

CITATION: Unique Broadband Systems (Re), 2011 ONSC 224
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-01-25

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED and IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Wilton-Siegel J.

COUNSEL: *Peter Roy and Sean Grayson*, for the Applicant, 2064818 Ontario Inc.

E. Patrick Shea, for the Applicant, Unique Broadband Systems, Inc.

Peter C. Wardle, for the UBS Directors, Grant McCutcheon, Henry Eaton and Robert Ulicki

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

Raj Sahni, for Jolian Investments Inc., in its capacity as a creditor

HEARD: December 20, 2011

ENDORSEMENT

[1] 2064818 Ontario Inc. ("206") seeks an order pursuant to ss. 11.5(1) and (2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") removing Grant McCutcheon ("McCutcheon") and Henry Eaton ("Eaton") as directors of Unique Broadband Systems, Inc. ("UBS"). UBS seeks an amendment to the initial order under the CCAA dated July 5, 2011 (the "Initial Order") granting protection to UBS that would extend the stay thereunder to include a stay of an oppression action against the UBS directors commenced by 206 on December 22, 2010 (the "Oppression Action"). I will deal with each matter in turn after briefly setting out the background.

Background

The Parties

[2] UBS is a public corporation incorporated in Ontario under the *Business Corporations Act*, R.S.O. 1990, c. B16 (the "OBCA").

[3] LOOK Communications Inc. ("Look") is a public corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA").

[4] UBS owns shares in Look carrying 39.2% of the equity and 37.6% of the votes. UBS also provides management services to Look pursuant to a management services agreement described below.

[5] 206 is a corporation controlled by Alex Dolgonos ("Dolgonos"). 206 is a substantial shareholder of UBS holding slightly less than 20% of the outstanding shares of UBS. Dolgonos also owns all of the outstanding shares of DOL Technologies Inc. ("DOI"), a private corporation incorporated under the OBCA.

The Election of the UBS Directors

[6] Each of the current UBS directors, being McCutcheon, Eaton and Robert Ulicki ("Ulicki") (collectively, the "UBS Directors"), was elected to the UBS board of directors at a special meeting of the shareholders held on July 5, 2010 to replace the former directors, being McGocy, Douglas Reesan and Louis Mitrovich, pursuant to s. 122 of the OBCA. The election of these directors was the subject of a proxy contest between the existing management and the shareholders who supported the UBS Directors.

[7] On July 6, 2010, UBS advised Look that it had the support of shareholders of Look possessing sufficient votes to effect a change of control of the board of directors of Look. UBS requested that the then-current board of Look resign and appoint a replacement slate of directors proposed by UBS, which included the UBS Directors, Laurence Silber ("Silber") and David Rattee ("Rattee"), without calling a special meeting of shareholders.

[8] On July 20, 2010, all five Look directors resigned and McCutcheon, Eaton and Ulicki were appointed directors of Look. On July 21, 2010, McCutcheon was also appointed the chief executive officer of Look, replacing McGocy who had previously served in that position pursuant to the provisions of a management services agreement between UBS and Look, described below. Silber and Rattee were subsequently elected directors of Look on July 27, 2010. Ulicki resigned from the board of directors of Look on October 29, 2010, with the result that there are currently four directors of Look.

[9] The UBS Directors were re-elected at the annual general meeting of UBS shareholders on February 25, 2011. 206 opposed the current slate of directors and proposed its own slate, which included the two directors it seeks on this motion to have installed as directors in place of McCutcheon and Eaton.

The Current Litigation

[10] UBS had previously retained DOI pursuant to an agreement dated July 12, 2008 (the "DOL Technology Agreement") to provide the services of Dolgonos as a "chief technology officer" to UBS. The DOL Technology Agreement was terminated by DOL after the election of the UBS Directors based on "change of control" provisions in the Agreement. DOL then commenced an action against UBS claiming amounts totalling approximately \$8.6 million. This action is being defended by UBS, which asserts that the largest component of the DOI claim is

not payable pursuant to the terms of the DOL Technology Agreement. UBS has also counterclaimed to set aside the DOL Technology Agreement.

[11] UBS had also previously retained Jolian Investments Inc., a corporation controlled by Gerald McGoey ("McGoey"), to provide his services as chief executive officer of UBS pursuant to an agreement dated January 1, 2006 (the "Jolian Agreement"). The Jolian Agreement was also terminated by Jolian after the election of the UBS Directors based both on the failure to elect McGoey to the UBS board and on "change of control" provisions in the Agreement. Jolian then commenced an action against UBS claiming amounts totalling approximately \$7.5 million. This action is also being defended by UBS, which asserts that the largest component of the Jolian claim is also not payable pursuant to the terms of the Jolian Agreement. UBS has also counterclaimed to set aside the Jolian Agreement. On July 5, 2010, McCutcheon was appointed the chief executive officer of Look to replace McGoey.

