as addressed in the Marrocco Order. As a practical matter, it appears that these rights would be relevant only in respect of professional and administrative fees in respect of the Look Action against Jolian and McGoey, among others, described above, but any such claim, while not quantified to date or quantifiable in total, could be in a significant amount.

[21] Second, Reeson filed a claim in the amount of $585,000. This claim relates to an unpaid award in respect of the UBS share appreciation rights plan.

[22] Third, DOL filed a claim in the amount of $8,042,716 plus taxes, interest, professional fees and expenses. This represented the claims in respect of the DOL Action. In addition,

Dolgonos and 206 also filed contingent claims. The Dolgonos contingent claim pertained to his rights of reimbursement and indemnification as a former director and officer of UBS, which was the subject of the Marrocco Order. The 206 claim pertained to the Oppression Claim referred to above. DOL, Dolgonos, and 206 are herein collectively referred to as the "Dolgonos Parties".

[23] All of these aforementioned claims of DOL, Dolgonos and 206 (collectively, the "Dolgonos Claims") were initially disputed by UBS. However, by an agreement dated July 5, 2012 (the "Dolgonos Settlement Agreement"), the Dolgonos Claims were settled. Pursuant to the Dolgonos Settlement Agreement, UBS agreed to accept the Dolgonos Claims in the amount of $500,000. In addition, UBS agreed to reconstitute its board of directors by appointing Victor Wells ("Wells") and Kenneth Taylor ("Taylor") to replace McCutcheon and Eaton who agreed to resign. A further contractual obligation in the Dolgonos Settlement Agreement is described below

[24] The settlement of the Dolgonos Claims was approved by a consent order of Campbell J. dated July 6, 2012. Subsequently, the UBS board of directors was reconstituted in accordance with the terms of the Dolgonos Settlement Agreement.

[25] At the time, Dolgonos also owned approximately 19% of the outstanding shares in the capital of UBS through 206 and 613. Subsequently, as mentioned above, these shares were sold to Niketo

[26] Fourth, five other creditors filed unsecured claims totalling approximately $300,000. These claims include the claim of $6,149.48 that has been assigned to Niketo. With the exception of a post-filing claim in the amount of $92,149.48 of Peter Minaki, a former director of UBS, these claims are asserted by parties who are entirely at arm's length to UBS.

[27] Lastly, Eaton, McCutcheon and Ulicki have filed contingent claims representing potential indemnification claims by them against UBS in respect of any actions taken in their capacities as directors, and, in the case of McCutcheon as an officer of UBS. Niketo has advised that the Proposed Plan will be amended to provide that such rights of indemnification will continue after plan implementation. On this basis, the Proposed Plan (as defined below) does not give these parties a vote as Ordinary Creditors (as defined below).

The Sales Process

[28] By order dated November 12, 2012, the Court approved a process by which the Look Shares would be marketed for sale in a process to be conducted by the Monitor. A special committee was established by the board of directors of UBS, consisting of Taylor and Wells, to oversee the sales process.

[29] The sales process culminated in a transaction entered into by UBS for the sale of 12,430,000 multiple voting shares and 14,630,000 subordinate voting shares in the capital of Look for an aggregate purchase price of approximately $3.8 million (the "Proposed Sale Transaction"). UBS is awaiting the outcome of the present proceeding before scheduling a motion seeking judicial approval of the Proposed Sale Transaction.

[30] Niketo submitted an offer in the sales process to acquire all of the Look Shares. This offer was rejected by the special committee on the basis that it was not as favourable as other offers received in the sales process, including the offer that has been accepted by UBS.

The Current Financial Status of UBS

[31] As mentioned, the assets of UBS consist of the Look Shares and the Tax Losses. The purchase price of the Look Shares in the Proposed Sale Transaction has been set out above. The value of the Look Shares may also depend upon the outcome of the Look Action described above. There is no information on the record regarding the value of the Tax Losses.

[32] At the present time, the liabilities of UBS consist principally of the claims set out above that were filed in the claims process, including the Dolgonos Claims as settled pursuant to the Dolgonos Settlement Agreement. In addition to the foregoing claims, there are also certain post-filing claims of UBS, which include a claim of McCutcheon in the amount of $200,000, but which are not material.

[33] For present purposes, it is important to note that the amount of the Jolian Claim exceeds the estimated realizable value of the Look Shares and the Tax Losses, after payment of the remaining unsecured claims against UBS. Therefore, the value of the UBS shares depends inversely upon the value of the Jolian Claim as determined at trial or in any settlement between UBS and Jolian. I will address the significance of this relationship later.

The Proposed Plan

[34] The following is a summary of the principal features of the plan of compromise or arrangement proposed by Niketo (the "Proposed Plan").

[35] The Proposed Plan contemplates three classes of Affected Creditors: (1) Class 1, being McGoey and Jolian; (2) Class 2, being Reeson; and (3) Class 3, being the five other unsecured creditors referred to above having quantified unsecured claims approximating $300,000 and the settled claim of the Dolgonos Parties (collectively, the "Ordinary Creditors").

[36] Under the Proposed Plan, the Jolian Claim would be settled on the terms set out in an agreement dated January 21, 2013 between Jolian and Niketo (the "Jolian Settlement Agreement"). Jolian and McGoey support the Proposed Plan, so that approval of the Class 1 creditors is assured. UBS is not a party to the Jolian Settlement Agreement.

