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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS INC.

Applicants

REPLY
AFFIDAVIT OF JAMES RILEY
(Sworn October 19, 2013)

I, JAMES RILEY, of the City of Toronto in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the Chief Operating Officer, Managing Director and Partner in The Catalyst Capital Group Inc. ("**Catalyst**") and have been directly involved in these proceedings, as well as in the oppression proceedings instituted by Catalyst and the proceedings initiated by the Mobilicity Group [1] under the *Canada Business Corporations Act*, R.S.C., 1985 c. C-44 ("**CBCA**"). As such, I have personal knowledge of the matters hereinafter deposed to, except when otherwise stated in which case I have identified the source of my information and belief.

[1] In this affidavit "Opco" refers to Data & Audio-Visual Enterprises Wireless Inc., the corporate entity which owns and utilizes spectrum and carries on active business with its wireless customers and suppliers. "Holdco" refers to Data & Audio-Visual Enterprises Holdings Inc., the corporate entity which is Opco's parent, and whose sole asset (other than certain tax losses) is its 100% equity interest in Opco.

2. This affidavit is sworn in reply to the Affidavit of William Aziz ("**Aziz**"), dated October 16, 2013 (the "**Responding Affidavit**").

STAY EXTENSION

(a) Aziz's Description of Events Since September 30, 2013

3. In paragraphs 7-28 of his Responding Affidavit, Aziz makes reference to the activities and business operations of the Mobilicity Group since the Initial Order herein dated September 30, 2013, and summarizes why a continuation of the stay granted at that time is being sought.

4. Catalyst supports any and all reasonable and responsible efforts to sell Opco's business so as to generate funds to meet Opco's obligations, provided the rights and interests of unconflicted First Lien Note Holders are fully protected. For that reason, Catalyst supports a continuation of the stay as requested by the Applicants.[2]

5. In the above paragraphs, Aziz describes various steps taken with third parties and suppliers, with the apparent purpose of maintaining Opco's business activities. Aziz further asserts that since the commencement of the CBCA proceedings, "the subscriber base of the Mobilicity Group has remained relatively stable", and that steps have been taken "...with a view to attract new customers and upgrade existing customers".

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[2] As described in my prior affidavit, a large number of First Lien Note Holders also hold debt at the Holdco level. These stakeholders have economic interests which conflict with the interests of the First Lien Note Holders who do not hold debt at the Holdco level. As in my prior affidavit, the First Lien Note Holders with these conflicting interests are referred to herein as the "**Conflicted First Lien Holders**". In para 34 below, I make reference to a chart which depicts, to the best of Catalyst's knowledge and belief, the identity of these Conflicted First Lien Holders and other stakeholders, as well as the quantum of their interests.

6. To be clear, the "Mobilicity Group" does not have a subscriber base. As indicated in my prior affidavit herein, Opco is the corporate entity that conducts the wireless business and it is Opco that owns the spectrum and has subscribers. In the result, other than tax losses at Holdco whose quantum and value is unclear, Opco owns all of the material assets that could be the subject of any potential sale transaction.

7. In these proceedings the Applicants have emphasized the importance of Opco's customer base and the need to ensure stability in order to maintain and expand that base. While the spectrum is and will continue to be Opco's most valuable asset, the existence of a subscriber base also has value for the purpose of any potential sale transaction. In this context, the more active subscribers exist at Opco, the more valuable Opco's business would be in any potential sale.

8. Based upon affidavits, financial statements, and quarterly reports, which have been issued by the Mobilicity Group, the number of subscribers at Opco over the last 12 months can be summarized as follows:[3]

December 31, 2012	271,337
March 31, 2013	254,457
June 30, 2013	235,422
September 29, 2013	194,000
October 31, 2013 (est.)	180,000

3 The figures with respect to the Mobilicity Group's subscribers can be found in several places in the record but are most conveniently grouped at page 6 of the MD&A contained within Exhibit "B" to my supplemental affidavit sworn September 25, 2013 in the CCAA proceedings commenced by Catalyst.

9. Based upon the above numbers, I cannot understand how Aziz can say that Opco's customer base is stable. In fact, Opco lost subscribers at a rate of 5,626 subscribers per month between December 31, 2012 and March 31, 2013, 6,345 subscribers per month between March 31, 2013 and June 30, 2013, and 13,807 subscribers per month between June 30, 2013 and September 29, 2013. Aziz's estimate for the month of October suggests that the attrition of approximately 14,000 subscribers a month is continuing. At this rate, Opco will have approximately 152,000 subscribers at December 31, 2013 and approximately 124,000 subscribers by the end of February 2014.

