

**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.**

**FACTUM OF THE RESPONDENTS
JOLIAN INVESTMENTS LIMITED AND GERALD MCGOEY
(Motion For Advancement Returnable June 13, 2012)**

June 7, 2012

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PART I – OVERVIEW

1. In this motion, the Respondents Jolian Investments Limited (“**Jolian**”) and Mr. Gerald McGoey (“**McGoey**”) move for an order requiring the Applicant (used here as that term is used in the Application for the Initial Order (identified below)) to pay Jolian and McGoey advances with respect to their reasonable legal, accounting or auditing expenses incurred to date or which may be incurred after today in providing services to the Applicant on or after July 5, 2011, including (1) the reasonable expenses incurred by Jolian and McGoey in establishing the Jolian and McGoey CCAA Claims (identified below), and (2) the reasonable expenses incurred by Jolian and McGoey in responding to the UBS Response (identified below) (the “**Post-Filing Services**”).

PART II – FACTS

2. McGoey is a former officer and director of Unique Broadband Systems, Inc. (“UBS”). Jolian is an Ontario management services corporation through which McGoey provided services to UBS.

UBS’s Mandatory Advancement Obligation

3. Over a year before the initial order was made by this Honourable Court in this CCAA proceeding on July 5, 2011 (the “**Initial Order**”), Jolian and McGoey claimed an entitlement to advancement from UBS on the basis of UBS’s By-Laws, the Jolian MSA (identified below), the UBS Indemnification Agreements (identified below), and s. 136 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the “**OBCA**”). Among other things, shareholder complaints, inquiries from regulators, and finally counterclaims by UBS gave reason for the advancement.

a. UBS By-laws

4. Under Article 7.01 of UBS’s By-laws, UBS has an obligation to advance monies to pay all costs, charges and expenses incurred to defend proceedings brought against its former officers and directors as a result of them being former officers or directors of UBS.

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), at paras. 78-81, Motion Record dated March 16, 2012 of Jolian Investments Limited and Gerald McGoey for CCAA Advancement Motion (“**Motion Record**”), Tab 2A, pp. 35-36

b. Jolian MSA

5. UBS entered into an employment agreement with McGoey effective June 1, 2002. On May 3, 2006, UBS and Jolian entered into a Management Services Agreement, effective

January 1, 2006 (the “**Jolian MSA**”). The Jolian MSA replaced the 2002 employment agreement entered into by UBS and McGoey.

Affidavit of Gerald McGoey sworn May 28, 2012, para. 29, Motion Record dated May 29, 2012 of Jolian and McGoey for Motion to Add Parties (“**Motion Record to Add Parties**”), Tab 2, p. 18

Jolian MSA, Motion Record, Tab 2B7

6. UBS has an obligation pursuant to Section 3.3 of the Jolian MSA to reimburse Jolian for all expenses incurred by Jolian as outlined in Appendix A to the Jolian MSA. UBS has an obligation pursuant to section 3.3(2) of the Jolian MSA that, among other things, legal expenses are to be reimbursed by UBS on a monthly basis.

Jolian MSA, Motion Record, Tab 2B7, pp. 254 and 262

7. With respect to Jolian expenses, in particular, UBS has an obligation pursuant to part (5) of Appendix “A” to the Jolian MSA to reimburse Jolian for all reasonable legal, accounting or auditing expenses incurred in respect of the Jolian MSA, Jolian’s performance of the “Services” as contemplated in the Jolian MSA, and any other matter relating to UBS including the defence against actions commenced by UBS, other shareholders or regulatory authorities. Part (5) of Appendix “A” to the Jolian MSA states:

“Legal and Accounting Expenses – UBS will reimburse Jolian for all reasonable legal, accounting or auditing expenses incurred in respect of this Agreement, Jolian’s performance of the Services as contemplated herein and any other matter relating to UBS including the defence against actions commenced by other shareholders or regulatory authorities. Notwithstanding the foregoing, UBS shall not reimburse Jolian for legal; expenses in respect of a matter (a) in which Cause has been established, and (b) arising out of dealings involving Jolian as a private shareholder.”

Jolian MSA, Motion Record, Tab 2B7, p. 262

8. UBS has an obligation pursuant to Part (6) of Appendix "A" to the Jolian MSA to indemnify the CEO Designee (being McGoey) for any matters not covered by UBS's directors and officers insurance.

Jolian MSA, Motion Record, Tab 2B7, p. 262

9. UBS has an obligation pursuant to Section 7.1 of the Jolian MSA to, among other things, indemnify and hold harmless Jolian, the CEO Designee (being McGoey), its directors and officers, to the fullest extent permitted by law, from any loss, liability or expense whatsoever arising out of, relating to, or in connection with Jolian, its directors or officers, providing UBS the "Services" under the Jolian MSA (except to the extent that such loss, liability or expense results from the gross negligence of Jolian, its directors or officers).

Jolian MSA, Motion Record, Tab 2B7, p. 258

10. Pursuant to section 7.11 of the Jolian MSA in the event of any dispute between Jolian and UBS as to any alleged breach by Jolian of any obligation under any other agreement between UBS and Jolian (the "**Other Agreements**"), UBS shall not be entitled to cease making payments required under the Jolian MSA to be made or provided to Jolian or McGoey and UBS shall not be entitled to hold back or set-off against any of its obligations under the Jolian MSA the amount of any damages it claims to have sustained as a result of any alleged breach under any of the Other Agreements.

Jolian MSA, Motion Record, Tab 2B7, pp. 260-261

c. Indemnification Agreements

11. Jolian and UBS entered an Indemnification Agreement dated January 25, 2007 (the **“Jolian Indemnification Agreement”**). UBS has an obligation pursuant to section 2(a) of the Jolian Indemnification Agreement to, among other things, advance within 10 days all expenses incurred in connection with, among other things, an investigation of an administrative matter or a defence of a civil action. Furthermore, pursuant to section 3(a) of the Jolian Indemnification Agreement, UBS is, among other things, to indemnify Jolian to the “fullest extent permitted by law”. Additionally, pursuant to section 12 of the Jolian Look Indemnification Agreement, Jolian’s expenses, including among other expenses, legal expenses, are to be paid by UBS for any action by Jolian to enforce or interpret the Jolian Indemnification Agreement.

Jolian Indemnification Agreement, Motion Record, Tab 2B8, pp. 268, 270 and 273

12. UBS and McGoey also entered an Indemnification Agreement dated January 25, 2007 (the **“McGoey Indemnification Agreement”**, and, collectively, with the Jolian Indemnification Agreement, the **“UBS Indemnification Agreements”**). The terms of the McGoey Indemnification Agreement are indistinguishable from those in the Jolian Indemnification Agreement.

McGoey Indemnification Agreement, Motion Record, Tab 2B9

Refusal to Honour Mandatory Advancement Obligation

13. In or about June and July 2010, Jolian requested reimbursement for legal expenses from UBS pursuant to the Jolian MSA and UBS paid these expenses in a timely manner.

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), at paras. 24-28, Motion Record, Tab 2A, p. 26

14. On July 5, 2010, after a contested shareholders meeting of UBS, the management and directors of UBS changed. That same day Jolian wrote to UBS to require payments due under the Jolian MSA as a result of the Company Default (used here as that term is defined under the Jolian MSA) and UBS's "termination without cause" of the Jolian MSA. UBS did not pay the amounts due to Jolian within the time agreed by the parties in the Jolian MSA. Jolian had no choice but to commence a lawsuit against UBS in the Ontario Superior Court of Justice (with Court File No. CV-10-406551) (the "**Jolian Proceeding**") and incur legal expenses in doing so.