[37] The Jolian Settlement Agreement contemplates that the Jolian Claim would be settled by the payment of $2 million plus interest, taxes and all legal and accounting fees of Jolian in respect of its claims against UBS. Conceptually, this settlement is comprised of the following components: (1) the deferred bonus of approximately $1.2 million plus interest since July, 2009; (2) $600,000 in respect of the former UBS share appreciation rights plan plus interest since July, 2009; and (3) damages of $200,000 for wrongful dismissal.

[38] It is agreed that the amount of $1,325,000 is payable for legal and accounting fees for the period to December 1, 2012. There is no estimate of the fees from such date to the plan implementation date. More significantly, the Jolian Settlement Agreement also provides that the

indemnification and reimbursement rights of Jolian and McGoey provided for in the Marrocco Order shall continue after the plan implementation date.

[39] The Proposed Plan contemplates that the Reeson claims would be settled on the terms of an agreement also dated January 21, 2013 between Reeson and Niketo (the "Reeson Settlement Agreement"). This agreement contemplates that the Reeson claim against UBS would be settled by the payment of $75,000. Reeson supports the Proposed Plan so that approval of the Class 2 creditor is assured. UBS is also not a party to the Reeson Settlement Agreement.

[40] Under the Proposed Plan, each Ordinary Creditor would receive a cash distribution in the amount of the creditor's proven claim in the sales process. The claims of the Dolgonos Parties are included in Class 3 under the Proposed Plan, bringing the total cash distribution contemplated in respect of the creditors whose claims have been quantified by UBS to approximately $800,000.

[41] In order to fund the payment of the claims of the Affected Creditors, the Proposed Plan contemplates that the plan sanction order of the court shall, among other things, authorize and direct UBS to enter into a loan agreement with Niketo in a form scheduled to the Proposed Plan (the "Niketo Loan Agreement"). Under the Niketo Loan Agreement, Niketo would advance the principal amount of $4,514,401.55 to UBS on the plan implementation date in order to fund the distributions to be made to the Affected Creditors in respect of their claims. It is understood that Niketo has agreed to increase this amount to $5.8 million. The Niketo loan in such increased amount is referred to herein as the "Niketo Loan".

[42] The Niketo Loan would have a two year term commencing on the plan implementation date and would bear interest at prime plus 2%. Interest would accrue until the maturity date of the loan, at which time the principal and all accrued interest would be payable. The Niketo Loan would be secured by a general security agreement covering all the personal property of UBS and a pledge of the Look Shares owned by UBS. Upon the Niketo Loan becoming due and payable on maturity or by virtue of an event of default, Niketo agrees not to exercise a right of foreclosure in respect of the Look Shares and to restrict any realization proceedings to power of sale proceedings.

[43] The Proposed Plan further contemplates that, upon the Proposed Plan becoming effective, the terms of office of the current directors of UBS will terminate and a new board of directors will be appointed consisting of John Zorbas ("Zorbas"), David Subotic ("Subotic") and David Tsubouchi ("Tsubouchi"), together with Wells and Taylor to the extent that either or both consents to remaining a director. Zorbas and Subotic are officers and directors of NWT. Tsubouchi is a member of the NWT advisory board and a partner of the law firm that acts as Niketo's corporate counsel.

[44] The Proposed Plan requires the sanction of this court pursuant to section 6(1)(a) of the CCAA after approval by each of the classes of Affected Creditors. The Proposed Plan does not, however, contemplate approval by the common shareholders of UBS.

The Dolgonos Voting Covenant

[45] Pursuant to section 7 of the Dolgonos Settlement Agreement, DOL, 206 and 613 agreed to support UBS in matters pertaining to these CCAA proceedings:

> The Dolgonos Parties will, until the termination of the CCAA proceedings by way of a plan of compromise or arrangement by UBS or otherwise:
>
> (a) fully support decisions made by the reconstituted UBS board consisting of Mr. Ulicki, Mr. Wells and Mr. Taylor, including, inter alia, any decision made by the reconstituted UBS board with respect to the CCAA proceedings and how UBS will resolve or determine claims made against UBS by, inter alia, Jolian Investments Limited ("Jolian") and Mr. Gerald McGoey, in accordance with the CCAA Claims Procedure;
>
> ...
>
> (c) not seek any Order terminating the CCAA proceedings, or support or assist any other person seeking such an Order; ...

[46] Section 9 of the Dolgonos Settlement Agreement also contained an express reference to the understanding of the parties regarding the determination of the Jolian Action:

> Subject to the discretion of the UBS board, UBS will continue defending the disputed claims made against UBS by, inter alia, Jolian and Mr. McGoey, and reorganizing itself under the supervision of the Court.

[47] UBS is of the view that, pursuant to the foregoing provisions, the Dolgonos Parties are contractually obligated to support the position of UBS in respect of the Proposed Plan. UBS argues that this requires the Dolgonos Parties to oppose the Proposed Plan, not just at this hearing and any plan sanction hearing, but also by voting against the Proposed Plan in their capacities as an Ordinary Creditor. On this basis, the Proposed Plan would not receive the requisite majority approval under section 6 of the CCAA. Given the conclusion reached below, it is unnecessary to address this issue and, accordingly, I decline to do so. However, I am of the view that the Court can take this commitment into consideration in making its determination as to whether the Proposed Plan requires shareholder approval. This is addressed below.

Applicable Law

[48] The following three provisions of the CCAA are relevant background to the issues on this application.

[49] First, the authority of the Court to order a meeting of the creditors and, if it so determines, of the shareholders, is set out in section 4 of the CCAA:

> Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in

> bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[50] Even if approved by the requisite majority of each class of creditors, a proposed plan of compromise or arrangement must also be sanctioned by the court under section 6 of the CCAA:

> If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be - other than, unless the court orders otherwise, a class of creditors having equity claims - present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; ...

