

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOLIAN INVESTMENTS LIMITED

Plaintiff

- and -

UNIQUE BROADBAND SYSTEMS, INC.

Defendant

AND BETWEEN:

UNIQUE BROADBAND SYSTEMS, INC.

Plaintiff by Counterclaim

- and -

**JOLIAN INVESTMENTS LIMITED, GERALD MCGOEY,
LOUIS MITROVICH AND DOUGLAS REESON**

Defendants By Counterclaim

STATEMENT OF DEFENCE AND COUNTERCLAIM

TO THE DEFENDANTS TO THE COUNTERCLAIM:

A LEGAL PROCEEDING has been commenced against you by way of a counterclaim in an action in this court. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS COUNTERCLAIM, you or an Ontario lawyer acting for you must prepare a defence to counterclaim in Form 27C prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff by counterclaim's lawyer or, where the plaintiff by counterclaim does not have a lawyer, serve it on the plaintiff by counterclaim, and file it, with proof of service in this court, WITHIN TWENTY DAYS after this statement of defence and counterclaim is served on you.

If you are not already a party to the main action and you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

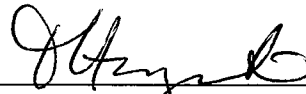
If you are not already a party to the main action, instead of serving and filing a defence to counterclaim, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS COUNTERCLAIM, 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.

IF YOU PAY THE AMOUNT OF THE COUNTERCLAIM AGAINST YOU, and \$2,500 for costs, within the time for serving and filing your defence to counterclaim, you may move to have the counterclaim against you dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the amount of the counterclaim and \$400.00 for costs and have the costs assessed by the court.

Date: August 18, 2010

Issued by:



Local Registrar

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STATEMENT OF DEFENCE

1. The defendant, Unique Broadband Systems, Inc. ("**UBS**"), admits the allegations contained in paragraphs 2, 3, 4, 18, 23 to 25 and 27 of the Statement of Claim of Jolian Investments Limited ("**Jolian**").

2. UBS denies the allegations contained in paragraphs 1, 5 to 17, 19, 20 to 22, 26, 28 and 29 of the Statement of Claim. As to paragraphs 5 to 14 which deal with the Jolian Management Services Agreement ("**Jolian MSA**"), UBS states that there is no legal entitlement to the money claimed by Jolian under the Jolian MSA or otherwise.

A. THE PARTIES AND OTHER RELEVANT ENTITIES

(i) *Unique Broadband Systems, Inc.*

3. UBS is governed by the *Business Corporations Act (Ontario)* (the "**OBCA**"). UBS was once a designer, developer and manufacturer of high-speed mobile and fixed wireless solutions.

4. When Gerald McGoey ("**McGoey**"), Louis Mitrovich ("**Mitrovich**"), Douglas Reeson ("**Reeson**") and others took control of the UBS Board of Directors on March 18, 2002, UBS had over \$25 million in revenue, specialized technology and engineering. As McGoey put it at the time, UBS was "a company with a very strong platform... a very strong engineering capability, boasts an attractive balance sheet and is active in one of the most explosive industries in the world – wireless communications".

5. However, in October 2003, UBS sold all of its engineering and manufacturing business for \$2.0 million in promissory notes to a new company owned by a group of former UBS engineers. The accounting impact was a one-time loss to UBS of approximately \$4.0 million.

6. Since the sale in October 2003, UBS has not carried on an active business. UBS has incurred losses in each of the past five years. As detailed below, UBS is essentially a holding company that holds, through its wholly-owned subsidiary UBS Wireless Services Inc., an equity interest in Look Communications Inc. ("**LOOK**").

(ii) Jolian Investments Limited

7. Jolian is a private company controlled by McGoey. Through Jolian, McGoey received from UBS an annual "base fee" for services of \$570,000, discretionary payments to "recognize the performance of Jolian", expenses and other payments granted by the Board of UBS under a Management Services Agreement dated May 3, 2006 between Jolian and UBS (the "**Jolian MSA**").

(iii) Gerald McGoey

8. McGoey was the Chairman of the Board of Directors and Chief Executive Officer of UBS from 2002 to July 5, 2010, at which time the shareholders voted to remove him from the UBS Board of Directors. On July 5, 2010, Jolian terminated the Jolian MSA thereby also terminating McGoey's role as CEO.

9. McGoey was also a member of the UBS Nomination, Human Resources and Compensation Committee (the "**UBS Compensation Committee**"), which made

recommendations to the Board regarding the setting of compensation, including his own compensation.

10. McGoey was appointed to these positions after a shareholders' meeting on March 18, 2002, when he and Alex Dolgonos ("**Dolgonos**"), the principal shareholder of UBS and a former President and CEO of UBS, formed a dissident group of shareholders to replace the existing Board of Directors of UBS with Dolgonos's slate of directors consisting of McGoey, Mitrovich, Reeson, Peter Minaki and John MacDonald.

11. A key tenet of their platform to replace the existing Board in 2002 was that the Board's interest was not aligned with shareholders' interest as UBS's share price had declined while fees paid to the UBS directors were excessive.

12. Once elected, however, McGoey and the new board made various decisions awarding excessive compensation. In particular, they approved an employment agreement with McGoey to serve as Chairman and CEO of UBS that, *inter alia*, paid him an annual salary of US\$360,000, bonuses, options and expenses. It also provided for a "Golden Parachute" provision (three times (3x) a prescribed annual payout) that could be triggered should McGoey's position as Chair or CEO of UBS be altered following a "change-in-control" of UBS as defined in the agreement.

