Court File No. CV-13-10274-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.

Applicants

FACTUM
(Motion of Amdocs Canadian Managed Services, Inc. and Amdocs Software Systems Limited, Returnable October 2, 2014)

September 23, 2014

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PART I - INTRODUCTION

1. Amdocs Canadian Managed Services, Inc. (**"ACMS"**) and Amdocs Software Systems Limited (**"ASSL"** and, collectively with ACMS, **"Amdocs"**) seek an order, inter alia:

(a) For the specific performance of the contractual and legal obligations of Data & Audio–Visual Enterprises Wireless Inc. (**"DAVE Wireless"** which, together with 8440522 Canada Inc. and Data and Audio Visual Enterprises Holdings Inc., is collectively referred to as **"Mobilicity"**) pursuant to a Master Services Agreement (the **"MSA"**) concluded between DAVE Wireless and Amdocs, including, specifically, the payment by DAVE Wireless to Amdocs of the amounts that have become due and owing subsequent to the filing of an Initial Application on September 29, 2013 (the **"Initial Application"**) pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (as amended, the **"CCAA"**) and the ensuing Initial Order rendered September 30, 2014 (the **"Initial Order"**), totalling:

(i) **$138,889** per month in respect of unpaid services forming part of the so-called "Implementation Fees," for a total, as at the date of the hearing hereof, of **$1,805,557**;

(ii) **$814,600** in respect of a so-called "Reconciliation Payment" further to defaults of Dave Wireless under the MSA;

(iii) **$235,274.99** in respect of "Additional Services" which have not been disclaimed by Mobilicity and which Amdocs has been readying for deployment.

(b) That in the event of failure by DAVE Wireless to pay Amdocs the amounts so ordered by the Court, the Stay of Enforcement Rights and Proceedings provided in the Initial Order shall be lifted as against Amdocs, and Amdocs shall be permitted to: (i) invoke the default clauses in the MSA; (ii) immediately cease providing services to the Applicants under the MSA; (iii) immediately cancel and terminate the MSA for all intents and purposes, without prejudice to Amdocs' claims and entitlements as a result of such default and notwithstanding the termination clauses, terms and conditions of the MSA.

(c) Such further and other relief as counsel may request and this Court may deem just.

PART II - FACTS

2. The relevant facts are set out in Mark Sumner's affidavits dated February 7th and 27th, 2014. A brief overview is provided below. Capitalized terms used in this factum and not defined herein have the meanings ascribed to them in the Sumner affidavits.

3. On December 22, 2009, the parties signed a Master Services Agreement ("**MSA**") pursuant to which Amdocs agreed to offer its software development services, licenses and other products and services to Mobilicity until April 30, 2016.

4. On March 31, 2012, the parties concluded Amendment 1 to the MSA in order to:

(a) extend the MSA's term by 32 months, and

(b) revisit the payment schedules.

5. For the purposes of these proceedings, the only contractual documents governing the rights and obligations of the parties are set out in the MSA, as amended.

6. On September 29, 2013, Mobilicity filed an application for an Initial Order under the CCAA.

7. On September 30, this Honourable Court issued the Initial Order.

8. To date, Amdocs has not received any notice disclaiming the MSA from either Mobilicity or the Monitor.

PART III - IMPLEMENTATION FEE

A. Payment for services rendered and licensed property used post-filing is owed immediately

9. Amdocs currently finds itself in an untenable situation. Mobilicity is demanding that it continue to deliver a multitude of services and provide access to essential licensed software pursuant to the MSA, but without being paid even a fraction of what it is owed for said services or for the use of said software in return.

10. This unreasonable demand is made without any legal justification. The Stay of Proceedings currently protecting Mobilicity does not exonerate it from paying for services rendered during the post-filing period, as clearly stated in the Initial Order.[1]

11. Indeed, refusal to pay for post-filing services directly contravenes s. 11.01 of the CCAA (previously s. 11.3 CCAA) which requires the "immediate payment" due for services rendered and property used during the post-filing period:

> *Companies' Creditors Arrangement Act*, RSC 1985, c C-36
>
> Rights of suppliers
>
> 11.01 No order made under section 11 or 11.02 has the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

[1] Initial Order, s. 19.

12. The fundamental requirement that a company benefitting from a stay order but enjoying ongoing services post-filing must "pay as it goes" was emphasized in *Sproule v. Nortel Networks Corporation*, where the Ontario Court of Appeal stated as follows:

[TAB 1] *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833, 2009 CarswellOnt 7383, 59 C.B.R. (5th) 23

> [34] Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the CCAA restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. […].

13. Similarly, in *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, the Court refers to the creditor's right to "cash on demand" payment for post-filing goods and services:

[TAB 2] *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72, 2007 CarswellSask 324, 33 C.B.R. (5th) 50

> [44] I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the CCAA, s. 11.3 [now 11.01] allows the supplier the right:
>
> (a) to refuse to supply any such goods or services at all;
>
> (b) to supply such goods or services on a "cash on demand" basis only;
>
> (c) to negotiate with the insolvent corporation for the amendment of the CCAA Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or
>
> (d) to take the risk of supplying goods or services on credit.
>
> Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

14. The same rules that apply to services and goods provided post-filing also apply to licensed property. The facts at play and legal principles applied in the matter of *Allarco Entertainment Inc. (Re)* are analogous and indeed virtually transposable to the case at bar. Where "use" is made of licensed property during the post-filing period, the party providing access to it is entitled to immediate payment:

[TAB 3] *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503, 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140

> [35] As a prelude to the discussion of the specific issue which is before the court, the court observes that the conclusion reached by Bauman J. in *Smith Brothers*, a leading decision on the interpretation of s. 11.3 [now 11.01] of the CCAA, to the effect that it is

> the **use** (emphasis in the original at para. 19) of "leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a)" also apply here. The implications of that finding are twofold: the Alliance contracts are "true" licenses within the meaning of *Smith Brothers* - which means on the one hand that they are not security documents - and, Alliance cannot be forced to provide the portions of those contracts which relate to the provision of services post-protection without an immediate claim for those services.
>
> [36] The nature of the Alliance contracts is that they provide a service - the right to advertise and broadcast the availability of a package of programming - rather than the right to make a single broadcast. The advertising by Allarco Entertainment of the availability of the Alliance Films packages, including SVOB rights, constitutes "use" of the Alliance Films licensed property.

15. As an alternative to the "pay as you go" rule, where cash on delivery is not appropriate, Courts will instead create a charge in favour of the supplier, with priority interest over other secured creditors of the debtor. In the case at bar, Amdocs is neither the beneficiary of such a charge, nor is it getting paid for a substantial portion of its post-filing services and products. Amdocs was also not deemed to be a critical supplier of Mobilicity, even though, in practice, it is clearly amongst the most, if not the most, critical suppliers of Mobilicity.

