There were two motions before me in this matter — a motion of Unique Broadband System Inc. ("UBS") for the approval of a sale transaction entered into with a third party for the sale of one-half of the shares of Look Communications Inc. ("Look") owned by UBS and a cross-motion brought by Nikato ~~Inv.~~ Ltd. ("Nikato") that a plan of compromise and arrangement be put to the creditors and shareholders of UBS for their consideration. ~~facts~~ The proposed Nikato plan entails a five-year DIP loan at prime + 2% to be accrued for two years at which time the loan, which is to be secured against the Look shares that are the subject of the proposed sale transaction, would become due and payable. It also contemplates a ~~back~~ standby sale arrangement ~~at~~ at or above the sale transaction price of 14¢ per share if the plan is not approved by the Court. Either route — implementation of the ~~Plan~~ proposed plan or operation of the standby sale agreement would entail a change in the Board of UBS described below, except for the limited case of a non-sanction of the plan and an agreement of the sale transaction purchaser to extend his agreement ~~for~~ which there is no agreement today. (the purchaser is insisting on closing in accordance with the agreement and did not appear on these motions).

Mr. Solmon has advised that ~~the~~ Niketo wishes to seek a stay of the Court's endorsement this morning granting the motion and denying the cross-motion, as well as leave to appeal. Given the urgency of this matter, as the sale transaction is to close on the next business day, I am ~~render~~ providing this endorsement which sets out the principal reasons for my conclusion, on the understanding that more complete reasons may be delivered later.

~~In The central issue is whether~~

I am satisfied that the sale process satisfies the requirements of ~~section 36 of the~~ fairness and integrity of outcome ~~given the~~ based on the factors set out in section 36 of the CCAA and the principles articulated in ~~S~~ *Royal Bank of Canada v Soundair*. 1

The principal issue ~~on the~~ in respect of these motions is whether the Court should interfere with the decision of the UBS directors that they prefer to sell the shares in accordance with the sale transaction ~~or~~ rather than accept a DIP loan under the terms, and as part of, the proposed plan of compromise or arrangement of Niketo.

~~Having regard to the information~~

In assessing this issue, I have had regard to the financial information presented by ~~Mr~~ Niketo as well as the analysis of the Monitor, which are roughly consistent. ~~I consider that~~ The issue is whether ~~UBS would~~ it is a better economic decision to lock in one-half of the Look shares at 14¢ per share or borrow against the shares, thereby banking on an increase in value of those shares over two years that would exceed the interest to be accrued over that period of time, which approximates 10% of the value at 14¢ per share.

There is a reasonable argument that ~~such a decision~~ ~~a loan is preferable~~ the potential for increased value would justify such a loan, although it is questionable whether any ~~incr~~ potential increase would be realized over the two-year horizon. ~~On the other hand,~~ ~~gr~~ Ascendence, in part, is the fact that a 20% shareholder is prepared to put forward such a loan on attractive ~~commercial~~ terms.

However, I cannot say that the UBS directors reached an unreasonable decision, due to the inherent uncertainties of any such increase in value. Among other things, there is no certainty of any recovery against Johan Investments even if Look were successful, in whole or in part, in its action against Johan and the other defendants.

In these circumstances, I think the business judgement rule dictates that the Court not interfere with the decision of the directors.

In any event, ~~if I then~~ and in addition as an independent basis for my decision, ~~the tele~~ the Niketo proposal requires that the board of UBS be reconstituted to include Messrs. Taylor, Wills and Zorbas as well as two further directors to be selected later. Messrs. Taylor and Wills do not consent to participate on ~~such~~ such a board today and there is no assurance that they ever will. Some of the reasons for the decision of the UBS board, as set out in Mr. Ulrich's affidavit of yesterday suggest ~~that~~ rather strongly that there is no reasonable likelihood of any such participation.