[51] Lastly, the Court retains inherent jurisdiction in respect of a proposed plan of compromise or arrangement in the manner and to the extent provided for in section 11 of the CCAA:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[52] The test regarding whether the Court should allow a plan of compromise or arrangement proposed by a creditor to be put to the stakeholders of a debtor subject to CCAA proceedings is whether it is in the best interests of the debtor and its stakeholders to do so: *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Ont. C. J. (Gen. Div.)) per Blair. J. (as he then was) at para. 37.

[53] In this case, I conclude that UBS has no independent interest as it is merely a holding corporation with no employees and no business activities. At an earlier hearing in this proceeding, it was even suggested that the only business of UBS was litigation. Accordingly, I have proceeded on the basis that the stakeholders of UBS whose interests must be considered on this application are the three classes of creditors and the shareholders.

[54] Shareholders do not have a right to vote on a plan of compromise or arrangement under the CCAA unless the plan so provides or the court so orders. I agree with the applicant that shareholders who have no economic interest in a debtor should not be able to play with the creditors' money. Accordingly, as Farley J. noted in *Re Stelco Inc.*, [2006] 14 B.L.R. (4th) 260 (Ont. S.C.J.) at para. 16, the Court must address whether the equity presently existing in UBS has

true value at the present time independent of the Proposed Plan and of what the Proposed Plan brings to the table. If the equity has value independent of the Proposed Plan, then the interests of the shareholders must be "considered appropriately in the Plan". The determination of whether shareholders have an economic value in a debtor is an analysis that should be conducted on a reasonable and probable basis: see *Re Stelco Inc.*, [2006] 14 B.L.R. (4th) 260 (Ont. S.C.J.) at para. 19. While a shareholder vote is not necessarily a requirement even in circumstances in which the equity in a debtor has true value, it is one manner of assessing whether the shareholders have been considered appropriately in a proposed plan of compromise or arrangement.

[55] The issue of a shareholder vote requirement must also be considered against the backdrop of the test to be applied at the plan sanction hearing if a proposed plan of compromise and arrangement is approved by the requisite majorities of the stakeholders. As the applicant argues in this proceeding, the fairness, reasonableness and equitable aspects of a plan must be assessed in the context of the hierarchy of interests recognized by insolvency legislation and jurisprudence: *Re Stelco Inc.*, [2006] 14 B.L.R. (4th) 260 (Ont. S.C.J.) at para. 15 wherein Farley J. goes on to cite with approval the following passage of Paperny J. in *Re Canadian Airlines Corp.*, 2000 ABQB 442 at paras. 143-145:

> Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: Royal Oak Mines Ltd., supra, para. 4., Re Cadillac Fairview Inc., [1995] O.J. No. 707, (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and T. Eaton Company, supra. To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens" to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.
>
> It is through the lens of insolvency legislation that the rights and interests of both shareholders and creditors must be considered. The reduction or elimination of rights of both groups is a function of the insolvency and not of oppressive conduct

> in the operation of the CCAA. The antithesis of oppression is fairness, the guiding test for judicial sanction. If a plan unfairly disregards or is unfairly prejudicial it will not be approved. However, the court retains the power to compromise or prejudice rights to effect a broader purpose, the restructuring of an insolvent company, provided that the plan does so in a fair manner.

The Position of UBS Regarding the Proposed Plan

[56] The Proposed Plan was delivered to UBS on January 23, 2013. The board of directors of UBS met on January 25, 2013 to consider that Proposed Plan. The board has determined that the Proposed Plan is not in the best interests of the UBS stakeholders and does not support the Proposed Plan. The board is of the view that the Jolian Claim should be determined at the trial scheduled to commence on February 18, 2013.

[57] The board of directors says its decision was based on the following nine conclusions regarding the Proposed Plan.

[58] First, the Proposed Plan does not provide for shareholder approval, although it considers that there is considerable value in the UBS equity based on the value of the Look Shares.

[59] Second, there is a risk that the UBS board of directors will not be constituted in a manner that will protect shareholder interests, given the terms of the Niketo Loan and the relationship of Zorbas, Subotic, and Tsubouchi to NWT, as described above.

[60] Third, the proposed settlement of the Jolian Claim contemplated by the Jolian Settlement Agreement is inappropriate. The board says that the settlement cannot be characterized as reasonable when it was entered into by Niketo without any assessment of the merits of the Jolian Claim.

[61] Fourth, the terms of the Niketo Loan to UBS will give Niketo *de facto* control over UBS and the Look Shares.

[62] Fifth, there is no business plan proposed by Niketo that would create value for the shareholders or generate cash flow to repay the Niketo Loan.

[63] Sixth, the Niketo Loan transaction documentation contains inaccurate representations of UBS, and certain covenants with which UBS may be unable to comply, as a result of Niketo's failure to include UBS in the negotiation of such documentation.

[64] Seventh, the proposed loan was insufficient at $4.5 million to fund the Proposed Plan, the post-filing creditors not covered by the Plan and UBS' on-going business going forward. As noted, Niketo has since agreed to increase the principal amount of the Niketo Loan to $5.8 million.

[65] Eighth, the Niketo Loan requires the consent of Niketo to any cash distribution to UBS shareholders.

[66] Ninth, in the opinion of the board of directors, the Proposed Plan provides Jolian/McGoey and Reeson with more favourable terms than the remaining creditors of UBS, who are Ordinary Creditors under the Proposed Plan.

