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Court File No. CV-11-9283-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF *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.**

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**FACTUM OF THE RESPONDENTS  
JOLIAN INVESTMENTS LIMITED AND GERALD MCGOEY  
(Applicant's Motion to Extend CCAA Stay, Returnable April 2, 2012)**

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**April 2, 2012**

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**PART I – OVERVIEW**

1. The Respondents Jolian Investments Limited ("**Jolian**") and Mr. Gerald McGoeY oppose the Applicant's motion to extend the CCAA stay until July 30, 2012.
2. The CCAA stay in this proceeding has served its purpose over the last 9 months. A number of recent events, however, have made it apparent that the Applicant's objectives in extending the CCAA stay are not to further any of the purposes of the CCAA; the Applicant's objectives instead are:
  - (a) to obtain an advantage in the litigation, which pre-dates the Initial Order, between Jolian/McGoeY and the Applicant, and between Mr. Dolgonos and his companies ("**Dolgonos**") and the Applicant, and

- (b) to entrench the McCutcheon Group in control of the Applicant's board of directors by frustrating the ability of the Applicant's shareholders, including Dolgonos, the Applicant's major shareholder, to exercise his basic shareholder's rights such as requisitioning a timely shareholder's meeting.
3. The breathing room the CCAA stay provided in the last year has permitted the identification of all of the Applicant's creditors and the nature and quantum of their claims. What has been revealed is that the Applicant has only two significant creditors – Jolian/McGoey and Dolgonos, and that the only business of the Applicant is litigation – the claims against it by Jolian/McGoey and Dolgonos and its counterclaims against these same parties.
4. There is no compelling reason why this litigation cannot be conducted in the normal course. There is no need for the CCAA shield. There is no prospect of a plan of compromise or arrangement; or, even if there should be a plan, one that is likely to produce a result more attractive than the litigation unfolding on the Commercial List under the case management of the CCAA judge in this proceeding should His Honour be willing to accept such a role.
5. Indemnity advancement was mandated for former directors by the Legislature and the Courts in the recognition of the fact that former directors, who cannot directly turn to the corporate treasury to pay their lawyers and other advisors, need this protection as they time and again face claims of misconduct by the directors who replace them – especially if after a contested proxy fight.

*Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380 at para. 20

See also *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 26 at para. 15

Stephen A. Radin, "Sinners Who Find Religion: Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing" (2006) 25 Rev. Litig. 251 at pp. 278-280

6. It should not be the case that the protection indemnity advancement affords can be circumvented by the new directors pointing to litigation claims adding to more than the CCAA threshold, and filing for CCAA protection. If this is true, then one will have to ask, who in the future will take the risk to become a corporate director?

## **PART II – ISSUES**

7. Pursuant to subsection 11.02(3) of the CCAA, the issues on this motion are:
  - (a) Has the Applicant satisfied the Court that circumstances exist that make the extension order appropriate?
  - (b) Has the Applicant satisfied the Court that the Applicant has acted, and is acting, in good faith and with due diligence?

## **PART III –ARGUMENT**

### **Introduction to relevant legal principles**

8. Jolian and McGoeey acknowledge that the Courts have concluded the CCAA is remedial legislation entitled to a liberal interpretation:

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

*Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24, 1993 CarswellOnt 183 (Ont. Ct.

(Gen. Div.)) at para. 6

9. The purpose of the stay in the Initial Order is to provide the debtor company breathing room and, by doing so, to preserve the *status quo* to assist in the restructuring or arrangement and to prevent any particular stakeholder from obtaining an advantage over the other stakeholders during the restructuring process.

*Re Canwest Global Communications Corp.*, [2009] O.J. 5379 (S. Ct. at para 30 and cited in *Unique Broadband Systems (Re)*, 2102 ONSC 1459 at para. 33

10. The ability of the Court to grant or continue a stay under s. 11.02 of the CCAA is not, however, a free standing remedy that the Court may grant whenever an insolvent company wishes to undertake a “restructuring”, a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11.02 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA’s fundamental purpose.