July 5, 2010 Notice Letter, Motion Record, Tab 2D3

Amended Statement of Claim of Jolian issued July 12, 2010 and amended July 30, Motion Record, Tab 2B2

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), at paras. 32, 34, and 35, Motion Record, Tab 2A, pp. 27-28

15. The response by UBS at the direction of its new directors to the Jolian Proceeding was to counterclaim and sue select former directors of UBS within the Jolian Proceeding (the "**UBS Counterclaim**").

Statement of Defence and Counterclaim of UBS dated August 18, 2010, Motion Record to Add Parties, Tab 2B

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), at para. 37, Motion Record, Tab 2A, pp. 28-29

16. The UBS Counterclaim was a full attack on the former directors of UBS that had not cooperated with the new directors of UBS. The UBS Counterclaim included allegations about McGoey's integrity and honesty. The allegations were extensive and included allegations that McGoey failed to "act honestly and in good faith", that McGoey breached statutory and fiduciary duties to the Applicant, that McGoey "unjustly enriched" himself

to the detriment of UBS, and that McGoey's conduct was "unjust, unfair, unreasonable, [and] unconscionable". Along with a significant damages claim and alternative relief totalling in excess of \$15 million and a claim for injunctive relief, in the UBS Counterclaim UBS sought from McGoey and Jolian \$5 million of punitive damages.

Statement of Defence and Counterclaim of UBS dated August 18, 2010, Motion Record to Add Parties, Tab 2B

17. Furthermore, the UBS Counterclaim purported to re-write UBS's history and to second-guess 8 years of corporate action by UBS at the direction of its full Board. It also purported to suggest that McGoey did not bring significant value to UBS. The propriety of just about everything McGoey did for UBS was put into question by the UBS Counterclaim.

Statement of Defence and Counterclaim of UBS dated August 18, 2010, Motion Record to Add Parties, Tab 2B

18. Legal expenses were also incurred with respect to a counterclaim with allegations similar to those made in the UBS Counterclaim brought by UBS against McGoey in a proceeding commenced on or about July 12, 2010 by DOL Technologies Inc. (collectively with the UBS Counterclaim, the "**UBS Counterclaims**"); this proceeding has Court File No. CV-10-406609 (the "**DOL Proceeding**").

Statement of Defence and Counterclaim of UBS dated August 18, 2010, Motion Record to Add Parties, Tab 2C

19. As a result of the shareholder complaints, regulatory inquiries and the litigation described above, among other things, Jolian and McGoey requested additional reimbursement from UBS for legal expenses and UBS failed to pay these.

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), at para. 151, Motion Record, Tab 2A, p. 45

UBS Indemnity Advances Motions

20. As a result, McGoey and Jolian brought a motion for partial summary judgment in January 2011 for an order requiring UBS to make advances, on an ongoing basis and prior to any ultimate determination to indemnify, of Jolian's and McGoey's expenses in, among other things, pursuing the Jolian Proceeding, defending the UBS Counterclaims in the Jolian Proceeding and the DOL Proceeding, and responding to regulatory investigations. Later, DOL Technologies Inc. ("**DOL**"), the consulting company of UBS's former Chief Technology Consultant, Mr. Alex Dolgonos, along with Mr. Dolgonos brought a similar motion (collectively, the "**UBS Indemnity Advances Motions**").

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), Motion Record, Tab 2A

21. After hearing argument on April 27, 2011 on the UBS Indemnity Advances Motions, on May 30, 2011, the Honourable Justice Marrocco issued his Reasons for Judgment granting the UBS Indemnity Advances Motions.

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), Motion Record, Tab 2A

McCutcheon Group Directs UBS to Avoid Paying Marrocco Judgment – CCAA Filing and Indemnity Advances Appeal

22. On June 18, 2011, UBS's Board of Directors resolved to make a filing under the CCAA to avoid making the indemnity advances ordered to be made by Justice Marrocco. The market and this Court were not made aware of this decision to implement a change until July 5, 2011.

June 18, 2011 UBS Board Minutes, bottom of page 1 of 3, Exhibit "A", Affidavit of Jonahbelle Coz Mondelo sworn April 2, 2012 ("Coz Mondelo Affidavit"), Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab1A, p. 6

23. As the parties could not agree on the wording of the formal judgment resulting from the UBS Indemnity Advances Motions, on June 24, 2011, Jolian and McGoey moved before Justice Marrocco to amend or vary the judgment to include specific reference to accounting and auditing expenses in addition to legal expenses; McGoey and Jolian were successful on this motion and the formal judgment from the UBS Indemnity Advances Motions was signed and entered that day (the "**Marrocco Judgment**").

Marrocco Judgment entered June 24, 2011, Motion Record, Tab 2B10

24. Within the Marrocco Judgment, this Court adjudged that UBS must immediately make advances to Jolian and McGoey, and must make advances to Jolian and McGoey on an ongoing basis, as a result of Jolian and McGoey providing UBS services that it is suggested in this motion are the same services Jolian and McGoey have and are continuing to provide UBS with the Post-Filing Services (identified below).

Reasons for Judgment of Marrocco J., dated May 30, 2011 (and as revised July 7, 2011), Motion Record, Tab 2A

25. On June 29, 2011, after resolving on June 18, 2011 to make a filing under the CCAA, UBS delivered its notice of appeal of the Marrocco Judgment (the "**Indemnity Advances Appeal**").

Affidavit of Robert Ulicki sworn July 4, 2011, para. 60, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab1A, p. 21

26. On July 5, 2011 (the "**Filing Date**"), the Applicant made its CCAA filing and the Initial Order was made.

Initial Order, Motion Record to Add Parties, Tab 2D

UBS Disallows CCAA Claims on Basis of Indemnity Advances Appeal yet Delays Indemnity Advances Appeal

27. Prior to the Claims Bar Date of September 19, 2011, Jolian and McGoey filed claims in this CCAA proceeding for, among other things, reimbursement, advancement, and indemnity of their costs, of among other things, in pursuing the Jolian Proceeding and defending the UBS Counterclaims (the “**Jolian and McGoey CCAA Claims**”).

Jolian Proof of Claim dated September 16, 2011, Motion Record, Tab 2B

28. On October 12, 2011, UBS sought to adjourn the Indemnity Advances Appeal *sine die*. The Court of Appeal for Ontario declined to adjourn the Indemnity Advances Appeal and the Indemnity Advances Appeal was set for April 26, 2012.

Seventh Monitor’s Report (March 27, 2012), Monitor’s Motion Record for Claims Hearing Procedure dated March 28, 2012, Tab 2, p. 17

29. On December 9, 2011, UBS declined to accept the indemnity portion of the Jolian and McGoey CCAA Claims on the basis that:

“UBS has appealed Mr. Justice Marrocco’s Judgment and obligation of UBS to indemnify Mr. McGoey is not absolute – UBS asserts that there are grounds for UBS to not indemnify Mr. McGoey. If UBS’s appeal is not successful and it is determined that Mr. McGoey is entitled to be indemnified his claim will be valid, subject to the determination that the amounts he is claiming are reasonable.”

Letter from Mr. Shea to Mr. Gottlieb dated December 9, 2011, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab1C, p. 42

30. On January 4, 2012, the Monitor provided its Notice of Disallowance of the Jolian CCAA Claim and disallowed the indemnity portion of the Jolian and McGoey CCAA Claims on the same basis as UBS had declined on December 9, 2011 (and as quoted above) to accept the indemnity portion of the Jolian and McGoey CCAA Claims.

