

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**DOL TECHNOLOGIES INC.**

**Plaintiff**

- and -

**UNIQUE BROADBAND SYSTEMS, INC.**

**Defendant**

**AND BETWEEN:**

**UNIQUE BROADBAND SYSTEMS, INC.**

**Plaintiff by Counterclaim**

- and -

**DOL TECHNOLOGIES INC., ALEX DOLGONOS  
GERALD MCGOEY, LOUIS MITROVICH,  
and DOUGLAD REESON**

**Defendants by Counterclaim**

**REPLY AND DEFENCE TO COUNTERCLAIM OF DOL TECHNOLOGIES  
INC. and ALEX DOLGONOS**

November 5, 2010

**ROY ELLIOTT O'CONNOR LLP**  
Barristers & Solicitors  
200 Front Street West  
Suite 2300  
Toronto, Ontario  
M5V 3K2

**Peter L. Roy (LSUC No. 161320)**  
**Sean M. Grayson (LSUC No. 46887H)**

Tel: (416) 362-1989  
Fax: (416) 362-6204

Counsel for the Plaintiff DOL and Defendant  
by Counterclaim Alex Dolgonos

**TO: GOWLINGS LAFLEUR HENDERSON LLP**

1 First Canadian Place  
100 King Street West  
Suite 1600  
Toronto, Ontario M5X 1G5

**Kelley m. McKinnon (LSUC No. 31193C)**  
**Ben Na (LSUC No. 409580)**

Tel: (416) 862-4432  
Fax: (416) 862-7661

Lawyers for the Defendant/ Plaintiff by Counterclaim  
Unique Broadband Systems Inc.

**AND TO: GROIA & COMPANY PROFESSIONAL CORPORATION**

Wilbeoer Dellelce Place  
1100-365 Bay St  
Toronto Ontario M5H 2V1

**Joseph Groia (LSUC No. 20612J)**  
**Gavin Smyth (LSUC No. 42134G)**  
**Owais Ahmed (LSUC No. 57004E)**

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

Lawyers for the Defendant by Counterclaim Gerald McGoey

**AND TO: BLAKE, CASSELS & GRAYDON LLP**

Commerce Court West  
2800-199 Bay St PO Box 25  
Toronto Ontario M5L 1A9

**Joel Richler**

Tel: (416) 863-2735  
Fax: (416) 863-2653

Lawyers for Defendant by Counterclaim Louis Mitrovich

AND TO: **MCLEAN & KERR LLP**  
2800-130 Adelaide St W  
Toronto Ontario M5H 3P5

**Sharon Addison**

Tel: (416) 364-5371  
Fax: (416) 366-8571

Lawyers for Defendants by Counterclaim Douglas Reeson

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1. The defendants to the counterclaim, DOL Technologies Inc. (“DOL”) and Alex Dolgonos (“Dolgonos”), deny the allegations contained in the counterclaim save to the extent they are admitted in this reply and defence to counterclaim.

2. DOL and Dolgonos repeat and rely on the allegations set forth in the statement of claim.

**A. RECENT EVENTS**

3. On July 5, 2010, Messrs. James G. McCutcheon, Robert Ulicki, and Henry Eaton were elected as the Board of Directors of the Defendant/Plaintiff by Counterclaim Unique Broadband Systems, Inc. (“**UBS**” or the “**Company**”) at a contested UBS shareholders meeting. The dissident shareholder group that supported their election was led by Mr. McCutcheon and included, among others, Messrs. Ulicki, Eaton, Stephen Rosen, and Arthur Silber (collectively, the “**McCutcheon Group**”). It is the McCutcheon Group and their lawyers, now with the benefit of UBS’ corporate treasury, that now seek to improperly target the defendants in this matter as part of a misguided effort to cover up their own misconduct as outlined below.

4. The McCutcheon Group’s statement of defence and counterclaim is remarkable for a number of reasons, but primarily because it purports to re-write UBS’ history and to second guess over nine years of corporate action by UBS at the direction of its full Board. It also purports to suggest that Dolgonos did not bring significant value to UBS and Look Communications Inc. (“**Look**”). This attempt by the McCutcheon Group to suggest Dolgonos did not earn his compensation is an attempt to distract the UBS shareholders attention from the McCutcheon Group’s lack of attention to, and mismanagement of, UBS since July 5, 2010.

**B. CORPORATE HISTORY OF UBS AND HOW DOLGONOS BECAME A CONSULTANT TO UBS IN 2001**

5. In July 2001, the then directors of UBS, Partick Lavelle (elected in 2000) (“**Lavelle**”), the Right Honourable John Turner (elected in 2000) (“**Turner**”), Edward Neufeld (elected in 2000) (“**Neufeld**”) and the Honourable William Rogers (elected in 1998) (“**William Rogers**”), (hereinafter referred to as the “**Turner Board**”) formed a special committee made up of all the aforementioned directors, leaving out the only other director of UBS Dolgonos, under the guise of pursuing a shareholder value maximization process (the “**Special Committee**”).

6. During this process the Turner Board began to pressure Dolgonos to step down from the position of President, Chief Executive Officer (“**CEO**”) and Chairman of the Board of UBS. As a result of the pressure placed on Dolgonos, Dolgonos resigned from the aforementioned positions and remained a director of the Company (the “**Dolgonos Resignation**”). The Dolgonos Resignation was announced on July 18, 2001.

7. None of the directors on the Special Committee had any background or experience in digital wireless technology and their lack of understanding of the industry ultimately left UBS in a dire position when they departed, as further described below.

8. Upon Dolgonos’ resignation from the positions of President, CEO and Chairman of the Board, the Turner Board recognized that given Dolgonos’ skills and expertise in engineering and in particular in the field of mobile and cellular technology, it needed to retain him as a consultant to utilize his skills and expertise.

9. In 2001, at the direction of the Turner Board UBS entered into a consulting agreement with Dolgonos whereby he would provide such engineering and technology services to the Company as may be specified from time to time by the CEO, on an as requested basis (the “**Dolgonos 2001 Consulting Agreement**”). The Dolgonos 2001 Consulting Agreement provided for a \$2,000.00 per diem payment.

10. Contrary to the allegations of the Defendant as set out at paragraph 9 of the Statement of Defence and Counterclaim, from the date of the Dolgonos Resignation forward Dolgonos was not an officer of UBS. Dolgonos never regained a corporate officer position with UBS, remaining instead as a consultant to the Company.