*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327 at para. 26

11. The fundamental purpose of the CCAA is expressed in the long title of the statute: “An Act to facilitate compromises and arrangements between companies and their creditors”.

*Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327 at para. 27

12. A CCAA stay may be initially appropriate to permit a Monitor to look at the state of affairs of the debtor company so that the Court could determine if CCAA proceedings were appropriate. Where it subsequently becomes evident, however, that “the plan is really not a plan and even as a plan, is unlikely to produce any result more attractive” than the alternative should the CCAA stay not remain in place, then the CCAA stay

should not be continued.

*Shire International Real Estate Investments Ltd. (Re)*, 2010 ABQB 84, 2010 CarswellAlta 234 at paras. 9 and 10

13. Where there was no business to protect, no employees, nor any prospect of a sale of business to satisfy the creditors that would require CCAA protection in order to conduct a sales process, and the principal purpose of the CCAA application was to seek a stay of certain licensing proceedings, a CCAA stay was not granted.

*Re Realtysellers (Ontario) Ltd.* (2008), 40 C.B.R. (5<sup>th</sup>) 154 (Ont. S.C.J)

**Jolian and McGoey do not want to delay matters**

14. Jolian and McGoey have no reason to want to delay the determination of the claims by them against the Applicant and the Applicant's counterclaims against them.
15. The Applicant's counterclaims against Jolian and McGoey contain serious, personal, and embarrassing allegations that include claims of bad faith conduct and breaches of fiduciary duty. McGoey, in particular, would like nothing more than to have his day in court to be able to clear his name.
16. Furthermore, Jolian and McGoey are the largest creditors of the Applicant. They would like to get paid. As they are owed more by the Applicant than it has in assets, they would also like to see an end to the significant spending by the Applicant on professional fees for its own advisors and those of the Monitor.

Affidavit of Robert Ulicki sworn March 16, 2012 ("Ulicki March 16, 2012 Affidavit"), para. 13, UBS Motion Record for Stay Extension, Tab 2, pg. 7



### **Applicant Cannot Meet the Onus for Extending the CCAA Stay:**

- 1) Circumstances that exist do not make an extension appropriate**
- 2) Applicant has not acted, and is not acting, in good faith and with due diligence**

### **CCAA proceeding has served its purpose**

17. In the past 9 months, all claims against the Applicant have been identified in detail.

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, p. 18

18. At outset in July 2011, at least from perspective of Jolian/McGoey, there was an atmosphere of uncertainty as a result of there being, among other things: an unknown number of creditors, concerns about conflicts of interest between the management of the Applicant and Look, concerns about ongoing oppressive acts, and uncertainty of what Look would do with respect to dividends, return of capital or the Applicant.

Affidavit of Robert Ulicki sworn July 4, 2011, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2A

### **Now know state of affairs of Applicant**

19. At this stage in the CCAA, the Applicant and its stakeholders know the finite number of claims and counterclaims, and the particulars of these claims including quantum – all claims, in other words, are on the table.

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, p. 18

20. While we are left with complex, complicated, and intertwined litigation claims rooted in claims of bad faith conduct and breach of fiduciary duty, the most significant claims are between only three groups – (1) the McCutcheon Group now in control of the Applicant, (2) McGoey and (3) Dolgonos.

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, p. 18

Jolian Proof of Claim dated September 16, 2011, Monitor's Notice of Disallowance dated January 4, 2012, and Jolian Notice of Dispute dated January 27, 2012, Jolian/McGoey Motion Record for Post-Filing Fees, Tabs 2B, 2C, and 2D

21. McGoey and Dolgonos are the key creditors of the Applicant. Their claims are in the 10s of millions and all other creditors taken together do not add up to \$1 million.

