

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

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. AND UBS WIRELESS SERVICES INC.

**FACTUM IN RESPONSE TO THE MOTION
FOR THE APPROVAL OF SALE**

February 12, 2013

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PART I - INTRODUCTION

1. Niketo¹, as a shareholder and creditor of the moving party, UBS, opposes the motion brought by UBS to approve a transaction to sell approximately 50% of LOOK Shares (the “Sale Motion”).

PART II - SUMMARY OF FACTS

(A) Sale Process contrary to basis of CCAA Proceeding

2. Niketo submits that the Sale Process and the proposed sale is contrary to the intent of the CCAA protection sought by UBS which, in part, was to protect the assets of UBS, including in particular, the LOOK Shares.

3. Specifically, UBS advised the Court that if CCAA protection was not granted, it would have to begin selling large volumes of LOOK Shares to fund litigation, Furthermore, UBS

¹ As defined in the materials filed and before the Court. All other defined terms used herein are as also defined in said materials.

advised the Court that an urgent sale of large volumes of LOOK Shares would likely result in an adverse impact on the value of UBS's holdings, including the LOOK Shares.²

4. Shareholder involvement in the approval motion was one of the features put to the Court in the Supplement to the 11th Report and in particular the Monitor stated that shareholders could be given notice and participate on the approval motion. This has not occurred. In any event as the equity of shareholders is affected, this sale of part of the control block should go to a shareholders' meeting vote.

(B) Sale Process was flawed

5. Furthermore, the Sales Process was flawed, in that it:

- (a) was not clear as to the amount of LOOK Shares that could be bid on; and,
- (b) was not managed to optimize or maximize the sale proceeds that could be obtained for the LOOK Shares;

in the Sales Process.

6. Specifically, the Monitor advertised the LOOK Shares as a "Control Block", but subsequently accepted a bid and entered into an agreement to sell only half the LOOK Shares.

7. In this regard, the Sales Process with respect to this "Control Block" was unclear, in that bidders were not clearly advised that they had a choice to bid for part or all the shares, particularly in light of the fact that the Monitor was receiving such bids.³

² Affidavit of Robert Ulicki sworn July 4, 2011 at para. 79.

³ Affidavit of Robert F. Wilson sworn February 12, 2013 (the "Wilson Affidavit") at para. 11.

8. Furthermore, the Monitor did not contact one of the highest bidders (or other bidders, including Niketo) to advise them they could either bid for half or all the shares and, in any event, to put in their highest bids. This was so, despite making representations to bidders (or at least one) that the highest bidders would be asked to make follow-up bids.⁴

9. Specifically, the Monitor represented that the Sale Process would be “iterative”, in that it would involve at least one final bidding round after the initial bids.⁵

10. More particular, the Monitor represented that it intended to ask the top 3 or 4 bidders to “sharpen their pencils” and that, based on the last and best bids, a “winner” would be selected and then recommended to the Board of UBS⁶

11. One bidder relied on these representations and adjusted their bidding strategy as a result.⁷

12. When one bidder subsequently contacted the Monitor to find out when the next round of bidding would commence, they were advised that no further offers or higher bids would be accepted, contrary to earlier representations made by the Monitor.⁸

13. In this respect, the Sales Process failed to ensure optimization and maximization of the sale proceeds for the LOOK Shares with respect to the price per share.⁹

(C) Sale Price did not take into account full value

⁴ Wilson Affidavit at para. 4, 8 and 11.

⁵ Wilson Affidavit at para. 5

⁶ Wilson Affidavit at para.s 4-5

⁷ Wilson Affidavit at para.s 4-7

⁸ Wilson Affidavit at para. 8

⁹ Wilson Affidavit at para. 10

14. Furthermore, the effect of the Sale Process adopted by the Monitor appears to have ensured that the LOOK Share price did not take into account the full value of matters other than the cash in Look. This includes both the value of the litigation and the value of the tax losses of \$166,000,000. There is significant value or potential value in these assets which do not appear to be part of the valuation when the share price is only 14¢ a share.¹⁰

15. Specifically, Niketo conducted an analysis of the value and potential value of the LOOK Shares, as follows:

- (a) At present, there is cash in LOOK of \$18,166,000 and liabilities of \$588,000 (as of November 30, 2013).
- (b) The net book value of the assets is \$17,578,000. The tax losses are \$166,116,000. The potential recovery in the LOOK litigation is a maximum of \$20,000,000. There are 139,702,000 outstanding shares of Look.
- (c) The net book asset (net cash only value) of the LOOK Shares, without taking into account the tax losses or any recover in litigation, is 12.6¢ per share. The sale price of half the LOOK shares is 14¢ per share. That gives value to the litigation and tax losses of .014¢ per share.¹¹

16. Given the above, the sale price of the half of the LOOK Shares does not take into account the true value of the tax losses and the litigation. Even if the litigation had a 25% chance of