[67] UBS also says that the Proposed Plan is doomed to fail for two reasons. First, as mentioned above, UBS says that the Dolgonos Settlement obligates the Dolgonos Parties to vote against the Proposed Plan in their capacities as, collectively, an Ordinary Creditor. Second, it argues that, as contingent creditors, McCutcheon, Eaton and Ulicki should have the right to vote as Ordinary Creditors. On either basis, the Proposed Plan would not receive the requisite majority of approval of the Ordinary Creditors under section 6 of the CCAA. Given the conclusion reached below, it is unnecessary to address these issues and, accordingly, I decline to do so.

[68] At the hearing of this application, UBS also argued that the Proposed Plan fails to include certain mandatory provisions under the CCAA. In addition, as mentioned, it argues that the proposed loan documentation does not reflect the increase in the Niketo Loan to $5.8 million or an important principle which Niketo says it is prepared to accept, namely, that any realization proceeding must occur in the form of a power of sale proceeding. These are more technical issues that would need to be addressed before the Court could approve submission of the Proposed Plan to the creditors. However, in view of the conclusion reached below, it is not necessary to provide for a process to make the necessary revisions to the Proposed Plan.

Analysis and Conclusions

[69] Although UBS has raised a litany of issues in opposition to the application, I propose to concentrate on the issue of whether the Court should accept the Proposed Plan and order a meeting of the creditors to consider approval of the Proposed Plan in the absence of a shareholder vote on the Proposed Plan. Determination of this issue requires consideration of all of the significant issues raised by UBS.

Positions of the Parties

Position of UBS and the Monitor

[70] In its factum, UBS argues that there should be no meeting of creditors called to consider the Niketo Plan for the following reasons:

1. the Niketo Plan is being put forward for an improper purpose, being to provide Niketo with control of the Look Shares;

2. the Niketo Plan is doomed to failure because the Niketo Plan will not be approved by the Applicants' creditors as required by the CCAA and the Niketo Plan;

3. the Niketo Plan, even if it were to be approved by the Applicants' creditors, could not be sanctioned by the Court because it:

   (a) is not in compliance with the CCAA;

(b) purports to determine the Jolian Claim and the Reeson Claim in a manner that is not authorized by the CCAA; and

(c) is not fair and reasonable to all of the UBS stakeholders.

[71] The Monitor supports the position of UBS in its Twelfth Report. However, I note that the Monitor has not reached an independent conclusion regarding the merits of the Jolian Claim in formulating its recommendation to the Court.

Position of the Applicant

[72] Niketo makes the following four principal arguments to dispense with shareholder approval for the Proposed Plan.

[73] First, it says that the shareholders should not be entitled to gamble with the creditors' money by requiring UBS to proceed to trial on the Jolian Claim. This argument assumes that there is currently no equity in the UBS shares, so that any success of UBS at trial will be for the account of the shareholders but any failure will be for the account of the creditors. I note that, in making this argument, the applicant concedes that it believes that the UBS shareholders would vote against the Proposed Plan.

[74] Second, it says that the payment of approximately $3.5 million to Jolian/McGoey contemplated by the Jolian Settlement Agreement is a small price to pay to settle a claim of $10 million. It argues that a settlement in this amount is commercially reasonable as it avoids a further expense of $1.3 million through the end of May 2013 and the uncertainty of outcome of the Jolian Claim.

[75] Third, the applicant says that any shareholder who opposes the Proposed Plan has the option to either sell his shares into the market or attend and speak at the court sanction hearing required under section 6 of the CCAA. As a related matter, the applicant argues that, based on the complexity of the Jolian Claim, it is unlikely that shareholders will be able to determine whether or not the proposed settlement with Jolian/McGoey and Reeson is fair and reasonable. Instead, it says the Court is in the best position to determine the merits of the Proposed Plan to all stakeholders.

[76] Fourth, the applicant raises a number of more practical issues regarding the convening of a shareholder meeting. It says a requirement for a shareholder meeting will delay implementation of the Proposed Plan by approximately 60 days, which it characterizes as a significant delay. It also says that conducting a shareholders meeting will entail an unreasonable expense, ranging from $250,000 to $500,000. Niketo says that it is not prepared to spend this amount of money and, more generally, argues that the creditors should not be required to bear this expense. This argument is predicated on the assumption that there is no equity in the UBS shares.

[77] In addition, the applicant denies the UBS arguments that the Proposed Plan is being proposed for an improper purpose or that the Proposed Plan is doomed to fail.

Preliminary Observations

[78] The following observations inform the conclusions reached below.

[79] First, the circumstances of this CCAA proceeding are unique. It has resulted from a proxy fight in which the dissident shareholders were successful in ousting the previous board of directors. As a result, McGoey and Dolgonos, together with their personal corporations, Jolian and DOL, asserted claims for monies accrued but not paid by UBS prior to their departure from the company, as well as damages for wrongful termination. The principal purpose of the CCAA proceedings has been to resolve these claims as expeditiously as possible. A settlement has been reached with the Dolgonos Parties. The trial of the Jolian Claim is scheduled to commence shortly. At the present time, the Jolian Claim, together with the Jolian and McGoey reimbursement and indemnification claims in respect of both the Jolian Claim and the Look Action, represent the overwhelming majority of the unsecured claims against UBS, being approximately 90% of the claims if the Dolgonos Parties are included and even higher if they are not.

[80] Second, as a result, the unsecured creditors, excluding the Dolgonos Parties, are unwillingly caught in the middle of a fight in which they have no interest but which has prevented payment of their claims.