Claims Register as at February 10, 2012, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab 2T

Ulicki March 16, 2012 Affidavit, para. 13, UBS Motion Record for Stay Extension, Tab 2, pg. 7

22. The Applicant's cash on hand (which is over \$3 million) could address all of the Applicant's creditors other than McGoey and Dolgonos.

Monitor's Seventh Report, Comparison of Budget to Actual, Appendix "E", Monitor's Motion Record regarding Claims Process, Tab 2, p. 41

**Freezing creditors by CCAA stay no longer needed or appropriate:**

- a. **McCutcheon Group using CCAA stay and process for litigation advantage and not any purpose permitted under CCAA**

23. Over the past few months, events have revealed that the CCAA stay is being used by the new management of the Applicant, the McCutcheon Group, to obtain an advantage in the pre-existing litigation and that it is no longer needed or appropriate. These events include:

- (a) The Applicant is working to delay or avoid the indemnity advancement issue being ultimately determined by, among other things, moving for the second time to adjourn the Indemnity Appeal (defined below), and resisting the scheduling the Jolian/McGoey Post Filing Fee Motion (identified below);
- (b) The Monitor failed to meaningfully consult the Applicant's creditors on the

CCAA claim process;

- (c) Once proposed for the first time last week, it was evident the Monitor's proposal for the CCAA claims process contained serious deficiencies;
- (d) Since the Applicant's counterclaims are not proposed to be dealt with within the CCAA claims process as proposed by the Monitor, then at the end of that CCAA claims process, the Applicant would be in no better position to propose a plan of compromise or arrangement;
- (e) The Applicant is now well funded as it recently received \$2.7 million as a return of capital distribution from Look Communication Inc.; and
- (f) The Monitor has reported that 7 of the filed CCAA claims remain unaddressed despite 9 months under CCAA and significant amounts of money being spent on professional fees by the Applicant and the Monitor.

24. While the McCutcheon Group states it needs the CCAA stay to permit the determination of the claims by Jolian/McGoey and Dolgonos against the Applicant and that then they will put forward a plan of compromise or arrangement, they cannot answer why this is necessary. Why does the Applicant not just defend the claims and prosecute its counterclaims in the normal course? From what is the CCAA stay shielding the Applicant?

Ulicki March 16, 2012 Affidavit, paras. 13, 39 and 40, UBS Motion Record for Stay Extension, Tab 2, pgs. 7, 12-13

25. As stated above, the only creditors of substance of the Applicant are the two parties to the pre-existing litigation in addition to the Applicant. Even the Applicant describes

Jolian/McGoey and Dolgonos as the only “major stakeholders” in these proceedings.

Ulicki March 16, 2012 Affidavit, para. 13, UBS Motion Record for Stay Extension, Tab 2, p. 7

26. The only issue facing the Applicant, aside from the Dolgonos take-over bid and shareholder meeting requisition, is the pre-existing litigation. None of the more common reasons for a CCAA stay are present:

- (a) The Applicant has no secured creditors.
- (b) There are no other significant unsecured creditors of the Applicant clamoring for payment.
- (c) The Applicant is not facing mass tort claims or class actions.

Ulicki March 16, 2012 Affidavit, UBS Motion Record for Stay Extension, Tab 2

27. If a CCAA stay and court-supervised CCAA claims process is appropriate every time a company faces a simple breach of contract lawsuit from one or two parties claiming amounts greater than the company’s assets on hand, then it is hard to not conclude that the CCAA will begin to replace the Rules of Civil Procedure as the rules for determining commercial litigation.

28. It is submitted that the McCutcheon Group seeks to use the CCAA stay:

- (a) to avoid its contractual and statutory obligation confirmed in the Marrocco Judgment<sup>1</sup> to make advancements on its indemnity obligation to Jolian/McGoey and others,

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<sup>1</sup> Reasons for Judgment by Marrocco J. of July 7, 2011 and Judgment entered June 24, 2011 may be found at Appendices 11 and 10 to Jolian Proof of Claim dated September 16, 2011, Exhibit “B”, Affidavit of Gerald McGoey sworn March 15, 2011, Jolian/McGoey Motion Record for Post-Filing Fees, Tab 2B11 and Tab 2B12

- (b) to deny McGoeys full procedural fairness in the process to determine the claims at issue though his reputation has been put in issue in those claims by the McCutcheon Group, and
- (c) to reserve the Applicant's claims against Jolian/McGoey to be dealt with post-CCAA.