[TAB 4] *Hydro-Québec c. Fonderie Poitras ltée,* 2009 QCCA 1416, 2009 CarswellQue 7456, 56 C.B.R. (5th) 18

> [82] Ce principe connaît cependant des limites pratiques. Il arrive parfois que la réalité s'oppose à ce que le fournisseur soit payé immédiatement pour les services qu'il fournit à une compagnie débitrice. La fourniture d'électricité en est un exemple patent : il s'agit d'un service continu qu'il est impossible de facturer au fur et à mesure de la consommation.
>
> [83] En pareilles circonstances, il est juste et équitable pour le fournisseur de services de demander des garanties de paiement. Commentant la décision Re Smoky River Coal Ltd, les auteurs Houlden, Morawetz et Sarra déclarent :
>
> > Under its inherent powers, the court can create a security for creditors who supply goods and services to the debtor after the filing of a CCAA petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the CCAA fails, the court can determine who are entitled to share in the proceeds of the security interest.
>
> [84] Selon l'intimée, la LACC n'autorise ni le paiement d'avance des services ni la constitution d'un dépôt de garantie. Cette prétention doit être rejetée. À moins de vider l'alinéa a) de l'article 11.3 de la LACC de tout son sens, un fournisseur dont le service est continu a le droit d'obtenir une garantie de paiement raisonnable. Autrement, le droit qu'accorde cet alinéa aux fournisseurs de services est sans objet.

B. The time at which the payment obligation crystallizes is irrelevant

16. In order to avoid paying Amdocs for the post-filing services in question, Mobilicity is claiming that the "Implementation Fees" which were attributed to various services in addition to

the license fee for the initial term of the MSA were only for pre-filing "start-up" services, such that Implementation Fee payments due during the post-filing period need not be made.

17. This position is predicated on a conveniently flawed reasoning and on a self-serving, albeit erroneous, interpretation of the meaning, purpose, intent and legal ramifications of the purely administrative or financial nature of this mechanism established by the parties.

18. More specifically, in Ryan Lausman's affidavit dated February 18, 2014, he states that the Implementation Fee was to be "a flat fee for the start-up services provided, but payable over a period of several years."[2] He adds that:

> While these provisions describe a portion of the Implementation Fee as a "license fee," I always understood the entire Implementation Fee to be a one-time fee payable to compensate Amdocs for the development and set up of the Amdocs System that was fully earned upon completion of that process.[3]

19. Mr. Lausman's interpretation of Implementation Fee is incorrect. Although the Fee was indeed to be payable over several years, it was not for start-up (per se, or launch of) services alone, but also—and indeed substantially—for a variety of ongoing services. The contract speaks for itself and contains rather plain language in this regard, when the contractual definition of "Implementation Fee" and the definitions of the terms pertaining to said fees are reviewed (see Table 1, below).

20. Whether the services covered by the Implementation Fee are ongoing is relevant since, as mentioned above, post-filing services must be paid for immediately. The payment mechanism itself (up-front payment, "pay-as-you-go," or payment in installments) is in fact irrelevant. This was emphasized in *Sproule*, mentioned above, in which the Ontario Court of Appeal cites the court of first instance and dismisses the appeal based on the following reasoning, which is transposable, *mutatis mutandis*, to the case at bar:

[TAB 1] *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833, 2009 CarswellOnt 7383, 59 C.B.R. (5th) 23

> [10] […] The essence of his reasons is as follows at para. 67:
>
> […] Section 11.3 contemplates, in my view, some current activity by a service provider post-filing that gives rise to a payment obligation post-filing. The distinction being that the claims of the Union for termination and severance pay are based, for the most part,

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[2] Lausman Affidavit, para. 18.
[3] Lausman Affidavit, para. 22.

> on services that were provided pre-filing. Likewise, obligations for benefits arising from RAP and VRO are again based, for the most part, on services provided pre-filing. The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

21. Thus, the key determination to be made by this Court pertains solely to the dates on which Amdocs performed the services paid for by the "Implementation Fee" and the dates on which the licensed property has been used. The only circumstance in which this cardinal determination is not relevant would be where the goods or services have already been paid for, which clearly is not the case; Mobilicity itself does not purport to have paid for these services in full, it merely qualifies them all as "start-up" fees, or alternatively confounds the legal consequences to be attached to the "time of payment."

22. In this regard, certain claims made in the Lausman affidavit must be addressed.

(a) First, at paragraph 18 (a), it is suggested that since the amount of the Implementation Fee was not increased when the term of the MSA was extended, the Implementation Fee must not have been for ongoing services. The fact, as established by the Sumner Affidavits, is that the Implementation Fee wasn't increased because other consideration was offered to compensate Amdocs during the additional time period, namely the additional $4.05M Commitment discussed below. It is otherwise inconceivable that such a valuable and crucial service and license offering could be offered continuously for no additional consideration.

(b) Second, at paragraph 18 (b) of the affidavit, Lausman states that the fact that any unpaid remainder of the Implementation Fee would become due upon early termination of the MSA demonstrates that the Fee is for services already rendered. In fact, the Early Termination Fee does not reflect the schedule according to which services were (and continue to be) rendered. Rather, the Early Termination fee constitutes consideration for Mobilicity's right to terminate the Agreement for convenience, and, as stated in s. 8.4 of Schedule 5 to the MSA, constitutes "an essential and fundamental part of the basis of the bargain between the Parties, in reliance upon which bargain Amdocs has set the fees and rates specified [in the MSA] and entered into this Agreement."[4]

(c) Third, at paragraph 18 (c) of the affidavit, reference is made to the fact that Schedule 5 to the MSA refers to the Implementation Fee as a "deferred" obligation. This is true but completely irrelevant. Payment for the entire Implementation Fee could have been demanded up-front or declared payable at some future date, but, as acknowledged by Lausman at paragraph 12 of his affidavit, the parties agreed that "[g]iven its size and Wireless' limited resources" the Fee would be paid over time.

23. Once again, the focus should not be on when and how the Implementation Fee was to be paid, but on when the services covered by it were offered. In this regard, a careful review of the MSA is useful.

[4] See the Sumner affidavit (February 26), para 10.

TABLE 1

PROVISION	DEFINITION	IMPLICATIONS
"Implementation Fee" See s. 1.1 of Schedule 5, Amendment 1	As provided in Sections 12.1.2 and 12.1.3 of the Agreement, Amdocs shall charge DAVE, and DAVE shall pay Amdocs, for the **Implementation Services** for the license and implementation of the customized **Amdocs Systems** at DAVE, as specified in Schedule 7, the sum of CAD$11,855,000 (**"Implementation Fee"**) of which the initial term license fee of the modified software is CAD$10,000,000. This software will be used in the **outsourcing services** provided by Amdocs to DAVE. Amdocs shall invoice DAVE for the Implementation Fee in varying instalments on the first day of each month according to the Schedule specified in Section 12 of this Schedule.	➢ The licensed software is used by Amdocs to provide the outsourcing services, which are being provided on an ongoing basis. It therefore constitutes licensed property currently in use for Mobilicity's benefit. ➢ The exact fee for the initial term license is $10 million. Payment for the initial term license is separate and distinct from payment for the Outsourcing Services, which is included in the Monthly Fees, defined in the MSA as "fees specified in Schedule 5 for the Services […]" (see complete definition below).
"Monthly Fees" See s. 1.2.26 MSA See also s. 2.1 of Schedule 5	1.2.26 The monthly fees specified in Schedule 5 for the services, which will be paid by DAVE in accordance with this Agreement. 2.1 Monthly Fees for Up to 1 Million Subscribers Amdocs shall charge DAVE, and DAVE shall pay to Amdocs, fixed monthly fees ("Monthly Fees"), Time Based Bonuses and Subscriber Based Bonuses for Amdocs' Outsourcing Services with respect to up to 1,000,000 System Subscribers on the Amdocs Systems, in accordance with the table specified in Section 13 of this Schedule.	➢ As mentioned above, these fees are, according to the explicit terms of the MSA, distinct from the amount payable for the initial term license. ➢ It is false to imply that the MSA requires the initial term license to be paid for by means of the Monthly Fees for Services.
"Amdocs Systems" See s. 1.2.7 MSA	The **Amdocs Software** together with any **Enhancement** thereto to be developed or provided by Amdocs in accordance with this Agreement, including all software (provided solely in object code), designs,	➢ "'Amdocs Systems' refers to the entire body of services and products which were and continue to be provided by Amdocs for the

