

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

**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 OF UNIQUE BROADBAND SYSTEMS INC.
AND UBS WIRELESS SERVICES INC.**

Dated: 12 February 2013

GOWLING LAFLEUR HENDERSON LLP

Barristers & Solicitors
Suite 1600, 1 First Canadian Place
100 King Street West
Toronto ON M5X 1G5

E. Patrick Shea (LSUC No. 39655K)

Tel: (416) 369-7399

Fax: (416) 862-7661

Solicitors for the Applicants

PART I – THE MOTION

1. This is a motion by UBS Wireless Services Inc. (“**UBS Wireless**”). UBS Wireless is a wholly owned subsidiary of Unique Broadband Systems Inc. (“**UBS**” and, together with UBS Wireless, the “**Applicants**”).
2. UBS Wireless is seeking an Order approving a transaction (the “**Sale Transaction**”) to sell approximately 50% of its shares (the “**Purchased Assets**”) of LOOK Communications Inc. (“**LOOK**”) to 2092390 Ontario Inc. (the “**Purchaser**”) and vesting the Purchased Assets in Canyon Creek Management Inc. free and clear pursuant to an Asset Purchase Agreement dated 14 January 2013 (the “**Purchase Agreement**”)
3. UBS Wireless owns shares that represent a 39% interest in LOOK (the “**LOOK Shares**”). The Purchased Assets represents slightly less than 50% of the LOOK Shares.
4. The Sale Transaction results from the Sale Process conducted by Duff & Phelps Canada Restructuring Inc. in its capacity as monitor of the Applicants (the “**Monitor**”) that was approved by the Court on 9 November 2012.¹
5. The Monitor recommends that the Sale Transaction be approved.²
6. The Sale Transaction is opposed by Niketo Co. Ltd. (“**Niketo**”). Niketo originally submitted an offer in the Sales Process to purchase all of the LOOK Shares for a price per share that was significantly below the Purchaser’s offer (the “**Niketo Offer**”). The Niketo Offer was rejected on the basis that it was not the highest and best bid selected. Subsequent to the Niketo Offer being rejected:
 - (a) Niketo announced its intention to make a takeover bid to acquire up to 49.9% of LOOK for only \$0.12 per share;
 - (b) Acquired approximately 20% of the shares of UBS;

¹ *Unique Broadband Systems, Inc. (Re)*, 2012 ONSC 6366 (CanLII).
² See Thirteenth Report of the Monitor dated 8 February 2013.

- (c) Acquired a \$6,0000 claim against UBS;
 - (d) Negotiated, without the involvement of UBS or the Monitor, an extremely unfavourable (from the UBS perspective) settlement of certain disputed claims against UBS; and
 - (e) Brought an unsuccessful Motion seeking an order to have a plan that it developed without the involvement of the Applicants, and would have given Niketo control over the LOOK Shares, directed to be put to a vote of UBS' creditors.
7. In the evening on Saturday, 9 February 2013, after this Motion had been scheduled for a hearing on 13 February 2013, Niketo served (another) Motion seeking to have the Court chose between 2 plans that Niketo wishes to have put to a vote of UBS' creditors, both of which seek to block the Sale Transaction. On 11 February, 2013 Niketo served another motion with two alternative plans and provided for the "back stop" agreement for the purchase of the LOOK Shares in the event that the Niketo plan is not approved or sanctioned. On the 12th of February, 2013 Niketo served a replacement plan.
8. The Sale Transaction must be approved by 14 September 2013.

PART II – THE FACTS

9. The Sales Process was approved over the objection of Jolian Investments Limited ("**Jolian**"), Gerald McGoey, DOL Technologies Inc. ("**DOL**") and Alex Dolgonos.³
10. The Sales process was conducted by the Monitor.⁴
11. The Applicants' boards of directors consist of Victor Wells, Ambassador Kenneth Taylor and Robert Ulicki. Ambassador Taylor and Mr. Wells were appointed to

³ Wells 22 January 2013 Affidavit, para 6 and Exhibit B.