29. There is no proposed plan of compromise or arrangement nor is there a plan to ever make such a plan. The McCutcheon Group's plan instead is to use the CCAA stay:

- (a) to deny or limit Jolian/McGoey's ability to fund their legal expenses in pursuing their claims against the Applicant and defending themselves from the Applicant's counterclaims,
- (b) to deny Jolian/McGoey's rights to a full trial process of the claims at issue including discovery and a trial despite the reputational and creditability issues at stake in those claims, and
- (c) to obtain findings in the proposed summary CCAA claims process that they can then use to support the Applicant's counterclaims that have been left out of the proposed CCAA claims process.

30. Ultimately, the McCutcheon Group plan is to use the CCAA stay and the resulting imbalance between resources to force Jolian/McGoey to give up their claims against the Applicant and to try to settle the Applicant's claims against them.

31. Disclosed during Dolgonos's director removal motion, the minutes of the Applicant's

board meeting on June 18, 2011, at which the resolution to file for CCAA protection was made, reveal that a key if not exclusive consideration by the Applicant's board was that:

"...concern was expressed that for so long as UBS had to defend against the contingent claims and pay the plaintiff's cost of pursuing their claims any cash received from Look could be expected to be fully utilized to meet ongoing negative cash flow, not build value or be available for distribution."

June 18, 2011 UBS Board Minutes, bottom of page 1 of 3, Exhibit "A", Affidavit of Jonabelle Coz Mondelo sworn April 2, 2012 ("Coz Mondelo Affidavit"), Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2A

32. Perplexingly, it appears that despite the recent events (identified above and which are discussed further below) that reveal the true intentions of the McCutcheon Group, the Monitor has never questioned the motives and objectives of this CCAA proceeding, and the Monitor has never alerted the Court that it may wish to re-examine if the CCAA stay continues to be appropriate.
33. Instead, the Monitor has simply echoed the positions taken by the McCutcheon Group at each and every stage and on each and every matter. The impact of the Monitor on this CCAA proceeding has been limited to be simply another set of lawyers and accountants to be paid by the Applicant – and it is hard for the McGoey and Dolgonos, as the Applicant's largest creditors by far and one of them being the largest shareholder by far, to not see this as in some way being their own money going out the door.
- b. McCutcheon Group using CCAA stay and process to frustrate shareholder rights**
34. Over the past few months, events have revealed that the CCAA stay is being used by the McCutcheon Group to prevent the Applicant's shareholders from exercising their rights including the right to requisition a timely shareholders meeting.

35. The recent events include:

- (a) The McCutcheon Group moved and the Monitor supported the motion to cause the Dolgonos oppression claim (which addressed ongoing oppressive conduct) to fall within the CCAA stay rather than addressing the claims.
- (b) The McCutcheon Group and Monitor resisted the Dolgonos director removal motion rather than reconstituting the board to meet the conflict of interest concerns raised by the Applicant's major shareholder.
- (c) McCutcheon Group refused to do a rights offering as suggested by Dolgonos and refused to acknowledge a requisition on November 22, 2011 to call a shareholders meeting to consider conducting a rights offering.
- (d) McCutcheon Group and Monitor fought to try to stop the Dolgonos take-over bid including by complaining to the OSC and by moving for injunctive relief from this Court.
- (e) The McCutcheon Group, in response to Dolgonos's requisition, has called a "maybe" shareholders meeting. The March 28, 2012 press release of the Applicant states that the Applicant's shareholders may get their meeting only once the CCAA claims process is completed. The March 28, 2012 announcement is so conditional and vague that it amounts to a refusal to call a meeting. Again, there is no rationale for the denial by the McCutcheon Group of one the few shareholder rights the Applicant's shareholders hold.

