

**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

Re: Motion for Advancement Returnable June 13, 2012

June 7, 2012

ROY ELLIOTT O'CONNOR LLP

Barristers

200 Front Street West, 23rd Floor

P.O. Box # 45

Toronto, Ontario

M5V 3K2

Peter L. Roy (LSUC No. 161320)

Alexandra M. Carr (LSUC No. 57042L)

Tel: 416-362-1989

Fax: 416-362-6204

Lawyers for DOL Technologies Inc., and
Alex Dolgonos

TO: Gowling Lafleur Henderson LLP
Suite 1600, 1 First Canadian Place
Toronto, ON M5X 1G5

E. Patrick Shea (LSUC No. 39655K)

Tel: (416) 369-7399
Fax: (416) 862-7661

Lawyers for UBS

AND TO: Bennett Jones LLP
3400, 1 First Canadian Place
Toronto, ON M5X 1A4

Raj S. Sahni/Derek Bell

Tel: (416) 777-4804
Fax: (416) 863-1716

Co-Lawyers for Jolian Investments Ltd. and Gerald T. McGoeys

AND TO: Groia & Company Professional Corporation
Wildeboer Dellece Place
365 Bay Street, 11th Floor
Toronto, Ontario M5H 2V1

Joseph Groia
Gavin Smyth

Tel: (416) 203 -2115
Fax: (905) 203- 9231

Co-Lawyers for Jolian Investments Ltd. and Gerald T. McGoeys

AND TO: Lax O'Sullivan Scott Lisus LLP
145 King Street West
Suite 1920
Toronto, ON M5H 1J8

Matthew Gottlieb (LSUC No. 32668B)

Tel: (416) 644-5353
Fax: (416) 598-3730

Lawyers for the Monitor

AND TO: WARDLE DALEY BERNSTEIN LLP
2104-401 Bay Street
P.O. Box 21, Toronto, ON M5H 2Y4

Peter C. Wardle

Tel : (416) 351-2771
Fax: (416) 351-9196

Lawyers for the Directors

AND TO: GOODMANS LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Brendan O'Neill/David Conklin

Tel: (416) 849-6017/(416) 597-5164
Fax: (416) 979-1234

Solicitors for LOOK Communications Inc.

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE
BROADBAND SYSTEMS, INC.

FACTUM

Re: Motion for Advancement Returnable June 13, 2012

PART I - OVERVIEW

1. Alex Dolgonos ("**Dolgonos**") and DOL Technologies Inc. ("**DOL**"), suppliers of the insolvent company Unique Broadband Systems ("**UBS**"), seek leave from this Court to enforce the Judgment of Justice Marrocco dated June 24, 2011 (the "**Marrocco Judgment**"), or, in the alternative, to enforce the Marrocco Judgment to reimburse DOL and Dolgonos for their legal expenses incurred defending the UBS Counterclaim (defined below).
2. Justice Marrocco held that UBS has a contractual obligation to pay for DOL and Dolgonos' future legal fees. UBS was ordered to pay these legal fees as they became due.
3. UBS subsequently filed for CCAA protection in order to avoid having to comply with the Marrocco Judgement.
4. Since the date of the Initial Order under the CCAA, DOL and Dolgonos have incurred legal fees by defending serious claims UBS makes against them. DOL has also incurred legal fees asserting its rights against UBS.

5. The payment of legal fees is not precluded by the Initial Order.
6. Further, pursuant to section 11.01 of the CCAA, fees to pay for services provided after the Initial Order are exempt from the stay of proceedings against UBS. Lawyers are service providers.
7. The fees required by the Marrocco Judgement are legal fees for which UBS is responsible.
8. DOL and Dolgonos have effectively been supplying a service to UBS by advancing money or credit to pay for UBS' financial obligation for these expenses.
9. UBS would not be able to effectively operate its business of determining the claims in the CCAA process if DOL and Dolgonos did not have legal representation.
10. This Honourable Court should grant leave to enforce the Judgment of Justice Marrocco.

PART II – THE FACTS

11. UBS, under the Technology Development and Strategic Marketing Agreement that was entered into between DOL and UBS on July 12, 2008 (the “**Technology Agreement**”), and in particular, clause 3.3.5 thereof, has an obligation to advance legal expenses to DOL, incurred in respect of:
 - (i) the Technology Agreement,
 - (ii) DOL's performance of the services contemplated in the agreement, and
 - (iii) any other matter related to UBS, in a timely manner.

