

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN :

2064818 ONTARIO INC.

Plaintiff

– and –

**UNIQUE BROADBAND SYSTEMS, INC., GRANT
MCCUTCHEON, ROBERT ULICKI, AND HENRY EATON**

Defendants

STATEMENT OF DEFENCE

1. The defendants Unique Broadband Systems, Inc. (“UBS”), Grant McCutcheon (“McCutcheon”), Robert Ulicki (“Ulicki”) and Henry Eaton (“Eaton”) (collectively, “the Defendants”) admit the allegations contained in paragraphs 3-10, 26, 28, 29, 33-36, 42 and 61.

2. The Defendants deny the allegations contained in paragraphs 1, 2, 11-25, 27, 30-32, 37-41, 43-60 and 62-75.

3. The Defendants plead that the Plaintiff is not entitled to any of the forms of relief claimed in paragraph 1 of the Statement of Claim.

A. The Parties

4. The plaintiff 2064818 Ontario Inc. (“the Plaintiff”) is a private Ontario corporation owned by Alex Dolgonos (“Dolgonos”), the principal shareholder of UBS, holding a 19.9% interest. The Plaintiff’s directors are Mark Zhuk, Eric Rouah and Dolgonos. Dolgonos was the Chief Technology Officer of UBS. Dolgonos was also a Technology Officer with Look Communications Inc. (“LOOK”), as described below.

5. Dolgonos is also the director and controlling mind of DOL Technologies Inc. (“DOL”), a corporation that has commenced a separate action against UBS, as described below.

6. UBS is a corporation incorporated pursuant to the laws of Ontario. At present, UBS’s only significant asset is an equity interest in LOOK, which it holds through its wholly-owned subsidiary, UBS Wireless Services Inc.. UBS previously operated as a designer, developer and manufacturer of high-speed mobile and fixed wireless solutions. In March 2002, when the former directors and officers of UBS, including Dolgonos, took control of the board, UBS had over \$25 million in revenue, specialized technology and engineering.

7. McCutcheon, Ulicki and Eaton were elected to the board of directors of UBS by a vote of the shareholders to replace the former board on July 5, 2010 at a special shareholders meeting (the “Special Meeting”).

8. McCutcheon and Eaton are also directors of LOOK. Until October 28, 2010, Ulicki was also a director of LOOK. Contrary to the Plaintiff's allegation at paragraph 11, the individual Defendants, along with two other individuals, only became directors of LOOK after the abrupt resignation en masse of the former board of LOOK, including Gerald McGoey ("McGoey").

9. The former LOOK board of directors and senior officers resigned abruptly late on July 20, 2010, effective on July 21, 2010, and appointed McCutcheon, Ulicki and Eaton as directors without their signed consents. To fill the void left in the LOOK board of directors following the abrupt resignation of the board, McCutcheon, Ulicki and Eaton accepted their appointments. Two independent directors were subsequently appointed to the LOOK board on July 27, 2010.

B. The Related Actions

10. Dolgonos owns and controls DOL. DOL is a plaintiff in Court File No. CV-10-406609 (the "DOL Action") wherein DOL claims payments from UBS allegedly owed under the "Technology Development and Strategic Marketing Agreement" ("DOL Agreement") between DOL and UBS. In the DOL Action, DOL seeks the payment of, *inter alia*, a golden parachute of over \$6 million ("Dolgonos Golden Parachute") allegedly triggered by a "Change in Control" of UBS following the removal of the former directors.

11. UBS counterclaimed against DOL and Dolgonos along with certain former directors, including McGoey, in the DOL Action for a declaration that the Dolgonos Golden Parachute and other claims by DOL and Dolgonos are unenforceable. UBS has also counterclaimed against DOL and Dolgonos for other relief.

12. In that action, UBS pleads that Dolgonos acted in a conflict of interest and contrary to his contractual and other duties to UBS. Dolgonos, as well as McGoey, placed himself in a material conflict of interest to the detriment of UBS and enriched himself improperly. All of his conduct, including the commencement of the within action, must be scrutinized on that basis. Further, Dolgonos has failed to mention his own claims for relief against UBS and the basis of UBS's claims against him notwithstanding the relevance to his pleading regarding the Defendants' duties and conduct.

13. In another related action, Jolian Investments Limited ("Jolian"), a private corporation controlled by McGoey, has sued UBS (Court File No. CV-10-406551) ("the Jolian Action"). In the Jolian Action, Jolian claims against UBS for similar payments under a golden parachute allegedly owed pursuant to the "Management Services Agreement" ("Jolian MSA") entered into between Jolian and UBS. Like the DOL Action, Jolian seeks the payment of over \$8.5 million as a golden parachute for McGoey ("McGoey Golden Parachute").

14. UBS has defended the Jolian Action and has counterclaimed against Jolian, McGoey and the other former directors on the grounds, *inter alia*, that the Jolian

MSA was breached by McGoey and that the terms of the McGoey Golden Parachute are unreasonable and unconscionable, and are therefore void and unenforceable.