March 28, 2012 UBS press release, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2U

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, pp. 16-17

Monitor's Sixth Report, dated February 13, 2012, p. 5 of 8

Ulicki March 16, 2012 Affidavit, paras. 24 to 36, UBS Motion Record for Stay Extension, Tab 2, pgs. 9-12

**McCutcheon Group supported by Monitor prevented Indemnity Appeal from proceeding**

36. With respect to the appeal of the Marrocco Judgment pending before the Court of Appeal for Ontario (the "**Indemnity Appeal**"):

- (a) Neither the Applicant nor the Monitor has ever suggested that the Indemnity Appeal is stayed by the CCAA stay in this proceeding.
- (b) The Applicant has now on two occasions moved to adjourn the Indemnity Appeal on the basis that the Applicant is subject to a CCAA proceeding.
- (c) By the time of the second adjournment motion by the Applicant at the Court of Appeal in the Indemnity Appeal (argued on March 8, 2012), the Applicant and Monitor had disallowed the indemnity advancement portion of the Jolian claim filed in this CCAA proceeding (and a similar claim by Dolgonos) on the basis that the Indemnity Appeal was pending before Court of Appeal and that the Indemnity Appeal would determine this issue.
- (d) The Applicant and Monitor have indicated that they will resist the scheduling before the claims process proceeds of the motion by Jolian and McGoeys brought March 15, 2012 for payment of the indemnity advances in the form of payment for post-filing services (the "**Jolian/McGoey Post Filing Fee Motion**").



Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, pp. 17-18

Letter from Mr. Patrick Shea, lawyer for UBS, to Mr. Matthew Gottlieb, lawyer for the Monitor, dated December 9, 2011 outlining UBS's reasons for denying the CCAA claims by Jolian, among others, Part E, p. 12 of the Letter, Exhibit "C", Coz Mondelo Affidavit, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2C

Notice of Disallowance dated January 4, 2012, Exhibit "C", Affidavit of Gerald McGoey sworn March 15, 2012, Jolian/McGoey Motion Record for Post-Filing Fees, Tab2C, p. 357

Letter from Mr. Shea to Mr. Sahni dated February 9, 2012, p.2 of Letter, last paragraph, Exhibit "M", Coz Mondelo Affidavit, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2M

Endorsement of the Honourable Justice Simmons dated March 12, 2012, Exhibit "E", Affidavit of Gerald McGoey sworn March 15, 2012, Jolian/McGoey Motion Record for Post-Filing Fees, Tab2E

Notice of Motion, Jolian/McGoey Motion Record for Post-Filing Fees, Tab 1

37. As a result of the above, Jolian and McGoey can only conclude now that the Applicant with the support of the Monitor are using the CCAA stay to avoid paying the indemnity advancement to Jolian and McGoey (and Dolgonos).

**Monitor's Claims Process is seriously deficient:**

38. The Monitor reports to the Court in its Seventh Report that:

- (a) The Monitor's lawyers met the lawyers for Jolian/McGoey and Dolgonos on March 6, 2012 and received input on the CCAA claims process;
- (b) Shortly thereafter, this input was withdrawn;
- (c) On March 7, 2012, the Monitor's lawyer responded by email that stated "...we have been asking for some time for a procedural proposal"; and
- (d) No further views or input have been received by Jolian/McGoey or Dolgonos.