10. Catalyst is very concerned that the continuing and accelerating decrease in Opco's customer base has had and will continue to have a material adverse effect on the value of its business, and hence, the proceeds that might be realized in any sale of Opco's business.

11. In his Responding Affidavit, Aziz does not address Catalyst's belief and concern that there has been a material change in Opco's cash expenditures and forecasts before and after June 30, 2013, and that this has adversely impacted the company's customer base. Rather, Aziz simply asserts that "...the Applicants have operated within the cash flow forecast (as previously filed with the Court in my Initial Order Affidavit...").

12. Consistent with the continuing loss of subscribers referred to above, these cash flows show declining revenues over the period. Opco appears to be caught in a vicious circle. Its diminishing customer base results in declining revenues. Without the cash required to maintain and improve service, conduct promotions, or undertake appropriate marketing efforts, its business appears to be deteriorating further. Opco's ever diminishing customer base creates even

more adverse pressure on revenues and the downward spiral continues. In these circumstances, I am not at all certain that the minimal DIP funding contemplated by the cash flows referred to by Aziz is adequate to maintain the value of Opco pending attempts to sell the business.

13. Aziz also states that "...the Applicants have already approached some suppliers about adapting their service offerings to the levels <u>that the Applicants now require</u>..." (<u>underlining added</u>). This suggests that even more service reductions are contemplated.

14. The foregoing accentuates the concerns which I have previously expressed that the reduction in weekly expenditures by Opco since June 30, 2013, (which presumably formed part of the projection referred to in the Mobilicity Group's June 30, 2013 financials), has resulted in a material reduction in support and maintenance of the customer base and has contributed to the accelerating decline in the company's subscriber base. As noted above, this trend is reflected in the deteriorating revenue contemplated in the cash flow projections which Aziz refers to in his Responding Affidavit. In my view this has had, and will inevitably continue to have, a negative impact on Opco's value.

15. The Mobilicity Group has ready access to detailed weekly cash flow projections and actual results available from and after (at least) February 6, 2013 to date: these materials were required to be prepared and provided to the Conflicted First Lien Holders pursuant to Articles 11.1(m), 11.2(b), 11.3(b), and 13(f)(i) of the Note Purchase Agreement. Catalyst has repeatedly attempted to obtain this information from the Mobilicity Group since early February. Its requests have been denied.

16. The foregoing documentation would help Catalyst (and the Court) understand the magnitude of the changes which have apparently been implemented to reduce Opco's ongoing expenditures, better assess the effects of such changes on Opco's subscriber base, and consider recommendations (including increased DIP funding) it might make to preserve Opco's value.[4] Unfortunately Catalyst has been shut out by the Mobilicity Group from having any such involvement.

(b) The "Proposed Transaction"

17. As previously described, the spectrum purchased by Opco in 2008 constitutes its most valuable asset. Aziz's Responding Affidavit suggests that this spectrum may be sold in a "Proposed Transaction".

18. Catalyst's information about the "Proposed Transaction" is primarily derived from Aziz's prior affidavits.

19. Based upon my reading of said materials, it is my belief that presently no offer has been made by any third party. Rather, it appears to me that the "Proposed Transaction" is a hoped for transaction which has been proposed by the Mobilicity Group, as opposed to a term sheet presented by any third party, let alone any agreement for a tangible transaction resulting from arm's length negotiations with any such third party.

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4 Catalyst has had extensive experience in the successful restructuring of insolvent companies and in enhancing stakeholder value. I believe this experience would be useful to the Mobilicity Group.

20. Unlike the Conflicted First Lien Holders,[5] Catalyst has been given no information about the "Proposed Transaction".

21. As in the case of the cash flow data, Catalyst has attempted to find out more about the "Proposed Transaction" through delivery of Requests to Inspect pursuant to the *Rules of Civil Procedure*. These Requests to Inspect were dated September 26, 2013 (in relation to the term sheet referred to in Aziz's September 25, 2013 affidavit), and October 11, 2013 (in relation to, *inter alia*, sale transaction documents referred to in Aziz's September 29, 2013 affidavit). To date, the Mobilicity Group has refused to provide the documentation relating to the "Proposed Transaction" or any other "expressions of interest" referred to in Aziz's affidavits. Now shown to me and marked as **Exhibit "A"** are the communications which demonstrate these efforts and the Mobilicity Group's refusal to provide the documentation.

22. The second source of Catalyst's information about the Mobilicity Group's "Proposed Transaction" has been from press reports, some of which were attached as Exhibit "V" to my affidavit sworn October 9, 2013. These materials reflect the fact that the media has reported that Telus is the prospective purchaser in the "Proposed Transaction".

