

Court File No. CV-10-406551

AMENDED THIS July 30, 2010 PURSUANT TO  
RÈGLE / LA RÈGLE 26.02 ( A ) CONFORMÉMENT À

BY THE ORDER OF ONTARIO  
ORDONNANCE DU SUPERIOR COURT OF JUSTICE  
PAR LE JUGE / FAIT LE

B. E. T. W. E. N.  
B. E. T. W. E. N. GREFFIER  
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

**JOLIAN INVESTMENTS LIMITED**

**Plaintiff**

- and -

**UNIQUE BROADBAND SYSTEMS, INC.**

**Defendant**

**AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO

PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE: July 12, 2010

Issued by "M. BRENTON"  
Local Registrar

Address of Court Office:  
393 University Avenue, 10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

TO: **UNIQUE BROADBAND SYSTEMS, INC.**  
8250 Lawson Road  
Milton, ON L9T 5C6

## CLAIM

## 1. The Plaintiff claims:

- (a) a declaration that a Company Default has occurred pursuant to the terms of the Management Services Agreement entered into between Jolian Investments Ltd. ("Jolian" or the "Plaintiff") and the Defendant dated May 3, 2006 (the "Jolian MSA");
- (b) a declaration that the failure of the Defendant to re-elect Mr. Gerald T. McGocy to its Board of Directors, and/or to appoint him the Chief Executive Officer of the company, and/or to nominate him for the position of Executive Chairman of the Defendant constitutes a "termination without Cause" by the Defendant pursuant to the Jolian MSA;
- (c) a declaration that the Deferred Bonus Award (defined below) of \$1,200,000.00 plus applicable taxes which was awarded to Jolian by the Board of Directors on August 28, 2009 is now due and owing, along with the interest which has accrued, by the Defendant to Jolian, as a result of the fact that the Jolian MSA has been terminated; or in the alternative, because a change in control of the Defendant has occurred;
- (d) a declaration that the Share Appreciation Rights Cancellation Payment (defined below) of \$600,000.00 plus applicable taxes will be due by the Defendant, along with the interest which has accrued, once Look Communications Inc. receives the full consideration of \$80,000,000.00 it is owed from the sale of its spectrum and broadcast license and the Defendant receives adequate cash resources;
- (e) a declaration that all Options awarded to the Plaintiff pursuant to Section 3.2 of the Jolian MSA shall vest as originally contemplated and shall be exercisable for the period ending the earlier of the expiry date of the

Option term or three years from the date of the termination of the Jolian MSA, pursuant to Section 5.3(2) of the Jolian MSA;

- (f) an order that the Defendant pay to the Plaintiff \$8,610,000.00 plus applicable taxes in addition to the interest which has accrued, being a total of:
  - (i) a sum of \$7,410,000.00 plus applicable taxes as a result of the Company Default and/or "termination without Cause", and calculated pursuant to Section 5.3(b) of the Jolian MSA, in addition to the interest which has accrued beginning July 5, 2010; and,
  - (j) a sum of \$1,200,000.00 plus applicable taxes in addition to the interest which has accrued beginning August 28, 2009, representing the amount of the Deferred Bonus Award payable to Jolian;
- (g) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
- (h) costs of this action on a substantial indemnity basis, together with applicable goods and services tax thereon; and
- (i) such further and other relief as this Honourable Court may deem just.

#### THE PARTIES

2. Jolian is a private Ontario corporation controlled by the Jolian Trust and Mr. McGoey.

3. Mr. McGoey is an individual residing in Toronto, Ontario, and served as the Chief Executive Officer, a Director, and Chairman of the Board of Directors of the Defendant from 2002 until July 5, 2010.
4. Unique Broadband Systems, Inc. is a public Ontario corporation listed on the TSX Venture Exchange.

#### **THE JOLIAN MSA**

5. The Defendant entered into an employment agreement with Mr. McGoey effective June 1, 2002. On May 3, 2006, the Defendant and Jolian entered into the Jolian MSA, effective January 1, 2006. The Jolian MSA replaced the 2002 employment agreement entered into by the Defendant and Mr. McGoey. The Jolian MSA was entered into, in part, because the Board of Directors of the Defendant believed that doing so would provide Mr. McGoey with greater protection from litigation and would thus encourage him to continue as an Officer and Director of the Defendant.
6. Under the Jolian MSA, Jolian agreed to cause Mr. McGoey to perform the services of Chief Executive Officer of the Defendant and such other services the Defendant deemed appropriate. The Defendant also agreed that Mr. McGoey would be appointed Chief Executive Officer, be an elected member of the Board of Directors, and be nominated as Chairman of the Board of Directors of the Defendant.
7. Pursuant to Section 3.1 of the Jolian MSA, and in exchange for the services provided by Jolian, the Defendant agreed to the following compensation:
  - (a) a base fee of USD\$360,000.00 per year plus applicable taxes, to be paid in twelve monthly installments on the first business day of each month;
  - (b) the award of performance incentives and options at the discretion of the Board of Directors;