[12] In the DOL action and the Jolian action, DOL, Dolgonos, Jolian and McGoey brought motions seeking confirmation of their right to an advancement of funds in respect of the legal costs of pursuing their respective claims and defending the UBS counterclaims against them. UBS resisted such relief and sought an order requiring the parties to return certain retainers previously advanced by UBS to counsel for such parties. By order dated April 11, 2011, Marrocco J. held that these parties were entitled to an advancement of funds as more particularly specified therein. UBS has appealed this order to the Court of Appeal and, pending the hearing of such appeal, has refused to advance or pay any of the amounts addressed in the order of Marrocco J.

[13] In addition, on July 6, 2010, Look also commenced an action against Dolgonos, DOL, McGoey and Jolian, among others, seeking damages based on allegations of breach of fiduciary duty and negligence. The action relates to certain restructuring awards paid by Look in 2009, for which Look seeks recovery.

The Oppression Action

[14] On December 22, 2010, DOL commenced the Oppression Action against both UBS and the UBS Directors. At the hearing of this motion, 206 advised that it is not pursuing the claims against UBS. The statement of claim in the Oppression Action seeks nine separate heads of relief against the UBS Directors in addition to interest and costs.

[15] The Oppression Action centres on two principal allegations. First, it is alleged the UBS Directors acted oppressively in approving a settlement between UBS and Look that was made pursuant to an agreement dated December 3, 2010 (the "Amending Agreement"), that amended a management services agreement dated May 19, 2004 between UBS and Look (collectively, with the Amending Agreement, the "Look MSA"). Second, it is alleged that, by failing to re-elect McGoey to the UBS board of directors on July 5, 2011, the UBS Directors intentionally triggered certain provisions of the Jolian Agreement, giving rise to a right in favour of Jolian to terminate the Agreement. It is alleged that these actions of the UBS Directors exposed UBS to the consequences of the default. 206 also alleges that the UBS Directors acted improperly in

defending the DOL claim described above. More generally, 206 alleges that the UBS Directors have depleted the funds of UBS by these actions contrary to their announced intention at the time of the proxy fight in July 2010 to minimize UBS' expenses and conserve its funds.

[16] 206 seeks damages for oppressive behavior against the UBS Directors in the amount of any loss suffered as a result of execution of the Amending Agreement and in the amount of any payment required to be made to Jolian under the Jolian Agreement. It also seeks declarations that the UBS Directors had a conflict of interest in respect of the execution of the Amending Agreement and have preferred the Look shareholders over the UBS shareholders. On these grounds, 206 further seeks an order removing the UBS Directors from the UBS board.

The CCAA Proceedings

[17] UBS is insolvent. It obtained protection under the CCAA pursuant to the Initial Order. Duff & Phelps Canada Restructuring Inc. (the "Monitor") has been appointed the monitor in the CCAA proceedings. Under the Initial Order, the Oppression Claim is currently stayed against UBS but not against the UBS Directors.

[18] Pursuant to an order dated August 4, 2011, the court approved a claims process in respect of claims against UBS. In accordance with this order, 206 filed a proof of claim in an amount "to be determined" that specifically referred to, and attached, the statement of claim in the Oppression Action.

[19] The largest claims filed in the claims process are: the DOL and Jolian claims described above; a contingent claim by Look for the remainder of the monies due to it under the Amending Agreement, which will expire in June 2012 provided UBS continues to provide services to Look in accordance with the terms of the Look MSA; and the 206 claim in respect of the Oppression Action. Each of the UBS Directors also filed contingent claims respecting indemnification of legal fees that may be incurred in defending the Oppression Action, based on indemnities dated July 5, 2010 granted to them by UBS.

[20] 206 took the position that McCutcheon and Eaton should not review any of the claims filed against UBS in the claims process by virtue of the alleged conflict of interest addressed below. While UBS disputes the existence of such a conflict of interest, these directors did not participate in the UBS review of the claims filed with it, which were therefore reviewed by Ulicki alone together with legal counsel. The UBS position regarding each of these claims was provided to the Monitor by letter dated December 9, 2011.