Exhibit “G” of the Dolgonos Affidavit sworn March 28, 2012 (the “Dolgonos Affidavit”), DOL and Dolgonos Motion Record dated March 29, 2012 (“DOL & Dolgonos Motion Record”), Tab 2G(7), Appendix “7”

12. Pursuant to two indemnity agreements dated January 25, 2007, between UBS and AD Enterprises, which was subsequently assigned to DOL, and between UBS and Dolgonos, (collectively referred to as the “**Indemnity Agreements**”), UBS is also obligated to indemnify DOL and Dolgonos for all legal expenses with respect to proceedings brought by or in the right of the corporation and to advance all legal expenses incurred by them in connection with the investigation, defence, settlement or appeal of any civil or criminal action or proceeding contemplated by the indemnity. UBS undertook to pay such expenses within ten days following delivery of a written request.

Exhibit “G” of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2G(8), Appendix “8”

13. On July 5, 2010, after a contested shareholders meeting of UBS, the management and directors of UBS changed. It became apparent that the new board had substantially altered the business relationship between UBS and DOL, no longer had any use for DOL’s services and was intent upon a course of action that made further provisions of the Technology Agreement untenable. That same day DOL notified UBS that it was exercising its rights for Good Reason and as a result of the Change-in-Control as those terms are defined in subsection 5.3 of the Technology Agreement. UBS did not pay the amounts due to DOL within the time agreed by the parties in the Technology Agreement. DOL had no choice but to commence a lawsuit against UBS in the Ontario Superior Court of Justice (with Court File No. CV-10-406609-CL) (the “**DOL Proceeding**”) and incur legal expenses in doing so.

Exhibit “G” of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2G(2), Appendix “2”

14. UBS' response to the DOL proceeding was to initiate a counterclaim dated August 18, 2010 (the "**UBS Counterclaim**") against DOL, Dolgonos and select former directors of UBS including, Gerald McGoe, Douglas Reeson and Louis Mitrovich. The UBS Counterclaim contains wide-ranging allegations calling into question Dolgonos' honesty and integrity, including allegations that Dolgonos "exerted undue influence on the Board" of UBS and that he "acted in a gross conflict of interest and contrary to his duty of loyalty to UBS at all times". Along with a significant damages claim and a claim for injunctive relief, in the UBS Counterclaim, UBS sought from DOL and Dolgonos, amongst other things, \$5 million of punitive damages.

Exhibit "G" of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2G(3), Appendix "3"

15. DOL and Dolgonos retained Roy Elliott O'Connor LLP ("**REO**") to act on their behalf with respect to the DOL Claim and UBS Counterclaim.
16. Contrary to its indemnification obligations, UBS has not reimbursed DOL or Dolgonos for accounts paid to REO, with the exception of the initial retainer advanced to REO on June 17, 2010 in the amount of \$100,000.
17. As a result of UBS' refusal to reimburse DOL and Dolgonos their legal fees, DOL and Dolgonos were required to bring a motion before Justice Marrocco, for an order requiring UBS to make advances, on an ongoing basis and prior to any ultimate determination to indemnify, of DOL and Dolgonos' expenses in, among other things, pursuing the DOL Proceeding and in defending the UBS Counterclaim (the "**Indemnity Advances Motion**").
18. The Honourable Justice Marrocco heard the Indemnity Advances Motion on April 27, 2011. On May 30, 2011, Justice Marrocco issued his Reasons for Judgment (the

“Marrocco Reasons”) granting the Indemnity Advances Motion. The formal judgment was signed and entered on June 24, 2011.

Marrocco Judgment, Exhibit “E” of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2E

Marrocco Reasons, Exhibit “F” of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2F

19. Meanwhile, on June 18, 2011, UBS’ Board of Directors resolved to make a filing under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (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, Exhibit “A” to the Affidavit of Jonahbelle Coz Mondelo, sworn April 2, 2012, DOL & Dolgonos Supplementary Motion Record with Answers to Undertakings (“DOL & Dolgonos Supp. Motion Record”), Tab 2

20. 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”**).

