

Court of Appeal File No.: C57884
Superior Court File No.: CV-11-9283-00CL

COURT OF APPEAL FOR ONTARIO

**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.**

NOTICE OF CROSS-APPEAL

THE RESPONDENTS, JOLIAN INVESTMENTS LIMITED AND GERALD MCGOEY (collectively, "**Jolian/Mr. McGoeY**" or the "**Cross-Appellants**") **CROSS-APPEAL** in this appeal from the judgment of the Honourable Madam Justice Mesbur, dated May 21, 2013 (the "**Justice Mesbur's Decision**"), made as part of the Claims Determination Process in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**") proceeding in the matter of a plan of compromise or arrangement of Unique Broadband Systems, Inc. ("**UBS**" or the "**Company**") and ask that this Honourable Court:

1. grant Jolian/Mr. McGoeY leave to cross-appeal from Justice Mesbur's Decision, if necessary;
2. expedite the cross-appeal; and
3. allow the cross-appeal and vary Justice Mesbur's Decision to declare that:

- (a) the decision of the UBS Board of Directors with respect to the SAR cancellation award in favour of Jolian/Mr. McGoey was within the range of reasonable alternatives available to the Board in the exercise of its business judgment;
- (b) the decision of the UBS Board of Directors with respect to the deferred bonus award in favour of Jolian/Mr. McGoey was within the range of reasonable alternatives available to the Board in the exercise of its business judgment;
- (c) the UBS Board of Directors, including Mr. McGoey as a member of the Board, did not breach their fiduciary duties when they approved the SAR cancellation award;
- (d) the UBS Board of Directors, including Mr. McGoey as a member of the Board, did not breach their fiduciary duties when they approved the deferred bonus award;
- (e) Jolian/Mr. McGoey were entitled to the SAR cancellation payment in the amount of \$600,000, as awarded by the Board;
- (f) Jolian/Mr. McGoey were entitled to the deferred bonus payment in the amount of \$1,200,000, as awarded by the Board;
- (g) Jolian/Mr. McGoey were entitled, under the Management Services Agreement entered into between UBS and Jolian in May 2006 (the "**Jolian MSA**"), indemnification agreements, corporate by-laws and provisions of the *Ontario Business Corporations Act*, R.S.O. 1990, c. S.5 (the "**OBCA**"), to be indemnified by UBS for their legal expenses reasonably incurred in respect of their claims and

defence of this proceeding; and that

(h) any payment advanced by UBS to Jolian/Mr. McGoey on this account was properly made and should not be repaid;

4. if cross-appeal is allowed, set aside the costs order of Justice Mesbur, dated August 6, 2013, in which she ordered no costs to either party;
5. award costs of the appeal and cross-appeal, costs of the motions for leave to appeal and for leave to cross-appeal, if applicable, and costs of the trial, in favour of Jolian/Mr. McGoey on a substantial indemnity basis; and
6. such further and other relief as counsel may request and this Honourable Court may deem just.

THE GROUNDS FOR THIS CROSS-APPEAL are as follows:

1. The learned trial judge made errors of law and errors of mixed fact and law:
 - a. by misapplying the business judgment rule and second-guessing the Board of Directors' decisions that led her to an erroneous finding that the Board of Directors, and Mr. McGoey as a member of that Board, breached their fiduciary duty; and thereby the learned trial judge came to erroneous conclusions in disallowing:
 - i. the SAR cancellation award in favour of Jolian/Mr. McGoey; and
 - ii. the deferred bonus award in favour of Jolian/Mr. McGoey;

- b. by misinterpreting the judgment of the Honourable Mr. Justice Marrocco, made in *Jolian Investments Ltd. v. UBS*, dated May 30, 2011 (appeal of which was abandoned by UBS on October 29, 2012) (“**Justice Marrocco’s Judgment**”), in which Mr. Justice Marrocco concluded, *inter alia*, that UBS had obligations to indemnify and advance payment on account of legal expenses to Jolian/Mr. McGoey under the Jolian MSA, indemnification agreements entered into between the parties, UBS’ by-laws and the *OBCA*; and thereby the learned trial judge erred in concluding that Mr. Justice Marrocco’s Judgment was subject to her finding of breach of fiduciary duty and further erred in finding that Jolian/Mr. McGoey have to repay the money UBS advanced to them on this account; and
- c. by failing to award costs of trial in favour of Jolian/Mr. McGoey.

**ADDITIONAL GROUNDS RELEVANT TO JOLIAN/MR. MCGOEY’S REQUEST FOR
LEAVE TO CROSS-APPEAL**

- 2. The proposed cross-appeal is *prima facie* meritorious. It raises substantive questions of law involving the interpretation and application of the “business judgment rule” and the scope of in hindsight judicial review of business decisions made by a corporate board and its directors;
- 3. The issues on the cross-appeal are of great significance to the practice and will have a direct effect on the decision-making process of corporate boards in Ontario and Canada;
- 4. Further, the issues raised on this cross-appeal call for a review and final determination of questions that will have a direct effect on Mr. McGoey’s reputation and livelihood. These

questions are also of importance to other parties affected by Justice Mesbur's findings, including other former directors and officers of UBS, and UBS's shareholders and creditors;

5. Jolian/Mr. McGoey do not dispute the factual and legal findings made by Justice Mesbur in their favour, in particular, *inter alia*, her findings that Mr. McGoey's employment agreement and the Jolian MSA were negotiated at arms' length and were *prima facie* valid; that Mr. McGoey's not being elected to the UBS Board of Directors or being appointed as CEO constituted "termination without cause"; that there was no "Jolian Default" as set out in the Jolian MSA; that Jolian/Mr. McGoey are entitled to the enhanced severance under the Jolian MSA; that Mr. McGoey's actions did not constitute "cause" or "after acquired cause" for dismissal under the Jolian MSA; that the Board of Directors' failure to disclose the terms of the Jolian MSA prior to May 2010 did not constitute a breach of fiduciary duty; and that Justice Mesbur did not need to consider whether the Board of Directors' actions might have constituted oppressive conduct;
6. Granting Jolian/Mr. McGoey leave to cross-appeal will not further hinder the progress of this proceeding. On November 1, 2013, Mr. Justice Doherty granted UBS leave to appeal the Justice Mesbur's Decision. This Court also held that UBS's appeal can be expedited. Jolian/Mr. McGoey ask that their cross-appeal be expedited and/or be heard at the same time as UBS's appeal; and
7. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS FOR THE COURT OF APPEAL'S JURISDICTION IS:

1. This is a cross-appeal from the final decision of a judge of the Superior Court of Justice (Commercial List);
2. The decision of Mr. Justice Marrocco, dated May 30, 2011;
3. The decision of Mr. Justice Doherty, dated November 1, 2013;
4. Leave to cross-appeal, if required, is being sought in this Notice of Cross-Appeal;
5. Sections 11, 13 and 14 of the *CCAA*;
6. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
7. Rules 61.03.1(18), 61.07(1)(b) and 61.07(1.2) of the *Rules of Civil Procedure*, R.R.O. 119, Reg. 194; and
8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

November 21, 2013

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