⁴ Thirteenth Report of the Monitor dated 8 February 2013, Section 3.3.

the Applicants' boards in July of 2012 as a result of a settlement (the "**Dolgonos Settlement**") reached with Mr. Dolgonos, DOL and certain other companies affiliated with or related to Mr. Dolgonos (together the "**Dolgonos Parties**").⁵

12. It was a term of the Dolgonos Settlement that the Dolgonos Parties, *inter alia*, must "fully support" decisions made by the Applicants' boards.⁶
13. Mr. Ulicki advised the Monitor and the Applicants that he might wish to submit an offer in the Sales Process. Mr. Ulicki was, as a result, not appointed as a member of the Special Committee and played no role in the Sales Process. Mr. Ulicki did not submit an offer in the Sales Process.⁷
14. The Monitor and the Special Committee participated in numerous meetings and discussions with respect to the Sales process to consider, *inter alia*, the purpose of the Sales process, the value of the LOOK Shares, the benefit of accepting an offer for less than all of the LOOK Shares and the ability of the Applicants to influence LOOK.⁸
15. When considering the offers submitted in the Sales Process, the Special Committee considered;
 - (a) UBS' cash requirements going forward and the challenges of raising cash from another source;
 - (b) the purchase price being offered per LOOK Share;
 - (c) the quantum of the proceeds to be received by UBS from the proposed transaction based on the number of LOOK Shares being sold;
 - (d) the uncertainty facing LOOK and the desire to retain a certain amount of the LOOK Shares in the event that the LOOK Shares do increase in value,

⁵ Wells 22 January 2013 Affidavit, para 8. Thirteenth Report of the Monitor dated 8 February 2013.

⁶ Wells 22 January 2013 Affidavit, paras 9 - 11, and Exhibit C.

⁷ Wells 22 January 2013 Affidavit, paras 12 - 15. Thirteenth Report of the Monitor dated 8 February 2013, para 2.

⁸ Thirteenth Report of the Monitor dated 8 February 2013, Section 3.6.

but the desire to “hedge” against a reduction in the value of LOOK Shares;
and

- (e) the complexity of the proposed transaction.⁹
16. Based on these criteria, and the recommendation of the Monitor, the Special Committee selected the Sale Transaction as representing the highest and best offer submitted in the Sales Process.¹⁰ There was one other offer that provided the same purchase price per share as the Sale Transaction, but that offer was for slightly fewer shares thereby resulting in the Sale Transaction providing slightly greater proceeds to UBS Wireless. On that basis, it was determined that the Sale Transaction was more favourable.¹¹
17. The details of the Sale transaction are described in Thirteenth Report of the Monitor dated 8 February 2013.¹²
18. The Sale Transaction provides for the sale of less than a 20% interest in LOOK. The Purchaser is, as a result, not required to make a take-over bid for LOOK.¹³
19. The Purchaser is at arms’ length to the Applicants and LOOK. It is not a shareholder of UBS or LOOK and has no relationship with the current or former directors or directors of the Applicants or LOOK.¹⁴
20. The LOOK Shares subject to the Sale Transaction are owned by UBS Wireless and represent approximately 50% of UBS Wireless’ total holdings of LOOK shares and represent less than 50% of the Applicant’s total assets, based on value.¹⁵

⁹ Wells 22 January 2013 Affidavit, para 16.

¹⁰ Thirteenth Report of the Monitor dated 8 February 2013, Section 3.8.

¹¹ Wells 22 January 2013 Affidavit, para 17.

¹² Thirteenth Report of the Monitor dated 8 February 2013, Section 4.

¹³ Wells 22 January 2013 Affidavit, para 25.

¹⁴ Wells 22 January 2013 Affidavit, para 26.

¹⁵ Wells 22 January 2013 Affidavit, para 27.

21. UBS Wireless is a wholly owned subsidiary of UBS.¹⁶ UBS Wireless has no creditors.
22. Under the applicable rules of the TSX Venture Exchange (the “TSXV”), the Applicants require TSXV approval to complete the Sale Transaction. The Applicants filed the required form with the TSXV and submitted a written request that the TSXV confirm its approval of the Sale Transaction.¹⁷ The TSXV has approved the Sale Transaction without requiring a shareholder vote.
23. The only condition to the Sale Transaction, aside from any required regulatory approvals, is the making of an order by the Court approving the transaction and vesting the LOOK Shares being purchased in the purchaser or as directed by the purchaser free and clear of all claims and encumbrances.¹⁸
24. The deposit provided for by the Sale Agreement has been paid and is being held by the Monitor’s counsel in trust. The Purchaser will pay the remainder of the purchase price provided for by the Sale Agreement in cash on closing, which will take place immediately following the making of an Order approving the Sale Transaction.¹⁹
25. Niketo submitted an offer in the Sales Process to acquire all of the LOOK Shares – the Niketo Offer. The Niketo Offer was considered by the Special Committee and rejected on the basis that it was not as favourable as other offers submitted in the Sales Process, including the offer that ultimately resulted in the Sale Transaction.²⁰
26. The Monitor has recommended that the Sale Transaction be approved.²¹

¹⁶ Wells 22 January 2013 Affidavit, para 28.