The Oppression Claim

[21] UBS seeks to have the court exercise its authority under s. 11.03(1) of the CCAA to extend the stay of proceedings in the Initial Order to include the Oppression Action in respect of the UBS Directors. It seeks to have the Oppression Action determined in its entirety in the CCAA proceedings.

[22] UBS makes several arguments in support of this relief. Among others, it submits that the requested relief will further the purposes of the CCAA by allowing the directors to focus on the restructuring rather than diverting their time and effort to other litigation. 206 says that this argument is of no force if the court finds that McCutcheon and Eaton are conflicted and grants its motion to replace them. Given the determination below on 206's motion, I accept this argument of UBS.

[23] In addition to the forgoing reason for extending the stay, there are three other considerations that also support such an order.

[24] First, unless and until a court determines that the UBS Directors are not entitled to indemnification by UBS in respect of the claims made against them in the Oppression Action, the UBS Directors have claims against UBS in the CCAA proceedings arising out of the Oppression Action that must be addressed in the restructuring. As a result, the restructuring cannot proceed until the Oppression Action and related indemnification claims are determined.

[25] Second, the Jolian claim against UBS is already proceeding in the CCAA proceedings. Given the similarity in the factual matrix between the claims in the Jolian action and the Oppression Action, any determination in the Jolian action will also likely apply to the claims and defences in the Oppression Action. Accordingly, the Oppression Action must proceed within the CCAA proceedings to avoid the possibility of both a multiplicity of actions and potentially conflicting decisions.

[26] Lastly, I note that there is no suggestion of any material prejudice to 206 if the determination of the Oppression Action also proceeds within the CCAA proceedings.

[27] Based on the foregoing considerations, the UBS motion to extend the stay in the Initial Order is granted.

Removal Motion

[28] I propose to first address the applicable law in respect of this motion before considering the specific issue in this proceeding.

Applicable Law

[29] Section 11.5 of the CCAA provides as follows:

(1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

(2) The court may, by order, fill any vacancy created under subsection (1).

[30] Accordingly, to succeed on this motion, 206 must demonstrate that the actions of McCutcheon and Eaton, or their positions as directors of both UBS and Look, are such that either (1) they are unreasonably impairing or are likely to impair the possibility of a viable restructuring; or (2) they are acting or are likely to act improperly as directors. Further, it should be noted that any such order, while it requires such a finding, remains subject to the discretion of the court.

[31] 206 does not propose a particular standard applicable to a determination under s. 11.5, apart from stating that the CCAA is remedial legislation and should therefore be construed liberally in accordance with the modern purposive approach to statutory interpretation. I understand this to mean that 206 would interpret s. 11.5(1) to establish a low threshold for entitlement to relief thereunder. UBS submits that there must be a "clear demonstration" of facts supporting a determination under s. 11.5, which appears directed more toward the standard of proof required than the nature of the threshold established under s. 11.5(1).

[32] There is nothing in the wording of s. 11.5 that displaces the ordinary standard of proof on a balance of probabilities. However, the language of s. 11.5(1) does establish a significant threshold for the entitlement to relief thereunder.

[33] A determination as to whether conduct is impairing, or is likely to impair, a restructuring requires a careful examination of the actions of the directors in the context of the particular restructuring proceedings, the interests of the stakeholders and the feasible options available to the debtor. A similar examination of the actions of the directors is required for a determination that a director has acted inappropriately in the circumstances of a particular restructuring. I note, in particular, that given this language, the fact that a shareholder or creditor may not agree with a decision of a director is far from being a sufficient ground for the director's removal. As a related matter, there is nothing in s. 11.5 that evidences an intention to displace the "business judgment rule".

[34] Further, the language of s. 11.5 expressly requires that the actions of a director "unreasonably" impair, or are likely to "unreasonably" impair, a viable restructuring or are "inappropriate", or are likely to be "inappropriate", in the circumstances.

[35] In addition, two other considerations also argue in favour of a significant threshold, although they may also be relevant to a determination regarding the exercise of judicial discretion where the necessary factual determinations have been made.

[36] First, removing and replacing directors of a corporation, even a debtor corporation subject to the CCAA, is an extreme form of judicial intervention in the business and affairs of the corporation. The shareholders have elected the directors and remain entitled to bring their own action to remove or replace directors under the applicable corporate legislation. At a minimum, in determining whether it should exercise its discretion, the court can take into consideration the absence of any such action by the other shareholders.

[37] Similarly, in a CCAA restructuring, the Monitor performs a supervisory function that provides a form of protection to the corporation's stakeholders. In determining whether to exercise its discretion in s. 11.5(1), a court would ordinarily take into consideration the presence or absence of any recommendation from the Monitor.