13. UBS also entered into a consulting agreement with Dolgonos to serve as "Chief Technology Officer" for an annual fee of US\$300,000, bonuses, options and expenses. Dolgonos's consulting agreement also had a Golden Parachute provision that could be triggered in the event of an alteration in his business relationship with the UBS Board following a "change-in-control" of UBS as defined in the agreement.

14. The McGoey and Dolgonos employment agreements were later replaced with the Jolian MSA (McGoey) on May 3, 2006, and a Technology Development and Strategic Marketing Agreement with DOL Technologies Inc., (Dolgonos) on July 12, 2008. These agreements provided even more generous compensation, bonuses and Golden Parachutes to McGoey and Dolgonos, notwithstanding that all of UBS's business and engineering assets had been sold long before this time, and there had been no expansion of business at UBS or LOOK.

15. In this period, McGoey was also the Vice-Chairman of the LOOK Board of Directors, President and Chief Executive Officer and a member of LOOK's Compensation and Human Resources Committee until he resigned on July 21, 2010. McGoey's services were provided to LOOK by UBS under a Management Services Agreement dated May 18, 2004 (the "**UBS – LOOK Agreement**").

16. The total compensation, including "Restructuring Awards", paid to or claimed by McGoey are \$10,144,240 from UBS and \$5,575,695 from LOOK for a total proposed payment of \$15,719,935 to McGoey as described below.

(iv) Louis Mitrovich

17. Mitrovich was a director of UBS from March 18, 2002 to July 5, 2010, when he was removed by UBS shareholders. As noted above, he was part of the slate of directors proposed in 2002 by Dolgonos and supported by McGoey. He was also a director of LOOK until his resignation on July 21, 2010. Mitrovich was the Chair of the UBS Compensation Committee and a member of the LOOK Compensation Committee.

He was paid, collectively by UBS and LOOK, \$753,000 in 2009, of which \$85,000 was director fees and \$668,000 was "Restructuring Awards" as described below.

(v) Douglas Reeson

18. Reeson was a director of UBS from March 18, 2002 to July 5, 2010 when he was removed by UBS shareholders. He was a member of the UBS Compensation Committee and was paid \$533,000 in 2009, of which \$68,000 was director fees and \$465,000 was for "Restructuring Awards" as described below.

(vi) Other Former Directors

19. Peter Minaki was a director of UBS and a member of the UBS Compensation Committee. He resigned as a director of UBS on September 2, 2009 and has publicly stated that he does not seek to receive \$465,000 in "Restructuring Awards" that were granted to him. The position on the Board vacated upon Minaki's resignation was left unfilled.

20. John MacDonald was a director of UBS for only a year following his election in March 2002, when he was asked by McGoey to resign from the UBS Board due to a conflict of interest. The position on the Board vacated by MacDonald's resignation was left unfilled.

(vii) LOOK / LOOK's Relationship With UBS

21. Under the UBS-LOOK Agreement dated May 18, 2004, LOOK paid UBS a base fee of \$2.4 million per year, and UBS provided McGoey as CEO, Director and Vice-

Chair of LOOK. The UBS-LOOK Agreement also provides that LOOK has discretion to recognize the performance of UBS through such performance incentives as it deems appropriate, paid directly to UBS.

22. Up to 2009, LOOK was a provider of information, communications and entertainment services, including high-speed and dial-up internet access, digital television distribution and customer services through its wireless spectrum with 142,900 customers at the end of 2002. LOOK had revenues of \$47.8 million on December 31, 2003 and was marginally profitable. By fiscal year-end August 31, 2008, LOOK's reported revenues had fallen to \$20.3 million and its customer base to 40,471. Efforts by McGoey as CEO to build out LOOK's network and create a viable business failed.

23. At a Special Meeting of LOOK shareholders on January 14, 2009, McGoey and his fellow LOOK directors urged shareholders to approve a court-authorized Plan of Arrangement to sell all of LOOK's assets and operations as the best means to maximize shareholder value (the "**2009 POA**"). No executive or director of LOOK disclosed any personal material interest or expected future benefit relating to the proposed asset sales under the 2009 POA.

24. On May 5, 2009, LOOK announced the sale, pursuant to the 2009 POA, of its key wireless spectrum asset for \$80 million to Inukshuk, a partnership of Bell and Rogers. In explaining the sale price of the wireless spectrum to shareholders at the ensuing Annual General Meeting in February 2010, McGoey stated "my point is not to celebrate the \$80 million we received..." He went on to say, "the price is not what we

had expected” and “there was a very good chance that if we did not conclude a transaction, we may have needed to obtain CCAA protection”.

25. As a condition of the sale transaction, LOOK paid Bell \$16 million of the \$80 million to settle outstanding litigation. LOOK also incurred professional fees of approximately \$8 million. Accordingly, the net proceeds to LOOK from the sale of its key asset were \$56 million.

26. Of the net proceeds of \$56 million, the extraordinary amount of \$22.7 million was granted to senior management and directors of LOOK and UBS as “Restructuring Awards”. These “Restructuring Awards” represented 40% of the net proceeds and were not disclosed at the time. The distribution of the Restructuring Awards to McGoey and others is set out below.