Notice of Appeal of UBS dated June 29, 2011, Exhibit “H” to the Affidavit of Robert Ulicki, sworn July 4, 2011, DOL & Dolgonos Supp. Motion Record, Tab 3

21. On July 5, 2011, UBS made its CCAA filing and the Initial Order was made.

Initial Order, Exhibit “A” to the Affidavit of Robert Ulicki, sworn July 11, 2011, DOL & Dolgonos Supp. Motion Record, Tab 4

22. The Initial Order provides that UBS may continue to pay (i) “counsel” and (ii) outstanding “employee benefits”:

“The Applicant shall be authorized and empowered to continue to retain and employ the employees, consultants, agents experts, accountants, counsel and such other persons (“Assistants”) currently retainer or employed by it with liberty to retain such

further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for carrying out the terms of this Order.

THIS COURT ORDERS that the applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

- (a) **all outstanding** and future wages, salaries, **employee** and pension **benefits**, vacation pay and expenses payable on or after the date of this Order, **in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements**; and
- (b) **the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.**

Initial Order, Exhibit "A" to the Affidavit of Robert Ulicki, sworn July 11, 2011, DOL & Dolgonos Supp. Motion Record, Tab 4, paras. 4 & 5

23. Prior to the Claims Bar Date of September 19, 2011, DOL and Dolgonos filed claims in this CCAA proceeding for, among other things, reimbursement, advancement, and indemnity of their costs in pursuing the DOL Proceeding and defending the UBS Counterclaim (the **"DOL and Dolgonos CCAA Claims"**).

Proof of Claim of DOL, DOL & Dolgonos Supp. Motion Record, Tab 5
Proof of Claim of Dolgonos, DOL & Dolgonos Supp. Motion Record, Tab 6

24. On December 9, 2011, UBS declined to accept the indemnity portion of the DOL and Dolgonos CCAA Claims on the basis that UBS was appealing Mr. Justice Marrocco's Judgment.

Letter from Gowlings to the Monitor, dated December 9, 2011, DOL & Dolgonos Supp. Motion Record, Tab 7

25. On January 4, 2012, the Monitor provided its Notice of Disallowance of the DOL CCAA Claim and disallowed the indemnity portion of the DOL CCAA Claim.

Disallowance Notice dated January 4, 2012, Exhibit "H" of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2H

26. On January 30, 2012, DOL provided its Notice of Dispute in this CCAA proceeding.

Notice of Dispute of DOL Technologies Inc., DOL & Dolgonos Supp. Motion Record, Tab 8

27. 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 8, 2012, Appendix “B” to the Seventh Report of the Monitor, DOL & Dolgonos Supp. Motion Record, Tab 18

28. 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 Report of the Monitor, Section 7.1, DOL & Dolgonos Supp. Motion Record, Tab 18

29. In its April 13, 2012 Order, this Court ordered that all claims that are to ever be advanced between DOL, Dolgonos, on the one hand and the Applicant (which term includes UBS) on the other hand should be determined within the Claims Determination Process.

Order of the Honourable Justice Wilton-Siegel dated April 13, 2012, DOL & Dolgonos Supp. Motion Record, Tab 21

30. Pursuant to the April 13, 2012 Order and within the Claims Determination Process, UBS submitted the UBS Response to the Claim of DOL and Dolgonos, dated May 7, 2012 (the “**UBS Response**”).

UBS’s Response and Counterclaim against DOL and Dolgonos dated May 7, 2012, DOL & Dolgonos Supp. Motion Record, Tab 22

31. It appears that UBS is asserting claims in the CCAA proceeding against DOL and Dolgonos and is seeking to set off other claims it alleges it has against DOL and/or Dolgonos in the UBS Response. DOL and Dolgonos must respond to these claims and

require the services of counsel to do so. The UBS asserted claims against DOL and Dolgonos are as follows:

- a. UBS claims that the basis for any remuneration or reimbursement received by, declared for, or available to DOL or Dolgonos from UBS is null, void, or unenforceable;
- b. UBS sets off from amounts that would have otherwise been payable to DOL or Dolgonos, 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 DOL and Dolgonos 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.; and
- e. UBS claims damages against Jolian and McGoey with respect to retainers UBS provided to lawyers for McGoey (collectively, the "UBS Claims").