23. I stand by my belief that it is highly unlikely that Industry Canada will approve any transaction involving a sale of Opco's 2008 spectrum to Telus or any other incumbent. While the Government has issued public statements indicating that it will review any proposed transaction on a case by case basis, since June 4, 2013 (the date of Industry Canada's decision to

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[5] Pursuant to Article 13(f)(ii) of the Note Purchase Agreement referred to in the prior affidavits ("**NPA**"), the Mobilicity Group is obligated to provide the Conflicted First Lien Holders with weekly updates about the status of any sale transactions.

deny approval of the Mobilicity Group's original transaction with Telus), the Government of Canada has made spectrum transfer rules even more restrictive, and has issued additional statements reiterating its concern about and its policy against transfer of spectrum assets that will result in increased concentration of such assets with incumbent wireless providers. Now show to me and marked as **Exhibit "B"** are true copies of Government Press Releases and policy announcements reflecting this.

24. If it is true that Telus is the potential purchaser in the "Proposed Transaction", it is also appropriate to note that Telus itself has recognized the adverse impact of the spectrum transfer rules announced by the Government of Canada on June 28, 2013. In this regard, Telus commenced an Application for Judicial Review in the Federal Court of Canada. Now shown to me and marked as **"Exhibit C"** is a true copy of Telus' originating application. In it, Telus alleges and relies upon the adverse impact of the Government's new spectrum transfer rules upon the marketability of spectrum.

25. The Application referred to above is part of an aggressive approach taken by Telus in its dealings with the Federal Government. Recent media reports also indicate that Telus' approach has included the institution of further legal proceedings against the Federal Government and has participated in an aggressive public relations campaign designed to influence and change the Government's policies in the wireless sector.

26. It is impossible to be certain whether Telus' activities as summarized above will help or hurt any attempts by Telus to obtain governmental approval for the acquisition of spectrum from Opco. Catalyst believes that the Government is highly committed to its existing policy, and that

recent events and announcements have created a more negative climate for any Telus transaction with the Mobilicity Group than existed last May. In my view there is a very substantial risk that any sale of Opco to Telus will never be approved.

27. It is evident, based upon a more careful review of the currently approved DIP provisions than was possible on September 30, 2013, that the DIP lenders also have concerns about the likelihood of any sale transaction. These concerns are reflected in the conditions which are contained in paragraphs 11.2(h) and 13(f) of the DIP Loan Agreement that was approved on an urgent basis by the Court on September 30, 2009. Now shown to me and marked as **Exhibit "D"** is a true copy of said provisions.

28. Given the ongoing deterioration in Opco's customer base and revenues, the uncertainties surrounding any Government approval for the transfer of spectrum to incumbent wireless providers like Telus, and the limited number of alternative potential bidders for Opco, I do not understand how Aziz could assert that "the Mobilicity Group has no information to suggest that its assets, and in particular its spectrum business, are deteriorating in value", and I disagree with this conclusion.

29. In Catalyst's opinion, the value of Opco, and consequently, the value of its security held in relation to the First Lien Notes, is very much at risk. That is why Catalyst (through the Affidavit of Gabriel De Alba, quoted at paragraph 38 of the Responding Affidavit) expressed concern about potential priming loans ranking ahead of the security for the First Lien Notes. No doubt these same concerns are what caused the Conflicted First Lien Holders (referred to by

Aziz as the Ad Hoc Committee) to object to any such priming loan, as was also described in paragraph 38 of the Responding Affidavit.

THE MOBILICITY GROUP'S OPPOSITION TO THE RELIEF SOUGHT BY CATALYST

30. The Responding Affidavit sets out the Mobilicity Group's position opposing the creation of an Opco Creditor Committee and its conclusion that the relief sought by Catalyst for a fair competition to achieve the best possible DIP financing is a "distraction".

(a) Opco Creditor Committee

31. Aziz implies that the Opco Creditor Committee sought by Catalyst would have inappropriate governance powers and that it would exercise undue control over Opco and/or the Mobilicity Group. I have difficulty reconciling these concerns with the degree of control that the Mobilicity Group has already ceded to the Conflicted First Lien Holders and to the current DIP lenders. Regardless, in seeking the creation of an Opco Creditor Committee, Catalyst does not have the inappropriate intentions assumed by Aziz.