¹⁷ Wells 22 January 2013 Affidavit, para 29.

¹⁸ Wells 22 January 2013 Affidavit, para 30.

¹⁹ Wells 22 January 2013 Affidavit, para 31.

²⁰ Wells 22 January 2013 Affidavit, para 35.

²¹ Thirteenth Report of the Monitor dated 8 February 2013, Section 4.1.

PART III – LAW AND ARGUMENT

A. Approval of the Sale Transaction

i. Section 36 Criteria

27. In deciding whether to approve the Sale Transaction, the Court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²²
28. The Sale Transaction was negotiated with the person that submitted the highest and best offer in the Sales Process based on the recommendation of the Monitor.
- (a) Process was Reasonable in the Circumstances**
29. The Sale Process was developed by the Monitor and approved by the Court.
30. In connection with its (unsuccessful) 31 January - 1 February 2013 Motion seeking to put forward a plan for consideration by UBS' creditors, Niketo

²² *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), s. 36(3).

examined all of the directors of UBS with respect to the Sale Process. The focus of Niketo's examination in this regard was the fact that UBS had not retained an investment dealer in connection with the Sales Process. This exact issue was previously raised by the Dolgonos Parties and the Jolian Parties when they opposed the approval of the Sale Process. On that Motion, the Court held that it was appropriate that the Monitor conduct the sales process and for the Monitor to be appointed as the sales agent as opposed to The Applicants retaining an investment dealer.²³

(b) Monitor Approved the Sale Process

31. The Sale Process was developed by the Monitor.

(c) Monitor Approves the Sale Transaction

32. The offer submitted by the Purchaser was selected by the Special Committee on the basis of the Monitor's recommendation.

(d) Creditors had Input into the Sale Process

33. UBS Wireless does not have any creditors.
34. In accordance with the Dolgonos Settlement, the Dolgonos Parties are obliged to fully support any decision of the UBS board with respect to the Sale Transaction.
35. The Motion by the Applicants to seek Court approval for the Sale Process was opposed by the Jolian Parties and the Dolgonos Parties. The Sale Process was approved by the Court over the objections of the Jolian Parties and the Dolgonos Parties.
36. UBS Wireless expects that Niketo will oppose the Sale Transaction, but Niketo is not a creditor of UBS Wireless and did not become a creditor of UBS until January of 2013, when it acquired a \$6,000 claim against UBS.

²³

Unique Broadband Systems, Inc. (Re), 2012 ONSC 6366 (CanLii), para 14.

37. Niketo also submitted an unsuccessful offer in the Sale Process to acquire the LOOK Shares at the price provided for in the Niketo Offer.

(e) No Effect on Stakeholders

38. The approval of the Sale Transaction and the sale of the Purchased Assets as contemplated by the Sale Transaction will not impact UBS' ability to present a plan of compromise or arrangement for the purpose of taking advantage of UBS' tax losses or public listing.
39. The ability to take advantage of UBS' tax losses or UBS' public listing is not tied in any way to UBS Wireless' ownership of the LOOK Shares.
40. The Sale Transaction will ensure that UBS has cash resources to implement any plan of compromise or arrangement without the need to borrow money.
41. Niketo, notwithstanding having participated in the Sale Process and submitted an (unsuccessful) bid for the LOOK Shares in the Sale Process, asserts that the sale of the Purchased Assets will have an adverse impact on UBS. Niketo has not put forward any evidence to establish what the negative impact to the Applicants might be incurred as a result of the sale of the Purchased Assets. In the absence of actual evidence of prejudice, the Court should defer to the reasonable business judgment of UBS' directors and the recommendation of the Monitor.
42. The Special Committee:
- (a) developed criteria for considering the offers submitted in the Sale Process; and
 - (b) considered the offers submitted in the Sale Process, took advice from the Monitor and exercised their reasonable business judgment.
43. There is no basis whatsoever to challenge the reasonable business judgment of the Special Committee.