PROVISION	DEFINITION	IMPLICATIONS
	specifications, *improvements*, techniques, flowcharts, and other materials related thereto. ** Note that the term "Amdocs Systems" is used throughout the MSA in contexts which do not pertain to deployment or start up, for example:* ➢ *Section 1.2.21:* "Gap Mediation" means the process by which Amdocs will mediate gaps that may exist between the **Amdocs Systems** and DAVE's business requirements, by providing Enhancements to the **Amdocs Systems** in accordance with the specifications for Enhancements ➢ *Section 1.2.38:* o "Data History Subscriber" means a Disconnected Subscriber whose account data is maintained on the **Amdocs Systems**. o "Disconnected Subscriber" means a DAVE customer whose account is maintained on the **Amdocs Systems**, but who does not have active service on the DAVE network and is not a Hotlined Subscriber. o "Hotlined Subscriber" means a DAVE customer whose account is maintained on the **Amdocs Systems** and who has been "hot-lined" on the DAVE network (i.e., a DAVE customer who is not yet a Disconnected Subscriber but who does not have active service and whose attempts to make outgoing calls are directed by the DAVE network to an intelligent voice response or other customer service system).	purposes of Mobilicity's ongoing day-to-day operations."[5] ➢ New releases of and Enhancements to the software constitute part of the Amdocs Systems. The implementation of same can therefore be described as an ongoing process and necessarily cannot refer to deployment or start up *per se*. ➢ Use of the term "Amdocs Systems" in contexts which do not pertain to deployment or start up demonstrates that these systems have an integral role in the ongoing services provided to Mobilicity.

[5] Sumner Affidavit, February 7, 2014, pg. 13 at (i).

PROVISION	DEFINITION	IMPLICATIONS
“Amdocs Software” or “Software” See s. 1.2.6 MSA	Certain generic, proprietary core software products, included within the Amdocs family of products, all as specified in Schedule 1 and new releases or versions provided thereto during the Term and in accordance with provisions of this Agreement.	➢ Thus, the implementation of the Amdocs Systems includes the provision of new releases of the Software, something which must continue to be done for the duration of the Term.
“Enhancement” See s. 1.2.19 MSA	Any modification of the Amdocs systems, including the development of a Local Extension Layer (“LEL”) to the core software.	➢ The “modifications” contemplated would not be limited to the “start-up” phase but would arise over the course of the parties’ contractual relationship.
“Implementation Services” See s. 2.2.1 MSA	2.2.1 […] “services for the implementation of the customized **Amdocs Systems**, as specified in Schedule 7 (the **“Implementation Services”**) 2.2.2 The Implementation Services include the following areas: (a) Program Management (b) Scoping Workshop (c) Business Process flow verification and/or design, including documentation (d) Infrastructure Design and Implementation that includes overall solution design, dimensioning, ordering, installation, testing, monitoring, maintenance, capacity planning, performance testing and any other activities required to ensure smooth operation of the **Managed Systems**. (e) Requirements verification and gathering, including documentation suitable for signoff/acceptance by relevant DAVE personnel (i.e., HLD documentation) (f) Development 1. Localization and Interfaces Development 2. Business Parameters Table (BPT) Set up 3. Any and all configuration, source code	➢ Again, reference is made to the Amdocs Systems, which, by definition, will evolve throughout the term. ➢ The term “Managed Systems” (defined below) also incorporates Amdocs Systems. Activities that include maintenance, monitoring, and ensuring the “smooth operation of the Managed Systems” must therefore necessarily be continue beyond the start-up phase. ➢ If Amdocs were to cease to provide the Implementation Services at this time, then Mobilicity would not be able to continue its operations, thereby constituting the best evidence, as a matter of fact, that the so-called implementation services are still being rendered.

PROVISION	DEFINITION	IMPLICATIONS
	modifications and/or integration required on any Amdocs supported system to support the signed-off requirements and business processes (g) End to End Integration Tests & Quality Assurance of all functionality (h) Training (i) User Acceptance Tests Support	
“Post-Production” Schedule 7 to MSA describes the “Post-Production” phase of the Implementation Services	2.4.8. Post-Production a) The "Post-Production" stage provides an integrated framework for setting up the ongoing support function (OGS) with DAVE, including, but not limited to, defect handling, production testing, and ongoing maintenance.	➢ Thus, explicit reference is made to the continuation of the “Implementation Services” past an initial stage on an ongoing basis. ➢ Note that the table in schedule 7 further provides that post-launch production support is to be “led” by Amdocs.
“Managed Systems” See s. 1.2.25	Amdocs Systems and any Third Party systems managed by Amdocs.	➢ Again, reference is made to the Amdocs Systems, which, by definition, will evolve throughout the term.
“Outsourcing Services” See s. 2.3.1 MSA	2.3.1 Amdocs will perform hosting, maintenance and other services with respect to the **Managed Systems**, as further defined in Schedule 8 (the “Outsourcing Services”), commencing on the applicable timelines as specified in Schedule 7. 2.3.2 The Outsourcing Services will include the following: (a) Service Management (b) Data Center Operations (c) Billing Operations (d) Application Support & Maintenance (e) Monitoring, support, plan for capacity and troubleshoot all connectivity related to the Amdocs Services.	➢ Mobilicity claims that the ongoing license fees are included in the fees payable for the “Outsourcing Services” (see pages 7 to 9 of Lausman affidavit), yet the descriptions of “Outsourcing Services” provided at s. 2.3.1 MSA and in Schedule 8 (see below) clearly do not include the provision of the license.