11. In the alternative, if it is determined that Mr. Dolgonos was an officer of UBS during any of the relevant times, which is not admitted but expressly denied, Dolgonos pleads that he complied with all of the applicable duties and obligations as further set out and described below.

12. On July 18, 2001, Stephen Rosen, resigned from the position of Chief Financial Officer, executive Vice-President and director of UBS (the “**Rosen Resignation**”).

13. As a result of the Dolgonos and Rosen Resignations the Board appointed Patrick Lavelle as the interim-President and CEO and Cameron Smith as the interim-CFO.

14. UBS then began a search for someone to fill the CEO position on a permanent basis, which it had extreme difficulty fulfilling.

15. In August 2001, Jeffery Friedman (“**Friedman**”) was appointed as the Chief Administrative Officer, Mohammed Benvidi (“**Benvidi**”) was appointed as Chief

Operating Officer and John Leon was appointed as the Vice-President, Sales and Marketing.

16. On August 21, 2001 UBS announced a Restructuring Plan that involved UBS reducing the size of its transmission and waveguide divisions. In addition the company was looking to sell or close its operations in Russia and close its operations in Denmark. The restructuring was to result in a significant reduction in staff.

17. At the time the Turner Board and the UBS management (Lavelle, Friedman and Benvidi) had no direction for the Company and were burning through its cash reserves at a very fast rate.

18. The Turner Board was also looking to have themselves re-elected to continue on in the same manner, which could have resulted in all of the cash reserves of UBS being used up leaving the Company bankrupt.

19. After Dolgonos resigned from his positions at UBS the Turner Board and the UBS management, save except for Dolgonos, neglected to pursue opportunities to obtain significant new contracts, closed down vital channels of distribution for UBS products and failed to find a permanent replacement for the CEO position.

20. In or around September 2001, in anticipation of an upcoming shareholder meeting and in an effort to protect and regain shareholder value at UBS, Dolgonos as a significant shareholder of UBS began to form a committee of concerned UBS shareholders. Dolgonos approached individuals who he believed would make exceptional and independent directors for UBS to create long-term shareholder value for the Company.

21. When the Special Committee learned that Dolgonos was going to put forward an alternative slate of directors for UBS, it compiled a draft letter of intent that contemplated a transaction that would take place without shareholder approval, which would result in the doubling of the issued and outstanding shares of UBS in an effort to dilute and diminish the voting rights of the UBS shareholders in an attempt to prevent the dissident board from being elected.

22. Upon being advised of this matter, various shareholders, including Dolgonos brought an application before the Superior Court of Justice to preserve and protect the rights of the UBS shareholders.

23. On October 11, 2001, the Turner Board circulated a Notice of Meeting and Management Information Circular for the Annual and Special Meeting of Shareholders to be held November 27, 2001 (the "**November 2001 MIC**").

24. The November 2001 MIC proposed the following directors Lavelle, Turner, Rogers, Neufeld and Rowland Fleming ("**Fleming**") to be elected for UBS.

25. It was noted in the November 2001 MIC that Dolgonos was going to present a dissident slate of directors; other than Lavelle, Turner, Rogers, Neufeld and Fleming.

26. It was further disclosed in the November 2001 MIC that UBS had entered into an employment agreement with both Friedman and Benvidi wherein they could resign with full severance upon a change in control of UBS.

27. On October 21, 2001 a dissident proxy circular was sent to the shareholders of UBS by the committee of concerned UBS shareholders led by Dolgonos and Gerald McGoey ("**McGoey**") (the "**Concerned Shareholders**").

28. The Concerned Shareholders sought to nominate a different set of directors than that proposed by the Turner Board; they were McGoey, John A. MacDonald ("**MacDonald**"), Louis Mitrovich ("**Mitrovich**"), Peter Minaki ("**Minaki**") and Douglas Reeson ("**Reeson**").

29. All of these directors were and are respected members of Canada's business community. Prior to working with UBS, McGoey worked within the BCE group of companies where he was Executive Vice President and Chief Financial Officer of BCE Inc. and then Chief Corporate Officer of Bell Canada. McGoey was also Chairman of the Board of Bimcor Inc., Chairman and President of BCE Ventures, Chairman of Bell Sigma, and a director of Bell Canada International, MediaLinx Inc. and a number of other Bell companies. Before joining the BCE group, McGoey held the positions of President and a director of Oxford Enterprises as well as Executive Vice President and Chief Financial Officer of Canada Development Company. He has also been a partner in the accounting firm Peat Marwick Thorne.

30. Messrs. Mitrovich, Minaki, and MacDonald had been well-known senior executives with public companies such as Alcatel Canada Inc., Ericsson Canada Inc., and Bell Canada. Reeson is the former Executive Director of Listings for the Toronto Stock Exchange, and, after a distinguished career in Canada's financial sector, is the director of many public companies in Canada.

31. As a result of the above-noted application to the court, the November annual general meeting was cancelled.

32. The court application was settled in January 2002 and a new meeting date was set for March 18, 2002.

33. As a result of the settlement it was agreed, among other things, that:

- a) The Special Committee would not oppose the candidates for the Board of Directors as proposed by the Concerned Shareholders;
- b) Alex Dolgonos would not be proposed as a member of the Board;
- c) The Special Committee would not propose or support any candidates for the Board and they themselves would not stand.

34. At the annual general meeting on March 18, 2002, McGoey, MacDonald, Mitrovich, Minaki and Reeson were voted onto the Board by the shareholders of UBS. At that meeting McGoey became the Chairman of the Board.

35. As a result of the change in the board of directors, all of the management of UBS being Friedman, Benvidi and Smith, tendered their resignations effective immediately. They were paid an aggregate of approximately \$2.1M in severance payments, in accordance with their recently modified employment agreements.

36. The resignation of Friedman, Benvidi and Smith and the departure of Lavelle resulted in UBS having no management in palace.

37. As a result of the foregoing resignations McGoey agreed to become the acting CEO of UBS. This position was to be held by McGoey until a permanent replacement

could be found. UBS would have to find individuals to replace Friedman, Benvidi and Smith.

38. It was made known by McGoey that, given the situation in which UBS found itself, he would take on the position of interim CEO, but that he would resign from that position upon UBS securing a permanent CEO.