39. The Monitor fails to report to the Court that:

- (a) The lawyers for Jolian/McGoey had been requesting a meeting to discuss the CCAA claim process since at least early February 2012 but no meeting was forthcoming until March 7, 2012;

Exhibits "K", "N", "O", "Q" (pages 2 and 3 of Exhibit), and "R", Coz Mondelo Affidavit, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2k, 2N, 2O, 2Q, and 2R

- (b) On March 6, 2012, the Monitor's lawyer emailed the lawyers for Jolian/McGoey and for the first time requested that they state in writing a proposal for the CCAA claims procedure;

Coz Mondelo Affidavit, para. 19 and Exhibit "S", Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2 and Tab 2S

- (c) When the Monitor's lawyer wrote his email on March 7, 2012 (and attached as Appendix "C" to the Seventh Monitor's Report) stating "...we have been asking for some time for a procedural proposal", he must have been referring to the day before;

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, pp. 18-19, and Appendix "C", p.36

- (d) The meeting between the lawyers for the Monitor and Jolian/McGoey and Dolgonos occurred on the afternoon of March 7, 2012, the day before the Applicant's motion to adjourn the Indemnity Appeal, and not on March 6, 2012;

Coz Mondelo Affidavit, para. 19, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2

- (e) On March 8, 2012, the Applicant's motion to adjourn the Indemnity Appeal was heard and the Court of Appeal indicated it would put off the Indemnity Appeal, but that the Marrocco Judgment should be considered valid by the CCAA Judge should Jolian/McGoey bring a motion for the payment of indemnity advances to the CCAA Judge as they indicated they would to the Court of Appeal in light of its ruling;

Endorsement of the Honourable Justice Simmons dated March 12, 2012, Exhibit "E", Affidavit of Gerald McGoey sworn March 15, 2012, Jolian/McGoey Motion Record for Post-Filing Fees, Tab2E

- (f) This development in the Indemnity Appeal required a change to the Jolian/McGoey proposed CCAA claims process as the first step had to be the Jolian/McGoey Post Filing Fee Motion instead of the Indemnity Appeal; and
- (g) The first time Jolian/McGoey saw the Monitor's proposed claims process was in the Monitor's motion record with respect to the CCAA claims process that was served late in the day on March 27, 2012. Jolian and McGoey were not asked to comment on the proposed CCAA claims process before this motion was commenced or after it was brought.

Coz Mondelo Affidavit, para. 19, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2

40. The Monitor's proposed CCAA claims process is seriously deficient in that:

- (a) The Monitor's proposed CCAA claim process fails to deal with the other former directors of the Applicant including the Applicant's claim against Mr. Douglas Reeson and the cross-claims against Mr. Peter Minacki and Mr. Louis Mitrovitch (of interest, the Applicant has disallowed claims for

indemnity advancement from Jolian, Dolgonos, and Mr. Reeson but has accepted the indemnity advancement claim by Mr. Minacki), despite the fact that all of these claims arise out of the same series of transactions or occurrences and have common questions of law or fact.

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, pp. 18-19, and Claims Hearing Procedure at Appendix "D", pp. 38-39

Claims Register as at February 10, 2012, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2T

- (b) The Monitor's proposed CCAA claim process fails to include the counterclaims by the Applicant against Jolian/McGoey and Dolgonos despite the fact that all of these claims arise out of the same series of transactions or occurrences and have common questions of law or fact.
- (c) The Monitor's proposed CCAA claim process fails to provide the procedural protections necessary for such claims of bad faith and breach of fiduciary duty.

(1) The Applicant and the Monitor seek to describe the Jolian/McGoey claims as resting on issues of contractual interpretation when the basis for disallowing the claims is the same serious personal allegations of bad faith and breach of fiduciary duty that underlie the Applicant's counterclaims. The claims by Jolian/McGoey and Dolgonos against the Applicant are resisted by the Applicant in large part because of alleged bad faith by McGoey, other former directors and Dolgonos and alleged breaches of their fiduciary duties. There is no "clean" contractual dispute to be determined here.