Monitor's Notice of Disallowance dated January 4, 2012, Motion Record, Tab 2C, p. 357

31. On January 27, 2012, Jolian provided its Notice of Dispute in this CCAA proceeding.

Jolian Notice of Dispute dated January 27, 2012, Motion Record, Tab 2D

32. On March 8, 2012, the Court of Appeal heard another motion by UBS to adjourn the Indemnity Advances Appeal *sine die*, and the Court of Appeal ordered that this motion shall proceed on the assumption that the Marrocco Judgment is valid.

Endorsement of Justice Simmons dated March 12, 2012, para. 1, Motion Record, Tab 2E

Subsequent Events

33. On March 13, 2012, UBS received approximately \$2.7 million as a result of a return of capital paid by Look Communications Inc. to its shareholders, which include UBS.

Seventh Monitor's Report (March 27, 2012), section 7.1, Monitor's Motion Record for Claims Hearing Procedure dated March 28, 2012, Tab 2, p. 19

34. On March 15, 2012, Jolian and McGoey brought this motion for payment of advances only after the Initial Order. DOL and Mr. Dolgonos brought a similar motion on March 29, 2012 (collectively, the "**CCAA Advancement Motions**").

Amended Notice of Motion dated March 15, 2012, Motion Record, Tab 1

Notice of Motion dated March 29, 2012, DOL Motion Record for CCAA Advancement Motion, Tab 1

35. On March 22, 2012, UBS brought a motion to extend the CCAA stay to July 31, 2012 and Jolian and McGoey resisted this motion.

UBS Notice of Motion dated March 22, 2012, Motion Record to Extend CCAA Stay dated March 29, 2012, Tab 1

36. On March 28, 2012, the Monitor brought a motion for, among other things, an order

establishing a procedure for the Court's determination of the claims filed by Jolian and DOL.

Monitor's Notice of Motion dated March 27, 2012, Motion Record for Claims Hearing
Procedure dated March 28, 2012, Tab 1

37. The CCAA Advancement Motions, UBS' motion to extend the stay, and the Monitor's motion regarding the claims process were heard on April 4 and April 13, 2012. These hearings resulted in an order entitled "Fourth Extension and Claims Determination Process" (the "**April 13, 2012 Order**").

April 13, 2012 Order, Motion Record to Add Parties, Tab 2A

38. In its April 13, 2012 Order, this Court ordered that all claims that are to ever be advanced between McGoey, Jolian, Mr. Dolgonos, and DOL on the one hand and UBS on the other hand should be determined within the Claims Determination Process.

April 13, 2012 Order, para. 2, Motion Record to Add Parties, Tab 2A

39. Pursuant to the April 13, 2012 Order and within the Claims Determination Process, the following documents were provided:

- a. The Claim of Jolian and McGoey dated April 26, 2012 (the "**Jolian Claim**");

Jolian Claim dated April 26, 2012, Motion Record to Add Parties, Tab 2E

- b. The Claim of DOL and Mr. Dolgonos dated April 26, 2012;

Claim of DOL and Mr. Dolgonos dated April 26, 2012, Motion Record to Add Parties,
Tab 2F

- c. UBS's Response and Counterclaim against Jolian and McGoey dated May 7, 2012 (the "**UBS Response**");

UBS's Response and Counterclaim against Jolian and McGoey dated May 7, 2012,

Motion Record to Add Parties, Tab 2G

- d. UBS's Response and Counterclaim against DOL and Mr. Dolgonos dated May 7, 2012 (the "**UBS DOL Response**");

UBS's Response and Counterclaim against DOL and Mr. Dolgonos dated May 7, 2012,
Motion Record to Add Parties, Tab 2H

- e. The Response of Jolian and McGoey dated May 18, 2012 (the "**Jolian Response**"); and

Jolian Response dated May 18, 2012, Motion Record to Add Parties, Tab 2I

- f. The Reply and Response of DOL and Mr. Dolgonos dated May 18, 2012 (the "**DOL Response**").

Reply and Response of DOL and Mr. Dolgonos dated May 18, 2012, Motion Record
to Add Parties, Tab 2J

40. It was unclear in the UBS Response whether UBS (1) was pursuing claims against Jolian or McGoey, (2) was setting off claims it has against Jolian or McGoey against the claims advanced by Jolian and McGoey, and/or (3) was abandoning all of its claims against Jolian and McGoey. McGoey requested that UBS clarify its position in the Jolian Response (Part C). Lawyers for McGoey wrote to UBS's lawyers on May 24, 2012 to again request clarification.

Affidavit of Gerald McGoey sworn May 28, 2012, para. 6, Motion Record to Add Parties,
Tab 2, p. 9

Jolian Response dated May 18, 2012, p.10, Motion Record to Add Parties, Tab 2I

Letter dated May 24, 2012, Motion Record to Add Parties, Tab 2K

41. At 5:42 p.m. on Friday May 25, 2012, in advance of McGoey's cross-examination scheduled for 9 a.m. the following Monday morning, UBS advised through an email from

its lawyers to his lawyers (and the lawyers for DOL and Mr. Dolgonos) the following:

“UBS is seeking as against your respective clients payments in respect of the "improper expenses" and the UBS Ltd. sale transaction. Those amounts will be quantified. To the extent that your clients are held to have acted in bad faith such that the Lawyer Funds must be returned to UBS, we will of course be seeking the return of those funds.”

Affidavit of Gerald McGoey sworn May 28, 2012, para. 7, Motion Record to Add Parties, Tab 2, p. 9

Email from lawyers for UBS dated May 25, 2012, Motion Record, Tab 2L

42. It remains unclear to McGoey (1) whether UBS continues to claim Jolian and/or McGoey are jointly and severally liable for amounts claimed against the other directors made parties to the Jolian Proceeding (the “**Former Directors**”), or (2) whether UBS is continuing to pursue its claims against the Former Directors and, if so, whether UBS is continuing to claim joint and several liability against them.

Affidavit of Gerald McGoey sworn May 28, 2012, para. 8, Motion Record to Add Parties, Tab 2, p. 10

43. It appears that UBS is making these claims against Jolian and McGoey and is seeking to set off other claims it alleges it has against Jolian and/or McGoey in the UBS Response. These claims include:

- a. UBS claims that the Jolian MSA (identified below) and/or the basis for any remuneration or reimbursement received by, declared for, or available to Jolian or McGoey from UBS is null, void, or unenforceable,
- b. UBS sets off from amounts that would have otherwise been payable to Jolian or McGoey, as a result of the claims advanced in the Jolian Claim, amounts for payments made to or declared to be made to Jolian or McGoey by UBS on the

basis they somehow were improper or arise from agreements that now are in UBS's view null, void, or unenforceable,

- c. UBS claims damages against Jolian and McGoey for what it alleges are improper expenses,
- d. UBS claims damages against Jolian and McGoey with respect to the sale by UBS of its Canadian engineering and manufacturing business in September 2003 to UBS Ltd. (the "**Engineering Business Sale**"), and
- e. UBS claims damages against Jolian and McGoey with respect to retainers UBS provided to lawyers for McGoey (collectively, the "**UBS Claims**").

Affidavit of Gerald McGoey sworn May 28, 2012, para. 9, Motion Record to Add Parties, Tab 2, pp. 10-11

UBS's Response and Counterclaim against Jolian and McGoey dated May 7, 2012, Motion Record to Add Parties, Tab 2G

44. UBS also advises in footnote 1 on page 14 of the UBS Response that it intends to bring a claim against UBS Ltd. to have UBS Ltd. provide UBS 66.66% of its common shares or, in the alternative, damages. While this claim is well out of time as it relates to events from 2003 to the latest 2006, UBS Ltd. will nonetheless need to defend itself and McGoey believes will bring an action against the directors of UBS at that time that include McGoey and the Former Directors (the "**Engineering Business Sale Claim**"). This will lead those Former Directors (including McGoey) to claim over against each other, claim against UBS, and claim against UBS's directors and officers insurer.