39. From March 2002 to June 2002, the UBS Board continued to search for a candidate for the full time position of CEO without success. During that time, the UBS Board, save except for McGoey, had on a number of occasions tried to hire McGoey as the full time UBS CEO.

40. McGoey repeatedly declined the UBS CEO position while continuing at the same time to operate the Company, stabilize the employee base, complete the contract with XM Radio and Hughes Network Systems, and pursue other opportunities for new large contracts for UBS. As discussed below, UBS was in financial difficulties with the completion of the Hughes Network Systems engagement coming to an end and no prospect of a major source of revenue.

41. After an unsuccessful search McGoey agreed to become the CEO of UBS.

42. The independent members of the UBS Board and McGoey reached an agreement for McGoey to become CEO on terms and conditions outlined in a management contract dated June 17, 2002 (the "**McGoey Employment Agreement**"). The McGoey Employment Agreement was later terminated and UBS entered into a Service Agreement effective January 1, 2006 with Jolian Investments Ltd. (the "**Jolian MSA**") a company

controlled by McGoey, whereby Jolian would cause McGoey to provide the CEO services to UBS.

43. In June 2002 it was announced that John D. Kennedy ("Kennedy"), a Chartered Accountant with CFO experience, was hired as the CFO of UBS. Kennedy's duties would include, among other things, all financial management and reporting requirements.

44. In July as part of the acquisition of Point-to-Point Radio assets from SierraCom, as further described below, Dr. Pasteur Ntake ("Ntake") joined UBS as the Vice President of Engineering. Dr. Ntake had over 25 years of radio experience gained from a number of companies including Nortel Networks (VP and General Manager wireless Division), Harris Corporation (VP General Manager) and SierraCom (VP Business Development).

45. Upon becoming the Vice President of Engineering Ntake was responsible for, among other things, the entire engineering department at UBS, which included the Point-to-Point team.

46. In September 2002, Doug Shaddock was hired by UBS to fill the role of Director of Sales and Marketing.

47. In March 2003 MacDonald resigned from the Board of UBS, as a result of a conflict of interest.

48. In September 2003, Ntake left UBS, after he and other employees set up a company to purchase the engineering and manufacturing businesses of UBS. The business Ntake set up was known as Unique Broadband Systems Ltd. ("UBS Ltd."). As

part of the purchase UBS Ltd. agreed to retain 44 employees of UBS. This sale reduced the total number of employees at UBS to 6.

49. In December 2003, Kennedy resigned from UBS.

50. In January 2004 Malcom Buxton-Forman ("**Buxton-Forman**") began to act as the interim CFO. Buxton-Forman became the permanent CFO in July 2004. Buxton-Forman is a Chartered Accountant and held senior positions with the Cadbury Schweppes Group.

51. From January 2004 to July 5, 2010, the officers of UBS remained McGoey and Buxton-Forman. On July 5, 2010 when the McCutcheon Group took control of UBS McGoey was removed as a director and CEO. Buxton-Forman remains as the CFO.

**C. DOLGONOS CONSULTING AGREEMENTS ARE VALID AND ENFORCEABLE**

**(i) The 2002 Dolgonos Consulting Agreement**

52. UBS retained Dolgonos for an initial term of 5 years, which could be (and was) automatically renewed for a subsequent term, under a Technical Development and Strategic Marketing Agreement dated August 22, 2002, effective March 18, 2002 (the "**2002 Dolgonos Consulting Agreement**").

53. The purpose of the 2002 Dolgonos Consulting Agreement was for UBS to retain Dolgonos as its Chief Technology Consultant ("**CTC**"). Dolgonos was listed in public filings as the CTC and he performed the role of a consultant.

54. Dolgonos was not a corporate Officer of UBS and UBS never considered Dolgonos to be a corporate Officer.

55. During the negotiation of the 2002 Dolgonos Consulting Agreement, both parties retained independent legal counsel and were advised by their own legal counsel. The Board of UBS, with the benefit of full information, determined that the 2002 Dolgonos Consulting Agreement was in the best interests of UBS, was necessary, reasonable and fair to UBS, and approved the 2002 Dolgonos Consulting Agreement.

56. The 2002 Dolgonos Consulting Agreement was properly negotiated and completed, and was a valid and binding contractual obligation of UBS.

57. The terms of the 2002 Dolgonos Consulting Agreement were consistent with industry norms and were disclosed annually in the relevant UBS management information circulars.

58. Dolgonos acted in reliance upon the 2002 Dolgonos Consulting Agreement and UBS' representation to him that it constituted the terms under which Dolgonos was to provide services to UBS.

59. UBS and ultimately Look greatly benefited from receiving the services of Dolgonos.

60. Within the negotiations of the 2002 Dolgonos Consulting Agreement, both sides were aware that three key terms needed to be included. Each of these were negotiated and agreed to by Dolgonos and UBS. First, it was agreed that the indemnity from the Company would be contained in the 2002 Dolgonos Consulting Agreement and that it would be comprehensive and all-inclusive. Second, it was agreed that all expenses whatsoever relating to any and all professional fees that were incurred in relation to the

2002 Dolgonos Consulting Agreement were to be borne by the Company. This clause was added to ensure that UBS could not claim to terminate the 2002 Dolgonos Consulting Agreement or that the 2002 Dolgonos Consulting Agreement had been terminated and thereby deny Dolgonos access to payment by UBS of his legal and other professional fees that might be required to fight for his rights under the 2002 Dolgonos Consulting Agreement. Third, there was a provision for payment if Dolgonos was to terminate the agreement for "Good Reason" following a "Change in Control", as those terms were used in the agreement.

**(ii) The 2008 DOL Consulting Agreement**

61. On July 12, 2008 UBS entered into a settlement agreement with Dolgonos that terminated the 2002 Dolgonos Consulting Agreement. At the same time a Technology Development and Strategic Marketing Agreement was completed between UBS and DOL Technologies Inc. (the "**DOL Consulting Agreement**") effective May 1, 2008. The DOL Consulting Agreement replaced the Dolgonos Consulting Agreement.

62. The purpose of the DOL Consulting Agreement, like the 2002 Dolgonos Consulting Agreement (collectively, the "**Dolgonos Consulting Agreements**") was for UBS to retain Dolgonos as its CTC.

63. After receiving independent legal advice throughout the negotiation of the DOL Consulting Agreement, the Human Resource Committee of the UBS Board recommended to the UBS Board that UBS enter the DOL Consulting Agreement.