[81] Third, Niketo's submission that the Court must respect the hierarchy of claims in the insolvency in considering the appropriateness of the treatment of the shareholders under the Proposed Plan assumes that all three classes of unsecured creditors should be considered in the same manner. In this case, however, there is a significant difference between the claims of the Ordinary Creditors and the claims of Jolian/McGoey and Reeson.

[82] The Ordinary Creditors have Claims that have been quantified and accepted by UBS. The Jolian/McGoey and Reeson claims have not yet been determined in the claims process and have not otherwise been accepted by UBS. Indeed, if UBS is successful at the trial of the Jolian Action, there would be no Class (1) unsecured claim of Jolian/McGoey to be dealt with in any plan of compromise or arrangement. In this sense, there is an element of contingency about these claims that distinguishes them from the claims of the Ordinary Creditors. Just as the Court must assess whether the UBS shares have true value at the present time independent of the Proposed Plan and what the Proposed Plan brings to the table, it must assess the Jolian/McGoey and Reeson claims independent of their treatment under the Proposed Plan. The fact that the applicant has reached an agreement with these creditors regarding their treatment in the Proposed Plan cannot have the effect of quantifying them for purposes of their current treatment under insolvency legislation.

[83] Fourth, it is of fundamental importance to the issues in this application that there is a direct inverse relationship between the value of the Jolian/McGoey and Reeson claims, on the one hand, and the UBS shares, on the other hand – the larger the amount of the value of the Jolian/McGoey and Reeson claims as determined at trial or accepted by UBS, the lower the value of the UBS shares and vice versa. For this reason, the Jolian/McGoey and Reeson claims are no more or less uncertain or contingent than the UBS shares.

[84] Given this relationship and the absence of a determination of the Jolian/McGoey and Reeson claims, the applicant cannot establish that the UBS shares have no value. In the absence of any evidence regarding the merits of the Jolian Claim, I consider that I must attach equal certainty or uncertainty to the unsecured claim of Jolian/McGoey as I do to the existence of value in the UBS shares. In order to find that the UBS shares have no value, the Court would have to conclude that the Jolian Claim will be substantially successful. This has not been established, and cannot be established, on the record before the Court.

[85] Fifth, in the present circumstances, I think there is a reasonable argument that the UBS shares have some value, even if quantification of such value is uncertain and contingent upon the determination of the value of the Jolian/McGoey and Reeson claims. This conclusion is based on the following reasoning.

[86] The UBS shares currently trade in the market at approximately $0.03 per share. This was also the price at which Niketo purchased its share position from 206 and 613. I think it is reasonable to consider that this price reflects the expectation of a cash distribution in the future after determination of the Jolian Claim. The UBS share price is also consistent with the financial statements of UBS, which exhibit an excess of assets over liabilities. In this regard, it is important to note that the UBS financial statements include an accrual of the Jolian/McGoey claims in respect of the deferred bonus and the award relating to the share appreciation rights plan, plus accrued interest, but not the claim of approximately $8 million for wrongful dismissal. On this basis, there is book value attributable to the UBS shares that represent assets that could be distributed to the shareholders after payment of the claims of the creditors shown on the books of UBS, including the claims of Jolian/McGoey and Reeson that have been accrued, unless the wrongful dismissal component of the Jolian Claim is successful.

[87] Sixth, under the Proposed Plan, although the shareholders would continue to own their UBS shares, the economic prospects for UBS, and therefore for the value of these shares, will be dramatically different.

[88] At the present time, the shareholders have an expectation of a cash distribution in some amount under a plan of arrangement or compromise after determination of the Jolian Action, notwithstanding the legal expenses to be incurred by UBS in the forthcoming trial and any subsequent appeal. This assumes, of course, that UBS will be successful at the trial of the Jolian Claim, at least in respect of the wrongful dismissal component of the Jolian/McGoey claims and the Jolian/McGoey claims for reimbursement or indemnification regarding the Look Litigation, and that any fees and expenses awarded do not eliminate any excess assets.

[89] On the other hand, Niketo is interested in UBS as a vehicle for future business activities. Under the Proposed Plan, the Look Shares will be preserved as an asset of UBS, but will be pledged to secure the Niketo Loan. Under the loan covenants, particularly the negative covenants, Niketo will have *de facto* control over the activities of UBS even before consideration of the relationship between the Niketo appointees to the UBS board of directors contemplated by the Proposed Plan.

[90] It is Niketo's intention to find a business to roll into UBS in order to utilize the Tax Losses. In all probability, such a transaction will involve the issue of a considerable number of

additional shares in the capital of UBS, thereby diluting the value of the shares held by existing shareholders. It is also clear that Niketo does not intend that UBS would distribute any excess value of the Look Shares following repayment of the Niketo Loan. The covenants prevent such a distribution prior to repayment of the Niketo Loan. Any excess will, in all probability, be required for working capital for the new business.

[91] In short, under the Proposed Plan, the UBS shareholders will lose the possibility of a cash distribution that could be made if UBS is successful in the trial of the Jolian Claim. In its place, they will retain an interest in a company effectively controlled by Niketo, the value of which will depend entirely upon Niketo's decisions regarding the future business and financing of UBS. In addition, based on the evidence before the Court, I consider that there is no realistic possibility that UBS could continue to exist with any assets beyond the two-year window available to Niketo to find a suitable business for UBS based solely on the funding in the Proposed Plan.