UBS's Response and Counterclaim against DOL and Dolgonos dated May 7, 2012, DOL & Dolgonos Supp. Motion Record, Tab 22

32. UBS claims that its current business is to "create value for stakeholders through the CCAA process and its management of Look". This includes disputing the DOL and

Dolgonos CCAA Claims and pursuing its counterclaims against DOL and Dolgonos in the CCAA Claims Determination Process.

Affidavit of Robert Ulicki, sworn February 7, 2012, DOL & Dolgonos Supp. Motion Record, Tab 9, paras. 60, 62 and 76

Endorsement of Justice Wilton-Siegel dated March 6, 2012, para. 33, Appendix "A" to the Seventh Report of the Monitor, Dolgonos Supp. Motion Record, Tab 18

33. Gerald McGoey ("McGoey") and his company, Jolian Investments Limited ("Jolian"), are also seeking to enforce the Order of Justice Marrocco for repayment of legal fees.

Amended Notice of Motion, of Jolian Investments Limited and Gerald McGoey, dated March 15, 2012, DOL & Dolgonos Supp. Motion Record, Tab 10

34. DOL, Dolgonos, McGoey and Jolian are the only substantial creditors in this proceeding. Together, their claims are together in excess of \$18 million. The total amount claimed by all other creditors combined is less than \$900,000.

Claims Register, Appendix "A" to the Fifth Report of the Monitor, DOL & Dolgonos Supp. Motion Record, Tab 16

35. DOL and Dolgonos continue to incur legal expenses in advancing their claims and defending themselves under the Claims Determination Process after the date of the Initial Order.

Proof of Claim of DOL, Claims Register, Appendix "A" to the Fifth Report of the Monitor, DOL & Dolgonos Supp. Motion Record, Tab 5, paras. 26-28

Proof of Claim of Dolgonos, Claims Register, Appendix "A" to the Fifth Report of the Monitor, DOL & Dolgonos Supp. Motion Record, Tab 6, paras. 5-7

PART III – ISSUES

36. The only 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 – LAW AND ARGUMENT

Introduction

37. No claim is made in this motion for UBS to make advances for, among other things, DOL and Dolgonos' costs of pursuing the DOL's claim in the DOL 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 DOL and Dolgonos CCAA Claims.
38. The Initial Order does not stay payment of the Legal Fees. In fact, paragraphs 4 and 5 of the Initial Order specifically provide that UBS may continue to pay counsel fees and may continue to pay outstanding employee benefits.
39. UBS is ostensibly paying legal fees for its own counsel incurred after the Initial Order. UBS is contractually obligated to pay the legal fees of DOL and Dolgonos and should be required to do so.

DOL and Dolgonos are Service Providers

40. Section 11.01 of the CCAA provides:

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.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.01

41. Section 11.01 applies where the extension of credit arises from a debtor's promise to pay money in the future and a debt is created in favour of the creditor.

***Air Canada (Re)*, [2003] O.J. No. 2976 (Ont.CA) at para 17, Book of Authorities, Tab 1**

42. Nothing in the CCAA authorizes the monitor or the court to unilaterally change the terms of a contract between the debtor company and a supplier of goods or services to the debtor under section 11.01.

***Allarco Entertainment Inc. (Re)* [2009] A.J. No. 996 (A.Q.B.) at paras. 45 – 46 & 54, Book of Authorities, Tab 2**

***Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no. 264 at para 47 (Q.C.A.) at paras. 47-50, Book of Authorities, Tab 3**

43. UBS claims that its business consists of maximizing value for stakeholders through the CCAA process by determining the disputed claims against UBS. In other words, its business is to litigate the claims under the CCAA.

Affidavit of Robert Ulicki, sworn February 7, 2012, DOL & Dolgonos Supp. Motion Record, Tab 9, paras. 60, 62 and 76

Endorsement of Justice Wilton-Siegel dated March 6, 2012, Appendix "B" to the Seventh Report of the Monitor, para. 33

44. The ongoing business of UBS requires:
- (a) defendants to defend actions brought by UBS;
 - (b) plaintiffs to continue to pay for protracted litigation in the CCAA process; and,
 - (c) defendants and plaintiffs to incur ongoing legal expenses.
45. UBS entered into indemnification contracts (including the Technology Agreements and the Indemnification Agreements) whereby it promised to reimburse:

- (a) DOL and Dolgonos for the legal fees for all proceedings brought by or in the right of the corporation, including to defend against the serious claims UBS makes against them in the UBS counterclaim; and
- (b) DOL for its legal expenses incurred by enforcing its rights associated with the Technology Agreement or any other matter related to UBS, such as in its claim against UBS.