64. The UBS Board authorized Mr. Mitrovich (the Chairman of the Human Resource Committee) and Mr. McGoey to execute the DOL Consulting Agreement on behalf of

UBS. The DOL Consulting Agreement was properly negotiated and completed, is a valid and binding contractual obligation of UBS, and is enforceable.

65. With the benefit of full information, independent legal counsel, the members of the UBS Board determined that the terms of the DOL Consulting Agreement were in the best interests of UBS and were necessary, reasonable and fair.

66. The DOL Consulting Agreement was far from being “one-sided” as alleged in the statement of defence and counterclaim; by entering into the DOL Consulting Agreement, Dolgonos was agreeing to assist two public companies both of which were in poor financial condition and facing substantial existing and potential litigation, including personal litigation, in a very competitive and evolving industry fraught with technical and regulatory challenges. Moreover, Dolgonos was going to have to devote a significant amount of time to the consultation, along with agreeing to non-completion, confidentiality and non-solicitation provisions, resulting in him not being able to undertake other work that was or would become available to him and his company.

67. By agreeing to the DOL Consulting Agreement, UBS was retaining the services of the individual who founded and understood all of the technology of UBS and LOOK so that it could meet its obligations under the UBS/Look MSA and to provide value to both UBS and Look.

68. The terms of the DOL Consulting Agreement, including its termination provisions, were consistent with industry norms in respect of individuals with the specialized experience and skill set that Dolgonos possessed. They were also consistent

with the economic and legal terms and conditions of the 2002 Dolgonos Consulting Agreement, all of which were publically disclosed.

69. The Canadian wireless-based industry at the time the Dolgonos Consulting Agreements were completed included a small number of significant players. There were few individuals in Canada who had the experience, skills and know-how in the wireless-based industry that Dolgonos possessed at the time the Dolgonos Consulting Agreements were entered into that would be able or willing to accept these positions. And the others, were leading the other key players in the industry such as Bell Canada, Rogers and Telus and as such were unavailable to UBS and Look.

70. The termination provisions of the Dolgonos Consulting Agreements (referred to pejoratively as the "Golden Parachute" by the McCutcheon Group in the statement of defence and counterclaim) were rational, precedented, reasonable and fair, necessary, economically reasonable, and in compliance with good corporate governance practices.

The termination provisions made sense in the circumstances that included:

- a. UBS (for itself and for Look) needed to attract and retain Dolgonos as it was in UBS' best interest to have someone with his hard-to-find experience, skills and know-how in such an evolving and competitive industry;
- b. Take-over and change of control protections such as those contained in the DOL Consulting Agreement were a common element in competitive compensation packages as they offered the expert consultant some protection from events that were largely outside the control of the

Dolgonos and provided an incentive for him to accept a position with a possible take-over target and to stay on in the face of an anticipated take-over or change of control, particularly given Dolgonos' previous experience with the Turner Board and where he would be devoting the vast majority of his time to the fulfillment of the agreement without taking on additional substantial work;

- c. The competitive, evolving, and litigious nature of the industry UBS and Look were in meant that their take-over or change of control through a fundamental transaction, change of control of the board or otherwise was a real possibility (and had already happened twice before) along with associated litigation. As a result, the termination provisions were needed to protect Dolgonos and to reduce the potential conflict of interest in such an event for an individual such as Dolgonos who would likely lose his position in such a take-over or change of control, and to provide him an incentive to stay in his position despite the likelihood of resulting litigation including claims against him;
- d. The termination provisions would allow Dolgonos security in foregoing other work and also allow him to assist in evaluating a take-over or change of control objectively if asked to do so; and
- e. The termination provisions were designed to protect Dolgonos' future no matter the outcome of a take-over or change of control attempt of UBS or

Look and to thereby free him to consider only the best interests of UBS or  
Look should a take-over or change of control attempt be made.

71. DOL and Dolgonos acted in reliance upon the DOL Consulting Agreement and UBS' representation to them, with the assistance of independent legal counsel to the UBS Board, that the DOL Consulting Agreement constituted the terms under which DOL and Dolgonos were to provide services to UBS and Look through to July 5, 2010. UBS and Look benefited from receiving these services.

72. It is unfair and unreasonable for the new management of UBS, eight years after the 2002 Dolgonos Consulting Agreement was completed and over two years after the DOL Consulting Agreement was completed, to allege that the DOL Consulting Agreement is void and never existed. To give credence to this claim would unjustly enrich UBS.

73. Furthermore, DOL and Dolgonos plead that unrelated to any duty to indemnify DOL or Dolgonos, UBS has an obligation under the terms of the DOL Consulting Agreement (at section 3.3.5 Legal Expenses) to reimburse DOL for all reasonable legal, expenses incurred in respect of the DOL Consulting Agreement, DOL's performance of the "Services" as contemplated in the DOL Consulting Agreement, and any other matter relating to UBS including the defence against actions commenced by UBS, and any other matter relating to UBS including the defence against actions commenced by regulatory authorities.

74. As was described above, this clause was included to ensure that UBS could not claim to terminate the DOL Consulting Agreement or that the DOL Consulting

Agreement had been terminated and thereby deny DOL and Dolgonos access to payment by UBS of his legal fees that might be required to fight for their rights under the DOL Consulting Agreement.

75. In addition, pursuant to section 7.11 of the DOL Consulting Agreement, in the event of any dispute between DOL and UBS as to any alleged breach by DOL of any obligation under any other agreement between UBS and DOL (the “**Other Agreements**”), UBS is not entitled to cease making payments required under the DOL Consulting Agreement to DOL and UBS is not entitled to hold back or set-off against any of its obligations under the DOL Consulting Agreement the amount of any damages it claims to have sustained as a result of any alleged breach under any of the Other Agreements.

76. Dolgonos’ continued successful contribution to UBS and Look was threatened by the environment of litigation including personal litigation that had developed by 2006.

77. UBS and Dolgonos agreed to a technology development and strategic marketing agreement structure and indemnity provisions which were necessary in the circumstances to reduce the risk of personal liability to Dolgonos, and to provide him the assurances, protection, and incentive to continue in his roles despite the litigious environment.

78. The DOL Consulting Agreement did not materially change the economic terms from those already agreed to by UBS in the 2002 Dolgonos Consulting Agreement. Furthermore, in clause 3.6 of the 2002 Dolgonos Consulting Agreement, UBS agreed to restructure the manner of compensating Dolgonos if such a change was more tax advantageous to Dolgonos and if such a change was not detrimental to UBS – as was the

case in switching to a management services structure through the DOL Consulting Agreement.