Affidavit of Gerald McGoey sworn May 28, 2012 at para. 10, Motion Record to Add Parties, Tab 2, p. 11

UBS's Response and Counterclaim against Jolian and McGoey dated May 7, 2012, p. 14, Motion Record, Tab 2G, p. 157

45. The DOL Response indicates in Part B (beginning at page 11) that DOL and Mr. Dolgonos, on the basis of the claims made by UBS against DOL and Mr. Dolgonos in the UBS DOL Response (which DOL and Mr. Dolgonos deny) may bring a claim against McGoeey and other former directors and executives of UBS including the Former Directors for contribution, indemnity and for misrepresentation (the “**DOL Claims**”).

Reply and Response of DOL and Mr. Dolgonos dated May 18, 2012, p. 11, Motion Record to Add Parties, Tab 2J, p. 275

PART III – ISSUES

46. The issue on this motion is:

Should UBS be permitted to use a CCAA filing to avoid the Marrocco Judgment and UBS’s mandatory advancement obligation?

PART IV –ARGUMENT

Introduction

47. No claim is made in this motion for UBS to make advances for, among other things, Jolian and McGoeey’s costs of pursuing the Jolian’s claim in the Jolian Proceeding and of defending the UBS Counterclaims up to the Filing Date (collectively, the “**Pre-Filing Services**”). Advances for the Pre-Filing Services form part of the Jolian and McGoeey CCAA Claims.
48. The facts as set out in Part II above reveal:
- a. UBS has a mandatory obligation to make advances to Jolian and McGoeey. This obligation arises from contracts – the Jolian MSA and the UBS Indemnification

Agreements, from the UBS By-Laws, and from statute – section 136 of the OBCA.

- b. UBS, under the direction of the McCutcheon Group, first refused to honour UBS's mandatory advancement obligation to Jolian and McGoey (while at the same time honouring this same obligation to other former directors such as Messrs. Mitrovich and Minaki, and the current directors of UBS). As a result, Jolian and McGoey moved before this Court, and this Court held in the Marrocco Judgment that UBS had a mandatory advancement obligation to Jolian and McGoey.
- c. In response, the McCutcheon Group in a concerted effort resolved to cause UBS to avoid the Marrocco Judgment and its mandatory advancement obligation by filing for CCAA protection. UBS did not tell Jolian, McGoey, or the Courts of its immediate intention to file for CCAA protection when it (1) unsuccessfully resisted Jolian and McGoey's motion to vary the Marrocco Judgment, and (2) filed its appeal of the Marrocco Judgment.
- d. The McCutcheon Group continued to cause UBS to avoid the Marrocco Judgment and its mandatory advancement obligation by, on the one hand, improperly disallowing the advancement portion of the Jolian and McGoey CCAA Claims by relying on the fact the Indemnity Advances Appeal was outstanding and, on the other hand, resisting efforts to have the Indemnity Advances Appeal heard and determined.

- e. Now, the McCutcheon Group seeks to pursue counterclaims and claim significant set off against Jolian and McGoey within the Claims Determination Process yet resists this motion and continues to seek to avoid the Marrocco Judgment and to refuse to honour its mandatory advancement obligation owed to Jolian and McGoey.
- f. The Court of Appeal for Ontario ordered that this motion shall proceed on the assumption that the Marrocco Judgment is valid.

The Marrocco Judgment

49. As was adjudged in the Marrocco Judgment:

- a. UBS entered into contracts with Jolian and McGoey in which it agreed to make advances to Jolian and McGoey for, among other things, the Pre-Filing Services (and it is suggested in this motion, for Post-Filing Services) including the Jolian MSA, the Jolian Indemnification Agreement, and the McGoey Indemnification Agreement,
- b. UBS's By-laws also provide for UBS making advances for the Pre-Filing Services (and it is suggested on this motion, for the Post-Filing Services),
- c. In addition, McGoey and Jolian have a statutory right to advances of the Pre-Filing Services (and it is suggested in the motion, of the Post-Filing Services) pursuant to s. 136 of the OBCA,

- d. UBS is to make advances to Jolian and McGoey for the Pre-Filing Services (and it is suggested in this motion, for the Post-Filing Services) on an ongoing basis and before any final determination as to the right to indemnification,
- e. Jolian and McGoey are presumed to have acted in good faith and therefore to be entitled to the advances and indemnity, and
- f. to end or avoid the obligation to make advances, the onus is on UBS to prove Jolian or McGoey have in a related respect not acted in good faith – it is only at this time the obligation to advance comes to an end.

Jolian Investments Ltd. v. Unique Broadband Systems Inc., 2011 ONSC 3241 at paras. 64, 69-71, 90, 148-150, Brief of Authorities, Tab 1

50. Among other things, in the Marrocco Judgment, this Court held:

“68 If the indemnification given to Jolian Investments Limited and Gerald McGoey is what it purports to be; namely, an indemnification "to the fullest extent permitted by law", then the indemnification agreements must indemnify Jolian Investments Limited and Gerald McGoey when they respond to allegations which squarely raise the CEO services which Jolian Investments Limited provided to UBS through Gerald McGoey. If Gerald McGoey's entire conduct as CEO is not sufficient to engage his indemnification agreement, then it is difficult to appreciate what indemnity, if any, it provides.

69 Section 136(1) of the *OBCA* permits UBS to indemnify an officer, director, former officer or former director against all charges, costs and expenses, including an amount paid to settle an action or satisfy a judgment reasonably incurred by the individual because of the individual's association with the Corporation.

70 Section 136(2) of the *OBCA* permits UBS to advance money for costs, charges and expenses incurred in respect of civil proceedings by an individual who acts or acted as a director or officer.

71 The Jolian Indemnification Agreement and the McGoey Indemnification Agreement make mandatory what sections 136(1) and (2) permit.

72 It is not necessary to determine whether there is also an implied agreement

to pay interim accounts as rendered for those legal services because section 2(a) of the McGoeys Indemnification Agreement specifically provides, among other things, that the Corporation shall advance all expenses incurred by Gerald McGoeys in the defence of any civil proceeding.

73 Even if this were not the case, I have already set out earlier my conclusion that, absent a contractual provision prohibiting advances on account of legal expenses, the agreement to indemnify against legal expenses "to the fullest extent permitted by law" must imply an agreement to pay retainers and interim legal accounts." [Emphasis added]

Julian Investments Ltd. v. Unique Broadband Systems Inc., 2011 ONSC 3241 at paras. 68-73, Brief of Authorities, Tab 1

Mandatory Advancement Obligation

51. 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, Brief of Authorities, Tab 2

See also *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 36 at para. 15, Brief of Authorities, Tab 3

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, Brief of Authorities, Tab 4

52. 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?
53. Subsection 136(2) of the OBCA states:

“(2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3)”¹

Why Advancement is not Dependent on a Determination of Indemnity Entitlement

a. Without advancement, indemnification becomes meaningless

i. The Law of Ontario

54. The answer to the question why advancement is needed as a precursor to determining entitlement to indemnification is that, speaking practically, without advancement, indemnification becomes meaningless. In the Marrocco Judgment it was held that:

“54 Section 136 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 (the “*OBCA*”) permits the indemnification for directors and officers of a corporation when they incur legal expenses related to their involvement with the corporation. It has been determined by the Court of Appeal that the Legislature, in making advancement part of the statutory indemnification scheme, recognized the reality that requiring an individual to fund his or her costs of litigation until its conclusion before being provided with indemnification would seriously impair the objective of indemnification itself (see: *Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380 (Ont. C.A.) at para. 20).