[92] Seventh, on the other hand, I do not accept the argument of UBS and the Monitor that the Proposed Plan should not be put to the creditors because it is not accompanied by a viable post-implementation business plan. There are two elements to this conclusion.

[93] First, I consider that the foregoing description of Niketo's intentions for UBS is sufficiently clear to constitute a business plan to which the Court should have regard in assessing the impact of the Proposed Plan upon the UBS shareholders. It involves the transformation of UBS into what is sometimes referred to as a "blind pool". The fact that Niketo has not yet identified a business that it intends to roll into UBS, or the terms upon which it intends to effect such a transaction, does not prevent the Court from assessing the impact of such a transformation on the UBS shares.

[94] Second, on the basis of the evidence before the Court, there is a reasonable possibility that UBS would be able to fund its ongoing expenses for up to two years, given the increase in the proposed Niketo Loan to approximately $5.8 million and the possibility of controlling and reducing its current expenses. This conclusion is, however, subject to UBS and Jolian/McGoey reaching an agreement or understanding regarding any claim that Jolian/McGoey might make for reimbursement or indemnification of their expenses in the Look Action, or a determination that no such rights exist. Given that the only assets of UBS, being the Look Shares, would be secured in favour of Niketo, I do not regard this as an unreasonable assumption. Accordingly, I do not consider it probable that UBS would default under the Niketo Loan, or would otherwise be rendered insolvent, shortly after implementation of the Proposed Plan as UBS and the Monitor suggest.

Conclusions

[95] As set out above, the test regarding whether the Court should allow a plan of compromise or arrangement proposed by a creditor to be put to the stakeholders of a debtor subject to CCAA proceedings is whether it is in the best interests of the debtor and its stakeholders to do so.

[96] In this case, UBS has no independent interest as it is merely a holding corporation with no employees and no business activities. For the reasons set out above, I have rejected the applicant's submission that there is no equity in the UBS shares. Accordingly, I have proceeded

on the basis that the stakeholders of UBS whose interests must be considered on this application are the three classes of creditors in the Proposed Plan and the UBS shareholders.

[97] In addition, for the reasons set out above, I also consider that it is necessary to distinguish the interests of the creditors in Classes (1) and (2) of the Proposed Plan from the interests of the Ordinary Creditors in Class (3). The latter have had no involvement in the events giving rise to the insolvency of UBS, apart from the Dolgonos Parties. In addition, and more importantly, they have quantified claims that have been accepted by UBS. The creditors in Classes (1) and (2) of the Proposed Plan have asserted claims that have been disputed by UBS and are not yet established for the purposes of the CCAA. An agreement between these creditors and the applicant to treat their claims as quantified for purposes of the Proposed Plan does not make them unsecured creditors with established claims. Moreover, to the extent that they are unsuccessful in establishing their claims, the value of the UBS shares, and the likelihood of a cash distribution being made in respect of these shares, will be correspondingly increased.

[98] Accordingly, I propose to address the issue of a possible requirement of a shareholder vote in two stages. I will first consider the appropriateness of a shareholder vote requirement in the limited context of the respective interests of the creditors in Classes (1) and (2) of the Proposed Plan and the UBS shareholders. I will then consider whether the presence of the Ordinary Creditors in Class (3) should affect the conclusion.

Considerations as between the Creditors in Classes (1) and (2) of the Proposed Plan and the UBS Shareholders

[99] In this section, I propose to consider the hypothetical situation in which there are no Ordinary Creditors, apart from the applicant holding an unsecured claim of $6,149.48, which it has acquired for the purpose of putting forward a plan of compromise or arrangement.

[100] I conclude that, in such circumstances, a court would have no hesitation in concluding that a shareholder vote is required in respect of the Proposed Plan. There are two principal reasons for this conclusion. I will describe these two reasons and then consider whether any of the arguments raised by the applicant either address or offset these concerns.

[101] First, as mentioned, it cannot be said that the creditors in Classes (1) and (2) of the Proposed Plan are unsecured creditors for the purposes of the CCAA whose claims must be presumed to be prior to those of the UBS shareholders. That remains to be established at trial. Until such time as these claims are determined, or accepted by UBS, both classes of stakeholders must have a right to vote because of the direct inverse relationship of value between these interests described above. It is only in this way that any acceptance or compromise of the claims of the creditors in Classes (1) and (2) of the Proposed Plan that gives value to such claims can be established for purposes of the CCAA. Any approval of this nature would, in effect, substitute for an agreement between UBS and the creditors in Classes (1) and (2) of the Proposed Plan as an alternative to a determination of the Jolian/McGoey and Reeson claims at a trial.

[102] Conversely, as discussed above, the applicant cannot establish that the UBS shares do not have any equity value due to this direct inverse relationship of value. This would require, in particular, a determination, or acceptance, of the Jolian Claim in favour of Jolian/McGoey.

[103] In addition, because the Court has found that there is a reasonable argument that there is equity in the UBS Shares, the effect of the Proposed Plan is, at least potentially, to transfer some of that value from the UBS shareholders to the creditors in Classes (1) and (2) of the Proposed Plan. This is, however, a supplementary argument that reinforces the conclusion in this section. In the present context, it is not so much the finding that the UBS shares have value as the fact of the direct inverse relationship of value and the absence of any determination of the claims of the creditors in Classes (1) and (2) of the Proposed Plan that calls for a shareholder vote. A finding of actual value today, and the potential for a transfer of some of that value to the creditors in Classes (1) and (2) under the Proposed Plan, only makes the conclusion that much stronger.