¹⁰ Although there is a Back-Stop agreement which would allow Niketo to buy the same LOOK Shares for 15¢ per share, that is not the approach that Niketo wishes to take. Rather, the Plan is the approach and the funding is available for not just purchase of shares, but rather for the full loan requirements as estimated by Niketo as part of its plan

¹¹ Affidavit of John Zorbas sworn February 12, 2013 (the “Zorbas Affidavit”) at para. 8-10.

success, that would add a further 2.9¢ in value per share. If the litigation is at least a 50/50 proposition, that would add 7.2¢ in value to the shares.¹²

17. Furthermore, the tax losses, if appropriately used, would be worth at least 4¢ on the dollar and as high as 10¢ on the dollar. This would equate from \$6,645,000 to \$16,612,000 in value for the tax losses. This equates to 4.8¢ per share or as high as 11.9¢ per share if the tax losses are properly dealt with.¹³

18. With respect to the two types of shares (LOK.H – multiple-voting shares and LOK.K – subordinate voting shares), during the last approximately thirty days, a total of 130,000 shares traded between 9.5¢ and 11.5¢ with regard to the LOK.H. shares and during that same time period, 260,000 shares traded with LOK.K shares between 9¢ and 11¢. Thus, the stock is thinly traded.¹⁴

19. In these circumstances, the price for half of the block of LOOK Shares sold by UBS under the guidance of the Monitor is far below their true value based on the assets that are available to LOOK.¹⁵

(D) Sale Process did not take into account dilution of voting power and value

20. According to paragraph 3.1(2) of the 13th Report of the Monitor, pursuant to LOOK's articles of incorporation, holders of multiple voting shares are entitled to 150 votes per share, whereas holders of subordinate voting shares are entitled to 1 vote per share. If a public tender offer is made to purchase only multiple voting shares, the holders of subordinate voting shares

¹² Zorbas Affidavit at para. 11.

¹³ Zorbas Affidavit at para. 11.

¹⁴ Zorbas Affidavit at para. 12.

¹⁵ Zorbas Affidavit at para. 12.

may tender to such an offer and all subordinate voting shares acquired convert into multiple voting shares.¹⁶

21. This was the first time the Monitor set out this fact in any of its Reports.

22. Specifically, in the circumstances of a public tender (including the public tender by Ulicki and his partner), the effect is the risk that if half the LOOK Shares are sold, the remaining half will not be able to be tendered. Those LOOK Shares that were sold could be tendered into such a public tender. This would result in the conversion of the subordinate voting shares into multiple voting shares, granting 150 votes for each of the subordinate voting shares (rather than 1 vote for each share) that are part of the share sale.

23. This would result in a dilution of the voting power of the remaining LOOK Shares owned by UBS, and that would adversely affect their value (the “Dilution Issue”).¹⁷

24. In fact, even Mr. Taylor on his cross-examination, acknowledged that the Dilution Issue could adversely affect share value.¹⁸

25. However, it appears that the Monitor and the Special Committee did not have full or any knowledge of the Dilution Issue, despite being a material fact that affects the value of the LOOK Shares and, most importantly, affects the value of the remaining LOOK Shares if only half were sold.

26. In fact, the Monitor (and the Special Committee) were unaware of the Dilution Issue prior to being advised of the adverse effect of Dilution Issue by counsel for Niketo.¹⁹

¹⁶ 13th Report of the Monitor, para. 3.1 (2)

¹⁷ Zorbas Affidavit, para. 4.

¹⁸ Cross-examination of Kenneth Taylor, January 30, 2013, Transcript, pg. 49, ques. 262-263.

27. Upon being advised of the Dilution Issue by Niketo on January 17, 2013, Mitch Vininsky, a representative of the Monitor, was thankful for bringing the matter to the Monitor's attention and confirmed that the Monitor did not understand or turn its mind towards the Dilution Issue.²⁰ However, the Monitor's counsel, Matthew Gottlieb, was more dismissive of the Dilution Issue.²¹

28. After raising the Dilution Issue with the Monitor, the Monitor did not include any reference to it in the 12th Report dated January 30, 2013. Rather, the Monitor only mentioned it for the first time in its 13th Report dated February 8, 2013, stating simply that holders of subordinate voting shares may tender to an offer to purchase multiple voting shares, and referring to the conversion of the voting rights.

29. This is further evidence that the Monitor and the Special Committee members lacked full knowledge of the issues during and prior to the Sale Process.

(E) Lack of shareholder approval

30. Furthermore, the sale of half the LOOK Shares, the major asset of UBS, does affect the equity of the shareholders, particularly in light of Mr. Taylor's acknowledgments that a sale of a large volume of the LOOK Shares (i.e. 50% of those owned by UBS) would adversely affect the value of the remaining UBS' holdings. This would clearly affect the value of the equity of the shareholders, such that shareholder approval should be required before such a sale is approved by the Court.

¹⁹ Zorbas Affidavit at para. 5.

²⁰ ²⁰ Zorbas Affidavit at para. 6.