PROVISION	DEFINITION	IMPLICATIONS
Description of services included in "Outsourcing Services" See Schedule 8 *Note – these excerpts are intended to provide an overview of what the various components of the Outsourcing Services entail.	**Service delivery management:** s. 2.1.1 Service delivery management ("Service Delivery Management") represents the day-to-day interface between DAVE and Amdocs. Service Delivery Management covers managerial and ongoing communications between the Parties and includes service performance issues resolution and working jointly with DAVE to plan and coordinate future Changes. Amdocs believes that the key to successful Service Delivery Management is establishment of a proper governance mechanism to manage and control the Managed Systems, and to ensure that the best methods are used for communication and decision-making. […] **Data Center and IT Operations:** s. 3 regards Data Center and IT Operations. Its subsections provide an overview of what this means: s. 3.2 Facilities and asset management; s. 3.3 Equipment setup and maintenance; s. 3.4 Operations monitoring; s. 3.5 Managed systems administration; s. 3.6 Database administration; s. 3.7 Networking and security; s. 3.8 Capacity management **Billing operations:** s. 4.1.1 Amdocs' Services for billing operations will consist of the various IT billing operations required to produce monthly subscriber statements, as detailed below. 4.1.2 The Amdocs "Billing Operations Team" will provide Outsourcing Services for billing operations on a 24x7x365 basis where required. **Application support:** s. 5.1.1 Amdocs' ongoing support Services ("OGS") included in the Outsourcing Services encompasses the activities required to maintain, update and service the Managed Systems. In addition, the application support function tracks Changes to the Managed Systems in accordance with the process set forth in Service Delivery Management above. Every Change is recorded in a central database to ensure that cross-system impact is assessed and the Change is properly implemented. The records will be sufficient to provide quarterly and annual reports of all	➢ The parties expanded upon the meaning of "Outsourcing Services" in a separate schedule. Nowhere in this schedule is reference made to the provision of a license for use of the Amdocs Systems.

PROVISION	DEFINITION	IMPLICATIONS
	Changes implemented since the prior report date.	
See s. 1.3, Schedule 5, Amendment 1	Pursuant to Section 5 of this Schedule, the **Implementation Fee** and the associated fees specified in the table set forth in Section 12 of this Schedule is subject to change as and if mutually agreed based upon finalization of the list of **Third Party products** to be included within the scope of the **Amdocs Systems** and the Parties' mutual determination of the extent to which such **Third Party products** shall be **Amdocs Third Party Software** (and/or Amdocs Equipment), or DAVE Third Party Software (and/or DAVE Equipment).	➢ Thus, the "Implementation Fee" changes based on what Third Party Products are included. ➢ "Third Party Products" are provided to Amdocs by Third Party Vendors in relation to ongoing services, at Amdocs' cost.[6] ➢ This is indicative of malleable nature of the term Implementation Fee.
"Third Party Products" See s. 4.4 of Schedule 5	Amdocs will procure software licenses and support for BassetLabs, Alfresco, and Infor products required by the Amdocs Systems. Amdocs will grant to DAVE the requisite right to use licenses in conjunction with the Amdocs Systems.	➢ A change to these products can affect the implementation fee. Since they continue to be subject to change, the implementation fee continues to be subject to change. ➢ Additionally, in some cases, these products continue to be paid for by Amdocs in order for Mobilicity to benefit from their use.[7]
"Amdocs Third Party Software" See s. 1 of Schedule 2-A	The software licensed or leased by Amdocs from Third Parties and used by Amdocs personnel in the performance of the Services, all as listed in Sections 2 and 3 below. **Note: an exhaustive list of the Third Party Software is provided in Schedule 2-A.*	➢ The software mentioned continues to be employed and paid for by Amdocs on an ongoing basis as it renders its services to Mobilicity.[8] ➢ The list of software therefore continues to be subject to change, such that the Implementation Fee also continues to be subject to change.

[6] See Sumner affidavit (Feb 7) at para 29(r)(ii) *en fine.*
[7] *Ibid.*
[8] *Ibid.*

C. Interpretation of the contract and the term "implementation"

24. When contracts are interpreted, the intention of the parties is paramount. Therefore, the plain, ordinary, literal meanings of words, in light of the entire agreement, should govern, unless this would create inconsistency within the contract.

[TAB 5] CED 4th (online), Contracts, "Interpretation of Contract: General Principles" (IX.1)

> §552 The objective of interpreting a contract is to discover and give effect to the parties' true intention as expressed in the written document as a whole at the time the contract was made. In the absence of ambiguity, the plain, ordinary, popular, natural, or literal meaning of the words, read in light of the entire agreement and its surrounding circumstances, should be adopted, except where to do so would result in a commercial absurdity or create some inconsistency with the rest of the contract.
>
> […]
>
> §557 Where possible, effect must be given to all terms of the contract and none are to be rejected as surplusage or as having no meaning. The absence of words may be considered. Similarly, a court must strive to harmonize apparently conflicting terms by attempting to reasonably give meaning to each of the terms in question; one clause or the other will be ruled ineffective only if such an interpretation cannot be found. When different parts of the instrument are in conflict, effect will be given to the real intention of the parties as gathered from the instrument as a whole. Apparent inconsistencies may be reconciled by construing a specific term as a qualification of a general one. Conflicting provisions will not be considered meaningless and unenforceable unless they are so clearly repugnant that the effect of one clause virtually destroys that of another. A situation not covered by specific provisions will by default fall within the general regime laid down by the contract.

25. In the present case, as appears from Tables 1 (above) and 2 (below), the contract is replete with indices that the term "implementation" should not to be interpreted in colloquial sense as referring exclusively to start-up activities but rather broadly interpreted as referring to the execution of the implementation services, on an ongoing basis, as required by the MSA. Indeed, it would be inappropriate to ignore the definitions and descriptions provided in the contract, as these provide an accurate indication of the intended meaning of the term "implementation."

[TAB 6] Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed, (LexisNexis Canada: 2012, Markham) at p. 95.

> Parties to a contract are free to define words or phrases in a manner which differs from their dictionary definitions. This can be accomplished in two different ways.
>
> Most commonly, words or phrases are given meanings different from their dictionary definitions by the use of a defined term. The parties set out a specific meaning for a word or a phrase, and denote the use of a prescribed meaning by capitalizing the defined term whenever it is used in the contract. Courts have no difficulty interpreting

> defined terms in accordance with the meanings ascribed to them, even if such terms are not consistent with dictionary definitions, as they clearly evince the parties' intentions.
>
> Parties may also ascribe a special meaning to a word or a phrase without using a defined term by their specific use of the word or phrase as demonstrated by a reading of the contract as a whole. This is referred to as adopting "the parties' own dictionary," a label borrowed from the law of wills. In this process, a court will interpret the word or phrase in a manner consistent with the parties' use of it, even if inconsistent with a standard dictionary definition and even in the absence of a defined term in the contract.
>
> Either manifestation is simply an example of giving effect to the parties' intentions by reading a contract contextually and as a whole, and is essential to achieve interpretive accuracy. If a contract read contextually shows, objectively, that the parties intended to use a word or phrase in a special way, either with or without an express definition, only by giving that meaning to the word or phrase can interpretive accuracy be achieved and the intentions of the parties be given effect.

26. Therefore, the explicit references in the contract to the continuation of the "Implementation Services" past the start-up phase and the inclusion, in the "Implementation Fee," of amounts not strictly pertaining to start-up costs, should take precedence over any colloquial definition of the word "implementation."

D. Pro-rata payments for ongoing services

27. It is clear from the foregoing that the Implementation Fee as a whole pertains to numerous ongoing services. Any claim to the contrary is without merit, being devoid of any basis in fact and in the contractual documents. That being said, Amdocs acknowledges that it would be difficult to determine what portion of the "Implementation Fee" truly does pertain to start-up costs. The same is not true for the initial term license fee. The MSA explicitly designates CAD$10,000,000 of the "Implementation Fee" as being the cost of the <u>software license</u> during the initial term.