B. CONDUCT IN BREACH OF DUTY / CONFLICT OF INTEREST

27. McGoey, Mitrovich and Reeson have used their respective positions, authority and influence to unjustly enrich themselves and others, including Dolgonos, to the detriment of UBS through awards of contracts, “Restructuring Awards” and other payments that were not lawful, nor supported by fact, nor were they in the best interests of UBS. They did so in breach of their statutory duties of loyalty and to act in good faith in the best interests of UBS. Their conduct also served to improperly entrench their respective positions and that of Dolgonos at UBS contrary to regulatory requirements, good governance and the interests of UBS. To the detriment of UBS, they made decisions in their own self-interest in disregard of their legal and fiduciary duties to UBS.

28. Under the tenure of McGoey, Mitrovich and Reeson from 2002 to 2010, the compensation they and others, including Dolgonos, received from LOOK and UBS skyrocketed, while the share price of UBS plummeted:

UBS	2001/02	2009/10	Value +/-
Closing share price	\$0.47 March 18, 2002	\$0.06 June 30, 2010	Minus 87%
Market Cap	\$48.8 million March 18, 2002	\$6.2 million June 30, 2010	Minus 87%
Cash compensation from LOOK and UBS to UBS Directors and Officers	\$1,512,931 2001 fiscal year	\$17,243,713 2009 fiscal year	Plus 1040%

29. In total disregard of UBS's performance and financial circumstances, the amount of compensation and awards granted by the UBS Board in 2009 was as follows:

Director/ Officer	Salary	Director Fees	Other Fees	Options	Restructuring Awards	TOTAL
McGoey	\$570,000	\$63,500	\$51,622	\$249,118	\$1,800,000	\$2,734,240
Dolgonos	\$475,000		\$26,761	\$118,530	\$1,530,000	\$2,159,291
Mitrovich		\$63,500		\$12,058	\$450,000	\$525,558
Reeson		\$68,500		\$12,058	\$465,000	\$545,558
Minaki		\$63,500		\$12,058	\$450,000	\$525,558
Other Senior Management	\$175,000		\$24,000	\$59,777	\$1,000,000	\$1,258,777

30. These UBS payments were made even though McGoey and Dolgonos were also paid \$5,565,695 and \$3,950,737, respectively, from LOOK as "Restructuring Awards" as detailed below.

31. In 2009, McGoey's total compensation collectively from UBS and LOOK was \$8,309,935, more than 1,350% of his base fee of \$570,000 under the Jolian MSA. McGoey's 2009 compensation alone was greater than the market capitalization of UBS.

32. McGoey was also granted options to acquire 2,000,000 shares of UBS at an exercise price of \$0.15 over the next 5 years (the "Options") to replace unvested options that were previously granted.

33. McGoey now claims further payments against UBS for a further "Restructuring Award" from UBS, "Golden Parachute" (defined below), and Options. He claims such payments were validly awarded notwithstanding his conflict of interest when he participated in the decisions while on the UBS Compensation Committee and the UBS Board, the unconscionability of the Golden Parachute, the lack of justification for the Restructuring Award and the fact that these decisions were not in the best interests of UBS.

(i) The McGoey Golden Parachute

34. The Jolian MSA executed in May 2006 substantially enhanced the employment terms in favour of McGoey and contrary to the interests of UBS despite the persistent decrease in UBS revenues and despite the lack of substantive business to be done.

35. The Jolian MSA also purported to grant a more generous “Golden Parachute” that could be triggered by Jolian in the event that:

- (a) McGoey is not elected by shareholders to the UBS Board; or
- (b) the Board does not appoint McGoey as the CEO; or
- (c) the Board does not nominate McGoey as Executive Chairman of UBS.

The Jolian MSA purports to permit Jolian to claim a lump sum payment equal to 300% of the aggregate of a base fee of \$570,000, “performance incentives” and expenses (the **“McGoey Golden Parachute”**).

36. The above terms of the McGoey Golden Parachute were never disclosed to UBS shareholders until May 30, 2010, when the management information circular was issued in response to the special shareholders meeting called to remove McGoey from the UBS Board. The McGoey Golden Parachute was presumably disclosed at this time as a disincentive to shareholders to remove McGoey from the Board at the special shareholders meeting. The McGoey Golden Parachute terms are material and ought to have been disclosed prior to that time.

37. A similar Golden Parachute had been granted to Dolgonos in his Technology Development and Strategic Marketing Agreement, dated July 12, 2008, with Dolgonos’s privately-owned company, DOL Technologies Inc. (**“DOL”**).

38. The agreements respecting McGoey and Dolgonos contain one-sided, unprecedented, unreasonable economic terms that are unconscionable and ought not to be enforced in the circumstances.

39. McGoey, Mitrovich and Reeson breached their duties to UBS in entering into agreements with such one-sided, unjustified terms for which UBS did not receive adequate consideration, nor did they obtain adequate independent advice. They breached their duty to ensure such material terms were disclosed to shareholders.

40. McGoey acted in a gross conflict of interest and contrary to his duty of loyalty to UBS at all times, and all of his conduct must be scrutinized on that basis. The other directors carried out McGoey's self-enriching goals contrary to their statutory and fiduciary obligations. Mitrovich and Reeson placed themselves in a material conflict of interest to the detriment of UBS in order to enrich McGoey, Dolgonos and themselves for their own material financial benefit without any justification or adequate consideration.