79. The DOL Consulting Agreement in no way fetters the rights of UBS shareholders.

80. The DOL Consulting Agreement was disclosed by UBS to the public in a timely manner in the Management's Discussion and Analysis of Financial Condition and Results of Operations of UBS for the three and nine months ended May 31, 2008 and 2007, that was released in July 2008.

81. Further the UBS Management Information Circular dated January 27, 2009 for the shareholders meeting of February 25, 2009 states the following:

- i. The Corporation entered into a consulting agreement with Alex Dolgonos, effective March 18, 2002. On July 12, 2008, the Corporation entered into a Technology Development and Strategic Marketing Agreement (the "**Technology Agreement**"), effective May 1, 2008, with DOL Technologies Inc. (the "Consultant"), a company controlled by Mr. Dolgonos. The Technology Agreement replaces the 2002 consulting agreement with Mr. Dolgonos.
- ii. Under the Technology Agreement, the Consultant will continue to provide, amongst other things, technology consulting services to UBS. The current term of the Technology Agreement is for a period of three years, commencing May 1, 2008. Unless the Board has decided otherwise and has communicated that decision to the Consultant in writing within

the three months preceding the end of the current term, the Technology Agreement shall be automatically renewed for a further three years on the terms and conditions no less favourable to the Consultant than those contemplated in the Technology Agreement.

- iii. Pursuant to the Technology Agreement, the Consultant will receive an annual base fee of \$475,000, which may be increased annually at the sole discretion of the Board of Directors. In addition, the Board of Directors may from time-to-time award bonuses to the Consultant, based on performance criteria that the Board deems appropriate. UBS must reimburse the Consultant for all expenses incurred by it. The Technology Agreement includes standard non-competition, non-solicitation and confidentiality provisions, which restricted Dolgonos from other businesses and opportunities.
- iv. The Consultant is entitled to terminate the Technology Agreement upon four months' written notice. If the Consultant terminates the Technology Agreement, the Corporation is required to pay the Consultant the "base fee" (currently \$475,000 per year) then due and owing, a pro rata portion of any performance incentive actually awarded and unpaid at the time of termination and all expenses due and owing. All stock options (whether or not granted or vested) will be immediately cancelled in such circumstances.

v. In the event of a "change in control" of the Corporation, the Consultant is entitled to terminate the Technology Agreement. The term "change in control" is defined in the Technology Agreement as meaning that control (control includes a Person or group of Persons acting in concert holding more than 20% of the voting shares of the Corporation) of the Corporation has transferred to another person or persons acting in concert.

vi. In the event that the Consultant terminates the Technology Agreement following a "change in control" of the Corporation or the Corporation terminates the Technology Agreement at any time without cause, the Consultant is entitled to a lump sum payment equal to 300% of the aggregate of: (i) the "base fee" (currently \$475,000 per year); (ii) a performance incentive based on the greater of the performance incentive in the immediately preceding fiscal or calendar years and the average bonuses paid in the immediately preceding two calendar or fiscal years; and (iii) amounts due and owing at the time of termination. In addition, in the event of a "change of control", all stock options then granted but not yet vested will immediately vest and be exercisable for a period ending five years after the date of the grant.

82. The UBS Management Information Circular dated February 4, 2010 repeated the disclosure noted above.

83. The Dolgonos Consulting Agreement and the DOL Technology Agreement contained essentially the same terms.

84. Neither DOL nor Dolgonos ever approved or set any of the bonus payments that were made to either of them. This was all done at the level of the Board of UBS and Look.

85. Neither DOL nor Dolgonos had any control over what was done at the level of the Board of UBS or Look, in respect of compensation or otherwise.

86. The UBS claims to set aside or avoid its obligations of the Dolgonos Consulting Agreements are time barred, as further set out below.

87. UBS is estopped from claiming against the provisions of the Dolgonos Consulting Agreements and its obligations there under, all of which were relied on by Dolgonos and DOL.

#### **D. DOLGONOS AS A CONSULTANT TO UBS AND THEN LOOK**

88. As a result of the actions of the Turner Board and then management of UBS, when they left UBS in March 2002, there was no one within UBS who could adequately deal with the current contracts and obligations of UBS such as the Hughs Network Systems contract for XM radio. Moreover, there was no one in UBS who competently understood the technology that UBS held and its need to acquire additional technology to continue on as a viable company.

89. In order to deal with the void of technical knowledge and action at UBS, when McGoey and the others members of the UBS Board were elected in March 2002, they hired Dolgonos as a consultant, as further set out herein.

90. During his tenure as a consultant with UBS Dolgonos did not unilaterally undertake any actions at UBS and no one reported directly to him. Everything that Dolgonos did was in consultation with and under the guidance of the CEO, the Board and/or the Technology Committee. Dolgonos' position at Look was the same.

91. Dolgonos did not, nor was he required to, regularly attend Board meetings.

92. The directors of UBS and subsequently Look were professional board members and completely independent of Dolgonos. Contrary to the repeated allegation of the Defendant, Dolgonos did not and could not exercise any undue influence over the board members of either UBS or Look.

93. For the previous 24 months or less, prior to the new board and management coming to UBS in March 2002, the Company lost over \$40 million from operations and was running at a negative cash flow.

94. The cash balances of UBS went from \$80.7 million to \$38.2 million – a decrease in cash of \$42.5 million in a space of 24 months. With over one hundred employees, UBS was burning through cash and there was no contract backlog in the Company.

95. In addition to helping it with its then current technology, UBS requested that Dolgonos assist in developing avenues by which UBS could decrease cash outflow and increase the value of UBS to its shareholders.

96. The following sets forth examples of Dolgonos' consultation efforts within UBS and Look, all of which is within the knowledge of the board and management of UBS and Look.