28. The present dispute therefore does not pertain to the $1,855,000 of the "Implementation Fee," which does not pertain to the initial term license fee. Amdocs must, however, insist on payment for Mobilicity's <u>ongoing use</u> of the licensed software. Schedule 1 to the MSA lists 17 different kinds of Amdocs Software. As explained in Mark Sumner's affidavit:

> Amdocs' software systems support the full strand of the customer life cycle: revenue management, customer management, operations support, network control and optimization and digital services. It includes services for deployment, configuration, integration, security, user interface and monitoring and control.[9]

[9] Sumner affidavit (February 7), para. 4.

29. Although the MSA does not define the term “License,” the sections of the MSA listed in Table 2, below, demonstrate that the licensed property is to be used throughout the initial term, that it pertains to the use of the Amdocs Systems, and that the license is non-perpetual.

TABLE 2: The license for use of the software

PROVISION	IMPLICATIONS
S. 8.1.1 MSA. Subject to the terms and conditions of this Agreement and payment of fees and amounts for Outsourcing Services which are or may become due pursuant to this Agreement or Orders hereunder, Amdocs hereby grants to DAVE a non-transferable right and license during the Initial Term, to use the Amdocs Systems and Product Documentation in conjunction with the Outsourcing Services solely for DAVE's telecommunication business purposes in the Territory and in order to receive Amdocs' services. This software, as modified for DAVE's specific requirements, is intended for DAVE's sole use.	➢ Thus, the license regards the use of the Amdocs Systems not only during the initial start-up period but throughout the Initial Term. ➢ Moreover, as the license served to authorize use of the Amdocs Systems then, as indicated above (see the definition of Amdocs Systems in Table 1) it was necessarily to be used beyond the start-up phase.
S. 8.2 MSA. DAVE may not, directly or indirectly, alone or with any other party, with or without consideration: (a) Distribute, transfer, resell, rent, lease, sublicense or loan the software components of the Amdocs System, the software components used in performing the Services or the Product Documentation to any other party or make such software components or the Product Documentation available to others (including, but not limited to, MVNOs) in a service bureau or outsourcing arrangement or for any similar commercial time-sharing, data processing or third party use; and/or (b) Disassemble, reverse engineer, or decompile or modify the core software components of the Amdocs Systems or the software components used in performing the Services.	➢ Thus, Mobilicity does not own the property in question but is merely permitted to use it as stipulated in the MSA.
S. 13.8 MSA. Following a lawful termination by DAVE or expiration of this Agreement, Amdocs, at DAVE's option, shall grant to DAVE a perpetual and non-transferable license to use the Amdocs Systems for DAVE's businesses. Amdocs shall also offer to DAVE the right to order maintenance services (including enhancements and upgrades) and support services with respect to the Amdocs Systems, to the extent such services are made available to Amdocs' other customers. Such licenses and services will be provided at prices and payment terms as set out in **Schedule 5**, and as otherwise agreed in writing by the Parties, pursuant to Orders placed under this Agreement (for which purpose this Agreement will be deemed to survive).	➢ In order to obtain a perpetual license, Mobilicity would be required to pay a further fee to Amdocs. Since it does not own the software or a perpetual license to use it, Mobilicity must pay the license fees owed to Amdocs. ➢ In other words, not only do the Amdocs Systems referred to in the definitions of Implementation Fee and Implementation constitute an integral part of the ongoing service provided by Amdocs, but their use is anticipated to continue even beyond the date on which

PROVISION	IMPLICATIONS
	the MSA expires.
S. 13.9 MSA. At DAVE's request, Amdocs shall provide DAVE (for up to twelve (12) months following the Termination Date) with assistance for the transitioning of responsibility for the Amdocs Systems components to DAVE or another service provider ("Termination Assistance"). Termination Assistance will be charged at the fees set forth in **Schedule 5**.	➢ S. 13.9 contemplates the transitioning, post-implementation, of the Amdocs Systems to another service provider. Considering that Amdocs Systems forms part of the consideration for payment of the Implementation Fee (see s. 1.1 of Schedule 5), this provides further evidence of the fact that the Implementation Fee corresponds to payment for ongoing services.
S. 12.1.3 MSA. In consideration for the granting of the License as set out in Section 8, DAVE shall pay Amdocs the initial term license fee (included in the implementation fees) as set out in **Schedule 5**, and, if applicable, the mutually-agreed license fee for each Renewal Term entered into by the Parties.	➢ If the initial term license fee pertains only to the start-up period, and the only other fees owed in consideration for the granting of the License are those agreed to for the purpose of Renewal Terms, then the fees owed during the initial term beyond the start-up period are never charged. ➢ It has already been explained, above, why Mobilicity's contention that the initial term license fee was included in the Monthly fees should not be accepted.

30. Given the clarity of the MSA as regards the initial term license fee, Mobilicity's refusal, since the Initial Order, to pay anything whatsoever for the software license is utterly unreasonable, unfair and unlawful. Amdocs is within its rights in demanding that the license be paid for, considering the continued use of and benefit derived from the software, as highlighted by authors Ullmann and McCready:

[TAB 7] David Ullmann and Melissa McCready, "Licensed to Steal: The Rights of IP Licensors and Licensees in an Insolvency" (2010) Ann. Rev. Insolv. Law 6 (WL Can)

> In either a BIA proposal or CCAA restructuring, a stay of proceedings is triggered or typically ordered at the outset. The stay of proceedings prevents the usual remedy which exists in all licence agreements to terminate the licence if payments are outstanding and are not made. It also prevents the licensor from terminating the licence solely because the licensee has filed for insolvency protection, notwithstanding the usual clause in the licence agreement that would allow the licensor to do so.
>
> <u>In what seems to be an attempt to partially balance this unfairness, both the CCAA and the BIA do allow one new power to the licensor which arises during the licensee's restructuring. Both statutes expressly allow the licensor to require that payments be made for the ongoing "use" of licensed property made by the debtor after filing for protection. This has the effect of allowing, but not requiring, the licensor to unilaterally alter the terms of its licence with the licensee so as to require payment on a C.O.D. basis for the duration of the licensee's restructuring.</u>
>
> What if, despite the ability of the licensor to demand C.O.D. payment, the licensee not only does not want to pay C.O.D. but in fact does not want to pay at all, or wants to pay on its own unilaterally imposed terms? Such was the case in *Re Allarco Entertainment Inc*. There the debtor-licensee attempted to use the CCAA proceedings to unilaterally renegotiate the payment terms of a licence agreement.
>
> […]
>
> Allarco stands for the proposition that there is no authority under the CCAA for the court to grant an order that alters a licence agreement to create payment terms more favourable to the licensee if the licensee is using the IP post-filing. <u>If the IP is used, the licensor can demand immediate payment for such use. If confronted, as Allarco was, with a regime that it cannot afford, the licensee's only option is either to terminate the licence, as it did in the case of Alliance following good faith negotiations, or to reach an agreement as it did with others.</u> [Our emphasis]

31. In order to determine the post-filing license fee payable by Mobilicity as consideration for the ongoing use of Amdocs' software, the CAD$10,000,000 due for "the initial term license fee" can be prorated. This is the only fair and logical method of attributing value to "every day" of use by Mobilicity. Given that the Initial Term covers a 72-month period (from May 2010 to April 2016, as per the Fees Schedule), the monthly payment comes to $138,888.89 ($10,000,000/72 months).