(ii) The "Restructuring Awards" Arising from the Sale of LOOK Assets

41. The sale authorized by McGoey and the LOOK directors under the 2009 POA for a disappointing net \$56 million is outlined at paras. 21 to 26 above. In summary, from the disappointing net proceeds of the LOOK sale of \$56 million, McGoey and the LOOK directors awarded themselves and Dolgonos "Restructuring Awards" of \$17,223,683. McGoey and the UBS directors also somehow purport to justify awarding themselves and Dolgonos an additional \$4,710,000 (relating to the sale by LOOK of LOOK assets – not UBS assets) without any additional consideration from them.

42. At the LOOK special shareholders meeting in January 2009, McGoey had represented that the sale of LOOK's wireless spectrum under a Plan of Arrangement was the best way to maximize share value for shareholders. To encourage approval of the shareholders, McGoey had presented the prices paid for wireless spectrum by Rogers, Bell and Telus, ranging from \$741 million to \$999 million for less total spectrum than LOOK had.

43. The net proceeds of \$56 million from the sale of LOOK's wireless spectrum was far less than the expected return McGoey had represented to shareholders. According to press coverage at the time, it was the lowest price ever paid for the type of wireless spectrum sold by LOOK on a Megahertz per Population basis since wireless spectrum was first auctioned by Industry Canada.

44. On July 21, 2009, LOOK announced generally "restructuring charges" of \$20.4 million in conjunction with the sale. The restructuring charges were described to include, *inter alia*, human resources restructuring and a \$9 million transaction relating to the cancellation of all outstanding options and share appreciation rights as of May 31, 2009. The particulars of the restructuring charges were not disclosed. It was also not disclosed that the decisions to set aside such monies had been made on June 17 and July 8, 2009.

45. LOOK disclosed for the first time in its annual audited financial statements for the fiscal year ended August 31, 2009 filed on December 4, 2009 that Restructuring Awards of \$17,223,683 were paid to LOOK's directors and officers. This included \$9,516,433 paid directly to McGoey and Dolgonos (as particularized below).

46. At the time of LOOK's July announcement, there was no disclosure that UBS Directors had also set aside (on the same dates: June 17 and July 8, 2009) "Restructuring Awards" identified as a "SAR Cancellation Payout Pool" of \$2.31 million and an "Interim Bonus Pool" of \$3.4 million to be paid to UBS directors and officers. The amount set aside to be paid to UBS directors and officers represented approximately 30% of UBS's market capitalization. This transaction was not approved by shareholders, contrary to statutory requirements, in that all directors had a conflict and benefited from this decision.

47. On December 4, 2009, UBS filed its annual audited financial statements for the fiscal year ended August 31, 2009 (the same day LOOK filed its audited statements). This was the first disclosure that Restructuring Awards of \$5.71 million were granted to McGoey, Dolgonos and the other Directors and management of UBS effective May 31, 2009. These awards to UBS officers and directors purportedly related to the sale of the LOOK assets, though UBS pleads that no justification for such UBS payments exists.

48. The UBS "Restructuring Awards" granted by McGoey, Mitrovich and Reeson to themselves and to Dolgonos were (the "**UBS Restructuring Awards**"):

McGoey	\$1,800,000
Dolgonos	\$1,530,000
Mitrovich	\$450,000
Reeson	\$465,000
Minaki	\$450,000

49. The purported basis for the Restructuring Awards was disclosed on January 19, 2010 in the management information circular issued by the Directors for the UBS Annual General Meeting held in February 2010. According to the management information circular, the "Restructuring Awards" were awarded because:

- (a) UBS may have needed to retain executive officers and senior management until May 2012 in order to maintain the LOOK spectrum in good standing pursuant to the conditional sale of these assets;
- (b) UBS does not have a pension plan nor any other deferred compensation plan in effect;
- (c) the executives and senior management did not receive any base salary increases in fiscal 2009;
- (d) the executives and senior management were required to wind-down and restructure LOOK;
- (e) the executives, directors and senior management were required to provide full and final releases for the relinquishment of all SAR units and stock options; and
- (f) the restructuring awards were contingent on LOOK receiving the full consideration of \$80 million due from the sale of its spectrum and UBS receiving adequate cash resources.

50. UBS pleads that the UBS Restructuring Awards as described in the management information circular were not “performance incentives” as contemplated in the Jolian MSA and that Jolian cannot validly claim payment of these amounts as part of the formula for the McGoey Golden Parachute. Further, UBS pleads that there can be no justification to pay such awards to McGoey, Dolgonos, Mitrovich and Reeson.

(iii) The Breakdown of the UBS Restructuring Award

51. The Restructuring Award granted by UBS that McGoey claims as part of his Golden Parachute formula purports to have two major parts, neither of which is justified, discussed below:

- (a) a “Share Appreciation Rights Cancellation Payout” of \$600,000; and
- (b) a “Deferred Bonus Award” of \$1,200,000.

(a) The UBS SAR Cancellation Payout to McGoey and Others

52. The UBS Share Appreciation Rights (“SAR”) Plan was adopted by the UBS Board in October 2006 to promote a greater alignment of interests between directors, officers, employees and consultants and the shareholders of UBS by permitting them to benefit from increases in UBS share price. Payment under the SAR Plan was a function of the actual share price above fixed strike prices.

53. The material terms of the SAR Plan are as follows:

...

2. Definitions. In this Plan:

..

“Value of a Unit” shall mean, at any time, the average closing board lot sale price of a Share on the TSX Venture Exchange ...

...

4. Payment. – **Effective on the date the conditions attaching to an award of Units are met, the Company or the relevant Affiliate, or the case may be, shall become obligated to pay to each Participant holding such Units, an amount equal to the Value at that date, plus the Value at the date of award of such Units held by such Participant, plus all required deductions.**

...