97. Dolgonos dealt only with the technology aspects of the UBS and Look businesses.

98. Dolgonos played an integral role in UBS acquiring several key assets to be added to its wireless portfolio at the time. Among these were:

- a. the July 2002 acquisition of a product line of point-to-point radios and other assets from SierraCom, a Massachusetts company that was involved in microwave based telecommunications systems. These assets included intellectual property, test equipment and various other inventories for an aggregate purchase price of \$1.9 million. This acquired product line was an addition to UBS' wireless product portfolio as it is used by various OEM's for their cellular network rollouts. The Company's plans were to continue with the manufacturing, development and evolution of the point-to-point radio product line into a 3G compliant backhaul internet protocol radio product. This acquisition also resulted in UBS retaining Dr. Ntake as its Vice President of Engineering, as further described herein; and
- b. the October 2002 purchase of certain assets of Broadtel Communications, Inc., a California-based developer of point-to-multipoint broadband wireless access systems for next generation networks. The system was based on the DOCSIS transmission protocol operating on frequency ranges from 1.5 GHz to 10.5 GHz. This acquisition brought to UBS a CMTS/WMTS component, which was strategic to the overall point-to-multipoint strategy, a product that

completed the UBS product line for turnkey broadband wireless access systems.

99. Dolgonos sourced the foregoing technology and assisted in its acquisition for the sole benefit of UBS. Moreover, the prices paid for the equipment and technologies were extremely advantageous to UBS and no liabilities were acquired or incurred that would have come with the purchase of the shares of the companies because the companies were in bankruptcy and/or winding down.

100. Dolgonos was the individual who recognized that UBS was very well situated and could benefit in the development of hand-held mobile video services and mobile television.

101. It was Dolgonos who recognized that Look had assets that UBS could use to its benefit and that UBS should attempt to deal with Look to use its assets and potentially acquire Look.

102. At the time Look was a multi media service provider delivering a range of communication services to residential and business customers including wireless digital television distribution, dial-up and high-speed wireless and wireless internet access, co-location facilities and Web-related services, including Web hosting and domain name registration.

103. Look provided a digital video and wireless Internet services using a Multipoint Distribution System (MDS) operating with 92MHz of spectrum in the 2.5 GHz band. Look had the exclusive use of the frequencies since it received licenses from the CRTC

as a “broadcast distribution undertaking” in 1997 for Southern Ontario and in 1998 for Quebec and Eastern Ontario. This allowed the coverage of the major metropolitan areas along that corridor.

104. Dolgonos was instrumental in developing the plan, technology and expertise to bring hand-held mobile video services and mobile television to the Canadian market through UBS and Look.

105. In fact, it was a result of the technology that UBS acquired from Broadtel that allowed Look to deploy its wireless internet service along the Ontario, Quebec corridor.

106. Dolgonos played a key role in the development of the technology to fully realize the potential of the UBS and Look’s assets. This complex task took several years to complete. It was a key factor in UBS’ evolution into an operating company and its exit from the production side of wireless technology.

107. It was Dolgonos who recognized and determined that the spectrum that was being held by Look could potentially be rezoned to mobile broadband suitable for offering such services as fourth generation wireless services and mobile broadcasting.

108. Among other things, Dolgonos went to Ottawa to meet with Michael Binder, the individual in charge of the radio division of Industry Canada to determine if the Look spectrum could be rezoned. As a result of Dolgonos’ work it was determined that the Look spectrum could be rezoned to first become mobile broadcast spectrum and then fourth generation spectrum.

109. After UBS and LOOK determined that it would be viable for the companies to work together, Dolgonos was asked to prepare an overview of the LOOK network. Dolgonos is the individual who set out the plans for the implementation of the network and the development of mobile tv and the mobile broadband network.

110. As a result of Dolgonos' efforts, Look ended up holding approximately 100 MHz of spectrum with the only mobile broadcast license in North America at the time, which would allow it to take advantage of the Mobile Multi Media (M3) platform.

111. At the request of UBS and Look, Dolgonos ultimately became responsible for dealing with all of the network updates, mobile trials and technology demonstrations and developing demonstration platform hardware and software for Look.

112. The engineering employees at Look reported and provided operational updates and information directly to McGoey, in his capacity as CEO of Look. As a consultant, Dolgonos assisted McGoey and the boards of Look and UBS to understand their technology and the aforementioned updates and information.

113. While the implementation of the 4G network was done by Look employees, it was Dolgonos who conceptualized the plan and developed the necessary technology that allowed the network to become functional.

114. In putting the 4G network together Dolgonos spent a significant amount of time at Look as well as at his home lab. Dolgonos also expended his own funds in the development of the M3 and 4G networks for which he was not reimbursed by either UBS or Look.

115. At this time primarily all of Dolgonos work for UBS and Look related to developing ideas of mobile television and 4G networks, including determining the best spectrum, the best standard to be applied to that spectrum and the model for the best coverage. These were extremely complex issues that took significant amounts of time to build out.

116. To build out and complete the M3 and the 4G networks across the Ontario Quebec corridor Look required additional financing. Notwithstanding its extraordinary efforts, Look was unable to raise sufficient capital to build out the broadband network.

117. As a result, Look began efforts to maximize shareholder value, which included potentially selling its spectrum, network and tax assets.

118. During these efforts, among other things, Look retained Greenhill & Co. to assist in the strategic repositioning of Look and to assist in maximizing shareholder value. This resulted in Look talking to several interested parties including Rogers.

119. During discussions with Rogers it became apparent that it was only interested in acquiring Look's spectrum to expand the 100MHz of spectrum that it already held in the same range. As a result of the discussions with Rogers, among others, Look determined that the other liabilities and potential liabilities of the company needed to be removed in order to make the company more attractive to a potential suitor.

120. Dolgonos assisted with and was instrumental in the decommissioning of the parts of Look that were not essential to the M3 and 4G networks in an effort to clean up the assets for sale.

121. Dolgonos was also the individual who recognized and assisted the Company in its filing for Scientific Research and Experimental Development (SR&ED) Tax Incentive Program credits resulting in significant payments to UBS.

**E. ASSISTING IN REDUCING CASH FLOW AND THE SALE OF THE ENGINEERING DIVISION**

122. During the acquisition of Look, and UBS's move into the operational side of wireless, it was recognized by the UBS Board that the engineering division of UBS was extremely problematic. The division was losing money and there was a very large employee liability both in terms of retaining them and in potentially having to terminate the approximately 116 employees.

123. The business of this division was adversely affected by the Turner Boards refusal to develop any new business for it for over a year and a half. This resulted in a large number of employees being employed dealing with contracts that were imminent.

124. The Board of UBS determined that the best way to remove all of the liabilities associated with this division was to sell it and require the buyers to take on the employees releasing UBS from any and all obligations.