55 The Manitoba Court of Appeal reiterated this perspective in *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 36, 31 C.B.R. (5th) 1 (Man. C.A.). The Court stated, at para. 50:

While it is possible that the present lawsuit will be resolved in short order, it is more likely that it will take some time before that happens. I agree with the judge when she said: '[t]hese matters are lengthy and complex and are unlikely to be completed for some considerable time' (at para. 41). In the meantime, the former directors and officers, presumed so far to have acted in good faith, have an immediate and legitimate need for counsel. Under the present circumstances they ought not to be obliged to finance their own defence costs.” [Emphasis added]

¹ Subsection 136(3) of the OBCA states:

“A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation’s request.”

Jolian Investments Ltd. v. Unique Broadband Systems Inc., 2011 ONSC 3241 at paras. 54-55, Brief of Authorities, Tab 1

55. Furthermore, in *Med-Chem* the Court of Appeal for Ontario recognized the importance of and policy objectives (as set out by the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*) of advances within the statutory indemnification scheme:

“In short, the legislature has made advancement a part of the statutory indemnification scheme, recognizing the reality that requiring an individual to fund his or her costs of litigation until its conclusion before being provided with indemnification would seriously impair the objectives of indemnification itself. As described by the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 74: “Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurship”.”
[Emphasis Added]

Med-Chem Health Care Ltd. v. Misir, 2010 ONCA 380 at para. 20, Brief of Authorities
Tab 2

56. It is also evident that s.136 of the OBCA and, in particular s.136(2) of the OBCA, exist to meet the policy objective commented on above of encouraging the most qualified individuals to become corporate officers and directors by permitting and requiring indemnification of and advancement to corporate directors.
57. It follows that, if corporate officers and directors are to be enticed to serve and be retained through commitments to provide them advancement should they later be sued, then should this Court decline to enforce UBS's mandatory obligation to make advances, this policy objective will be undermined.

ii. Guidance from Delaware

58. The Courts of the State of Delaware in the United States of America have a longer history than the Ontario Courts in dealing with issues of mandatory advancement obligations of

corporations. Delaware has a similarly worded corporate statute to that of the OBCA.

With respect to advancement, the relevant provisions state:

Section 136 of OBCA	DELAWARE CODE, TITLE 8, Corporations CHAPTER 1. GENERAL CORPORATION LAW Subchapter IV. Directors and Officers § 145. Indemnification of officers, directors, employees and agents; insurance
Advance of costs (2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3).	(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

Application to court

(5) A corporation or a person referred to in subsection (1) may apply to the court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit.

(k) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).

59. While not binding on this Court, the courts of Delaware have clearly determined that:

- a. advancement is not dependent on the right to indemnity,
- b. advancement must occur before the determination of entitlement to indemnity or the right to indemnity becomes meaningless,
- c. the policy rationale that supports advances and indemnification are applicable even where allegations of misconduct have been alleged against officers and directors of the company,
- d. "corporations that voluntarily extend to their officers and directors the right to indemnification and advancement . . . have a duty to fulfill their obligations under such provisions with good faith and dispatch. It is no answer to an advancement action, as either a legal or logical matter, to say that the corporation now believes the fiduciary to have been unfaithful. Indeed, it is in those cases that the right to advancement attaches most strongly . . .", and
- e. "corporations that adopt mandatory advancement provisions and then, after drawing 'harsh conclusions about the integrity and fidelity of the corporate

official seeking advancement,' defend against claims for mandatory advancement are like the 'sinner who suddenly finds religion': '[c]ontent to adopt advancement and indemnification bylaws drafted with holes large enough to drive a truck through, the . . . company . . . suddenly 'finds religion' – insisting on a rigorous interpretation of its loosely written bylaws."

Stephen A. Radin, "Sinners Who Find Religion: Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing" (2006) 25 Rev. Litig. 251 at pp. 252-253, 256, 268-269, 278-280, Brief of Authorities Tab 4

60. In the decision of *Reddy v. Electronic Data Systems Corp.*, No. Civ. A. 19467, 2002 WL 1358761 (Del. Ch. June 13, 2002), *aff'd mem.*, 820 A.2d 371 (Del 2003), for example, the Delaware Court of Chancery stated:

"Corporate advancement practice has an admittedly maddening aspect. At the time that an advancement dispute ripens, it is often the case that the corporate board has drawn harsh conclusions about the integrity and fidelity of the corporate official seeking advancement. The board may well have a firm basis to believe that the official intentionally injured the corporation. It therefore is reluctant to advance funds for his defense, fearing that the funds will never be paid back and resisting the idea of seeing further depletion of corporate resources at the instance of someone perceived to be a faithless fiduciary.

But, to give effect to this natural human reaction as public policy would be unwise....That result would make the promise made to Reddy in the EDS bylaws an illusory one.

For these reasons, this court has often been required to uphold the indemnification and advancement rights of corporate officials accused of serious misconduct, because to do otherwise would undermine the salutary public policies served by s. 145"

Reddy v. Electronic Data Systems Corp., No. Civ. A. 19467, 2002 WL 1358761 (Del. Ch. June 13, 2002), *aff'd mem.*, 820 A.2d 371 (Del 2003), Brief of Authorities, Tab 5

iii. Objectives of Indemnification Agreements at Issue in this Case

61. The role the policy objectives of advancement and indemnification played in this case are apparent on the face of the UBS Indemnification Agreements where in the recitals the UBS Board documented at the time some of the reasons they exercised their business judgment to agree to the agreements. The UBS Indemnification Agreements at issue document that the Board of UBS was concerned about retaining the services of its officers and directors at the time the UBS Indemnification Agreements were negotiated. The reasons for the concern included the litigious environment the company found itself in and a concern over the ongoing payment of defence costs should a director or officer get sued as a result of service provided to UBS. The recitals in the UBS Indemnification Agreements state:

“A. The Corporation and Indemnitee recognize the increasing difficulty in obtaining adequate directors’ and officers’ liability insurance, the significant increases in the cost of such insurance and the general reductions in the coverage of such insurance.

B. The Corporation and Indemnitee further recognize the substantial increase in corporate litigation in general, subjecting officers, consultants and directors to expensive litigation risks at the same time as the availability and coverage of liability insurance has been severely limited.

C. Indemnitee does not regard the current protection available as adequate under the present circumstances, and Indemnitee and other officers, consultants and directors of the Corporation may not be willing to continue to serve as officers, consultants and directors without additional protection.

D. The Corporation desires to attract and retain the services of highly qualified individuals, such as Indemnitee, to serve as officers, consultants and directors of the Corporation and to indemnify its officers, consultants and directors so as to provide them with the maximum protection permitted by law.”

Julian Indemnification Agreement, Motion Record, Tab 2B8

McGoey Indemnification Agreement, Motion Record, Tab 2B9

b. Right to Advancement Analogous to Duty to Defend

62. Jolian and McGoeey submit that the right to advancement should be determined on an application with limited extrinsic evidence as a preliminary matter, and the issue of whether a right to indemnity exists should be left for the trial of the underlying dispute. Jolian and McGoeey submit that, while there is little guidance in Ontario law on how to approach this issue², this situation is analogous how this Court approaches disputes over an insurer's duty to defend and whether ultimately the insurer needs to pay out on the insurance policy.