15. Amendment and Termination. This Plan may be amended or terminated at discretion of the Company. Should this Plan be terminated, and if the conditions attached to an award of Units have not been met, the Board may elect in its sole discretion to waive such conditions. In such case, payments shall be made in accordance with section 4, and the reference in section 4, the Value of the Units at the date the conditions attaching to an award of Units are met, shall be read as a reference to the Value of a Unit at the date of plan termination. **[emphasis added]**

54. The conditions for payment on SAR Units generally arose only with merger, take-over, liquidation/wind-up type events affecting UBS or if the market capitalization exceeded \$125 million.

55. On June 17, 2009, the Directors cancelled all the SAR Units effective May 31, 2009. None of the conditions for payment referenced above had been met when the Directors cancelled all the SAR Units.

56. Notwithstanding the conditions for payment were not met, the Directors appear to have waived the conditions for payment without justification. However, they then also ignored and breached the payment terms of the SAR Plan. The Directors valued each SAR Unit based on a \$0.40 share price when the shares were only trading at \$0.18. They approved a SAR Cancellation Payout Pool of \$2.31 million on this basis when, by

the terms of the SAR Plan, the maximum true total "in-the-money" value was only \$372,000.

57. The Directors improperly and unjustly awarded McGoey, Dolgonos and themselves the following payments:

SAR Holder	Number of SAR Units to be Cancelled	Inflated SAR Cancellation Payout
Jolian Investments Inc. (McGoey)	3,000,000	\$600,000
DOL Technologies Inc. (Dolgonos)	3,000,000	\$330,000
Louis Mitrovich	1,500,000	\$450,000
Douglas Reeson	1,650,000	\$465,000
Peter Minaki	1,650,000	\$465,000
John Fekete	500,000	-
Total	11,300,000	\$2,310,000

58. Even if it was appropriate to waive the conditions for payment, which is denied, the actual total value of McGoey's SAR Units in accordance with the SAR Plan's terms appears to be only \$120,000 (based on a strike price of \$0.10 for 1,500,000 units and a strike price of \$0.30 for 1,500,000 units and a then share price of \$0.18). Notwithstanding this true value, as noted above, McGoey and the Directors granted McGoey a SAR Cancellation Payout of \$600,000.

59. Similarly, the maximum value of the SAR Units held by each of the Directors was approximately \$120,000 to \$132,000 when the Directors awarded SAR Cancellation

Payouts to themselves, as set out. Further, Dolgonos's SAR Units had no value (based on the strike price for his units) when the Directors approved a \$330,000 SAR Cancellation Payout to him.

60. The Directors breached the terms of the SAR Plan to disguise large, unjustified payments of the proceeds of the LOOK sale to McGoey, Dolgonos and themselves. This SAR Cancellation Payout by the Directors in breach of the SAR Plan's terms was an egregious grab of money which was in no way justifiable.

61. Further, the Directors all had a material interest in the SAR Cancellation Payouts that they awarded to themselves. Contrary to their express statutory obligations, this transaction was not approved by UBS shareholders and therefore must be set aside.

(b) The "Deferred Bonus Award" to McGoey and Others

62. On July 8, 2009, as part of the "Restructuring Award", the UBS Directors purported to create a one-time interim Deferred Bonus Award ("DBA") pool of \$3.4 million to be paid to directors and management of UBS.

63. On August 28, 2009, the Directors granted a DBA of \$1.2 million to McGoey and a DBA of \$1.2 million to Dolgonos.

64. The DBA was "conditional" upon LOOK receiving the full consideration of \$80 million from the sale transaction of LOOK's wireless spectrum (received 13 days later) and UBS receiving adequate cash resources.

65. The DBA was not a “performance incentive” as contemplated in the Jolian MSA for which Jolian can validly claim payment as part of the McGoey Golden Parachute.

(iv) Summary: The UBS Restructuring Awards Are Not Owing to McGoey

66. The Directors awarded the one-time DBA and SAR Cancellation Payouts, contrary to the governing agreements and their legal and fiduciary obligations. In their own self-interest, the Directors effectively abolished or altered UBS’s existing compensation plans and also created a new “bonus” plan for themselves. Using \$0.40 per share as a basis for the SAR Cancellation Payout was a material transaction that altered the SAR Plan without TSX or shareholder approval.

67. The UBS Restructuring Awards were unjust, unfair and unreasonable and were awarded by the Directors to further enrich McGoey, Dolgonos and themselves to the detriment of UBS and in direct conflict with their duties of loyalty and to act solely in the best interests of the Company.

68. The Directors did not exercise any independent judgment and ignored the best interests of UBS in granting their UBS Restructuring Awards. The Directors awarded their UBS Restructuring Awards to themselves based on the recommendation of McGoey and/or Dolgonos and without the advice of an independent compensation consultant.

69. McGoey caused and induced the Directors to award him the \$1.8 million UBS Restructuring Award without any factual or legal basis. The Directors carried out McGoey’s self-enriching scheme, at the same time approving awards to themselves.

The UBS Restructuring Award unjustly enriched McGoey to the detriment of UBS without any juristic reason. The Directors placed themselves in a material conflict of interest to the detriment of UBS and enriched McGoey and themselves for their material financial benefit.

70. UBS pleads that the UBS Restructuring Awards granted by the Directors are void and unenforceable and denies that any amounts claimed as Restructuring Awards are owing.