125. Dolgonos played an integral role in negotiating an agreement between UBS and UBS Ltd., whereby UBS Ltd. purchased the business and assumed the responsibility of approximately 44 employees resulting in a significant savings to UBS.

126. Dolgonos was also integral in negotiating the inclusion of provisions into the sales agreement with UBS Ltd. that UBS Ltd. would assume all of the warranty claims for XM Radio and other military and other government related contracts, and that UBS Ltd.

would provide assistance to both Look and UBS in the development of its M3 network. The foregoing were significant savings to UBS, some of which continue to this day.

127. Without Dolgonos' assistance in the sale of the engineering division to UBS Ltd., the removal of the aforementioned liabilities would not have taken place.

**F. THE CRAs REASONABLE AND FAIR**

128. Contrary to the allegations in the statement of defence and counterclaim and for the reasons provided below, the Contingent Restructuring Awards ("CRAs") made by UBS and Look to Dolgonos among others were, as Dolgonos understood, necessary, reasonable, and fair to both UBS and/or Look, were properly authorized by UBS and/or Look and in their best interests, were granted with proper consideration, and were fully disclosed in a timely manner.

129. The CRAs are "performance incentives" as that term is used in the Dolgonos Consulting Agreements; and, in that respect, the CRAs were found to be "performance incentives" by the members of the UBS Board and were treated as such in their calculations of the payment due to DOL under the termination provisions of the DOL Consulting Agreement as stated in the July 5, 2010 Meeting Management Information Circular.

**i. CRAs Not Paid**

130. On September 18, 2009, Dolgonos, for himself and on behalf of DOL, signed a full and final release of UBS in consideration for the CRAs offered to Dolgonos by UBS in a letter dated September 14, 2009. Despite the foregoing, the UBS CRAs have not

been paid to Dolgonos as the second condition of its payment, namely that UBS receive adequate cash resources, has not yet been met.

**G. DOLGONOS AND DOL ALWAYS ACTED IN THE BEST INTERESTS OF UBS AND LOOK**

131. While Dolgonos denies that he was a corporate Officer of UBS, if it is determined that he was a corporate Officer he pleads that contrary to the allegations in the statement of defence and counterclaim Dolgonos:

- a. always did his best for UBS and acted in the best interests of UBS;
- b. always did his best for Look and acted in the best interests of Look;
- c. spent from 2002 to July 2010 working in the best interests of UBS;
- d. spent from 2004 to July 2010 working in the best interests of Look;
- e. in exercising his powers and discharging his duties to the Company, always:
  - i. acted honestly and in good faith with a view to the best interests of the Company; and
  - ii. exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances;
- f. always complied with the OBCA, the regulations made under the OBCA, and UBS' articles and by-laws;

- g. always met any duty of loyalty he owed. In the case of Look;
- h. always properly managed the business and affairs of UBS;
- i. always preserved and protected the assets of UBS from unnecessary and/or wasteful dissipation, for the benefit of UBS and its shareholders;
- j. has always properly disclosed and avoided any conflicts of interest;
- k. never caused UBS to enter contracts with companies and entities directly or indirectly related to him on terms that were not justified or contrary to UBS' interests;
- l. never put his personal interests ahead of UBS;
- m. put UBS' interests before his own – even his own personal safety. During the time Dolgonos was a consultant of UBS it is believed that ex-employees sent thugs to attack him at his house on two occasions. On both of these occasions Mr. Dolgonos was beaten up, went to the hospital, and the incidents were reported to the police;
- n. always put UBS' interests before his own financial interests; for example, Dolgonos received annual performance incentive awards from the UBS Board, but in June 2007 when the UBS Board awarded an annual performance award to Dolgonos, which was entirely up to the discretion of the UBS Board, Dolgonos declined the award because he felt that at that

time it was better to decline the award due to the cash and financial position of UBS;

- o. has always complied with and never acted contrary to the terms of the UBS/Look MSA;
- p. always complied with (including causing DOL to comply with) and never acted contrary to the terms of the Dolgonos Consultant Agreements;
- q. never controlled or unduly influenced the Board, other employees and/or management of UBS;
- r. never improperly sought to secure or entrench any control of UBS; and
- s. never did anything or sought to do anything that would result in UBS resources being used for personal gain.

#### **H. LAWYERS FUNDS APPROPRIATE**

132. UBS advanced \$100,000 (the “**DOL Reimbursement**”) to the trust account of Roy Elliott O’Connor LLP (“**REO**”). REO are the lawyers for Dolgonos and DOL in matters related to DOL and Dolgonos services to UBS.

133. The DOL Reimbursement was made in compliance with the DOL Consulting Agreement, UBS’ bylaws, the Indemnification Agreement between UBS and Dolgonos and DOL dated January 25, 2007, and the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (“**OBCA**”). The DOL Reimbursement was reasonable in all the circumstances.

134. While Dolgonos and DOL gave written notice to UBS of claims and potential claims under various indemnity obligations UBS has to Dolgonos and DOL, the DOL Reimbursement are not moneys advanced under an indemnity provided by UBS and as such are not subject to the requirements of s. 136(4.1) of the OBCA.

135. The DOL Reimbursement are moneys advanced to meet anticipated legal expenses with respect to DOL's performance of the Services that would be reimbursed by UBS as contemplated by the DOL Consulting Agreement and other related matters pursuant to section 3.3.5 of the DOL Consulting Agreement

136. In the alternative, if the DOL Reimbursement are moneys advanced under an indemnity provided by UBS, which is denied, then they were not advanced "in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour" and as such are not subject to the requirements of s. 136(4.1) of the OBCA.

137. The DOL Reimbursement was advanced in respect of claims and potential claims by parties other than UBS including shareholders of UBS and Look.

#### **I. UBS HAS NO CLAIM TO PAYMENTS MADE BY LOOK**

138. At all material times UBS was well aware that Look's Board had chosen to declare, and if certain conditions were met, then to pay a CRA, as did the UBS Board, directly to DOL. UBS had no complaint at that time.

139. Dolgonos pleads that UBS was not entitled to any CRA from Look and UBS is not entitled to the CRAs that Dolgonos received from Look.

140. In fact, UBS and all of its directors at that time understood without objection, and it remains the position of Dolgonos, that the Look Board could recognize the performance of UBS and any other companies or individuals that the Look Board deemed appropriate. The payment of compensation by Look to UBS under the UBS/Look MSA is clearly separate from Look's decision to compensate other individuals or entities.