Exhibit "G" of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tabs 2G(7) and (8), Appendices "7" and "8"

46. The validity of these contractual obligations was enforced by the Marrocco Judgment. In that judgment, UBS was ordered to abide by their contractual obligations, thereby reimbursing DOL and Dolgonos for the Legal Fees.

Marrocco Judgment, Exhibit "E" of the Dolgonos Affidavit, DOL & Dolgonos Motion Record, Tab 2E, paras. 5, 6 & 8

47. The Court of Appeal has directed that this motion to enforce the Marrocco Judgment proceed on the assumption that it is valid.

Endorsement of Justice Simmons, dated March 8, 2012, Appendix "B" to the Seventh Report of the Monitor, DOL & Dolgonos Supp. Motion Record, Tab 18

48. Since the Initial Order, UBS has continued to operate its business by litigating or otherwise disputing the claims by and against DOL and Dolgonos. This has necessarily caused DOL and Dolgonos to incur legal fees. UBS would not be able to operate its business of determining the disputed claims without DOL and Dolgonos incurring legal fees.
49. UBS has refused to pay for DOL and Dolgonos' legal fees, notwithstanding the Marrocco Judgment and their contractual obligations.

50. Since the Initial Order, DOL and Dolgonos have been paying for legal fees on behalf of UBS. UBS made a promise of future repayment after DOL and Dolgonos incur debt for their legal fees.
51. DOL and Dolgonos are service providers under section 11.01 and are entitled to the immediate payment for services or other valuable consideration provided to UBS after the Initial Order was made.
52. Alternatively, counsel for DOL and Dolgonos are service providers under section 11.01 and are entitled to the immediate payment for services or other valuable consideration provided to UBS after the Initial Order was made.
53. The only other major creditors in the CCAA proceedings (McGoey and Jolian) are asking for the same or similar relief. Granting the requested relief will not give one creditor any priority over another.

CCAA Stay of Proceedings Irrelevant

54. UBS and the Monitor have taken the position that the CCAA stay of proceedings made in the Initial Order must be “lifted” for this Court to be able to determine if UBS must make advances to DOL and Dolgonos as requested in this motion.
55. 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] S.J. No. 313 (SKCA) (“*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] S.J. No. 313 (SKCA), para.68, Book of Authorities, Tab 4**

56. DOL and Dolgonos submit that 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, DOL & Dolgonos Supp. Motion Record, Tab 4, para. 12

57. Furthermore, DOL and Dolgonos do not seek leave to commence a lawsuit outside the CCAA process as was the case in *ICR*. DOL and Dolgonos 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.

Alternatively, the Stay Should be Lifted

58. In the alternative, DOL and Dolgonos submit that when the factors are considered they all suggest that this Honourable Court should take any steps that may be necessary to require UBS to pay the advances at issue on an ongoing basis.

59. As set out above, the factors used to determine whether the Court should exercise its discretion to lift a stay of proceedings are:
- 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] S.J. No. 313 (SKCA), para.68, Book of Authorities, Tab 4**

i. Balance of Convenience

60. There is nothing to balance against. Messrs. Dolgonos and McGoey 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 and DOL as the only "major stakeholders" in these proceedings. McGoey and Jolian have also brought a motion for advancement.

Claims Register, Appendix "A" to the Fifth Report of the Monitor, DOL & Dolgonos Supp. Motion Record, Tab 16

Ulicki March 16, 2012 Affidavit, para. 13, DOL & Dolgonos Supp. Motion Record, Tab 23