C. SHAREHOLDERS EXERCISED THEIR RIGHT TO REMOVE McGOEY

71. At the July 5, 2010 special meeting of shareholders of UBS, the shareholders voted to remove McGoey, Mitrovich and Reeson from the Board. They then elected a new slate of directors.

72. Immediately after the special shareholders' meeting, McGoey, in his capacity as the CEO of UBS, was asked by letter to provide assistance and information to the new Directors to facilitate the transition of the new Board. He was not terminated as CEO.

73. McGoey, while still CEO, delivered later that evening a voluntary notice of termination of the Jolian MSA, alleging a "Company Default" and "Termination without Cause", and demanding payment of the McGoey Golden Parachute.

74. "Company Default" is defined in the Jolian MSA as follows:

"Company Default" means the failure of UBS to respect any of its obligations hereunder including without limitation the failure of the CEO Designee to be elected to the Board of Directors of UBS (provided that Jolian has

voted its Company Shares in favour of the CEO Designee), the failure of the Board of Directors of UBS to appoint the CEO Designee as Chief Executive Officer, the failure of the Board of Directors of UBS to nominate the CEO Designee for the position of Executive Chairman of UBS or any substantial diminution of the responsibilities of the CEO Designee, 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. **[emphasis added]**

75. "Termination without Cause" is described in the Jolian MSA as:

The failure of the shareholders of the Company to re-elect the CEO Designee to the Board or the failure of the Board to appoint the CEO Designee as the Chief Executive Office of UBS or the failure of the Board to nominate the CEO Designee for the position of Executive Chairman of UBS... [emphasis added]

76. There was no "Company Default" or "Termination without Cause" by UBS that triggered any payment under the Jolian MSA. The removal of McGoey from the Board by a vote of shareholders is not a valid and legal basis upon which a claim can be properly made against UBS under the Jolian MSA or otherwise.

77. The election of directors is one of the primary statutory functions and rights of shareholders. UBS cannot be obligated to dictate or fix the results of a shareholder vote, including electing McGoey as a director. Further, it is contrary to corporate governance principles and public policy, and it is unreasonable and unlawful to penalize shareholders by making them pay to replace a director.

D. NO LIABILITY UNDER THE JOLIAN MSA

78. In summary, UBS pleads that there is no liability under the Jolian MSA because:
- (a) Jolian unilaterally terminated the Jolian MSA in the absence of a “Company Default” or “Termination without Cause” or “Change-in-Control”, and therefore there is nothing owing;
 - (b) in any event, no moneys can be owing in relation to McGoey being removed by shareholders as a director or the resulting non-appointment of McGoey as Chair of the Board as these acts are not obligations of UBS nor are they within the authority, control and competence of UBS and any such provisions in the Jolian MSA are void and ought to be set aside;
 - (c) there is no “Company Default” or “Change-in-Control” or other conduct by UBS which gives rise to any payments owing under the Jolian MSA;
 - (d) in the alternative, if any moneys are payable to Jolian, the “McGoey Golden Parachute” provisions are excessive, unsupported, unfair and unconscionable, were not in the best interests of UBS and were the result of McGoey’s undue influence; such provisions ought therefore to be set aside; and
 - (e) further, in the alternative, if any moneys are payable to Jolian, no payments are properly or lawfully made in respect of the claimed “Restructuring Awards” because they are not “performance incentives” as

contemplated by the Jolian MSA, and they are unreasonable and unjustified in fact and law.

79. The McGoey Golden Parachute, the UBS Restructuring Awards, the Options and other payments in all the circumstances of this case represent abuses of powers and breaches of duties of the Directors. McGoey acted in blatant conflict of interest. The Directors, other than McGoey, were negligent or wilfully blind in permitting and facilitating these abuses. Their conduct demonstrates repeated breaches of their legal and fiduciary duties to UBS and a consistent disregard of the duties of care and loyalty they owed to UBS. Accordingly, the McGoey Golden Parachute, the UBS Restructuring Awards and the Options claimed by the Plaintiff are void and unenforceable.

80. UBS requests that the Plaintiff's action be dismissed with costs on a substantial indemnity basis.

COUNTERCLAIM

81. The Defendant claims:

(a) a declaration that:

- (i) the conduct of McGoey, Mitrovich and Reeson is oppressive and/or unfairly prejudicial to and/or unfairly disregards the interests of UBS;
- (ii) the business and affairs of UBS have been carried on or conducted by McGoey, Mitrovich and Reeson in a manner that was oppressive

and/or unfairly prejudicial to and/or unfairly disregarded the interests of UBS;

(iii) the powers of McGoey, Mitrovich and Reeson have been exercised in a manner that was oppressive and/or unfairly prejudicial to and/or unfairly disregarded the interests of UBS;

(b) a declaration that McGoey, Mitrovich and Reeson have:

(i) failed to act honestly and in good faith with a view to the best interests of UBS; and

(ii) failed to exercise the care, diligence and skill that a reasonably prudent individual would exercise in the circumstances.