15. In the present action, the Plaintiff essentially alleges that the election of McCutcheon, Ulicki and Eaton triggered the McGoey and Dolgonos Golden Parachutes and that the Defendants' failure to cause UBS to pay the full amount claimed under the McGoey Golden Parachute, the Dolgonos Golden Parachute and other claimed amounts totalling nearly \$20 million constitutes oppression to the very shareholders who elected McCutcheon, Ulicki and Eaton. Contrary to the allegations made in the Plaintiff's claim, the Defendants plead that they are taking the very steps to stop harm to UBS by McGoey and Dolgonos that do fulfill the reasonable expectations of the UBS shareholders.

C. Election of the Current Directors Did Not Trigger the Jolian MSA

16. McCutcheon, Ulicki and Eaton were elected by a vote of the shareholders of UBS to replace McGoey and the other former directors at the Special Meeting.

17. Contrary to the Plaintiff's assertion, the election of McCutcheon, Ulicki and Eaton by the shareholders of UBS did not and could not in fact or in law trigger any payment of the McGoey Golden Parachute or otherwise under the Jolian MSA. Further, Jolian unilaterally terminated the Jolian MSA, under which McGoey's full-time services as CEO to UBS were provided, by letter dated July 5, 2010. None of the circumstances

which trigger termination had been met as defined in the Jolian MSA. As a result, there is nothing owing to Jolian or McGoey under the Jolian MSA and it is reasonable for UBS to defend the exorbitant claims made by Jolian.

18. The former directors of UBS fulfilled their obligation under the Jolian MSA by putting McGoey forward on the management slate for election as a director at the Special Meeting. The shareholders' decision not to re-elect McGoey as a director or write his name in as director on their ballots does not give rise to a valid cause of action against the Defendants who were elected instead of McGoey.

19. In any event, no moneys can be owing in relation to McGoey being removed by shareholders as a director, or the non-appointment of McGoey as Chair of the Board when he was not re-elected as a director, as the election of a director is not within the authority, control and competence of UBS and any provisions purporting to require otherwise in the Jolian MSA are void and ought to be set aside.

20. The election of directors is a statutory right and one of the most important rights and obligations of shareholders. Neither UBS nor its current directors can be obligated to dictate the results of a shareholder vote, including electing McGoey as a director. Further, it would be contrary to corporate governance principles and public policy to recognize such a claim.

21. The Plaintiff's claim at paragraph 66 that McCutcheon, Ulicki and Eaton removed McGoey from the board of directors and failed to put him forward as CEO and Chair, and as a result intentionally triggered the payment of the McGoey Golden Parachute, is illogical, without merit and unenforceable in law. McGoey was replaced as a director by a vote of UBS shareholders. There is no cause of action founded in oppression or breach of duty against UBS or its current directors with respect to the McGoey Golden Parachute.

D. The Defendants Have Acted in UBS's Best Interests

22. Since their election as directors of UBS, McCutcheon, Ulicki and Eaton have acted in the best interests of UBS and its shareholders and have fulfilled their duties.

23. UBS has denied the claims made by DOL and Jolian for unconscionable and invalid sums pursuant to the McGoey and Dolgonos Golden Parachutes, along with other monetary claims totalling nearly \$20 million. UBS has counterclaimed against Dolgonos, McGoey and certain former directors to recover various general damages totalling in the millions of dollars.

24. The above amounts, along with other awards, options, expenses and bonuses the former directors awarded themselves and certain officers, including

Dolgonos, were paid in breach of the former directors' fiduciary and statutory duties owed to UBS.

25. The Plaintiff's wholly unsupported claim at paragraphs 45 and 46 that the Defendants have acted contrary to UBS shareholders' reasonable expectations by failing to simply pay almost \$20 million to McGoey, Dolgonos and others, and by counterclaiming against them and certain former directors to recover funds wrongfully taken from UBS, defies logic and is factually and legally unsupportable.

26. Contrary to the Plaintiff's allegations, the Defendants have not acted contrary to the shareholders' reasonable expectations nor engaged in any conduct that has oppressed UBS shareholders. The Defendants have taken steps to undo and remedy the significant damage caused to UBS by Dolgonos himself and by McGoey and certain former directors when they were in control of UBS.

27. Since being elected by shareholders to the board of UBS on July 5th, McCutcheon, Ulicki and Eaton have taken reasonable and diligent steps to fulfill their duties to the corporation in very challenging circumstances. In particular, McGoey immediately resigned as CEO and did not assist in the transition of the new board and a new CEO and therefore a new CEO was appointed. The new board and CEO undertook to assess the circumstances of UBS, including reviewing the propriety of prior expenditures of senior executives of UBS. Further, as known to Dolgonos since he is a party in the related litigation, UBS was immediately sued by both McGoey and Dolgonos

through their personal companies through which they had executed employment or service agreements with UBS. The new board has responded in the best interests of UBS in defending claims for excessive and unwarranted payments sought by McGoey and Dolgonos.

28. Further, since the Special Meeting, the new UBS board has reduced operating expenses by nearly \$800,000 per year due to reductions in salary following the departure of the former directors and officers, including Dolgonos, who the Defendants state were overpaid without providing corresponding value. It has also reversed \$1.2 million of awards that were granted in 2009 by the former UBS board.

