

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF *COMPANIES' CREDITORS ARRANGMENT 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.**

**FACTUM OF UNIQUE BROADBAND SYSTEMS, INC.  
(Returnable 5 April 2012)**

Dated: 4 April 2012

**GOWLING LAFLEUR HENDERSON LLP**  
Barristers & Solicitors  
Suite 1600, 1 First Canadian Place  
100 King Street West  
Toronto ON M5X 1G5

**E. Patrick Shea** (LSUC No. 39655K )  
Tel: (416) 369-7399  
Fax: (416) 862-7661

Solicitors for the Applicant

## PART I – OVERVIEW

1. Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the “**CCAA**”) were commenced in respect of Unique Broadband Systems Inc. and a wholly owned subsidiary (together “**UBS**”) pursuant to an Initial Order made on 5 July 2011 (the “**Initial Order**”). The Initial Order appointed Duff & Phelps Canada Restructuring Inc. (the “**Monitor**”) as monitor.
2. The CCAA proceedings were precipitated by litigation among, *inter alia*, UBS, Jolian Investments Inc. (“**Jolian**”), Mr. Gerald McGoey, DOL Technologies Inc (“**DOL**”) and Mr. Alex Dolgonos. The stated purpose of the CCAA proceedings was to facilitate the determination of the claims being asserted by Jolian and DOL against UBS in a claims process to be implemented under the CCAA.
3. The Stay Period, as defined in the Initial Order has been extended, on an unopposed basis, three times<sup>1</sup> and, in accordance with an Order made on 4 August 2011 (the “**First Extension and Claims Order**”), a claims process has been implemented by the Monitor to identify claims against UBS.
4. DOL and Jolian filed claims against UBS in accordance with the First Extension and Claims Order and the claims filed by DOL and Jolian have been disallowed. DOL and Jolian have appealed the disallowance of their claims against UBS and the parties have agreed, pursuant to the First Extension and Claims Order, that DOL’s and Jolian’s disputed claims will be determined by a Judge. The First Extension and Claims Order now requires that a procedure and timeline be put in place for the determination of DOL’s and Jolian’s disputed claims by a Judge.
5. UBS has brought a motion seeking a fourth extension of the Stay Period to permit the disputed claims against UBS being asserted by Jolian and DOL and counterclaims brought by UBS against Jolian, DOL, Mr. Alex Dolgonos and Mr. Gerald McGoey (the

---

<sup>1</sup> There were two short extension to extend the Stay Period from 30 March 2012 to 4 April 2012 and then to 5 April 2012 to accommodate the scheduling of this Motion.

“**UBS Counterclaim**”) to be determined in accordance with the First Extension and Claims Order.

6. The Monitor has brought a parallel motion seeking to establish a procedure and timeline to have DOL's and Jolian's disputed claims against UBS and the UBS Counterclaim determined. The Monitor is bringing its motion because UBS, DOL and Jolian were not able to make any progress in developing a process to have the disputed claims against determined as per the First Extension and Stay Motion.
7. UBS supports the procedure and timeline being proposed by the Monitor.
8. The Monitor supports UBS's motion seek to have the Stay Period Extended and has provided its view that an extension of the Stay Period is appropriate and that UBS has acted and continues to act in good faith and with due diligence.
9. Jolian is opposing UBS's motion to extend the Stay Period and DOL and Jolian are opposing the Monitor's motion to establish a process and timeline to have the disputed claims against UBS determined in accordance with the First Extension and Claims Order.
10. Jolian's position is that, notwithstanding that it consented to the First Extension and Claims Order and has consented or not opposed the three previous extension of the Stay Period, the Stay Period should not be extended and that the litigation as among, *inter alia*, DOL, Jolian and UBS that precipitated the commencement of the CCAA proceedings and that underlies DOL's and Jolian's disputed claims against UBS ought to allowed to proceed in the ordinary course, but subject to being case-managed by a Judge presiding over the Commercial List. Jolian also opposes the procedure and timeline being proposed by the Monitor.
11. DOL's position on the request that the Stay Period be extended is not clear. DOL does not oppose the concept of a procedure and timeline being put in place to determine the its disputed claims against UBS, but takes issue with certain aspects of the procedure and timeline being proposed by the Monitor.

## PART II – ISSUES

12. The only issue to be determined on UBS's motion is whether the Stay Period ought to be extended to 30 June 2012.

## PART III – LAW AND ARGUMENT

13. To obtain an Order extending the Stay Period, UBS must satisfy the Court that
  - (a) circumstances exist that make an extension of the Stay Period appropriate; and
  - (b) it has acted, and is acting, in good faith and with due diligence.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), s. 11.02(3).