63. In *Halifax Insurance Co. of Canada v. Innopex Ltd.*, the Court of Appeal for Ontario dealt with an application under clause 14.05(3)(d) of the *Rules of Civil Procedure* to determine whether an insurance company owes a duty to defend a policyholder in a lawsuit. It was held that establishing whether an insurer owes a duty to defend is a "preliminary matter", and that an application under clause 14.05(3)(d) is the appropriate procedure to determine this issue.

Halifax Insurance Co. of Canada v. Innopex Ltd. (2004), 72 O.R. (3d) 522 [*"Halifax"*] at para. 37, Brief of Authorities, Tab 6

64. The Court stated that the procedure to be followed on such an application is summary and not intended to resemble a "trial within a trial" into the truth of the allegations in the underlying statement of claim. The introduction of extrinsic evidence or findings that bear on the underlying issues must be limited or avoided where possible.

² It is true a cross motion for advancement was granted on December 29, 2010 by the Honourable Justice Wilton-Siegel in *Bennett v. Bennett Environmental Inc.* 2010 CarswellOnt 9904, 2010 ONSC 6030 (Brief of Authorities, Tab 7); however, a review of this decision indicates the former director in that case either did not know, or chose not, to argue that his cross motion for advancement should be determined before there was any consideration of the question of whether he was entitled to indemnity. It may be, for example, that the former director in that case (as it was in the Indemnity Advances Motions that led to the Marrocco Judgment) assessed the limited evidence put forward by the company and chose not to fight that issue.

Halifax Insurance Co. of Canada v. Innopex Ltd. (2004), 72 O.R. (3d) 522 at para. 37,
Brief of Authorities, Tab 6

65. In *Halifax*, stressed that determining the duty to defend is a preliminary matter that need be resolved expeditiously:

“In addition, the procedure undertaken by the insurer, albeit a misguided effort to persuade the court on the basis of “the true facts”, demonstrates that Rule 20 does not lend itself to deciding duty to defend issues. The delay involved to bring a motion for summary judgment, that can be resorted to only after the defendant has delivered a statement of defence, necessarily defeats the objective of deciding duty to defend issues expeditiously as a preliminary issue. Moreover, further delay is possible if genuine issues arise which cannot properly be resolved by a motion judge on a Rule 20 motion.

When an insured person is sued for a claim that may fall within a risk that is insured, it is essential that he or she know at a very early stage whether or not the claim falls within the coverage, thereby creating a duty to defend, as it is necessary that prompt steps be taken to defend the lawsuit and to forestall default judgment. No doubt this underlies the principle that the duty to defend issue is to be decided expeditiously as a preliminary matter on the basis of the allegations in the underlying litigation read with the insurance coverage. The insurer's procedure in this case did not result in either an early, or an economical resolution of the issue. Indeed, it has now been more than four years since Halifax commenced its action claiming a declaration that it was not under a duty to defend.”

Halifax Insurance Co. of Canada v. Innopex Ltd. (2004), 72 O.R. (3d) 522 at para. 39, 55,
Brief of Authorities, Tab 6

66. Finally, the court in *Halifax* noted that a duty to defend application should not be turned into a substantive consideration of whether the insured is entitled to indemnification:

“What the insurer did in this case, by the procedure it followed, was to turn a duty to defend application into a duty to indemnify application by introducing extrinsic evidence pertaining to what it termed “the true facts”. It is well-recognized that the insurer's duty to defend is broader than its duty to indemnify. The time to determine the insurer's duty to indemnify, if at all, is at the conclusion of the underlying litigation.” [Emphasis Added]

Halifax Insurance Co. of Canada v. Innopex Ltd. (2004), 72 O.R. (3d) 522 at para. 38,
Brief of Authorities, Tab 6

CCAA Stay of Proceedings Irrelevant

67. UBS and the Monitor have gone to great lengths to try to “pin down” Jolian and McGoey to agree with their position that the CCAA stay of proceedings made in the Initial Order must be “lifted” for this Court to be able to determine UBS must make advances to Jolian and McGoey as requested in this motion.
68. The “lift stay” cases, such as that the Saskatchewan Court of Appeal decision in *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 CarswellSask 324, 33 C.B.R. (5th) 50 (“*ICR*”), usually involve a request to lift the stay to permit a lawsuit to proceed against the debtor. In such cases, including in *ICR*, whether the Court exercised its discretion to lift the stay or not for that purpose depended on whether there were “sound reasons” to do so; and these could be determined by considering such factors as:
- a. the balance of convenience;
 - b. the relative prejudice to the parties;
 - c. the merits of the proposed action (where they are relevant to the issue of whether there are “sound reasons” for lifting the stay); and
 - d. the good faith and due diligence of the debtor company.
- ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 CarswellSask 324, 33 C.B.R. (5th) 50, at para. 68, Brief of Authorities, Tab 8
69. UBS has made much of this issue in the lead up to this motion, and in particular the factor that includes an assessment of the relative prejudice to the parties, as UBS wished to use it as a basis to delve into McGoey’s personal financial condition either (1) to

somehow seek to scare McGoey away from pursuing this motion by threatening to air his personal financial information in open court, and/or (2) to obtain an advantage in the ongoing litigation between Jolian, McGoey and the McCutcheon Group by being able assess for how long and how far Jolian and McGoey might be able to finance the litigation.

70. Jolian and McGoey submit the issue before the Court in this motion is simply whether UBS must pay the Marrocco Judgment. The stay of proceedings in the Initial Order stayed enforcement of judgments; it does not stay any judgments themselves. The Marrocco Judgment remains in full force and effect and the Court of Appeal has directed that for the purposes of this motion it is valid.

Initial Order, para. 12, Motion Record to Add Parties, Tab 2D, p. 110

Endorsement of Justice Simmons dated March 12, 2012, para. 1, Motion Record, Tab 2E

71. Furthermore, Jolian and McGoey do not seek leave to commence a lawsuit outside the CCAA process as was the case in *ICR*. Jolian and McGoey seek to be paid advances within the CCAA process. All of the Post-Filing Services at issue relate to the CCAA claims process and those going forward will relate to the Claims Determination Process.
72. Additionally, or in the alternative, section 11.01 of the CCAA provides that no CCAA stay of proceedings can have the effect of “(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or (b) requiring the further advance of money or credit.”

Alternatively, All factors Point to Lifting the Stay

73. Should Jolian and McGoey be wrong in this respect, in the alternative, they submit that when all four of the “lift stay” factors are considered they all suggest this Court should take whatever steps may be necessary to require UBS to pay the advances at issue on an ongoing basis.

i. Balance of Convenience

74. There is nothing to balance against. McGoey and Mr. Dolgonos are the key creditors of UBS. Their claims are in the 10s of millions of dollars and all other creditors taken together do not add up to \$1 million. Even UBS describes Jolian/McGoey and Mr. Dolgonos as the only “major stakeholders” in these proceedings. While their interests differ, on the issue of advancement, Mr. Dolgonos has also brought a motion for advancement.

Claims Register as at February 10, 2012, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab 1T.

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

Notice of Motion dated March 29, 2012, DOL Motion Record for CCAA Advancement Motion, Tab 1

75. Furthermore, UBS has no secured creditors. There are no other significant unsecured creditors of UBS clamoring for payment. UBS is not facing mass tort claims or class actions.

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

Ulicki July 4, 2010 Affidavit, para. 32, Jolian/McGoey Responding Motion Record to UBS Motion to Extend Stay, Tab 1B, p. 15

76. As McGoey and Mr. Dolgonos are owed more by UBS than it has in assets, McGoey (and likely Mr. Dolgonos) would also like to see an end to the significant spending by UBS on professional fees for its own advisors and those of the Monitor.