(c) a declaration that the McGoey Golden Parachute as defined herein is null, void and unenforceable;

(d) an order setting aside the McGoey Golden Parachute or in the alternative, an order varying the McGoey Golden Parachute;

(e) a declaration that the UBS Restructuring Awards granted are null, void and unenforceable;

(f) a declaration that the Options granted in 2009 are null, void and unenforceable;

- (g) a declaration that, if any or all of the LOOK Restructuring Award was validly payable, the LOOK Restructuring paid to McGoey is payable to UBS;
- (h) an order that McGoey pay \$5,565,695, the amount of the LOOK Restructuring Award, to UBS pursuant to the terms of the UBS-LOOK Agreement;
- (i) a declaration that the Lawyer Funds, as defined below, taken from UBS were taken unlawfully, without authority and contrary to the Indemnity Agreements, UBS's By-laws and the OBCA;
- (j) an interim interlocutory order that McGoey, Mitrovich and Reeson or their counsel on their behalf immediately return the Lawyer Funds to UBS;
- (k) damages in the amount of \$3 million dollars for breach of statutory and fiduciary duty in respect of the Cash Redemption Decision as defined herein;
- (l) in the alternative, damages for breach of statutory and fiduciary duty, oppression and unjust enrichment in the amount of:
 - (i) \$7,410,000 in relation to the McGoey Golden Parachute;
 - (ii) \$3,180,000 in relation to the UBS Restructuring Awards granted to themselves;

- (iii) \$5,565,695 in relation to the LOOK Restructuring Award paid to McGoey;
- (iv) \$300,000 in relation to the Options granted to McGoey;
- (v) \$440,000 in relation to the Lawyer Funds advanced to their respective legal counsel;

should UBS be held liable for any payments thereunder.

- (m) punitive damages in the amount of \$5,000,000;
- (n) a declaration that McGoey, Mitrovich and Reeson are jointly and severally liable for all amounts ordered to be paid;
- (o) pre-judgment and post-judgment interest on all amounts awarded pursuant to sections 127 to 130 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43;
- (p) costs on a substantial indemnity basis, plus H.S.T.; and
- (q) such further and other relief as this Honourable Court deems just.

82. UBS repeats and relies upon the allegations contained in its Statement of Defence.

A. UBS MONIES IMPROPERLY TAKEN FROM UBS FOR LEGAL FEES

83. Just prior to the Directors' removal from the Board by UBS shareholders, the Directors made the following payments to lawyers retained by McGoey, Dolgonos and the other Directors for legal expenses:

Director/Officer	Indemnity Advanced	Law Firm
McGoey	\$200,000	Groia & Company
Dolgonos	\$100,000	Roy Elliott O'Connor
Mitrovich	\$120,000	Blake Cassels Graydon
Reeson	\$120,000	McLean & Kerr

84. These UBS monies were purportedly advanced by the Directors pursuant to paragraph 2(b) of respective Indemnity Agreements with UBS and pursuant to article 7 of UBS's By-laws.

85. Paragraph 2(b) of the respective Indemnity Agreements, however, provides:

(b) *Proceedings by or in the Right of the Corporation.* **The Corporation shall indemnify** Indemnatee if Indemnatee was or is a party or is threatened to be made a party to any threatened, pending or completed action or proceeding by or in the right of the Corporation...to procure a judgment in its favour by reason of:

(i) the fact that Indemnatee is or was a director, officer, employee, consultant or agent of the Corporation,...

(ii) any action or inaction on the part of the Indemnitee while an officer, director, employee, consultant or agent of the Corporation, or...

(iii) ...

against expenses (including legal fees) and, to the fullest extent permitted by law, amounts paid in settlement, in each case to the extent actually and reasonably incurred by Indemnitee in connection with the defense or settlement of such action or proceeding **if Indemnitee acted honestly and in good faith and with a view to the best interests of the Corporation,...and such indemnification is approved by a court of competent jurisdiction in accordance with applicable law.** [emphasis added]

86. Similarly, Article 7.01(b) of the By-laws provides:

The Corporation shall, subject to the approval of the Ontario Court (General Division), indemnify a person referred to in subsection 7.01(a) of this by-law in respect of an action by or on behalf of the Corporation or body corporate to procure a judgment in its favour, to which he is made a party by reason of being or having been a director or an officer of the Corporation or body corporate, against all costs, charges and expenses and reasonably incurred by him in connection with such action if he fulfils the conditions set out in clauses 7.01(a)(i) and 7.01(a)(ii) of this by-law. [emphasis added]

87. Subsection 136(4.1) of the OBCA also provides:

(4.1) A corporation may, with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to obtain a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1), against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3). [emphasis added]

88. No court approval was obtained by McGoey, Mitrovich and Reeson before the monies were advanced to their lawyers as purported indemnification for claims made against them by UBS (the "Lawyer Funds"). The UBS money was advanced contrary to the Indemnity Agreements, UBS's By-laws and the OBCA and were also unreasonably forwarded in all of the circumstances.

B. THE CASH REDEMPTION DECISION (LOOK DEBENTURES HELD BY UBS)

89. Until recently, UBS was the holder of \$3 million in debentures of LOOK. As a debenture holder, UBS had the right to convert its LOOK debentures into LOOK shares at a conversion price of \$0.075 per share or redeem its debentures into cash.

90. On April 22, 2010, LOOK announced in connection with a second Plan of Arrangement to sell LOOK's remaining assets, distribute cash and obtain full releases against LOOK and UBS directors, that LOOK would redeem all issued debentures.

91. In response to that announcement, McGoey, Reeson and Mitrovich decided that it was in the best interests of UBS to convert its debentures into LOOK shares for investment purposes such that UBS would hold 49% of LOOK and redeem or sell UBS's remaining debentures for cash.