### A. Circumstances Exist that Make the Extension of the Stay Period Appropriate

14. The Court should consider whether the extension of the Stay Period being requested by UBS, and supported by the Monitor, is appropriate based on the purposes of the CCAA proceedings in respect of UBS. If the requested extension of the Stay Period will further the purpose of the CCAA proceedings, then it is appropriate and should be granted.
15. Julian's argument that the extension of the Stay Period is not appropriate is based on the flawed premise that these CCAA proceedings were commenced for the purpose only of:
  - (a) identifying the claims against UBS; and
  - (b) determining the statement of the affairs of the Applicants. This is not correct. The purpose of CCAA proceedings in respect of UBS was (and is), *inter alia*, to establish a process to identify and determine the validity of the claims being asserted against UBS. As described in the Affidavit of Robert Ulicki sworn 4 July 2011 and delivered in support of the Initial Order:
    4. *UBS and UBS Wireless are both insolvent and are seeking to commence proceedings under the CCAA to, inter alia:*
      - (i) *facilitate the determination and compromise or arrangement of creditor claims against UBS to permit the company to propose a plan to realize value from the company's assets, including its*

*shareholdings in LOOK Communications Inc. (“LOOK”), and its accumulated tax losses and public listing;*

- (ii) avert an imminent liquidity crisis being caused by litigation-related expenses that will prevent UBS from: (i) continuing to carry on business for the benefit of its stakeholders; (ii) defending certain proceedings brought against the company; and (iii) prosecuting claims commenced by UBS; and*
- (iii) provide a process to determine certain claims being asserted against UBS asserted by certain former directors and officers on their merits.*

5. *But for the commencement of proceeding under the CCAA, UBS will not be able to continue and will likely be forced into a liquidating proceeding. This will not be in the best interests of UBS’s stakeholders.*

...

53. *The cost of the Litigation [with DOL and Jolian] is, as set forth below, causing a serious strain on UBS’s cash flow. The costs of the Litigation are such that UBS believes that it will not be able to fund the Litigation through to a determination on the merits. If UBS is not able to continue to fund the defence of the Litigation (and the prosecution of the counterclaims), the matter will not be determined on its merits and this will result in prejudice to UBS’s other stakeholders. The amount being claimed against UBS in the Litigation is more than the total value of UBS’s assets and will “swamp” the claims of UBS’s other creditors.*

...

80. *UBS ... believes that a CCAA claims process will facilitate the determination of the claims asserted against UBS in the Litigation [with DOL and Jolian] and the Oppression Action in a more cost-effective and expedient manner for the benefit of UBS’s stakeholders.*

16. There have been no motions brought seeking to lift the stay imposed by the Initial Order to permit litigation against UBS to continue and, until 2 April 2012, the parties appeared to be in agreement that the disputed claims against UBS should be determined in the CCAA proceedings.
17. There has been no dispute that the purpose of the CCAA proceedings was to, *inter alia*, have the disputed claims against UBS determined on their merits in a effective, economic and efficient process developed in the context of the CCAA proceedings. There has also been no dispute that the determination of the disputed claims being asserted against UBS

by DOL and Jolian needed to be determined for UBS to proceed with a reorganization for the benefit of its stakeholders.

18. The CCAA is a broad statute that serves a remedial purpose and there is nothing inappropriate appropriate for a debtor company to engage the CCAA to facilitate the determination of litigation claims against the debtor company outside of the “ordinary” litigation process.
19. In *Ravelston Corp. (Re)*, 2005 CarswellOnt 1619 (S.C.J.), CCAA proceedings were commenced in respect of a company whose only assets were shares. The company – Ravelston Corp. – was involved in significant litigation.

*Ravelston Corp. (Re)*, 2005 CarswellOnt 1619 (S.C.J.).

20. Similarly, in *Muscletech Research & Development Inc. (Re)*, 2006 CarswellOnt 264 (S.C.J.), proceedings under the CCAA were commenced in respect of a debtor company where the main purpose of the proceeding was to deal with various litigation proceedings commenced against the debtor company.

*Muscletech Research & Development Inc. (Re)*, 2006 CarswellOnt 264 (S.C.J.).