44. The sale of the Purchased Assets
 - (a) Maximizes value of the Purchased Assets;
 - (b) Limits the going forward risk associated with the LOOK litigation;
 - (c) Permits UBS Wireless to retain a certain number of the LOOK Shares in the event that there is, at some future date, an increase in the value of LOOK shares; and
 - (d) Provides UBS, indirectly through its holdings of UBS Wireless, with access to capital to fund the CCAA process and a plan to its creditors and shareholders.
45. Niketo also appears to assert that there is some sort of “control premium” that will be lost if the Sale Transaction is completed. Niketo:
 - (a) Proceeds on the assumption that UBS has “control” of LOOK without putting forward any evidence that there is not another “block” of LOOK shares that controls LOOK;
 - (b) Puts forward no evidence whatsoever, except the “opinion” of Mr. Zorbas, to establish there is any “control premium” associated with UBS Wireless’ LOOK holdings or how any such “control premium” will be impacted by the Sale Transaction; and
 - (c) Has indicated that it would pay only \$0.12 per share for up to 49.9% of LOOK.
46. The LOOK Shares are not a significant part of UBS’s business going forward and there is risk the value of LOOK shares will drop in the future.
47. UBS Wireless is not operating a going-concern business and the sale of the Purchased Assets cannot, as a result, have any impact on UBS Wireless’ “business”. The purpose of holding the LOOK Shares is to realize value from the

shares, either through dividends or sale(s), and the Sale Transaction accomplishes that business objective insofar as it realizes a significant premium for the a portion of the LOOK Shares. The fact that Niketo believes that the LOOK shares may, potentially be worth more at some later date is not reason for this Court to not approve the Sale Transaction.

48. Any restructuring of UBS will be to facilitate the use of UBS' accumulated tax losses and public listing. UBS Wireless' holdings of LOOK are not connected to those purposes. It is not possible to develop a going concern business around or involving UBS Wireless' LOOK holdings that will be able to take advantage of UBS' accumulated tax losses. UBS Wireless' LOOK holdings represent nothing more than a interest in another public company that has no operating business – aside from being an asset against which borrowings could be leveraged, the LOOK holdings are irrelevant to any going-forward operating business for UBS.
49. LOOK is currently engaged is litigation with, *inter alia*, the Jolian Parties and certain of the Dolgonos Parties. That litigation will be extremely expensive and the outcome of the litigation could have an impact on the value of LOOK's shares. It will be many years until the outcome of the LOOK litigation is determined. Realizing on a portion of UBS' LOOK holdings now provides a hedge against any future reduction in the value of LOOK as a result of the costs or results of the litigation – UBS realizes on 50% of its LOOK holdings at a very favourable price when compared to all other current alternatives and retains 50% of is LOOK holdings.

(f) The Purchase Price is Reasonable

50. The purchase price has to be reasonable, not the highest theoretical purchase price attainable.
51. The purchase price being paid by the Purchaser is more than reasonable. It represents a premium over the “market” price for LOOK shares. It also represents a premium over what Niketo offered UBS Wireless for the LOOK Shares and

what Niketo advised the market it would pay for LOOK shares in a takeover bid for 49.9% of LOOK.

52. There is absolutely no evidence that the purchase price being paid by the Purchaser is not reasonable.
53. While Mr. John Zorbas, who describes himself as “a principal” of Niketo asserts in an Affidavit sworn 8 February 2013, which Affidavit was not sworn in opposition to this Motion, that it is his personal belief that Purchased Assets are “undervalued” by the market and in the Sales Transaction:
 - (a) Mr. Zorbas is not qualified as an independent expert on the valuation of shares;
 - (b) Aside from Mr. Zorbas’ personal views, Niketo has put forward no valuation evidence to suggest that the purchase price being paid for the Purchased Assets is not fair and reasonable;
 - (c) The Niketo Offer to acquire all of the LOOK Shares was significantly below the Purchaser’s offer;
 - (d) Niketo’s takeover bid for up to 49.9% of LOOK was at a price of \$0.12 per share; and
 - (e) Mr. Zorbas’ views are tainted by his own apparent malice towards UBS’ management and his own desire to have Niketo control the LOOK Shares.
54. Mr. Zorbas expresses his “fundamental” disagreement with the sale of the Purchased Assets in accordance with the Sale Process, but was perfectly happy with the Sales Process and the sale by UBS Wireless of the LOOK Shares when the Niketo Offer was submitted in the Sales Process to acquire the LOOK Shares. Presumably Mr. Zorbas would also be perfectly happy to have UBS tender the LOOK Shares into a takeover bid by Niketo at \$0.12 per share. What Mr. Zorbas is not content to see happen is the Purchaser – who participated in good faith in

the Sales Process and who submitted the highest and best offer in the Sales Process – acquire LOOK Shares that he wants Niketo to own or control.

55. Niketo acquired its interest in UBS subsequent to the Sales Process being approved and subsequent to its offer for the LOOK Shares in the Sales Process being rejected.