See, for example, the Applicant's suggestion for a motion for summary judgment on the contractual interpretation issue, letter from Mr. Shea to Mr. Sahni dated February 2, 2012 with respect to the CCAA claims determination process, Exhibit "G", Coz Mondelo Affidavit, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2G

Letter from Mr. Shea to Mr. Gottlieb dated December 9, 2011 outlining UBS's reasons for denying the CCAA claims by Jolian, among others, Part E, pp. 5-9 of the Letter, Exhibit "C" to Coz Mondelo Affidavit, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2C

- (2) The Applicant's counterclaims against Jolian/McGoey, other former directors, and Dolgonos are entirely based on the alleged bad faith by McGoey, other former directors, and Dolgonos and alleged breaches of their fiduciary duties.

Appendices 2 and 3 to Jolian Proof of Claim dated September 16, 2011, Exhibit "B", Affidavit of Gerald McGoey sworn March 15, 2011, Jolian/McGoey Motion Record for Post-Filing Fees, Tab 2B2 and Tab 2B3

- (3) This is not, for example, a CCAA involving disputes over aircraft leases; personal reputations and credibility are central to all of the claims. Full procedural protections are required when such claims are to be determined. Full discovery rights, for example, must be provided in such a case. A summary claims procedure of the type often used within a CCAA claims process is not appropriate for the nature of the claims at issue in this proceeding.

41. It is submitted that one trial of all the claims and counterclaims at issue should be conducted, and that this trial can be conducted just as effectively, economically, and efficiently outside a CCAA process than as in a CCAA process. Jolian and McGoey are content with this trial proceeding on the Commercial List under the case management of the CCAA judge in this proceeding should His Honour be willing to accept such a role.

**Completing CCAA claims process as proposed by Monitor does not leave the Applicant in a position to propose a plan of compromise or arrangement**

42. It is submitted that if the CCAA claims process as proposed by the Monitor proceeds, then, at end of CCAA claims process, the Applicant will be left with its counterclaims against Jolian/McGoey, Mr. Reeson, and Dolgonos and related cross-claims. The Applicant will still be tangled in litigation, and will be no where closer to being able to propose a plan of compromise or arrangement.

**Applicant now has funding to permit the Applicant to deal with litigation as it should chose**

43. During the week of March 16, 2012, the Applicant received \$2.7 million as a result a return of capital distribution from Look Communications Inc.

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, p. 9

44. With these funds, the Applicant can defend the claims against it and prosecute its counterclaims.

**The CCAA process is staking too long and costing too much**

45. The CCAA process has been underway for 9 months. Despite this time and significant amounts of money being spent on professional fess of the Applicant and the Monitor, the Monitor reports that 7 of the filed CCAA claims remain unaddressed.

Monitor's Seventh Report, Monitor's Motion Record regarding Claims Process, Tab 2, pp. 18-19

Claims Register as at February 10, 2012, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab2T

#### **PART IV – ORDER SOUGHT**

46. The Respondents Jolian and Mr. McGoey respectfully request that the Applicant's motion to extend the CCAA stay be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,**

April 2, 2012

  
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Co-lawyers for the Respondents  
Jolian Investments Limited and Gerald McGoey

**IN THE MATTER OF 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.**

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| <p><b>ONTARIO</b><br/><b>SUPERIOR COURT OF JUSTICE</b><br/><b>(Commercial List)</b><br/>(Proceeding commenced at Toronto)</p> | <p><b>FACTUM OF THE RESPONDENTS</b><br/><b>JOLIAN INVESTMENTS LIMITED AND</b><br/><b>GERALD MCGOEY</b></p> | <p><b>GROIA &amp; COMPANY</b><br/>Professional Corporation ■ Lawyers<br/>Wildeboer Dellelee Place<br/>365 Bay Street, 11<sup>th</sup> Floor<br/>Toronto, ON M5H 2V1<br/>Fax: 416-203-9231</p> <p><b>Joseph Groia</b>, LSUC No. 20612J<br/>Tel.: 416-203-4472</p> <p><b>Gavin Smyth</b>, LSUC No. 42134G<br/>Tel: 416-203-4475</p> <p>Co-lawyers for the Respondents<br/>Jolian Investments Limited and Gerald McGoeY</p> |
|---|--|--|