Analysis and Conclusions

Positions of the Parties

[38] 206 asserts that McCutcheon and Eaton have a conflict of interest as directors of both UBS and Look which prevents them from fulfilling their responsibilities as directors in the restructuring and justifies an order under s. 11.5 of the CCAA.

[39] 206 has advised the court that it does not allege a monetary conflict based on a larger personal economic interest in Look than in UBS. Instead, 206 alleges that McCutcheon and Eaton are conflicted by virtue of their concurrent positions as directors of both UBS and Look. 206 says that, as a result, these directors can have no role in the UBS CCAA proceedings and should be removed.

[40] UBS takes the position that these directors are not conflicted and are not prevented from participating in any aspect of the CCAA proceedings except for (1) the determination of the Look contingent claim; and (2) the determination of their individual contingent claims for indemnification. It says that, as a result of the position taken by 206 regarding the review of the claims filed under the CCAA proceedings, McCutcheon and Eaton voluntarily did not participate in the UBS review of these claims. However, they intend to be involved on a going-forward basis after determination of this motion, subject to the exceptions described above.

Analysis and Conclusions

[41] For the purposes of this motion, I accept the premise of 206's argument — that the presence of a conflict of interest may prevent directors from fulfilling their responsibilities in a CCAA proceeding to the extent that their continued involvement unreasonably impairs, or is likely to unreasonably impair, the possibility of a viable compromise or arrangement being made in respect of the insolvent company. I also accept that McCutcheon and Eaton have a conflict of interest as directors of both Look and UBS that prevents them from acting in respect of any matter within the CCAA proceedings that pertains to the relationship between the two corporations.

[42] However, such a conflict of interest is not, by itself, sufficient to satisfy the requirements of s. 11.5. Courts have long recognized that interlocking directorships are acceptable, often inevitable or necessary, in the corporate context. Further, the Court of Appeal expressly recognized that "a reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders" is insufficient for removal of directors: see *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.), at para. 76. Instead, courts recognize that conflicts of interest may exist that are to be dealt with in accordance with applicable fiduciary law principles. There is nothing in s. 11.5 that evidences an intention to alter the

general rule, stated by Blair J.A. in *Stelco*, at paras. 74-76, that apprehension of bias is insufficient, on its own, to remove a director.

[43] More generally, as Blair J.A. made clear in *Stelco*, at paras. 74-76, directors will only be removed if their conduct, rather than the mere existence of a conflict of interest, justifies such a sanction:

In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

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[44] Accordingly, on this motion, 206 must demonstrate either (1) that McCutcheon and Eaton have breached their duties as directors in respect of the conflict that exists in a manner that constitutes acting inappropriately in the circumstances; or (2) that the existence of such conflict of interest prevents them from acting as directors of UBS in a meaningful manner in the restructuring such that they are unreasonably impairing the possibility of a viable restructuring.

[45] I am not persuaded that the fact that McCutcheon and Eaton are directors of both UBS and Look justifies an order replacing them as directors of UBS under s. 11.5 of the CCAA on either ground. I reach this conclusion for the following reasons.

[46] First, the evidence does not disclose that this conflict of interest has prevented the UBS board from functioning. Prior to the CCAA proceeding, the Amending Agreement was negotiated between Rattco, on behalf of Look, and Ulicki on behalf of UBS with the benefit of legal counsel. 206 may object to the result on the basis that the agreement was not in the best interests of UBS. However, that is a matter to be addressed in the Oppression Action. It cannot be said that the fact that the other two directors were unable to participate in the decision prevented the negotiations between UBS and Look from proceeding to a conclusion or would have resulted in a different agreement.

[47] Moreover, it should be noted that the Amending Agreement was negotiated and signed before the CCAA proceedings began. In the current proceeding, the only issue that is relevant to the progress of a restructuring of UBS in which the two directors have a conflict of interest is the Look contingent claim. Apart from their individual indemnification claims, there is nothing that prevents these directors from acting in respect of all other aspects of the CCAA proceedings. The fact that they have not done so to date is attributable not to any legal impediment but to the position taken by 206, which cannot survive the order giving effect to these Reasons.

[48] Second, I am not persuaded that the record demonstrates a preference by these directors for the shareholders of Look over the shareholders of UBS. I will first address three specific matters raised by 206 as evidence of this alleged preference. I will then address the issue more generally.

[49] The first allegation pertains to the terms of the Amending Agreement, which involved a release of a payment obligation of Look to UBS of \$900,000. This has been addressed above — the determination of this allegation is a matter for the Oppression Action. The court cannot reach any conclusion on this issue at this time based on the record before the court.