92. On May 3, 2010, LOOK announced that it would not be proceeding with the second Plan of Arrangement but would nonetheless be proceeding with the redemption of its debentures. In response to that announcement, McGoey, Mitrovich and Reeson again decided that it would be in the best interests of UBS to convert its debentures into

LOOK shares to hold 49% of LOOK and redeem or sell UBS's remaining debentures for cash.

93. However, on May 12, 2010, the UBS Directors announced, contrary to their earlier decisions, that UBS had redeemed its entire debenture for cash rather than convert the debentures for shares (the "**Cash Redemption Decision**"). The debentures, if converted into shares as originally decided, had a value of approximately \$6 million. Rather than achieve \$6 million in value, the UBS Directors decided to take \$3 million in cash for UBS instead.

94. No changed circumstances arose prior to the Cash Redemption Decision except notice of the special meeting of shareholders to remove McGoey, Mitrovich and Reeson. UBS pleads that McGoey, Mitrovich and Reeson breached their legal duty to act in the best interests of the company and breached their fiduciary duties in making the Cash Redemption Decision because it was motivated by self-interest, making cash available for their personal legal fees, to the detriment of UBS. They ought to be held liable for the resulting damages to UBS.

C. MCGOEY'S LOOK RESTRUCTURING AWARD

95. As outlined at paras. 30 to 34 above, in addition to his usual compensation, McGoey was paid a Restructuring Award directly by LOOK of \$5,565,695.

96. At no time prior to 2009 did LOOK pay any cash compensation, bonus or otherwise, directly to McGoey. All payments by LOOK for services rendered by McGoey were to be paid directly to UBS in accordance with the UBS-LOOK Agreement. All

services of McGoey to LOOK as Chief Executive Officer are provided by UBS pursuant to the UBS-LOOK Agreement.

97. The UBS-LOOK Agreement provides that payment for services under the Agreement is to be made directly to UBS and that bonuses for services may be awarded to UBS.

98. McGoey caused or induced the UBS Directors to permit the LOOK Restructuring Award to be paid directly to him and not to UBS, contrary to the UBS-LOOK Agreement. The LOOK Restructuring Award to be paid to McGoey was designed to unjustly enrich McGoey to the detriment of UBS. This payment was improperly made and unjustly enriched McGoey without any juristic reason and, if that Restructuring Award is valid, it must be re-paid by McGoey to UBS.

D. SUMMARY OF DUTIES/CLAIMS

99. McGoey, Mitrovich and Reeson owe statutory and common law fiduciary duties and duties of care to UBS to, *inter alia*:

- (a) properly manage the business and affairs of UBS;
- (b) preserve and protect the assets of UBS from unnecessary and/or wasteful dissipation, for the benefit of UBS and its shareholders;
- (c) avoid conflicts of interest, such as causing UBS to enter into contracts with companies and entities directly or indirectly related to them on terms that are unjustified and contrary to UBS' interests; and

- (d) avoid conflicts of interest by putting their personal interests ahead of the UBS and to exercise objective independent judgment.

100. Based on the foregoing, UBS pleads that McGoey, Mitrovich and Reeson breached their statutory duty of care to act honestly and in good faith with a view to the best interests of UBS and failed to exercise the care, diligence and skill that a reasonably prudent individual would exercise in the circumstances, as well as their common law and fiduciary duties. UBS pleads and relies upon sections 132, 134 and 136 of the OBCA.

101. The McGoey Golden Parachute, the UBS Restructuring Awards and the Options were unjust, unfair, unreasonable, unconscionable and the result of undue influence, and ought to be set aside or varied. The monies received from the LOOK Restructuring Award (if valid), and the Lawyer Fund, ought to be paid to UBS.

102. In addition, the actions of McGoey, Mitrovich and Reeson in agreeing to the McGoey Golden Parachute, granting the UBS Restructuring Awards and Options, permitting payment of the LOOK Restructuring Award to McGoey, and advancing the Lawyer Funds amount to conduct that is oppressive, unfairly prejudicial to, and in unfair disregard of the interests of UBS and its shareholders. UBS pleads and relies upon section 248 of the OBCA and the remedies thereunder, particularly s. 248 (3)(h) which permits the Court to vary or set aside a transaction or contract.

103. In authorizing, permitting or acquiescing to the payment of the LOOK Restructuring Award to McGoey, each of McGoey, Mitrovich and Reeson acted contrary to the terms of the UBS-LOOK Management Services Agreement and the Jolian MSA

and contrary to the interests of UBS. The LOOK Restructuring Award unjustly enriched McGoey and was paid without any juristic reason.

104. The UBS Restructuring Awards were granted without proper consideration and were for the improper and ulterior motive of unjustly enriching themselves and others to the detriment of UBS.

105. Further, the McGoey Golden Parachute specifically, and the Jolian MSA generally, were designed to not only enrich but to improperly entrench McGoey as CEO, director and Chair to the detriment of UBS and its shareholders and contrary to good governance principles and regulatory requirements. The McGoey Golden Parachute was further intended to achieve the improper purpose of securing and entrenching control of UBS with the result that UBS resources could be used for personal gain.

106. UBS requests its costs of this counterclaim on a substantial indemnity basis.

107. UBS requests that this counterclaim be tried together with the main action.

Dated: August 18, 2010

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JOLIAN INVESTMENTS LIMITED

– Plaintiff/Defendant by Counterclaim –

v.

UNIQUE BROADBAND SYSTEMS, INC.,

– Defendant/Plaintiff by Counterclaim –

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding Commenced At Toronto

**STATEMENT OF DEFENCE AND
COUNTERCLAIM**

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