141. Furthermore, the UBS/Look MSA does not preclude Look from granting awards such as SAR units directly to DOL or Dolgonos. Article 3.2.1 of the UBS/Look MSA does not preclude Look from making payments directly to UBS officers or consultants. Article 3.2.1 of the management services agreement relates only to "...cash bonus payments, the direct grant of treasury Company Shares, or options for the purchase of Common shares from treasury ("Options")" made directly to UBS to recognize its performance.

142. Contrary to the allegation in the statement of defence and counterclaim, in the past Look had made direct payments to individuals who also held positions at UBS. The Look Board chose to award SAR units in February 2005 to all Look personnel, including Dolgonos and McGoey directly, as a special incentive to maximize value for all of Look's shareholders. As well, stock options were granted to McGoey and other directors of Look in their capacity as directors of Look. The award of SAR units in February 2005 to Dolgonos took place while the 2002 Dolgonos Consulting Agreement was in effect, and before the DOL Consulting Agreement was effective.

143. The Share Appreciation Rights Plan approved by the Look Board on February 25, 2005 was intended to enhance Look's ability to attract and retain talented persons to

serve as directors, officers and employees of Look or to render consulting services to Look. Accordingly, Look's Board could award SAR units to any of these persons, including those who are also UBS officers or consultants, on such dates and subject to such conditions as it determines from time to time.

144. The purpose of Look's Stock Option Plan was to provide directors and employees of, and consultants to, Look and its subsidiaries with a proprietary interest through the granting of options to purchase any authorized class of equity shares of Look. Accordingly, Look's Board could grant stock options to any of these persons, including those who are also UBS officers or consultants, on such dates and subject to such conditions as Look determines from time to time.

145. For the reasons provided above, Dolgonos and others earned and were lawfully entitled to the CRA's that Look granted to them.

146. As is more specifically pleaded above, the Look CRAs Dolgonos received were in the best interests of Look, were necessary, reasonable, and fair to Look, were properly authorized by Look, were granted for proper consideration, and were fully disclosed in a timely manner by Look.

147. Dolgonos was not unjustly enriched and UBS suffered no detriment as a result of the Look CRA payment being made. UBS had on previous occasions, including within the time period the Look CRAs were granted to Dolgonos, requested that it receive performance incentive payments from Look under the UBS/Look MSA, but those requests were rejected by all of the independent Board members of Look.

148. Dolgonos denies that he induced the Look or UBS board to grant any CRAs.

**J. CLAIMS OUT OF TIME**

149. The claims advanced by UBS in its statement of defence and counterclaim are out of time and statute-barred by the *Limitations Act, 2002*, S.O. 2002, Chap. 24, Sched. B and, in the alternative, by the common law and equity. In particular but without limiting the generality of the foregoing, the Dolgonos Consulting Agreement was completed over eight years ago, and the DOL Consulting Agreement was completed over two years ago.

150. The claims made in the statement of defence and counterclaim are made by UBS. UBS was the actor involved in all the claims made, and UBS at all times had all the knowledge of its directors and management who had approved all the transactions now impugned. Accordingly UBS cannot now assert the claims that have been made.

**K. NO DAMAGES**

151. In the alternative, Dolgonos and DOL plead that UBS has not suffered any damages.

152. UBS has not alleged or particularized any material facts upon which an award of punitive damages would be appropriate.

153. DOL and Dolgonos request that the counterclaim against each of them be dismissed with costs payable on a substantial indemnity basis.

**Date: November 5, 2010**

**ROY ELLIOTT O'CONNOR LLP**  
Barristers & Solicitors

200 Front Street West  
Suite 2300  
Toronto, Ontario  
M5V 3K2

**Peter L. Roy (LSUC No. 161320)**  
**Sean M. Grayson (LSUC No. 46887H)**

Tel: (416) 362-1989  
Fax: (416) 362-6204

Counsel for the Plaintiff DOL Technologies  
Inc. and Defendant by Counterclaim Alex  
Dolgonos

TO: **GOWLINGS LAFLEUR HENDERSON LLP**  
1 First Canadian Place  
100 King Street West  
Suite 1600  
Toronto, Ontario M5X 1G5

**Kelley m. McKinnon (LSUC No. 31193C)**  
**Ben Na (LSUC No. 409580)**

Tel: (416) 862-4432  
Fax: (416) 862-7661

Lawyers for the Defendant/ Plaintiff by Counterclaim  
Unique Broadband Systems Inc.

AND TO: **GROIA & COMPANY PROFESSIONAL CORPORATION**  
Wildeboer Dellelce Place  
1100-365 Bay St  
Toronto Ontario M5H 2V1

**Joseph Groia (LSUC No. 20612J)**  
**Gavin Smyth (LSUC No. 42134G)**  
**Owais Ahmed (LSUC No. 57004E)**

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

Lawyers for the Defendant by Counterclaim Gerald McGoey

AND TO: **BLAKE, CASSELS & GRAYDON LLP**  
Commerce Court West  
2800-199 Bay St PO Box 25  
Toronto Ontario M5L 1A9

**Joel Richler**

Tel: (416) 863-2735  
Fax: (416) 863-2653

Lawyers for Defendant by Counterclaim Louis Mitrovich

AND TO: **MCLEAN & KERR LLP**  
2800-130 Adelaide St W  
Toronto Ontario M5H 3P5

**Sharon Addison**

Tel: (416) 364-5371  
Fax: (416) 366-8571

Lawyers for Defendants by Counterclaim Douglas Reeson

**DOL TECHNOLOGIES INC.**

**Plaintiff/Defendant by Counterclaim**

- and -

**UNIQUE BROADBAND SYSTEMS INC.**

**Defendant/Plaintiff by Counterclaim**

**Court File No.: CV-10-406609**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**Proceeding commenced at Toronto**

**REPLY AND DEFENCE TO  
COUNTERCLAIM OF DOL  
TECHNOLOGIES INC. and ALEX  
DOLGONOS**

**ROY ELLIOTT O'CONNOR LLP**

Barristers  
200 Front Street West  
Suite 2300  
Toronto, Ontario  
M5V 3K2

**Peter L. Roy (LSUC No. 161320)  
Sean M. Grayson (LSUC No. 46887H)**

Tel: (416) 362-1989  
Fax: (416)-362-6204

Counsel for the Plaintiff DOL and Defendant by  
Counterclaim Alex Dolgonos