[50] The second allegation is that the UBS Directors are spending the remaining cash of UBS rather than causing Look to pay a dividend to the Look shareholders, including UBS. This allegation is part of a larger allegation that the UBS Directors are taking an inordinate amount of time to deal with the claims filed in the CCAA proceeding and refuse to consider financing alternatives, with the result, if not the intention, that the Look shares owned by UBS will be ultimately sold at a discount to Look or its other principal shareholder, a brother of Silber.

[51] The evidence does not support this allegation for a number of reasons. Whether or not McCutcheon and Eaton are on the Look board, the non-UBS directors of Look will determine

whether to pay a dividend based on their view of the best interests of Look. UBS cannot cause such a dividend to be paid. On this basis, I do not see how the failure of the Look board to consider such a dividend is a relevant consideration. Further, for the moment at least, the evidence does not support 206's position that there is an imminent likelihood that UBS will run out of cash to fund its operations. Moreover, there can be no restructuring plan until the principal claims in the claims process are resolved. While the time spent responding to the claims filed may have been longer than desirable, the evidence does not, at the present time, support the conclusion that the three-month period was inordinate and without reasonable explanation. Lastly, and in any event, 206 has failed to put a specific, alternative funding proposal to the directors for their consideration.

[52] The third allegation is that the Look shareholders have benefitted from the UBS proxy fight by which the UBS Directors were nominated. UBS bore the \$600,000 cost of the proxy fight. Referring to a letter of Ulicki to Rattoc and Silber dated November 17, 2010, 206 says that, absent the UBS proxy fight, UBS would have controlled Look and the cost of any Look action against Dolgonos, DOL, McGoey and Jolian would have been borne by individual 206 shareholders.

[53] While this may be factually correct, there is no evidence before the court that would justify a conclusion that, in taking such action, the UBS Directors preferred the Look shareholders to the UBS shareholders. Their position is that there is a common interest in initiating claims against the defendants in the Look action. On the current evidence, this position is at least as probable as 206's position. The court cannot determine this issue on this motion.

[54] More generally, the fact that UBS and Look have adopted a common position in regard to Dolgonos and McGoey, and their respective companies, since the election of the UBS Directors is not, *per se*, evidence that McCutcheon and Eaton are preferring the interests of the Look shareholders over the interests of the UBS shareholders. The actions that the UBS Directors, including McCutcheon and Eaton, have taken may not be supported by Dolgonos and 206, but that is not evidence of the alleged preferment absent proof as to the absence of any reasonable basis for the actions of the UBS Directors. At this stage in the proceedings, such proof is not before the court.

[55] In reaching the foregoing conclusions, I should add that the court has also had regard to the Monitor's advice that it has not observed any conduct of these directors that will compromise the CCAA proceeding or UBS's attempt to restructure, and that it has also not observed any conduct that the Monitor would consider inappropriate or would cause the Monitor concern that they would act inappropriately in the future. Further, the Monitor has advised that, in its view, there would be no benefit and substantial harm to the CCAA proceedings if these directors were removed from their position. This advice would argue against the exercise of the court's discretion in the present circumstances even if 206 had otherwise established activity on the part of these directors that satisfied the requirements of s. 11.5.

[56] Lastly, the backdrop to this motion is a dispute between two opposing groups of UBS shareholders. A particular objective of 206 is to have a new board of directors review the

decision of the UBS Directors to defend the DOJ action brought against UBS. However, s. 11.5 cannot be used to replace a board of directors to the extent that the purpose of such relief is to have a new board of directors revisit decisions taken by the existing board. At this stage, the court cannot decide the merits of the issues of the appropriateness of the past payments to Dolgonos and McGocy, the actions of the UBS Directors in respect of the Amending Agreement, or their competing visions for the future of Look/UBS. These issues involve all three of the UBS Directors. These issues are the subject of the litigation between the parties, including the Oppression Action, to be addressed in the claims process with the CCAA proceedings. Equally important, as mentioned above, the "business judgment rule" continues to govern judicial intervention in the affairs of a debtor corporation under the CCAA. To succeed on this motion, 206 must provide evidence that establishes the elements of the test in section 11.5. It cannot do so on the facts before the court on this motion.

[57] Based on the foregoing, the 206 motion to replace McCutcheon and Eaton as directors of UBS is dismissed.

Costs

[58] The parties will have thirty days from the date of this Endorsement to make written submissions as to costs not to exceed five pages in length.



Wilton-Siegel J.

Date: January 25, 2012