32. Prorating the initial term license fee provides a commercially reasonable outcome. As stated by Mark Sumner at para. 40 of his affidavit dated February 7, 2014:

> […] Had the parties decided to establish a payment structure on a "pay-as-you-go" basis over the same 72-month period, it is likely that an amount closely approximating the aforementioned figure of $138,888.89 would have been established.

33. The court would not be remiss in varying the contract so as to allow payment for post-filing software use in this manner. As stated in *Allarco*:

[TAB 3] *Allarco Entertainment Inc. (Re), 2009 ABQB 503, 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140*

> 5. […] At this stage of the proceedings, the broad wording of the CCAA, which is remedial legislation, does allow the courts to make some contracts between debtors and creditors: for example, with respect to utilities such as electricity, the court can allow the service provider to be paid not only the usual utility rate but also a security deposit: *Hydro-Québec*. **Another example is the court's decision that some contract provisions relate to past services, and cannot therefore be enforced, and that other contract provisions relate to post-protection services for which the debtor incurs an obligation of immediate payment** […]

34. Moreover, as stated by the court in *Re Air Canada*, splitting obligations into pre- and post- filing categories is in accordance with commercial reasonableness*:*

[TAB 8] *Air Canada, Re*, 2004 CarswellOnt 643, [2004] O.J. No. 576, 47 C.B.R. (4th) 182

> [5] In my view, the substance of this obligation and an interpretation in accordance with commercial reasonableness is that the reconciliation obligation is to be split into a pre-filing and post-filing obligation of AC. To do otherwise would, as well, allow TA to obtain a priority as to such reconciliation payments which is unwarranted vis-a-vis the other lessors who are compromising their claims under their ongoing leases. TA did not dispute the split of the various hourly components as set out at para. 14 of the AC factum. It would seem to me that the reconciliation payments claim should be divided in accordance with that para. 14 chart.

35. As the Applicants do not wish to pay any part of the Implementation Fee, including the initial term license fee, they have developed an argument according to which the license fee is in fact included in the fees due for Outsourcing Services. They suggest that s. 8.1 MSA supports this contention. The relevant section reads as follows:

> S. 8.1.1 Subject to the terms and conditions of this Agreement and payment of fees and amounts for the Outsourcing Services which are or may become due pursuant to this Agreement or Orders hereunder, Amdocs hereby grants to DAVE a non-transferable right and license during the Initial Term, to use the Amdocs Systems and Product Documentation in conjunction with the Outsourcing Services solely for DAVE's telecommunication business purposes in the Territory and in order to receive Amdocs' Services. This software, as modified for DAVE's specific requirements, is intended for DAVE's sole use.

36. The statement in the Lausman affidavit that "Amdocs grants Wireless a license in consideration for 'fees and amounts for the Outsourcing Services'" is not and cannot be supported by any of the facts or the contractual documents.[10] Indeed, only the Outsourcing Services themselves are provided in consideration of those fees and amounts. A more reasonable and logical interpretation of s. 8.1.1 is that if *either* the terms and conditions of the MSA (including payment of the initial term license fee) are not respected *or* the Outsourcing Services not paid for, the license will be withheld. The initial term license is provided in consideration for full payment thereof, as provided in s. 12 of Schedule 5.

37. If there is any doubt on this point, s. 12.1.3 of the MSA further provides that:

> In consideration for the granting of the License as set out in Section 8, DAVE shall pay Amdocs the initial term license fee (included in the implementation fees) as set out in **Schedule 5**, and, if applicable, the mutually-agreed license fee for each Renewal Term entered into by the Parties.

38. Amdocs acknowledges that Mobilicity has kept up with its payments for the Outsourcing Services, which are covered by the Monthly Fees; however, this is irrelevant to the question of whether Mobilicity must continue to pay for the license covering the software used to provide those Outsourcing Services since the issuance of the Initial Order.

PART IV - RECONCILIATION PAYMENTS

39. Section 6.5 of Schedule 5 provides that Mobilicity shall purchase Additional Services worth a minimum of CAD$4.05 million from Amdocs between 2013 and 2017. This "$4.05M Commitment" is broken down into "annual minimum obligations" of $850,000 for each of 2013, 2014, 2015 and 2016, and $650,000 for 2017.

40. In the event that Mobilicity neglects to purchase its minimum obligation for a given year, a "Reconciliation Payment" worth the difference between said obligation and the value of any Additional Services actually purchased becomes payable. The relevant section states:

> 6.5 […] DAVE shall retain Amdocs, during the period of January 1, 2013 to December 31, 2017, by way of various Work Orders, to provide services in respect of Additional Services projects (the "Additional Services Projects") having an aggregate value of no less than four million and fifty thousand ($4,050,000) Canadian dollars (equivalent to 35,217 development hours) ("$4.05M Commitment"). Such $4.05M Commitment is applicable to Additional Services Projects supporting DAVE's business growth. Only one-

[10] Lausman Affidavit, para. 27.

> time fees for Amdocs provided professional services and/or Amdocs products may be counted towards the $4.05M Commitment. […]
>
> The aggregate of $4.05M Commitment must meet the annual minimum obligations, as follows:
>
> 2013 calendar year - $0.850 Million
>
> 2014 calendar year - $0.850 Million
>
> 2015 calendar year - $0.850 Million
>
> 2016 calendar year - $0.850 Million
>
> 2017 calendar year - $0.650 Million
>
> […] In the event that DAVE has not met its annual minimum obligation in either the 2013, 2014, 2015 or 2016 calendar year, on or before December 31 of the applicable calendar year, DAVE shall pay Amdocs, on a non-refundable basis, the difference between the amounts paid in the calendar year and the annual minimum amount committed above (the "Reconciliation Payment")

41. In 2013, the Work Orders issued by Mobilicity which counted towards its "annual minimum obligation" for that year only amounted to $35,400, as evidenced by change request nos. 317, 274 and 275, and this despite a reminder from Amdocs that the obligation had not been met.

42. The Reconciliation Payment due as a result is equal to the difference between the $850,000 "annual minimum obligation" and $35,400, which is $814,600.

43. An invoice for the Reconciliation Payment was issued by Amdocs on December 31, 2013 but Mobilicity has, to date, refused to pay it or to issue additional Work Orders so as to meet its "annual minimum obligation."

44. Instead, Mobilicity claims that the Reconciliation Payment is not due and that its obligation to meet the $4.05M Commitment has been terminated by virtue of the fact that Additional Services were not requested after the date of the Initial Order. More specifically, the Lausman affidavit claims that Work Orders for Additional Services constitute "distinct and separate agreement[s] between the parties."[11] Yet the Work Orders themselves provide that:

> [Work Orders] shall be governed by the terms and conditions of the Managed Services Agreement dated October 15, 2009 by and between Data & Audio-Visual Enterprises Wireless Inc. ("Mobilicity"), Amdocs Canadian Managed Services Inc. and Amdocs Software Systems Ltd, as amended (the "Agreement").