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

Ulicki March 16, 2012 Affidavit, DOL & Dolgonos Supp. Motion Record, Tab 23

62. As DOL, Dolgonos, Jolian and McGoey are owed more by UBS than it has in assets, DOL and Dolgonos (and likely Jolian and McGoey) 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, DOL & Dolgonos Supp. Motion Record, Tab 23

ii. *Relative Prejudice*

63. There is no prejudice to UBS to comply with the Marrocco Judgment and make advances. It is UBS that made the contractual agreements with DOL and Dolgonos, and it is UBS's own conduct that triggered the requirement for DOL and Dolgonos to provide UBS services and for UBS to make advances for these services.
64. 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.
65. On a point that goes to relative prejudice and the balance of convenience, DOL and Dolgonos are unable to refuse to provide the Post-Filing Services for, among other reasons, UBS's refusal to recognize the DOL and Dolgonos CCAA Claims, and UBS's pursuit of significant set off claims and counterclaims within the UBS Response.
66. UBS is a litigation vehicle. The only significant business of UBS is to respond to the DOL Proceeding and now the DOL and Dolgonos CCAA Claims (and the similar claims in the Jolian Proceeding), and to pursue the significant set off claims and counterclaims within the UBS Response (and the UBS Jolian Response).
67. In any event, should a court from which no further right of appeal exists determine that DOL and Dolgonos are not entitled to be indemnified, then DOL and Dolgonos will be obliged to return to UBS the advances ordered on this motion.

iii. *The Merits of the Proposed Action*

68. 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*

69. 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 DOL and Dolgonos 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 DOL and Dolgonos despite putting their reputations in issue, and
 - iii. frustrating the rights of UBS shareholders including that of having a timely meeting.

70. 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 as McGoey and who approved and supported all the conduct at issue, is having 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 at the same time UBS was initiating its complaints about retainers being paid to the lawyers for Jolian and McGoey, among others.

Transcript of Cross-Examination of Grant McCutcheon from April 15, 2011, DOL & Dolgonos Supp. Motion Record, Tab 24, pp. 60-62, pp. 70-73, and pp. 80-81

71. Moreover, it is important to note that in August 2010 the McCutcheon Group caused UBS to counterclaim in the UBS Counterclaims for approximately 15 different claims totalling approximately \$12 million against DOL, Dolgonos and others.
72. Today, it appears UBS's claims are limited to three claims. Leaving aside for the moment the many other defences available to DOL and Dolgonos to these claims, of these, the claim with respect to the lawyers funds or retainers was decided within the Marrocco Judgment. The claim with respect to the UBS Ltd. sale transaction is statute barred for being out of time. 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. At best, this expense claim involves \$135,000 of expenses many of which stretch back more than the two-year limitation period.

UBS's Response and Counterclaim against DOL and Dolgonos dated May 7, 2012, DOL & Dolgonos Supp. Motion Record, Tab 22

73. 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, DOL and Dolgonos have been required 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), DOL & Dolgonos Supp. Motion Record, Tab 25

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, DOL & Dolgonos Supp. Motion Record, Tab 26

Appendix "F" to the Seventh Report of the Monitor, Dolgonos Supp. Motion Record, Tab 18, (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).

- 74. 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

- 75. For the reasons provided above, 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 – NATURE OF THE ORDER SOUGHT:

- 76. DOL and Dolgonos request the following:
 - a. Without prejudice to the determination by this Honourable Court of the DOL and Dolgonos CCAA Claims including any obligation by the Applicant to make the

advances ordered below or any obligation by the Applicant to indemnify DOL or Dolgonos:

- i. an order directing the Applicant to immediately make advances to DOL and Dolgonos 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 DOL and Dolgonos in establishing the DOL and Dolgonos CCAA Claims, and (2) the reasonable expenses incurred by DOL and Dolgonos in responding to the UBS Response, and
 - ii. an order directing the Applicant to make advances to DOL and Dolgonos 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 DOL and Dolgonos 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 DOL and Dolgonos 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 DOL and Dolgonos CCAA Claims including any obligation by the Applicant to make advances to DOL or Dolgonos or to indemnify DOL or Dolgonos, and

ii. to the right of DOL or Dolgonos to claim as part of the DOL and Dolgonos CCAA Claims or otherwise an obligation by the Applicant to make advances to DOL or Dolgonos or to indemnify DOL or Dolgonos; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2012.



Peter L. Roy
LSUC No.: 161320



Alexandra Carr
LSUC No. 57042L

Schedule "A" - Authorities

1. *Air Canada (Re)*, [2003] O.J. No. 2976 (Ont.CA)
2. *Allarco Entertainment Inc. (Re)*, [2009] A.J. No. 996 (A.Q.B.)
3. *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] J.Q. no. 264 (Q.C.A.)
4. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 313 (SKCA)

Schedule "B" - Statutes

1. *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.