²¹ ²¹ Zorbas Affidavit at para. 6.

31. In fact, the Monitor, when seeking Court approval of the Sale Process advised that shareholder approval could be dealt with by giving notice to the shareholders of UBS and having them attend at the approval hearing. However, the Monitor has not done so.

32. Based on the Endorsement of the Honourable Justice Wilton-Siegel dated February 12, 2013 (the “Endorsement”), it makes no sense that the shareholders of UBS are not and have not been given notice, or been given the opportunity to provide input into the Sales Process and the proposed sale of 50% of the LOOK Shares owned by UBS, in these circumstances, where their equity is clearly and directly affected.

33. Given the failure by the Monitor and the Special Committee to provide the shareholders with either notice of, or the opportunity to take the issue with or have any input into the sale of half of the “Control Block” of the LOOK Shares owned by UBS, it is submitted that this Honourable Court should not approve the sale. This is particularly so in light of the Endorsement.

34. The Plan proposed by Niketo responds to concerns raised in the Endorsement, including, but not limited to providing for shareholder input in the Plan.

35. However, while UBS and the Monitor, raised the issue of shareholder input on Niketo’s initial Plan (insisting that that it was required given that the Plan affected the equity of the Shareholders), UBS and the Monitor now seek to circumvent shareholder approval and input in the Sale Process and the sale of 50% of the LOOK Shares, which clearly affects the equity of the shareholders.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

36. When assessing whether to approve a transaction to sell assets of a company under CCAA proceedings, the court should consider the following factors:²²

- (a) *Whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently.* Niketo submits that the Monitor has not obtained the best price, and appears to have acted improvidently, given the circumstances set out herein, under subheading (B) and (C), and as set out below;
- (b) *The interests of all parties.* Niketo submits that the Monitor has not taken into account the interest of all relevant parties, including the creditors and shareholders, given the circumstances set out herein, under subheading (E), and as set out below;;
- (c) *The efficacy and integrity of the process by which offers are obtained.* Niketo submits that the Sales Process was flawed, given the circumstances set out herein, under subheading (A), (B), (C) and (D), and as set out below;; and
- (d) *Whether there has been unfairness in the working out of the process.* Niketo submits that there was unfairness in the Sales Process, given the circumstances set out herein, under subheading (B) and (C), and as set out below.

37. A court-appointed receiver has an obligation is to make a sufficient effort to obtain the highest possible sale price for the assets.²³

38. The Monitor failed to do so, as it did not go back to the bidders to obtain better and higher bids, despite that it advised it would.

²² *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247 (CanLII)

²³ *Royal Bank of Canada v. Fracmaster Ltd.* [1999] A.J. No. 675 at para. 32

39. A court-appointed receiver must act with meticulous correctness. The standard required as an officer of the court reaches further than merely acting honestly.²⁴

40. In addition, in *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.* 59 O.R. (3d) 376, [2002] O.J. No. 1398, Wilson J. recognized although the court will not lightly withhold approval of sale by a receiver, the counter point is the requirement that the procedures adopted by the receiver must be commercially reasonable and fair from the perspective of potential purchasers, creditors and debtors alike. Wilson J. noted that the procedure must be both fair and reasonable and be seen to be fair and reasonable by all those participating in the process.²⁵

41. Given the circumstances set out herein, including that, during the Sale Process, the Monitor:

- (a) did not take into account the full value of the LOOK Shares, by properly taking into account the tax losses and LOOK litigation;
- (b) was not aware of material facts which significantly affected the value of the LOOK Shares and was unaware of the detrimental effect of the remaining LOOK Shares owned by UBS if only half were sold;
- (c) did not take into consideration the resulting equity of the shareholders, and seek their approval or input on the Sales Process and the sale of 50% of the LOOK Shares, either by way of a shareholders' meeting or giving them notice of this Sales Motion (despite initially stating that the Monitor would do so)

²⁴ *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 CarswellAlta 315, 81 D.L.R. (4th) 280, at para.s 38, 40.

²⁵ *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.* [2002] O.J. No. 1398

such a Sale Process, which does not address these factors, is clearly not meticulously correct, and is either unfair or unreasonable, or cannot be seen to be fair and reasonable by stakeholders of UBS.

PART IV - ORDER REQUESTED

42. Niketo respectfully request that the Sale Motion be dismissed.

43. Rather, Niketo respectfully requests the Plan be allowed to proceed to a Creditor's Meeting and the Shareholders Meeting and then subsequently a Court Sanction Hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ..13th... day of February, 2013.

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SCHEDULE “A”

LIST OF AUTHORITIES

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

Royal Bank of Canada v. Fracmaster Ltd. [1999] A.J. No. 675 at para. 32

Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd., 1991
CarswellAlta 315, 81 D.L.R. (4th) 280, at para.s 38, 40.

Toronto-Dominion Bank v. Crosswinds Golf &Country Club Ltd. [2002] O.J. No. 1398

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1.

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

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