E. The Amending Agreement is Reasonable

29. Until late 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. The “Master Services Agreement” entered into by UBS and LOOK on May 18, 2004 (“LOOK MSA”) stated that UBS would provide, *inter alia*, “CEO Services” to LOOK for \$2.4 million annually. The LOOK MSA also stated that UBS could provide “Other Services” to LOOK, including:

- (a) technical support services in respect of technical and engineering expertise which is available to UBS and necessary or useful for [LOOK].

30. The LOOK MSA provided that McGoey would act as a director and Chief Executive Officer of LOOK. Pursuant to the “Other Services” provision of the LOOK MSA, Dolgonos was made Technology Consultant of LOOK. While McGoey was CEO and a director of LOOK, and Dolgonos was Technology Consultant of LOOK, McGoey, *inter alia*:

- (a) engineered the sale of LOOK’s key wireless spectrum asset to Inukshuk, a partnership of Bell and Rogers, for a disappointing \$80 million, \$24 million of which was paid to settle litigation and professional fees during the sale,
- (b) out of the remaining \$56 million from the sale, caused LOOK to pay to him \$5,565,695 as a “restructuring award”, and caused LOOK to pay Dolgonos \$3,950,737 as a similar award, and
- (c) in paying the “restructuring awards” to himself and Dolgonos, exposed LOOK and its directors to serious potential penalties and costs by failing to withhold amounts pursuant to tax requirements.

31. As admitted by the Plaintiff at paragraph 3 of its claim, “as of November 15, 2009, [LOOK] terminated its services to all its then remaining subscribers and as of December 31, 2009, [LOOK] decommissioned its wireless network. LOOK no longer has an operating business.”

32. The end of LOOK as an operating business caused a substantial change in the commercial reality between UBS and LOOK.

33. As admitted by the Plaintiff at paragraph 24, the Conversion Agreement executed by UBS and McGoey on behalf of LOOK was negotiated “[i]n order to gain support from UBS for the 2010 [Plan of Arrangement] and for LOOK to preserve its tax attributes”. As further admitted by the Plaintiff at paragraph 27, the 2010 LOOK Plan of Arrangement (“2010 POA”) was abandoned shortly before the Special Meeting.

34. The Conversion Agreement was premised on the completion of the 2010 POA. The terms of the Conversion Agreement cannot reasonably be interpreted to mean that the only obligation thereunder was for LOOK to continue paying \$2.4 million annually to UBS regardless of the circumstances.

35. Following McGoey’s resignation from the LOOK board, UBS and LOOK agreed to amend the LOOK MSA (“the Amending Agreement”) to reflect the modified circumstances. The terms of the Amending Agreement state that:

- (a) LOOK shall continue to pay to UBS the sum of \$2.4 million per year, in 12 monthly instalments of \$200,000, until December 31, 2010, for the CEO and Other Services as set out in the LOOK MSA,

- (b) for the remaining term of the LOOK MSA (ending May 19, 2012), LOOK shall pay to UBS \$2.4 million in 17 monthly instalments for CEO and Other Services.

36. The Amending Agreement spread the annual fee of \$2.4 million for the remaining term over a 17 month period. This appropriately preserved reasonable value to UBS under the LOOK MSA in light of the fact that LOOK was no longer operating an active business and was therefore in a position to object and did object to continuing payments to UBS.

37. The decision by UBS to amend the LOOK MSA was a reasonable and prudent business decision in light of the modified commercial reality and the options available as between UBS and LOOK. The Amending Agreement was made honestly and in good faith and was in the best interests of UBS and its shareholders in the circumstances.

38. Contrary to the Plaintiff's allegations at paragraphs 13 and 57-63, the Amending Agreement was not completed with the intent to prefer the interests of LOOK shareholders over the interests of UBS shareholders and there is no evidence whatsoever to support this assertion. The Amending Agreement protected UBS shareholders' interests by preserving a contractual relationship with LOOK notwithstanding considerable changes in the circumstances of LOOK that put the original terms of the contract at risk.

39. Notwithstanding the conflicts of interest, which were duly disclosed, and which had previously existed in that McGoey was CEO and a director of both LOOK and UBS, along with another common director, the Amending Agreement was negotiated and executed appropriately by the independent directors of UBS and LOOK in good faith.

40. Further, the Amending Agreement is not oppressive and does not unfairly prejudice or unfairly disregard the interests of UBS shareholders.

41. The Defendants therefore ask that this action be dismissed with costs on a substantial indemnity basis.

42. The Defendant submits that pursuant to Rule 6.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, this action should be consolidated with the DOL and Julian Actions (Court File Nos. CV-10-406609 and CV-10-406551, respectively) that have been transferred to the Commercial List by Order dated February 2, 2011. As described above, the relief sought in this action arises from the same series of transactions and occurrences as in the Related Actions, and all three actions share common questions of fact and law.

Date: February 8, 2011

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(PROCEEDING COMMENCED AT TORONTO)

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