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

ii. Relative Prejudice

77. There is no prejudice to UBS to comply with the Marrocco Judgment and make advances. It is UBS that made the contractual agreements with Jolian and McGoey, and it is UBS's own conduct that triggered the requirement for Jolian and McGoey to provide UBS services and for UBS to make advances for these services.
78. UBS's own ongoing choices such as making significant set off claims and counterclaims within the UBS Response in the Claims Determination Process trigger UBS's mandatory advancement obligation.
79. On a point that goes to relative prejudice and the balance of convenience, Jolian and McGoey are unable to refuse to provide the Post-Filing Services for, among other reasons, their ongoing fiduciary duties to UBS, UBS's refusal to recognize the Jolian and McGoey CCAA Claims, and UBS's pursuit of significant set off claims and counterclaims within the UBS Response.
80. UBS is a litigation vehicle. The only significant business of UBS is to respond to the Jolian Proceeding and now the Jolian and McGoey CCAA Claims (and the similar claims in the DOL Proceeding), and to pursue the significant set off claims and counterclaims within the UBS Response (and the UBS DOL Response).

81. For UBS to be able to continue its business as a litigation vehicle, no matter the personal beliefs and interests of the current directors of UBS, as a result of the commitments UBS made directly and indirectly to recruit McGoey in 2002 and 2006 and to retain McGoey, UBS requires the services of Jolian and McGoey just as much as UBS requires the services of its current directors and its lawyers.

82. In any event, should a court from which no further right of appeal exists determine that Jolian and McGoey are not entitled to be indemnified, then Jolian and McGoey will be obliged to return to UBS the advances ordered on this motion.

iii. The Merits of the Proposed Action

83. Unlike in *ICR* and the other “lift stay” cases, there is no proposed action at issue. What is at issue is whether a Judgment of the Commercial List is to be complied with or not.

iv. The Good Faith and Due Diligence of the Debtor Company

84. UBS has not exercised good faith in:

- a. refusing to comply with the Marrocco Judgment;
- b. refusing to comply with the Marrocco Judgment and yet asking this Court for relief and taking additional steps before this Court;
- c. resolving to file for CCAA protection but not advising the market, the parties or this Court until after this Court had to consider and determine a motion to vary the Marrocco Judgment, and after filing notice of the Indemnity Advances Appeal;

d. denying the Jolian and McGoeys CCAA Claims on basis the Indemnity Advances Appeal was outstanding while at the same time twice seeking to adjourn the Indemnity Advances Appeal *sine die* on the basis there were CCAA proceeding underway with respect to the appellant UBS; and

e. bringing this CCAA proceeding for the improper purpose of:

i. avoiding the Marrocco Judgment,

ii. seeking a litigation advantage by denying the defendants their entitlement to advances of their legal costs, and seeking to deny full procedural fairness to Jolian and McGoeys despite putting their reputations in issue, and

iii. frustrating the rights of UBS shareholders including that of having a timely meeting.

85. Additionally, the McCutcheon Group has directed UBS to selectively meet or not meet its mandatory advancement obligations. Mr. Louis Mitrovich, who was a director of UBS at the same time McGoeys was and who approved and supported all the conduct at issue, has had his legal expenses paid by UBS. Similarly, the current directors are having their legal costs advanced to them. In fact \$330,000 was advanced as a retainer to their lawyers without court approval at the same time UBS was initiating its complaints about retainers being paid to the lawyers for Jolian and McGoeys, among others.

Excerpt of Transcript of Cross-Examination of Grant McCutcheon from April 15, 2011, Exhibit "T" of Affidavit of Alex Dolgonos sworn September 20, 2011, 2064818 Ontario Inc. Motion Record dated September 20, 2011, Tab 2T, pp. 350-352

Transcript of the Cross-examination of Grant McCutcheon from April 15, 2011, pp. 60-62, pp. 70-73

86. Even on this motion UBS has not demonstrated the good faith this Court should expect from a company availing itself of the Court's protection and from a public company. As mentioned above, on this motion, the McCutcheon Group aided by the Monitor has sought to delve into McGoey's personal financial affairs in an effort to scare him off the motion and/or to seek litigation advantage by knowing his resources to continue the fight.

Transcript of Cross-Examination of Gerald McGoey dated May 28, 2012

87. Taking a step back and looking at the larger picture, two years ago in August 2010 (and as proposed to be amended in February 2011) the McCutcheon Group caused UBS with much public fanfare to counterclaim in the UBS Counterclaims for approximately 24 different heads of relief and alternative relief totalling approximately \$32 million against Jolian, McGoey and others.

Proposed Amended Statement of Defence and Counterclaim, para. 91, Motion Record, Tab 2B3, pp. 109-112

88. Today, as described above, it appears the number of UBS's heads of relief and alternative relief have dropped from 24 down to 3. Leaving aside for the moment the many other defences available to Jolian and McGoey to these claims, of these:
- a. The claim with respect to the Lawyers Funds or retainers was decided within the Marrocco Judgment.
 - b. The Engineering Business Sale Claim is statute barred for being out of time.

- c. The expenses claim involves a claim that \$155,000 of expenses were claimed and paid “without proper justification”, and that there was \$367,000 of expenses paid by UBS for which there “is insufficient or no explanation”. Despite the terms of the April 13, 2012 Order, and commitments by UBS’s lawyers before this Court, UBS has refused to provide the back-up documentation for this claim. One reason this may not have been done is that it is the case that many of these expenses were paid well before the two-year limitation period ran out.

UBS’s Response and Counterclaim against Jolian and McGoey dated May 7, 2012, Motion Record to Add Parties, Tab 2G

89. While the claims dropped away, the costs to UBS have been considerable and continue:
- a. It is estimated that over \$5.4 million has been spent by the McCutcheon Group on professional fees since it acquired control of UBS’s board.
 - b. This figure is projected by UBS and the Monitor to rise to \$6.4 million by the end of July 2012.
 - c. For the four month period from March 23, 2012 until July 27, 2012 alone, the Monitor projects UBS will spend \$1,296,931 on professional fees.

Throughout this period, Jolian and McGoey have been forced to defend themselves.

Interim Unaudited Consolidated Financial Statements of UBS for the Three and nine months ended May 31, 2010 and 2009, p.1 (showing cash or cash equivalents of \$5.496 million as at May 31, 2010)

Interim Unaudited Consolidated Financial Statements of UBS for the Three and six months ended February 28, 2011 and 2010, p.1 (showing cash or cash equivalents of \$4.332 million as at August 31, 2010), Exhibit “S” of Affidavit of Alex Dolgonos sworn September 20, 2011, 2064818 Ontario Inc. Motion Record dated September 20, 2011, Tab 2S, pp. 327

Seventh Monitor’s Report (March 27, 2012), Monitor’s Motion Record for Claims Hearing Procedure dated March 28, 2012, Tab 2, p. 41 (showing the receipt of the \$2.76 million

return of capital from Look), and p. 43 (showing the available cash drops below \$2.76 million by April 6, 2012, and the projected expenditure of \$1,296,931 on professional fees in the four months ending July 27, 2012).

90. UBS has not led any evidence in response to this motion. UBS has not sought to establish its good faith and due diligence. In doing so, UBS has avoided being cross-examined on these issues and/or needing to produce related documentation.

Conclusion

91. While this Court may not have been convinced to not extend the CCAA stay on the Applicant's most recent motion to extend the stay heard April 4 and 13, 2012, it is submitted for the reasons provided above that it is correct in law, it is correct in policy, and it is only fair that this Court should order UBS to comply with the Marrocco Judgment.