[11] Lausman affidavit, para. 30.

45. Even if the Work Orders did constitute distinct agreements, and Mobilicity were within its rights in cancelling a given Work Order, it would still be obliged to ensure that its "annual minimum obligation" was met by December 31 of each year by placing new Work Orders, given that the $4.05M Commitment arises from the MSA and not from the Work Orders themselves.

46. If Mobilicity no longer wishes to be held to the $4.05M Commitment, or indeed to any of its other obligations pursuant to the MSA, then the MSA must be disclaimed or renegotiated. Mobilicity cannot be permitted to disregard, at its sole discretion, a selection of its obligations under the MSA going forward while Amdocs is forced to fully perform its own obligations. As further discussed below, to sanction this would be to allow Mobilicity to rewrite the MSA to Amdocs' detriment, which would be grossly unfair.

PART V - ADDITIONAL SERVICES

47. On January 1, 2010, Work Order no. 2011.002.0 for certain "Additional Services" was issued by Mobilicity and accepted by Amdocs. Its Term was defined as the term of the MSA, and, like all Work Orders, it was to be governed by the terms and conditions of the MSA. The Work Order was amended on more than one occasion, and its current payment terms are stated at s. 4 of its third amendment, which provides for the annual payment by Mobilicity to Amdocs of a "Fixed Price" of $313,700.

48. Mobilicity was duly invoiced for the abovementioned amount on December 31, 2013. However, on January 14, 2014, it responded with an email indicating that the Additional Services in question would no longer be required and that payment would not be forthcoming.

49. The MSA does not allow Mobilicity to terminate the abovementioned Work Order by email weeks after payment was due. Indeed, the termination provisions found in the MSA state that nine months' notice is required for early termination for convenience (s. 13.5.1 MSA). As notice was not provided, Amdocs is entitled to payment for nine months' services in lieu of notice. The prorated monthly amount due for 2014's Additional Services amounts to $235,274.99 ($313,700/12 months).

PART VI - DISCLAIMING THE MSA

A. Mobilicity cannot disclaim parts of the MSA

50. At no point has Mobilicity or the Monitor indicated to Amdocs that the MSA, or any part thereof, is to be disclaimed. This is hardly surprising in view of Amdocs's involvement with virtually every aspect of Mobilicity's business. As stated in Mark Sumner's affidavit dated February 7, 2014:

> 18. Throughout the relationship between Mobilicity and Amdocs until today, Mobilicity depends entirely on Amdocs for the daily performance of DAVE Wireless' billing, payments processing and customer care systems, all of which have direct impacts on the related customer experience and, consequently, on its general competitiveness in Canadian wireless industry.
>
> 19. In fact, it may be safely asserted that without the services currently being provided by Amdocs and the use of Amdocs' software, Mobilicity simply would not be able to continue its operations.

51. Yet, as described in previous sections of this factum, it appears that Mobilicity, while continuing to benefit from and heavily rely on Amdocs' services pursuant to the MSA, in effect wishes to disclaim certain portions thereof, namely its obligation to meet its $4.05M Commitment and its obligation to pay the "Fixed Price" owed for Work Order 2011.002.0.

52. S. 32 of the CCAA provides that:

> **32.** (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

53. Naturally, neither this provision nor any other provision in the CCAA provides that a debtor company may disclaim select portions of an agreement. Indeed, the courts have held that if a debtor company finds itself unable to meet certain contractual obligations post-filing, it may either enter into negotiations to vary the contract in question or terminate the contract as a whole.

[TAB 3] *Allarco Entertainment Inc. (Re), 2009 ABQB 503, 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140*

> [46] At this stage, that is the stage of the initial order, whatever services are provided post-protection are offered by service providers who are entitled to be paid for those services. Generally, two payment regimes will be adopted. One is that ongoing service providers will accept, at least until the presentation of a plan, some new, negotiated, plan. Obviously if the parties to a contract agree to a variation of the terms of that contract, that variation governs. However, a service provider is not required to provide

post-protection services without the right to claim immediate payment. If a service provider will not agree to modify its contractual payment terms in order to provide post-protection services, then the debtor must either terminate the contract or pay the contractual amount. In reaching this conclusion, I rely on the fact that, at the stage of the initial order, it would be inappropriate for a court to attempt to draw up a contract for the parties. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the services provided. Not only are courts not business experts, but the cost of attempting to bring the court up to speed on the reasons that a creditor and a debtor each have for advancing a payment proposal would exhaust the financial capacity of an already insolvent debtor. At the stage of the presentation of a plan, the situation is, of course, different: at that stage the court has much more information on which to rely, including the business acumen of all other creditors.

[TAB 9] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 4218

[12] Through their Motion, the Petitioners also ask the Court to authorize BCFPI to amend the Trust Agreement in accordance with Amendment No 1 (the “Amended Trust Agreement”). Amongst others, the Petitioners want to dissociate BCFPI from all of its obligations under the Trust Agreement and to create a committee of beneficiaries who would take over from BCFPI the power to give directions to RTC and to make all decisions regarding the funds still to be managed.

[13] RTC disagrees with most of the amendments proposed to the Trust Agreement. It does not want to dissociate BCFPI from the Trust Agreement and to be forced to deal from now on with a committee of beneficiaries, on terms and conditions that it finds unacceptable.

[…]

[107] In the Motion, BCFPI asks the Court to also authorize it to amend the Trust Agreement entered into with RTC, notably to dissociate itself from all of its obligations under the Trust Agreement.

[108] There is no provision in the Trust Agreement dealing with amendments and the interested parties, including BCFPI, RTC or, for that matter, the members listed in Schedules A, B and C to the Motion, do not agree on the nature, extent or wording of the amendments sought.

[109] Under these circumstances, the Court considers that the Trust Agreement entered into between BCFPI and RTC cannot be amended and that BCFPI cannot ask the Court to modify it. This negotiation belongs to the parties themselves. It is not for the Court to substitute itself to this process.

[110] It is inappropriate for a Court to attempt to draw up a contract for the parties when these parties do not agree to modify its contractual terms. Contracts represent a law which private parties have agreed applies to them and they normally cannot be varied by the Courts. This remains true as well in the context of a CCAA restructuring.

[111] Without RTC's consent, BCFPI cannot have the Trust Agreement amended to remove all of its rights and obligations and give those rights and obligations to a committee of beneficiaries.

[112] For the time being, the Trust Agreement entered into between BCFPI and RTC is still in force and has not been terminated.