21. The First Extension and Claims Order is clear on its face that the purpose of the Order, and the claims procedure contained therein, is to determine the disputed claims against UBS on their merits. And there has never been any doubt that the claims made against DOL and Jolian were disputed. That was clear from the materials filed in support of the Initial Application by UBS under the CCAA and the materials filed on every motion brought in the CCAA proceedings.
22. Jolian: (a) had input into the claims procedure contained in the First Extension and Claims Order; (b) consented to the making of the First Extension and Claims Order; and (c) participated in the claims procedure implemented by the First Extension and Claims Order – Jolian insisted that UBS and the Monitor develop a procedure and timeline had to be developed to have the claims determined in accordance with the First Extension and Claims Order.

23. Jolian questions why UBS doesn't now "just defend the claims [brought by DOL and Jolian] and prosecute its counterclaim in the ordinary course?" That issue was, with respect, addressed by the materials filed in support of the Initial Application by UBS under the CCAA on 5 July 2011 and nothing has changed since July of 2011. While UBS did receive a \$2.7 million distribution from LOOK Communications Inc., that distribution does not make UBS solvent or now make litigation with, *inter alia*, Jolian a financially palatable option to UBS's stakeholders for resolving the disputed claims made against UBS by DOL and Jolian.
24. Jolian willingly concedes that the determination of the Jolian Claim can be determined effectively, economically and efficiently in the CCAA process, but argues that the same result can take place outside of the CCAA. However, while Jolian argues that a process can be put to determine the disputed claims against UBS outside of the CCAA that will mirror the economics, efficiency and effectiveness of a CCAA claims process, Jolian fails to provide any suggestions whatsoever as to how the process it proposes to implement outside of the CCAA would differ in any substantive way from a process under the CCAA.
25. Two of the three cases relied on by Jolian to oppose the extension of the Stay Period - *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (C.A.) and *Realtysellers (Ontario) Ltd. (Re)*, 2008 CanLII 3220 (S.C.) - involved initial application or motions in the early stages of the CCAA process where the Court determined that the CCAA could not be used by the debtor company to accomplish its intended objective(s).
26. The third case relied upon by Jolian, *Shire International Real Estate Investments Ltd (Re)*, 2010 ABQB 84 (Q.B.), involved a "liquidating" CCAA and the issue before the Court on the stay extension application was whether a "liquidating" CCAA was appropriate in the circumstances. The secured creditor, whose claim and security were not subject to dispute, objected to the continuation of the CCAA proceedings and the Court found that the CCAA would serve no purpose. It is worth noting, however, that the Court accepted that CCAA proceeding were appropriate where the interests of investors

were being protected by the CCAA proceedings and the CCAA proceedings might be of benefit to the investors<sup>2</sup>.

27. Jolian argues that: (a) there is no prospect of UBS being able to present a plan of compromise or arrangement; and (b) there is no proposed plan of compromise or arrangement and nor is there a plan by UBS to ever make such a plan. This is not correct.
28. Mr. Dolgonos has indicated that he would like to see UBS emerge from the CCAA proceedings and continue to carry on business. While Mr. Dolgonos has never said how he proposes to have UBS emerge from the CCAA proceedings and continue to carry on business, UBS emerging from CCAA proceedings would, in all likelihood, involve a plan of compromise or arrangement being developed and put to UBS's creditors and shareholders. UBS has proposed an outline of the plan to Mr. Dolgonos.
29. Jolian argues that if there is a plan developed by UBS it will not produce results more attractive to shareholders or creditors than will result from the litigation among UBS, DOL, Jolian, Mr. Dolgonos and Mr. McGoey. This argument is difficult to follow.
30. Litigation is akin to the claims process in a CCAA proceedings, not the plan of compromise or arrangement. Under the CCAA, the plan of compromise or arrangement is, generally, intended to effect a compromise or arrangement of the claims against the debtor and/or implement some sort of reorganization of the debtor company's business or corporate structure, not to determine the claims against the debtor. Almost by definition a plan will be more attractive to UBS stakeholders than litigation.

**B. UBS has Acted and is Acting in Good Faith and with Due Diligence**

31. The good faith and due diligence requirements of s. 11.02(3) of the CCAA is concerned primarily with good faith and due diligence by the debtor in the CCAA proceedings.

*See Pacific Shores Resort & Spa Ltd. (Re)*, [2011 B.C.J. No 2482 (S.C.)], para 31.

---

<sup>2</sup> In that case there were 800 investors who were represented by counsel. In the case of UBS, no representative counsel has been appointed for the 15,000 shareholders.