(g) Significant Creditors

56. There were no claims filed against UBS Wireless in the Claims Process and UBS Wireless has no creditors.
57. The largest creditors of UBS are the Dolgonos Parties, who are, collectively, owed \$500,000. Pursuant to the Dolgonos Settlement, the Dolgonos Parties are obligated to fully support any decision of the UBS board.
58. The Jolian Parties have only a contingent claim against UBS.
59. The Sales Process was approved notwithstanding the objections of the Dolgonos Parties and the Jolian Parties.
60. While Niketo has indicated that it opposes the Sale Transaction:
- (a) Niketo is owed only \$6,000 by UBS and has no claim against UBS Wireless;
 - (b) Niketo acquired its claim against UBS after participating in the Sale Process and submitted the Niketo Offer to acquire the LOOK Shares for the sole purpose of stopping the Sale Transaction; and
 - (c) Mr. Zorbas, the “principal” of Niketo has made threats to the directors of UBS in an attempt to intimidate them into not proceeding with the Sale Transaction.

ii. Other Criteria

61. The elements which can be found in S. 36 of CCAA are: (a) not limitative; and (b) need not all to be fulfilled in order for the Court to approve the Sale Transaction. The Court has to look at the transaction as a whole and essentially decide whether or not the Sale Transaction is appropriate, fair and reasonable.
62. The Court should also consider:
- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process by which offers have been obtained; and
 - (d) whether there has been unfairness in the working out of the process.²⁴

Importance of the Integrity of the Sale Process

63. In reviewing the aforementioned duties of the Court, when deciding whether a receiver has acted properly when selling the property and assets of the debtor, the Court of Appeal in *Royal Bank v Soundair Corp*²⁵ explicitly stated that:

*While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected.*²⁶

²⁴ See *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (CanLII), para 53; citing *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA) at para 16..

²⁵ *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA).

²⁶ *Ibid* at para 42.

64. In reaching this conclusion, the Court of Appeal referred to *Re Selkirk*,²⁷ where the Court considered the approval of a sale of real property. In reaching its conclusion to approve the sale, the Court noted that:

*...the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.*²⁸

65. In reciting the above noted duty of the Court, the Court of Appeal in *Royal Bank v Soundair Corp*²⁹ adopted the analysis by the Court in *Crown Trust Co v Rosenberg*³⁰ where Anderson J. stated:

*While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus, to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.*³¹

66. The Sale Process satisfies each of these criteria. It was a fair and fully transparent process that was developed by the Monitor and approved by the Court. No person has taken any issue whatsoever with the implementation of the Sales Process by the Monitor. In practical terms, Niketo's only real complaint is that it was not the successful purchaser.
67. In *Terrace Bay Pulp Inc (Re)*, this Court considered an opposed sale approval motion. The motion to approve the transaction that resulted from the sales process was opposed by a "bitter bidder" supported by a creditor who asserted that it would realize better recoveries under the transaction proposed by the "bitter bidder". The Court rejected the argument that a "better" transaction ought to be approved over the transaction that had resulted from the Court-sanctioned sales

²⁷ *Re Selkirk* (1986), 58 CBR (NS) 245 (Ont SCJ).

²⁸ *Ibid* at para 5.

²⁹ *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA).

³⁰ *Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 (Ont HC).

³¹ *Ibid* at para 29.

process. In doing so, the Court adopted the following passage from the Court of Appeal's decision in *Royal Bank of Canada v Soundair*:³²

*It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.*³³

68. The Purchaser “played by the rules” and participated in the Sales Process. Niketo, having made an unsuccessful offer in the Sales Process, ought not to be permitted to make an “end run” around the Sales Process. Query what Niketo’s position on this Motion would be if the Niketo Offer had been accepted and it was the Purchaser that had acquired an interest in UBSA and was seeking to block a transaction with Niketo?

iii. Role of the Monitor

69. It is accepted that no transaction will be perfect and there will always be those that believe that a different transaction (or no transaction at all) ought to be approved by the Court. The Court will rely on the advice of the Monitor with respect to whether a proper balance is achieved by the transaction being put forward for approval.³⁴
70. In *Canwest Global Communications Corp (Re)*³⁵ the Court adopted the principles set out by the Court of Appeal in *Royal Bank v Soundair*.³⁶ The reasoning for this was based on the fact that the Court found these principles to be more appropriate than a fair and reasonable test, which was in the Court’s view, too limited. Justice Pepall also commented on the position and influence of the Monitor, stating:

³² *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA).