54. Thus, Mobilicity has three options available to it: 1) fully perform its obligations under the MSA 2) terminate the MSA or 3) vary the terms of the MSA through negotiations with Amdocs. As regards the third option it bears mentioning that, as stated in *Re Air Canada*, negotiations regarding contractual modifications are "a two-way street" and if a contract is not modified through such negotiations then the parties remain liable for their existing obligations:

[TAB 8] *Air Canada, Re, 2004 CarswellOnt 643, [2004] O.J. No. 576, 47 C.B.R. (4th) 182*

> [11] However, it does not appear to me that the conduct of TA in response to AC's invitation to negotiate would support AC's claim for promissory estoppel. Negotiation is a two-way street. I also note that TA neither billed AC at the $115,000 US per month rate nor accepted payment at that rate. Certainly, if there had been any conduct, acknowledgement or statement by TA which would support a modification of the contractual arrangement so that the rent would be $115,000 US per month, then there would be no necessity for any negotiation past that event as it would have been a fait accompli. AC is not in my view, able to point to any such turning point; certainly the tacit acceptance and indeed entering into of negotiations by TA cannot be construed as holding out in words or by conduct, audibly or in silence, that TA was willing to accept the $115,000 US per month rent even if there were no successful conclusion to the negotiations. […]

55. The purported partial termination of the MSA against Amdocs' wishes would amount to an outright modification of its terms without any negotiation. Such unilateral modifications should not be sanctioned by this court, which should refuse to order or recognize any partial termination of the MSA. To quote the court in *Allarco* once more:

[TAB 3] *Allarco Entertainment Inc. (Re), 2009 ABQB 503, 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140*

> 5. […] It is not necessary to articulate the principle which applies to the jurisdiction of the court in relation to contracts, s. 11.3(a) of the CCAA, and initial orders, but if that were required, it may be that, in the initial order courts have only a limited jurisdiction to affect contractual rights and that contractual payment terms negotiated between debtors and creditors generally represent the payments which debtors are required to make if they use the services set out in those contracts post-protection as that scale of payment best represents both a fair and reasonable price for the services and business in the ordinary course. This principle arises from the common law's respect for contractual obligations. Generally, contracts cannot be varied by courts: contracts represent, in effect, a law which private parties have agreed applies to them. Court can interpret or rectify, but not vary, contracts. […]

B. The criteria for disclaiming the MSA as a whole are not met

56. Even if Mobilicity wished to disclaim the MSA as a whole, which it should not logically wish to do, given the crucial and indispensable nature of the services rendered by Amdocs, the criteria for doing so have not been met in the present instance. Subsection 32(4) CCAA states:

Companies' Creditors Arrangement Act, RSC 1985, c C-36

> 32 (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

57. In the present case, the abovementioned criteria are not met:

(a) As indicated above, we do not believe that the Monitor has the power to approve a partial disclaimer of the MSA as such disclaimers are not contemplated by the *CCAA*. In any event, the Monitor has not, to our knowledge, approved or sought to approve the partial disclaimers that Mobilicity has purported to make.

(b) Disclaiming the MSA would in fact be detrimental to the prospects of a viable compromise or arrangement. It is thanks to Amdocs' ongoing services that Mobilicity is currently operating an active business, and one which may be sold as a going concern.[12]

(c) Finally, Amdocs will suffer significant financial hardship in the event that the MSA or any part thereof is disclaimed. The "$4.05M Commitment" and payment of the "Fixed Price" under Work Order 2011.002.0 were taken into consideration by Amdocs in setting its prices and accepting the payment schedule agreed to in Amendment 1 to the MSA, and if they are now removed from the agreement, Amdocs will be denied significant benefits for which it bargained and upon which it relied. As stated in Mark Sumner's affidavit of February 7, 2014, at para. 57:

> […] Amdocs had structured its service offerings and fee proposals as a function of an overall revenue plan adapted to its relationship with and obligations towards Mobilicity. This revenue plan and the revenue streams contemplated therein, which are eventually integrated as part of the MSA, are used to determine the type and quantity of resources dedicated to the MSA. [...]

[12] Sumner Affidavit (February 7, 2014), para. 45.

[TAB 10] *Boutique Jacob inc. (Arrangement relatif à)*, 2011 QCCS 276, 2011 CarswellQue 709, 74 C.B.R. (5th) 103

> [52] Le but recherché par l'article 32 est double :
>
> > a) Préciser dans quel cadre et à quelles conditions un débiteur peut résilier un contrat;
> >
> > b) Empêcher que par le fait de cette résiliation, le créancier ne soit lui-même placé dans une situation précaire.
>
> [53] Quant à ce deuxième objectif, il faudrait que le créancier établisse que dans la situation qui lui est propre, l'absence de ces revenus ou encore du profit généré par cette activité fragiliserait de façon importante sa situation financière.

58. In addition to the foregoing, even if the termination of a contract pursuant to s. 32 need not be essential to the debtor's survival, mere evidence to the effect that a company may be more profitable following such termination is insufficient to justify such an action. As stated in *Doman Industries et al, Re*:

[TAB 11] *Doman Industries et al, Re*, 2004 BCSC 733, 2004 CarswellBC 1262, 1 C.B.R. (5th) 7

> [38] In my opinion, therefore, there is insufficient evidence for me to conclude that the proposed contract terminations are fair and reasonable in all of the circumstances. All that the evidence available to me supports is a conclusion that the restructured company will have an opportunity of being more profitable if the contracts are terminated. It has not been demonstrated that the loss of this opportunity will outweigh the prejudice which will be suffered by Hayes and Strathcona if the contracts are terminated. In weighing the competing interests on the evidence before me, it is my conclusion that I should exercise my discretion against approving the contract terminations. I dismiss the application with costs.

PART VII - ORDER REQUESTED

59. For the reasons set out above, the Applicants request an Order substantially in the form of the Draft Order set out at Tab A of the Applicants' Motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of September, 2014.

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Dentons Canada LLP

Lawyers for Amdocs Canadian Managed Services Inc. and Amdocs Software Systems Limited

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Sproule v. Nortel Networks Corporation*, 2009 ONCA 833, 2009 CarswellOnt 7383, 59 C.B.R. (5th) 23

2. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, 2007 SKCA 72, 2007 CarswellSask 324, 33 C.B.R. (5th) 50

3. *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503, 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140

4. *Hydro-Québec c. Fonderie Poitras ltée*, 2009 QCCA 1416, 2009 CarswellQue 7456, 56 C.B.R. (5th) 18

5. CED 4th (online), Contracts, “Interpretation of Contract: General Principles” (IX.1)

6. Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2nd ed, (LexisNexis Canada: 2012, Markham) at p. 95.

7. David Ullmann and Melissa McCready, “Licensed to Steal: The Rights of IP Licensors and Licensees in an Insolvency” (2010) Ann. Rev. Insolv. Law 6 (WL Can)

8. *Air Canada, Re*, 2004 CarswellOnt 643, [2004] O.J. No. 576, 47 C.B.R. (4th) 182

9. *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 4218

10. *Boutique Jacob inc. (Arrangement relatif à)*, 2011 QCCS 276, 2011 CarswellQue 709, 74 C.B.R. (5th) 103

11. *Doman Industries et al, Re*, 2004 BCSC 733, 2004 CarswellBC 1262, 1 C.B.R. (5th) 7

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

General power of court
11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Rights of suppliers
11.01 No order made under section 11 or 11.02 has the effect of
(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
(b) requiring the further advance of money or credit.

Stays, etc. — initial application
11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
Stays, etc. — other than initial application
(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
Burden of proof on application
(3) The court shall not make the order unless
(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.
Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

[…]

Disclaimer or resiliation of agreements
32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement

to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

Court File No: CV-13-10274-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.
Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO

FACTUM
(Returnable October 2, 2014)

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