[104] Second, the Proposed Plan not only proposes to establish and pay out the claims of the creditors in Classes (1) and (2) of the Proposed Plan, but it also proposes to radically change the expectation of the benefits associated with ownership of the UBS shares. This raises a separate question regarding the appropriateness of the treatment of the UBS shareholders in the Proposed Plan.

[105] As set out above, the UBS shareholders have an expectation of a cash distribution depending upon the outcome of the Jolian Claim. The Proposed Plan, if implemented, will transform UBS into a company that is effectively controlled by Niketo, the value of which will depend entirely upon Niketo's decisions regarding the future business and financing of UBS. Under this scenario, there would be no expectation of a cash distribution to UBS shareholders, notwithstanding settlement of the Jolian Claim in an amount that would otherwise permit such a distribution. Moreover, there is no evidence of any track record of Niketo or NWT in respect of similar activities which provides comfort to the UBS shareholders that Niketo's business plan for UBS is achievable and will generate value for them. I consider that the radical change in economic benefits associated with the UBS shares, if not an actual reduction in the anticipated value of such benefits, requires a shareholder vote.

[106] The point may be illustrated by hypothesizing another possible plan in which the claims of the creditors in Classes (1) and (2) of the Proposed Plan would be determined at a trial but would, in any event, be limited to a maximum amount equal to the amount to be paid under the Proposed Plan. This hypothetical is intended to isolate the impact of the Proposed Plan on the economic benefits associated with the UBS shares. A plan of this nature might be considered to address, at least partly, the first reason for a shareholder vote discussed above. However, the transformation of the prospects for value from the UBS shares remains a consideration that the Court would have to address. While I am not satisfied that the proposed business plan for UBS can be characterized as being directed toward an improper purpose as UBS argues, I am of the view that the impact of the Proposed Plan on the prospects for the UBS shares is sufficiently material on its own to constitute an independent reason for requiring a shareholder vote.

[107] Turning to the arguments of the applicant against the requirement of a shareholder vote, I have the following comments.

[108] First, the argument that a shareholder vote would allow the shareholders to roll the dice using the creditors' money, as the applicant puts it, does not apply to the creditors in Classes (1) and (2) of the Proposed Plan. They have not yet been established to be creditors entitled to insist upon compliance with the hierarchy of claims under insolvency legislation. If there is equity, or a

reasonable prospect of equity depending upon the determination of the Jolian Claim, the UBS shareholders are rolling the dice with their own money. This is an argument that can only be made, if at all, by the Ordinary Creditors.

[109] Second, as a related matter, I do not accept that a shareholder vote requirement gives the shareholders a veto in circumstances in which they should not have one. Any vote is potentially a veto. To avoid a veto, it is necessary to treat the shareholders appropriately under a proposed plan of compromise or arrangement. I leave open the issue of whether a court could grant a sanction order notwithstanding a negative vote in circumstances in which it considered that the shareholders were being treated appropriately. In the present circumstances, the absence of any benefit to the shareholders, and arguably some reduction in the value of the expected benefits to be derived from the UBS shares, constitutes a reason for requiring a shareholder vote.

[110] Third, I do not consider that, in the present circumstances, it is an answer that the shareholders can oppose the Proposed Plan at the plan sanction hearing if they choose. The applicant candidly concedes that it would expect the shareholders to oppose the Proposed Plan. This begs the question of how a court could conclude that the Proposed Plan was fair and reasonable at a sanction hearing.

[111] There is no evidence before the Court from either party regarding the merits of the Jolian Claim. In particular, there is no evidence as to how Niketo arrived at its settlement with Jolian. In the absence of such evidence, I think it is reasonable to draw the inference that it was established with regard to the financial viability of the Proposed Plan, rather than an assessment of the merits of the Jolian Claim. Given the lack of evidence regarding the Jolian Claim, how could the Court conclude that the Jolian Settlement Agreement, which is at the heart of the Proposed Plan, is fair and reasonable?

[112] If the applicant wishes to make this argument, I think it has the onus to demonstrate that the proposed settlement with Jolian is at least commercially reasonable. In this regard, the applicant's only submission is that it must be commercially reasonable to compromise a claim of $10 million for a payment of $3.5 million that could only be pursued at an additional cost, which it says is $1.3 million. Setting aside the dispute as to whether the additional cost would be $1.3 million or a much lower number as UBS argues, I do not see how it necessarily follows that the proposed settlement is commercially reasonable. To reach that conclusion, it is necessary to know the risk of failure if the additional expenditures are incurred. If the likelihood of success is high, it might be commercially unreasonable to forego the additional expenditures to retain $3.5 million.

[113] Moreover, in the absence of any evidence, I think that the Court must assume that the current directors of UBS, two of whom the applicant has invited to stay on the board, are fulfilling their responsibilities in deciding that the Jolian Claim should proceed to trial despite the somewhat unsatisfactory evidence of Mr. Wells as to the nature of the deliberations of the UBS board in reaching its determination to oppose the Proposed Plan at its meeting on January 25, 2013.

[114] Fourth, I do not consider that inconvenience in the form of the cost of convening a shareholders meeting or the delay involved in plan implementation are sufficient considerations

to exclude a shareholders meeting. UBS is a public corporation; Niketo would not be proposing its plan if it were not. This is a case where it must deal with the inconvenience associated with a public corporation if it wishes to take the benefits after plan implementation. In addition, with respect to the cost, I am not persuaded that voluminous documentation is required to provide shareholders with proper disclosure. Further, delay is principally a consideration given the scheduled hearing date for the trial of the Jolian Claim. However, if the Court were to order that the Proposed Plan be submitted to the shareholders, there would be a reasonably compelling argument for staying the trial in the Jolian Claim pending voting on the Proposed Plan, although such relief has not been requested to date by the applicant. Lastly, the issues of who would prepare the disclosure materials, the nature of any dissident materials, the responsibility for attendant costs and any issues of voting are practical issues that are not unusual for public companies and are not insoluble. They are not a reason on their own for denying a shareholder vote. In any event, as the applicant says it will not proceed if a shareholder vote is required, I am not sure that these are meaningful concerns on this application.