³³ *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 (CanLII), para 59.

³⁴ *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (CanLII), para 52.

³⁵ *Canwest Global Communications Corp (Re)*, 2010 ONSC 1176.

³⁶ *Royal Bank v Soundair Corp* (1991), 4 OR (3d) 1 (Ont CA).

*...I would add that the court should consider the position of the Monitor. This is a factor to be considered when approval of an asset sale outside the ordinary course of business is sought pursuant to s. 36 of the CCAA. In my view, this is a useful factor to consider in circumstances such as those before me in this case.*³⁷

71. The Monitor's support of the sale in *Canwest Global Communications Corp (Re)*,³⁸ among other things, was a key factor which persuaded the Court to grant the relief requested.³⁹

B. Shareholder Approval is not Required

72. UBS Wireless is not seeking that the Court exercise its discretion to exempt UBS Wireless or UBS from seeking shareholder approval for the Sale Transaction.
73. Section 36(1) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") provides the Court with the jurisdiction to dispense with any requirement for shareholder approval that may be imposed by applicable federal or provincial law. The section does not provide that the Court may impose the requirement for shareholder (or creditor) approval that does otherwise exist in the section.
74. The Senate Report that resulted in the enactment of s. 36 of the CCAA provides:

*During a reorganization, an insolvent company may benefit from an opportunity to sell part of its business in order to generate capital, avoid further diminution in value and/or focus better on the financially solvent aspects of its operations. In some situations, a win-win situation would be created: insolvent companies would be able to increase their chance of survival as they gain capital and focus on their solvent operations, and creditors would avoid further reductions in the value of their claims. These sales would occur outside the normal course of the organization's business. In some cases, the best situation for stakeholders might involve the sale of the business in its entirety.*⁴⁰

³⁷ *Canwest Global Communications Corp (Re)*, 2010 ONSC 1176 at para 36.

³⁸ *Canwest Global Communications Corp (Re)*, 2010 ONSC 1176.

³⁹ *Ibid* at paras 46-47.

⁴⁰ Senate Committee on Banking Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Government of Canada, 2003), p 146.

75. A clause-by-clause analysis of the legislation clarifies that the intention of Parliament with respect to s. 36(1) was to provide an exemption from an otherwise existing requirement that shareholder approval be obtained:

*Subsection (1) is amended to clarify that the ability of the debtor to dispose of his or her assets should not be restricted by a requirement that shareholder approval be obtained.*⁴¹

76. The questions to be satisfied with respect to shareholder approval for sales under s. 36 of the CCAA are as follows:

- (a) is there a requirement under any applicable provincial or federal law that shareholder approval be obtained for the transaction; and
- (b) if so, should the Court exempt the debtor from obtaining that shareholder approval for the transaction or guarantor.

77. In the case of the Sale Transaction, there is no requirement for shareholder approval under s. 36 and, as a result, no need for the Court to consider whether it should exempt UBS Wireless from any such requirement.

78. The issue is whether shareholder approval is required by any applicable federal or provincial law.

79. Even where a company is solvent, shareholder approval will only be required in specific circumstances, none of which apply *vis-a-vis* the Sale Transaction:

- (a) Multinational Instrument 61-101 where a transaction is with a related person;
- (b) TSXV Policy 5.1;
- (c) Subsection 184(3) of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the “**OBCA**”).

i. Multilateral Instrument 61-101

⁴¹ Bill C-12 Clause-by-Clause Analysis of Bill C-12.

80. Where a subsidiary of the public company proposes to sell assets to a related person, the transaction must be put to the shareholders of the public company for approval.
81. The Purchaser is not related to the Applicants and no approval is required under Multilateral Instrument 61-101.

ii. TSXV Policy 5.1

82. Under TSXV Policy 5.1, the TSXV must approve a transaction involving the sale of the property of a subsidiary of a listed company and the TSXV has jurisdiction to require, as a condition of granting its consent, that the transaction be put to shareholders for approval.
83. As required by TSXV Policy 5.1, UBS applied for TSXV consent for the Sale Transaction. The TSXV has provided their consent to the Sale Transaction without imposing a requirement for shareholder approval.

iii. *Business Corporations Act (Ontario)*

84. Under the OBCA, the sale of “all or substantially all” of a company’s assets requires shareholder approval.
85. In the case of the Sale transaction, approval of UBS’ shareholders is not required:
 - (a) The Sale Transaction is between the Purchaser and UBS Wireless and the requirement of s. 184(3) of the OBCA do not extend to sale transactions by subsidiaries;⁴²
 - (b) While out of the ordinary course, the Sale Transaction is not “all or substantially all” of the assets of UBS Wireless – the sale of ½ of the LOOK Shares does not satisfy the “quantitative” or the “qualitative” the

⁴² *Amaranth LLC v. Counsel Corporation*, 2007 CanLII 1884 (ON SC).