- (c) expenses incurred by Jolian and detailed in Appendix A of the Jolian MSA.
8. Also pursuant to Section 3.1, the base fee was to be reviewed annually by the Board of Directors of the Defendant, and if increased, would thereafter be the new base fee under the Jolian MSA. On May 15, 2007, the Board of Directors of UBS amended the base fee payable to Jolian to \$570,000.00 per year plus applicable taxes.
9. Under Section 5.3(1) of the Jolian MSA, in the event of a Company Default or a Change-of-Control, Jolian is entitled to terminate the Jolian MSA. If the Jolian MSA is terminated by Jolian on that basis, or in the event of a "termination without Cause" by the Defendant, Jolian is then entitled to 300% of the aggregate of:
- (a) the base fee;
  - (b) a performance incentive equal to the greater of:
    - i. the performance incentive in the immediately preceding fiscal year;
    - ii. the performance incentive in the immediately preceding calendar year;
    - iii. the average of the performance incentive paid in the two immediately preceding fiscal years;
    - iv. or the average of the performance incentive paid in the two immediately preceding calendar years; or

v. \$285,000.00; and

- (c) the annualized expenses of Jolian as per Appendix A of the Jolian MSA, items 1, 2, 3, and 4.
10. The sum of \$285,000.00 listed in Section 5.3(1)(b) was originally USD\$180,000.00, but was modified by the Board of Directors of the Defendant on May 15, 2007.
11. Under Section 5.3(2) of the Jolian MSA, following a termination of the Jolian MSA under Section 5.3, all Options awarded to Jolian pursuant to Section 3.2(1) "shall vest as originally contemplated and shall be exercisable for the period ending the earlier of the expiry date of the Option term or three years from [the] date of resignation [as defined in Section 5.3(4)]".
12. A Company Default is defined in the Jolian MSA as:

the failure of [the Defendant] to respect any of its obligations hereunder including without limitation the failure of [Mr. McGoey] to be elected to the Board of Directors of [the Defendant] (provided that Jolian has voted its Company Shares in favour of [Mr. McGoey]), the failure of the Board of Directors of [the Defendant] to appoint [Mr. McGoey] as Chief Executive Officer, the failure of the Board of Directors of [the Defendant] to nominate [Mr. McGoey] for the position of Executive Chairman of [the Defendant] or any substantial diminution of the responsibilities of [Mr. McGoey], after having received written notice of such failure and having been given reasonable time to correct same, which failure has not been waived by Jolian.

13. A "termination without Cause" is defined in the Jolian MSA as the:

failure of the shareholders of the Company to re-elect [Mr. McGoey] to the Board or the failure of the Board to appoint [Mr. McGoey] as the Chief Executive Officer of UBS or the failure of the Board to nominate [Mr. McGoey] for the position of Executive Chairman of [the Defendant].

14. Section 5.4 of the Jolian MSA governs the timeframe within which any termination payments due to Jolian as a result of a termination pursuant to Section 5.3 must be paid by the Defendant:

Any such payments due to Jolian owing upon the termination of this Agreement shall be paid to Jolian in a lump sum payment within five (5) business days of the date of such termination, or if an amount is not determinable within such period, then the determinable amount shall be paid within five (5) business days of the date of the termination of this agreement and the amount not determinable shall be paid within five (5) business days of determination, but in any event not later than four months after the date of termination.

#### **THE CONTINGENT PERFORMANCE INCENTIVE**

15. On August 28, 2009, the Board of Directors of the Defendant granted Jolian a performance incentive of \$1,200,000.00, plus applicable goods and services tax (GST), to be payable, including any accrued interest compounded monthly at the prime rate of interest of the Defendant's corporate bank, on the earlier of (i)

adequate cash resources being received by the Defendant, (ii) the termination of the Jolian MSA, (iii) a change in control of the Company, and (iv) at the discretion of the Board of Directors of the Defendant (the "Deferred Bonus Award").

16. Also on August 28, 2009, the Board of Directors of the Defendant granted Jolian a performance incentive of \$600,000.00 plus applicable taxes, in exchange for the relinquishment by Jolian of 3,000,000 Share Appreciation Rights units (the "Share Appreciation Rights Cancellation Payment"). The Share Appreciation Rights Cancellation Payment has not yet been paid, and pursuant to the terms of the agreement between Jolian and the Board of Directors, is contingent, upon the receipt by Look Communications Inc., a public company in which the Defendant holds shares, of \$80,000,000.00 which it is owed as a result of the sale of its spectrum and broadcast license, and UBS receiving adequate cash resources.
17. The aggregate of the Deferred Bonus Award and the Share Appreciation Rights Cancellation Payment (collectively, the "Contingent Performance Incentive") represent the performance incentive paid to Jolian pursuant to Section 3.1 of the Jolian MSA in the previous calendar and fiscal year.