[115] Lastly, in this case, I do not consider that it is a sufficient answer to say that opposing shareholders can sell their shares into the market. Niketo is not offering to purchase UBS shares at the current market price. There is good reason to be concerned that announcement of the Proposed Plan would result in a significant decline in the value of the UBS shares, as the expectation of a cash distribution would immediately cease given that approval of the Proposed Plan would be assumed in the absence of a requirement of a shareholder vote.

Consideration of the Interests of All of the Stakeholders Including the Ordinary Creditors

[116] I turn then to the question of whether the inclusion of the Ordinary Creditors in the Proposed Plan affects the conclusion reached above. That is, is it in the best interests of all of the stakeholders of UBS, taking into consideration the Ordinary Creditors as well as the creditors in Classes (1) and (2) of the Proposed Plan and the UBS shareholders, that the Court order a meeting of the creditors of UBS on the Proposed Plan without also requiring a shareholder vote?

[117] Before addressing this question, I would note an important distinction between the Dolgonos Parties and the other five unsecured creditors.

[118] I have considerable sympathy for the five Ordinary Creditors who argue that the Court should allow the Proposed Plan to go forward to allow them to be paid their claims under a plan of compromise or arrangement that will make them whole. As mentioned, they have had no involvement in the events that have resulted in the CCAA proceedings.

[119] However, I think the Dolgonos Parties, while Ordinary Creditors, stand in a different relationship to the situation for purposes of assessing the interests of the stakeholders. Although it is not necessary to address the issue of the ability of the Dolgonos Parties to vote on the Proposed Plan as an Ordinary Creditor, I consider the provisions of the Dolgonos Settlement Agreement set out above to be relevant to the issue in this section.

[120] The principle behind these provisions is a commitment of the Dolgonos Parties to a determination of the Jolian Claim within the CCAA proceedings. As such, it is acknowledged

that the Dolgonos Parties cannot support the applicant or the Proposed Plan on this application. For the same reason, I do not think that the Dolgonos Parties can take the position of the remaining Ordinary Creditors that the Proposed Plan should be permitted to proceed in order to pay them out given that the remaining purpose of the CCAA proceeding which they committed to support – the determination of the Jolian Claim – has not yet been completed.

[121] Accordingly, in the assessment below, I have distinguished the interests of the Dolgonos Parties from those of the other Ordinary Creditors. In short, only these Ordinary Creditors, whose claims total approximately $300,000, can legitimately insist that the Court have regard to the traditional hierarchy of priorities in assessing whether to allow the Proposed Plan to be put to the creditors.

[122] Is it in the best interests of all the stakeholders to allow the Proposed Plan to be put to the creditors without a shareholder vote? This requires a balancing of the interests of each of the creditors, as described in these Reasons, and the interests of the shareholders. In my opinion, Niketo has failed to demonstrate a compelling reason not to require a shareholder vote even taking into consideration the claims of the five Ordinary Creditors in Class (3).

[123] The principal reasons for this conclusion have already been set out above in considering the balancing of interests between the creditors in Classes (1) and (2) of the Proposed Plan and the UBS shareholders. There is, in fact, a sense in which the proponents of the Proposed Plan shelter entirely under the claims of the small group of unsecured creditors comprising the Ordinary Creditors for the legitimacy of a plan of compromise or arr angement that would otherwise be without any principled support.

[124] The Ordinary Creditors, aside from the Dolgonos Parties who should be treated differently for the reasons stated above, have claims totaling $300,000. This is not a material amount in the context of the aggregate amount of the claims being dealt with in the CCAA proceedings. It is also not a material amount relative to the value of the equity in the UBS shares that might be eliminated if the Proposed Plan were implemented.

[125] In addition, while the outcome of the Jolian Claim is uncertain, there is a reasonable possibility that the claims of the Ordinary Creditors will be paid eventually. Based on the UBS financial statements, the claims of the Ordinary Creditors would be paid in full even if the Jolian Claim were successful in respect of the deferred bonus and share appreciation rights components of that Claim. This must be balanced against the certainty of termination of the current expectation of the UBS shareholders of a cash distribution from UBS after the determination of the Jolian Claim, and of the probability of a reduction in the associated value of the UBS shares, if the Proposed Plan were implemented.

[126] To summarize, I have concluded above that the interests of the UBS shareholders must be recognized in the Proposed Plan. The Court must also have regard to such interests in balancing the interests of the UBS stakeholders in any consideration of whether to allow a proposed plan of compromise or arrangement to be submitted to the stakeholders for approval. In the absence of any consideration having been given to the UBS shareholders in the Proposed Plan, after taken into consideration the interests of the stakeholders in accordance with the factors set out above, I do not think it would be appropriate for the Court to order a meeting of the creditors to consider

the Proposed Plan without also requiring a shareholder vote. In particular, I am not persuaded that the interests of the Ordinary Creditors outweigh the interests of the shareholders for the reasons set out above.

Conclusion

[127] Based on the foregoing, the application is denied.

Wilton-Siegel J.

Date: February 12, 2013