Court have developed to determine whether a transaction involves “all or substantially all” of a company’s assets.⁴³

C. Niketo is a “Bitter Bidder”

86. Niketo acquired a claim against MKS and shares of UBS knowing the LOOK Shares were being marketed for sale and knowing that its offer had not been accepted.
87. Niketo submitted an offer in the Sales Process to purchase the LOOK Shares. The Niketo Offer was not the highest and best of the offers submitted in the Sales Process and was rejected. As a “bitter bidder” Niketo has no standing to oppose the approval of the Sale Transaction.⁴⁴
88. Subsequent to the Niketo Offer for the LOOK Shares being rejected:
 - (a) Niketo announced its intention to make a takeover bid to acquire up to 49.9% of LOOK for \$0.12 per share;
 - (b) Acquired the Dolgonos Parties’ shares of UBS;
 - (c) Acquired a \$6,0000 claim against UBS;
 - (d) Negotiated, without the involvement of UBS or the Monitor, extremely unfavourable (from the UBS perspective) settlement of certain disputed claims against UBS;
 - (e) Brought an unsuccessful Motion before this Court seeking an order directing that a plan it had developed without the involvement of the

⁴³ See *Amaranth LLC v. Counsel Corporation*, 2007 CanLII 1884 (ON SC);

⁴⁴ See *Consumers Packaging Inc. (Re)*, 2001 Can LII 6708 (ON CA); *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (CanLII) and *AbitibiBowater Inc. (Arrangement relatif à)*, 2010 QCCS 1742 (CanLII). See also *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637 (Can LII) where the Court considered a case where the “bitter bidder” acquired an interest in the debtor after its offer had been accepted. The Court of Appeal found the “bitter bidder” had no standing.

Applicants, and that would have given Niketo control over the LOOK Shares, be put to a vote of UBS'; creditors;

- (f) On 9 February 2013, Niketo served a another Motion seeking to have the Court select between 2 "new" plans, neither of which had been developed with any consultation with the Application, put to a meeting of UBS' creditors⁴⁵;
 - (g) On 11th February 2013 Niketo served yet another motion putting forward the same two plans but also offering that Niketo would "back stop" the Sale Transaction with an agreement to purchase the LOOK Shares at the price of \$0.15 per share in the event that UBS does not proceed with the Sale Transaction and a plan is not approved or sanctioned; and
 - (h) On 12 February 2013 Niketo served a replacement plan which provides for the retention of the LOOK Shares by UBS (the consequential termination of the Sales Process). The replacement plan contemplates, *inter alia*, for the payment of the "Affected Claims", in full, and that the stay of proceedings will continue in respect of the Disputed Claims while the claims procedure continues and provides that Niketo will fund up-to \$6 million to the Applicants' in accordance with an Exist Loan Agreement as provided for in the replacement plan.
89. Niketo should not be permitted to rely on its "after-acquired" interest(s) in UBS to de-rail the Sale Process, especially after having (unsuccessfully) participated in the Sales Process.
90. In *Sterling Centrecorp Inc. (Re)*, this Court refused to permit an unsuccessful bidder to engage in an end-run around a plan of arrangement based on an interest acquired after the plan had been approved, but before it was sanctioned by the Court. The facts in *Sterling Centrecorp Inc. (Re)* are remarkably similar to this

⁴⁵ Both of the 2 plans that Niketo proposes that the Court chose from are so fundamentally flawed as to be unworkable and are incapable of being sanctioned or implemented.

case. In that case, the “bitter bidder” sought to make a take-over bid that was conditional on the plan of arrangement not being sanctioned by the Court.⁴⁶