#### **THE DEFENDANT'S INDEPENDENT DIRECTORS ACKNOWLEDGE LIABILITY**

18. A special meeting of the shareholders of the Defendant was requisitioned by certain shareholders, not including Jolian and Mr. McGoey, (the "Dissident Shareholders"), which was held on July 5, 2010. The requisition called for the shareholders to consider whether or not to remove the Board of Directors of the Defendant, being at the time Messrs. McGoey, Louis Mitrovitch, and Douglas Reeson.
19. In May, 2010, and in response to the matters to be considered at the upcoming special meeting of the shareholders, two independent directors of the Defendant conducted a review of the Jolian MSA and its termination provisions. The

- independent directors found that in the event that Mr. McGoey was voted off the Board of Directors at the special meeting of the shareholders a Company Default would occur, and that the resulting termination of the Jolian MSA would trigger Jolian's entitlement to a total termination award under Section 5.3(1) of \$7,410,000.00. The independent directors arrived at that amount by taking the sum of the base fee, the Contingent Performance Incentive, and annualized expenses estimated at \$100,000.00, and multiplying the total by three.
20. The independent directors also decided that in the event of a Company Default and the resulting termination of the Jolian MSA, Jolian would be entitled to the amount of the Deferred Bonus Award immediately, being \$1,200,000.00.
21. Based on the above, the Defendant's Management Circular dated May 30, 2010, which was approved by the independent directors, and filed with the regulatory authorities, reported the following

In the event that the resolution to remove the incumbent directors of the corporation from office is adopted at the [special] Meeting [of the shareholders], Mr. McGoey will no longer be on the Board of Directors of UBS. This will give Jolian the right to terminate the Jolian MSA as a result of a "Company Default" ... Taking into account performance incentives awarded only by UBS, the payment that would be due Jolian upon termination of the Jolian MSA [as a result of a Company Default] is estimated by the two independent directors of UBS to be \$8.6 million ... Any such payments due to Jolian under the Jolian MSA are payable to Jolian in a lump-sum payment within five business days of its termination and, in the case of a portion of a contingent restructuring award granted by UBS to Jolian in 2009 [the Deferred Bonus Award], immediately upon such termination. The portion of the contingent

restructuring award [the Deferred Bonus Award] is also immediately payable upon a change in control of UBS.

22. The termination calculation performed by the independent directors in the case of a Company Default is the same in the event of a "termination without Cause" by the Defendant, as is explained above.

#### **THE JULY 5, 2010 SHAREHOLDERS MEETING**

23. At the special meeting of the shareholders of the Defendant on July 5, 2010, the shareholders voted to remove the incumbent Board of Directors from the Defendant.
24. Subsequent to the first vote, the Dissident Shareholders proposed that a new slate of individuals be elected to the Board of Directors, being Messrs. Robert Ulicki, Grant McCutcheon, and Henry Eaton. This slate was approved by the shareholders.
25. Jolian and Mr. McGoey voted their shares against both votes at the special meeting of the shareholders.
26. Immediately after Mr. McGoey was removed from the Board of Directors and after the Defendant's failure to re-elect him to the Board of Directors, the Plaintiff delivered the Defendant with notice that it had terminated the Jolian MSA as a result of the Company Default and that a "termination without Cause" by the Defendant had occurred, pursuant to Section 5.3 of the Jolian MSA.
27. In a press release dated July 6, 2010, the Defendant announced that Mr. McCutcheon had become the Chief Executive Officer for the Defendant, effective on that day.

28. As a result of the above, there has been a Company Default and a "termination without Cause" by the Defendant. There has also been a change in control for the purposes of the Deferred Bonus Award.
29. In breach of its contractual duties to Jolian under the Jolian MSA, the Defendant has failed to pay Jolian any termination payments pursuant to Section 5.3 of the Jolian MSA, though such payments are determinable and/or have been determined by the independent directors of the Defendant, and were thus due immediately or at the latest within 5 business days of the termination of the Jolian MSA. The Defendant has also failed to pay the Deferred Bonus Award.

#### **PLACE OF TRIAL**

30. The Plaintiff proposes this action be tried at the City of Toronto, in the Province of Ontario.

July 12, 2010

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Court File No.: CV-10-406551

**JOLIAN INVESTMENTS LIMITED**  
Plaintiff

**UNIQUE BROADBAND SYSTEMS, INC.**  
Defendant

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
(Proceeding commenced at Toronto)

**AMENDED STATEMENT OF CLAIM**

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