PART V – ORDER SOUGHT

92. Jolian and McGoey request the following:
- a. Without prejudice to the determination by this Honourable Court of the Jolian and McGoey CCAA Claims including any obligation by the Applicant to make the advances ordered below or any obligation by the Applicant to indemnify Jolian or McGoey:
 - (i) an order directing the Applicant to immediately make advances to Jolian and McGoey on an interim basis for their reasonable legal, accounting or auditing expenses incurred to date in providing services or other valuable consideration to the Applicant on or after July 5, 2011, including (1) the reasonable expenses

incurred by Jolian and McGoey in establishing the Jolian and McGoey CCAA Claims, and (2) the reasonable expenses incurred by Jolian and McGoey in responding to the UBS Response, and

(ii) an order directing the Applicant to make advances to Jolian and McGoey for the Post-Filing Services on an interim and monthly basis as such reasonable expenses may be incurred after today;

- b. In the alternative or in addition, should it be necessary, leave of this Court to the extent it may be necessary to require the Applicant to make advances on an interim basis to Jolian and McGoey for the Post-Filing Services;
- c. In the alternative or in addition, should it be necessary, an order varying the Initial Order to the extent it may be necessary to require the Applicant to make advances on an interim basis to Jolian and McGoey for the Post-Filing Services;
- d. In the alternative, should this motion be dismissed and/or the interim orders requested above not be made, then an order that this motion is without prejudice:
 - (i) to the determination by this Court of the Jolian and McGoey CCAA Claims including any obligation by the Applicant to make advances to Jolian or McGoey or to indemnify Jolian or McGoey, and
 - (ii) to the right of Jolian or McGoey to claim as part of the Jolian and McGoey CCAA Claims or otherwise an obligation by the Applicant to make advances to Jolian or McGoey or to indemnify Jolian or McGoey; and

- e. Such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

June 7, 2012



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SCHEDULE A

LIST OF AUTHORITIES

1. *Julian Investments Ltd. v. Unique Broadband Systems Inc.*, 2011 ONSC 3241
2. *Med-Chem Health Care Ltd. v. Misir*, 2010 ONCA 380
3. *Manitoba (Securities Commission) v. Crocus Investment Fund*, 2007 MBCA 36
4. Stephen A. Radin, "Sinners Who Find Religion: Advancement of Litigation Expenses to Corporate Officials Accused of Wrongdoing" (2006) 25 Rev. Litig. 251
5. *Reddy v. Electronic Data Systems Corp.*, No. Civ. A. 19467, 2002 WL 1358761 (Del. Ch. June 13, 2002), aff'd mem., 820 A.2d 371 (Del 2003)
6. *Halifax Insurance Co. of Canada v. Innopex Ltd.* (2004), 72 O.R. (3d) 522
7. *Bennett v. Bennett Environmental Inc.* 2010 CarswellOnt 9904, 2010 ONSC 6030
8. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 CarswellSask 324, 33 C.B.R. (5th) 50

SCHEDULE B

LIST OF STATUTES, REGULATIONS & BY-LAWS

1. Section 136 of *Business Corporations Act* (Ontario), R.S.O. 1990, c. B.16
2. Clause 14.05(3)(d) of *Rules of Civil Procedure* R.R.O. 1990, Regulation 194
3. Chapter 1, Subchapter IV of the *Delaware Code, Title 8, Corporations*
4. Sections 11.01 and 11.02 *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36

1. *Business Corporations Act (Ontario), R.S.O. 1990, c. B.16*

Indemnification

136. (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity. 2006, c. 34, Sched. B, s. 26.

Advance of costs

(2) A corporation may advance money to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1), but the individual shall repay the money if the individual does not fulfil the conditions set out in subsection (3). 2006, c. 34, Sched. B, s. 26.

Limitation

(3) A corporation shall not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation or, as the case may be, to the best interests of the other entity for which the individual acted as a director or officer or in a similar capacity at the corporation's request. 2006, c. 34, Sched. B, s. 26.

Same

(4) In addition to the conditions set out in subsection (3), if the matter is a criminal or administrative action or proceeding that is enforced by a monetary penalty, the corporation shall not indemnify an individual under subsection (1) unless the individual had reasonable grounds for believing that the individual's conduct was lawful. 2006, c. 34, Sched. B, s. 26.

Derivative actions

(4.1) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3). 2006, c. 34, Sched. B, s. 26.

Right to indemnity

(4.2) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking an indemnity,

(a) was not judged by a court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and

(b) fulfils the conditions set out in subsections (3) and (4). 2006, c. 34, Sched. B, s. 26.

Insurance

(4.3) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual,

(a) in the individual's capacity as a director or officer of the corporation; or

(b) in the individual's capacity as a director or officer, or a similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request. 2006, c. 34, Sched. B, s. 26.

Application to court

(5) A corporation or a person referred to in subsection (1) may apply to the court for an order approving an indemnity under this section and the court may so order and make any further order it thinks fit. R.S.O. 1990, c. B.16, s. 136 (5).

Idem

(6) Upon an application under subsection (5), the court may order notice to be given to any interested person and such person is entitled to appear and be heard in person or by counsel. R.S.O. 1990, c. B.16, s. 136 (6).

2. Rules of Civil Procedure R.R.O. 1990, Regulation 194

Application under Rules

14.05(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

3. *Delaware Code, Title 8, Corporations*

Chapter 1. General Corporation

Subchapter IV. Directors and Officers

§ 145. Indemnification of officers, directors, employees and agents; insurance.

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(c) To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

(d) Any indemnification under subsections (a) and (b) of this section (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because the person has met the applicable standard of conduct set forth in subsections (a) and (b) of this section. Such determination shall be made, with respect to a person who is a director or officer of the corporation at the time of such determination:

- (1) By a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum; or
- (2) By a committee of such directors designated by majority vote of such directors, even though less than a quorum; or
- (3) If there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion; or
- (4) By the stockholders.

(e) Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

(f) The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office. A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such

person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section.

(h) For purposes of this section, references to "the corporation" shall include, in addition to the resulting corporation, any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee or agent of such constituent corporation, or is or was serving at the request of such constituent corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall stand in the same position under this section with respect to the resulting or surviving corporation as such person would have with respect to such constituent corporation if its separate existence had continued.

(i) For purposes of this section, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any excise taxes assessed on a person with respect to any employee benefit plan; and references to "serving at the request of the corporation" shall include any service as a director, officer, employee or agent of the corporation which imposes duties on, or involves services by, such director, officer, employee or agent with respect to an employee benefit plan, its participants or beneficiaries; and a person who acted in good faith and in a manner such person reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this section.

(j) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

(k) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification brought under this section or under any bylaw, agreement, vote of stockholders or disinterested directors, or otherwise. The Court of Chancery may summarily determine a corporation's obligation to advance expenses (including attorneys' fees).

8 Del. C. 1953, § 145; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 6; 57 Del. Laws, c. 421, § 2; 59 Del. Laws, c. 437, § 7; 63 Del. Laws, c. 25, § 1; 64 Del. Laws, c. 112, § 7; 65 Del. Laws, c. 289, §§ 3-6; 67 Del. Laws, c. 376, § 3; 69 Del. Laws, c. 261, §§ 1, 2; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 120, §§ 3-11; 77 Del. Laws, c. 14, § 3; 77 Del. Laws, c. 290, §§ 5, 6; 78 Del. Laws, c. 96, § 6;

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

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

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.

Stays, etc. — other than initial application

(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.

Burden of proof on application

- (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.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F).