91. The Sale Transaction which resulted from the Sale Process, that had been approved by this Court, and Niketo voluntarily participated in the Sale Process Niketo only acquired its interest(s) in UBS after it was unsuccessful in acquiring the LOOK Shares in the Sales Process. It now seeks to reopen the entire sale process once the result of the Sale Process is known and the result turns out to be not as satisfactory as Niketo may have been expected.⁴⁷
92. The 2 new plans that Niketo seeks to put forward are specifically designed to derail the Sales Process. It is condition of each of the plans that the Sale Transaction not be completed.
93. There is no cogent explanation as to why Niketo did not have an issue with UBS selling all of the LOOK Shares to it at the price contained in the Niketo Offer or tender into its takeover bid for \$0.12 per share - only a portion of which may have been taken up in the bid - but doesn't want any LOOK shares sold to the Purchaser at \$0.14 per share.
94. In seeking to have a plan put to UBS' creditors for a vote, Niketo indicated that it intended to put an operating business into UBS to take advantage of UBS' accumulated tax losses. There is no reason why UBS Wireless needs the LOOK Shares so that a plan can be put into UBS to take advantage of UBS' accumulated taxes losses. There is also no explanation from Niketo as to why a plan for UBS would not be possible using the proceeds from the Sale Transaction, instead of a secured loan backed by the LOOK Shares.

D. Secured Claims

⁴⁶ *Sterling Centrecorp Inc. (Re)*, 2007 CanLII 32675 (ON SC). The Court relied on the business judgment of the directors.

⁴⁷ *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (CanLII), paras 37 – 40.

95. There are no secured claims against UBS and the only security interest that applies to the LOOK shares is the charge created by the Initial Order. The Approval Order includes the “standard” provisions with respect to security interest in the LOOK Shares.


E. Employee Claims

96. UBS has paid or will pay in the ordinary course the amounts claims referred to in s. 36(7) of the CCAA.⁴⁸

PART IV – ORDER REQUESTED

97. UBS Wireless requests:
- (a) An Order be made substantially in the form required by the Sale Transaction and attached as Schedule “A” to the Notice of Motion of the Applicants;
 - (b) Costs against any party that opposes on a substantial indemnity basis, plus any applicable taxes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of February 2013



Alex MacFarlane/E. Patrick Shea

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

Solicitors for the Applicants

⁴⁸ CCAA, s. 36(7). Note that there a typographical error in s. 36(7) and the reference is intended to be to ss. 6(5)(a) and 6(6)(a).

SCHEDULE “A”

Unique Broadband Systems, Inc. (Re), 2012 ONSC 6366 (CanLII).

White Birch Paper Holding Company (Arrangement relatif à), 2010 QCCS 4915 (CanLII).

Royal Bank v Soundair Corp (1991), 4 OR (3d) 1 (Ont CA).

Re Selkirk (1986), 58 CBR (NS) 245 (Ont SCJ).

Crown Trust Co v Rosenberg (1986), 60 OR (2d) 87 (Ont HC).

Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247 (CanLII).

Canwest Global Communications Corp (Re), 2010 ONSC 1176.

Amaranth LLC v. Counsel Corporation, 2007 CanLII 1884 (ON SC).

Consumers Packaging Inc. (Re), 2001 Can LII 6708 (ON CA).

AbitibiBowater inc. (Arrangement relatif à), 2010 QCCS 1742 (CanLII).

BDC Venture Capital Inc. v. Natural Convergence Inc., 2009 ONCA 637 (Can LII).

Sterling Centrecorp Inc. (Re), 2007 CanLII 32675 (ON SC).

SCHEDULE "B"

Business Corporations Act, R.S.O. 1990, c. B.16.

184. (3) A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (4) to (8).

(4) The notice of a meeting of shareholders to approve a transaction referred to in subsection (3) shall be sent to all shareholders and shall include or be accompanied by,

- (a) a copy or summary of the agreement of sale, lease or exchange; and
- (b) a statement that a dissenting shareholder is entitled to be paid the fair value of the shares in accordance with section 185, but failure to make that statement does not invalidate a sale, lease or exchange referred to in subsection (3).

(5) At the meeting referred to in subsection (4), the shareholders may authorize the sale, lease or exchange and may fix or authorize the directors to fix any of the terms and conditions thereof.

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

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;

- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
- (5) For the purpose of subsection (4), a person who is related to the company includes
- (a) a director or officer of the company;
 - (b) a person who has or has had, directly or indirectly, control in fact of the company; and
 - (c) a person who is related to a person described in paragraph (a) or (b).
- (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
- (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
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- (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF UNIQUE BROADBAND SYSTEMS,
INC. AND UBS WIRELESS SERVICES INC.**

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

**E. Patrick Shea (LSUC# 39655K)
Alex L. MacFarlane (LSUC# 28133Q)**

Tel: (416) 862-7399 / (416) 369-4631
Fax: (416) 862-7661

Lawyers for the Applicants, Unique Broadband Systems
Inc. and UBS Wireless Services Inc.