32. The Monitor has provided its view that UBS has acted and is acting in good faith and with due diligence in the CCAA proceedings.
33. While the Jolian Factum does not deal specifically with the issue of good faith and due diligence and does not contain any specific arguments that UBS has not acted in good faith and with due diligence, Jolian does make a number of assertions that could be taken as being aimed at the issue as to whether UBS has acted in good faith and with due diligence. There is no merit to any of the assertions. For example:

Assertion	UBS Response
UBS is working to avoid the indemnity advancement issue being ultimately determined.	Jolian and DOL have, in accordance with an Order made by the Court of Appeal on [Date] 2012, brought motions seeking indemnity advancement from UBS. Jolian and DOL have yet to schedule 0930 appointments to schedule the return of those motions.
UBS is using the CCAA to avoid its contractual and statutory obligations to make advancements on its indemnity obligations.	See above.
UBS has indicated it will resist scheduling a motions with respect to the indemnity advancement requested by Jolian and DOL.	This is simply not true.
UBS is using the CCAA to deny Mr. McGoey “full procedural fairness” vis-à-vis the assertions made by UBS with respect to Mr. McGoey’s actions as a director of UBS in response to Jolian’s and DOL’s disputed claims.	The Monitor has proposed a procedure and timeline for the determination disputed claims on their merits. UBS has agreed to have all of the assertions made as against, inter alia, Mr. McGoey addressed in that procedure.
UBS is attempting to “reserve” its counterclaims against Jolian and Mr. McGoey .	With one limited exception – a claim for payment over of any amounts paid to Jolian by LOOK – UBS has agreed to have its counterclaims against, inter alia, Mr. McGoey and Jolian dealt with in the claims procedure being proposed by the Monitor.
UBS brought a motion to have the oppression remedy commenced by 206 Ontario as against the directors of UBS stayed.	UBS’s motion was granted over the objections of, <i>inter alia</i> , Jolian.

UBS resisted 206 Ontario's motion to remove members and replace the majority of the UBS board.	206 Ontario's motion was dismissed.
UBS refused to do the rights offering "suggested" by 206 Ontario and refused to "acknowledge" a requisition to call a meeting to consider a rights offering.	This issue was addressed on 206 Ontario's motion seeking to remove and replace the majority of the UBS board.

34. UBS understands that Jolian may also argue that the e-mail attached as Exhibit D to the Affidavit of Robert Ulicki sworn 3 April 2012 is somehow privileged and that UBS has acted improperly by including that e-mail in the Affidavit sworn in response to Jolian's opposition to UBS's motion seeking to extend the Stay Period.
35. It is UBS's position that the e-mail is not privileged and was not part of any settlement discussion. The e-mail, which was copied to the Monitor, was sent to outline how UBS believes that a plan under the CCAA can be structured to accomplish what UBS believes the objective of Mr. Dolgonos might be *vis-à-vis* UBS and to invite Mr. Dolgonos to engage in a negotiation with respect to the structure of a plan of compromise or arrangement in respect of UBS. The e-mail does not disclose or refer to the details of any of the without prejudice discussions or negotiations that have taken place with Jolian and/or DOL.
36. The e-mail was included in the materials responding to Jolian's opposition to UBS's motion to extend the Stay Period to refute the (incorrect) assertion made in the Jolian Factum that "there is no proposed plan....nor is there a plan to ever make such a plan."

#### **PART IV – ORDER REQUESTED**

37. UBS requests:
- (a) an Order extending the Stay Period to 30 June 2012; and
  - (b) costs plus applicable taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of April 2012



---

**GOWLING LAFLEUR HENDERSON LLP**

Barristers and Solicitors

1 First Canadian Place

100 King Street West, Suite 1600

Toronto, ON M5X 1G5

**E. Patrick Shea** (LSUC No. 39655K)

Tel: (416) 369-7399

Fax: (416) 862-7661

Solicitors for the Applicant

**SCHEDULE “A”**

*Ravelston Corp. (Re)*, 2005 CarswellOnt 1619 (S.C.J.).

*Musclotech Research & Development Inc. (Re)*, 2006 CarswellOnt 264 (S.C.J.).

*Pacific Shores Resort & Spa Ltd. (Re)*, [2011 B.C.J. No 2482 (S.C.).

## SCHEDULE "B"

### *Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.*

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
  - (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
  - (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
- (3) The court shall not make the order unless
- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
  - (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS INC.  
(the "Applicant")

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Commercial List)  
  
(PROCEEDING COMMENCED AT TORONTO)

**FACTUM**

**GOWLING LAFLEUR HENDERSON LLP**  
Barristers and Solicitors  
1 First Canadian Place  
100 King Street West, Suite 1600  
Toronto ON M5X 1G5  
  
**E. Patrick Shea**  
LSUC No.: 39655K  
Telephone: (416) 369-7399  
Facsimile: (416) 862-7661  
  
SOLICITORS FOR THE APPLICANT