In such circumstances, I consider that it is inappropriate to accept the proposed plan for two ~~reasons~~ interrelated reasons. It is not a viable plan at the present time and may never be. ~~However~~, to order that the plan proceed could ~~mean~~ risk ~~rejecting~~ losing the sale transaction in its current form. The result could be that neither a DIP loan nor the sale transaction proceeds. Given the acknowledged

I do not think it is appropriate for the Court to order individuals to serve on a board of directors ~~to which they are not prepared to~~ in the absence of their consent, given the potential liabilities that such a position entails among other considerations. In these circumstances,

requirement ~~the~~ of UBS for working capital, this result would be ~~severely~~ severely prejudicial to the CCAA proceedings and the prospect of a future plan.

The principal argument of Niketo ~~against~~ in opposition to the relief sought by UBS is that it does not contemplate a shareholder approval. This is also ~~the~~ a principal argument which Niketo ~~they~~ raises ~~raises~~ in support of its plan. This feature of a shareholder vote on the financing alternatives of a DIP loan or a share sale is an attractive feature of the Niketo proposal as is the fact that it will pay out certain unsecured creditors who have been unwillingly caught up in a fight between UBS and its former ~~CE~~ chief executive officer and chief technology officer that followed a successful proxy fight and that has resulted in this CCAA proceeding.

However, I do not consider that ~~a~~ ~~sha~~ shareholder approval is required in respect of the proposed sale transaction. As a corporate matter, this is not a sale of "all or substantially all" of the assets of UBS. Niketo argues that it does, however, represent a fundamental change in the nature of UBS' business or in the economics of the UBS shares that should call for a shareholder vote. They rely on language in an earlier endorsement of this court in which an earlier proposed plan of Niketo was not accepted because it failed to provide for a shareholder vote.

I think the circumstances are, however, different in two respects.

First, and most importantly, I do not agree that there ~~has~~ will be a fundamental change as Niketo suggests.

The CCAA proceeding has been directed toward preserving and then selling the Look shares after completion of the Tokar litigation in order to fund a cash distribution of the equity in UBS to the UBS shareholders. That did not preclude UBS from ~~sell~~ monetizing this asset at any time during the proceeding if it felt the price ~~warranted~~ warranted such a decision. The use of the proceeds of ~~it~~ such a sale is an entirely separate matter to be addressed in another ~~proceeding~~ hearing in this matter.

Second, there is a significant difference between a plan proposed by a creditor and ~~an~~ a course of action that is the subject of an express decision of ~~their~~ the debtor's board of directors. The considerations relative to the former are set out in my earlier endorsement. In the latter case, as addressed above, the business judgment rule must be respected. That extends not merely to judicial respect for the decision but also judicial restraint in imposing an additional requirement of shareholder approval that removes the decision from the directors. The directors could have imposed such a requirement voluntarily. There is no evidence that their decision not to do so ~~such a decision is~~ is unreasonable, however attractive it might be to the shareholders. The Court must respect this as an aspect of the business judgment rule as mentioned. I note as well that this result is consistent with corporate legislation generally — not all "fundamental" transactions require shareholder approval. Where the legislation does not impose such a requirement, there must be a good reason to supplant it. I am not aware of any provision of securities or insolvency legislation that provides such a reason in this case.

Lastly, I would note that implicit in these reasons is the conclusion that I ~~do~~ accept ~~M~~Aclato's argument that it is not precluded from proposing a plan either by virtue of the fact that it is only a small creditor by assignment or because the conclusion that the sales process satisfies the requirements of fairness and integrity excludes such a right. I think that a ~~creditor~~ a potential purchaser in an auction ~~for~~ run by a debtor which is subject to court approval always runs the risk that a creditor or shareholder can propose a plan that seeks to effect a different transaction instead of the ~~sale~~ proposed sale. So long as the plan does not constitute a collateral attack on the sale process and sale transaction i.e. seeks to effect the same transaction in favour of a different party, I do not think it is objectionable under the jurisprudence. That is the case in my opinion, even with the standby agreement — it is not principally a transaction to acquire the Keoki shares in the sale transaction. However, for the other reasons expressed above, I have concluded that the Nikato plan cannot be accepted and be put to the creditors and shareholders.