32. On Tuesday, October 15, 2013, Jon Levin of Fasken Martineau DuMoulin LLP and I had an informal meeting with the Monitor and its counsel to discuss the relief sought by Catalyst on this Comeback Motion, including the possible establishment of the proposed Opco Creditor Committee that would be composed of a representative group of Opco creditors and that would be available to be consulted during the restructuring process. Catalyst envisions that such a committee could act as a helpful resource and sounding board with a view to facilitating a successful restructuring. This was a constructive meeting. Catalyst intends to have further

dialogue with the Monitor about the creation of an Opco Creditor Committee, with a view to presenting reasonable and appropriate terms of reference for, and a suggested composition of, such a committee prior to the return of its Comeback Motion.[6]

33. Aziz and the Mobilicity Group also reject the need for any Opco Creditor Committee on the basis that "[Aziz does] not believe that the Wireless Creditors have any unique interest that need to be protected by a committee in the current circumstances".

34. Aziz's conclusion ignores the structural conflicts between Opco and Holdco as set out in my prior affidavit, as well as the fundamentally different (and competing) financial interests of the Conflicted First Lien Holders referred to therein. To put the latter conflict in perspective, Catalyst has prepared a chart which represents, to the best of Catalyst's knowledge and ability, a summary of the financial interests held by the stakeholders at Opco and Holdco. Now shown to me and marked as **Exhibit "E"** is a true copy of this Chart. As appears from the Chart, many of the First Lien Holders (and, Catalyst believes, all of the members of the "Ad Hoc Committee") hold significant debt at the Holdco level which is, for all intents and purposes, unsecured and valueless.

35. Aziz's conclusion also ignores the fact that for the last 6 months, and continuing, notwithstanding its ownership of over $60 million of Opco First Lien Notes, Catalyst has been denied material information about the affairs of Opco and has been excluded from any discussions or involvement in the solutions available to deal with Opco's problems. By contrast, the group of Conflicted First Lien Holders with materially different financial interests have been

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6 Catalyst intends to include conflict of interest provisions applicable to all potential members of such a committee in such terms of reference.

effectively granted control of the process, and have also been provided with continuing and detailed insight into all of Opco's affairs, on a regular and detailed basis. This has given this group of stakeholders a very significant advantage over any unconflicted First Lien Note Holders (such as Catalyst).

36. Catalyst has set out its concerns about the February Financing and the conduct of the Conflicted First Lien Holders in prior filings with the Court, and I do not intend to repeat them. It is noteworthy to observe, however, that the material recently filed by the Mobilicity Group now shows that the Mobilicity Group had bound itself to initiate CBCA proceedings within 6 days of the announcement of the February Financing. Pursuant to the NPA, the Mobilicity Group was contractually required to include, as part of that restructuring, provisions that allowed the Conflicted First Lien Holders to convert tens of millions of their worthless Holdco debt into debt secured by Opco's assets in the form of Second Secured Notes falling due on May 31, 2013.

37. As in the case of the $8.25 million "Bridge Financing Fee" which was immediately payable and deemed to be fully earned on the first tranche of $15 million financing provided for in the NPA, the payment of substantial fees through the conversion of valueless Holdco debt to secured Opco debt was not disclosed in the press release issued at that time. This benefit is just one more example of the Conflicted First Lien Holders' efforts to obtain advantages for themselves, with the concurrence of the Mobilicity Group, in a manner which contravened the First Lien Note Trust Indenture. It also represents another instance of incomplete and inaccurate disclosure regarding the steps that the Mobilicity Group has taken to restructure its affairs.

38. This lack of disclosure is a small part of the current imbalance that exists whereby the Conflicted First Lien Holders have had access to ongoing detailed information about the affairs of Opco and the restructuring that is being attempted. This imbalance is aggravated by the continuation of the effective veto of the Conflicted First Lien Holders of any other financing options, and over any restructuring transactions.

39. The Opco Creditor Committee is intended to provide some redress to the above situation. I believe its creation would help reduce the acrimony that has arisen and would be a benefit to all concerned.

(b) DIP Loan Process

40. Aziz and the Mobilicity Group also oppose the relief sought by Catalyst with respect to a new DIP loan. I do not understand the reason for this position; as outlined below, Catalyst proposes a simple and expeditious procedure which would provide the Mobilicity Group with an opportunity to obtain a more flexible DIP loan on better financial terms.

41. Under cover of Catalyst's counsel's letter to the Monitor, dated October 9, 2013, Catalyst outlined the terms of a DIP loan facility which it was prepared to offer. Catalyst requested at that time that the Monitor not provide those terms to the Mobilicity Group, because of the provisions in the DIP Note Purchase and Guarantee Agreement which require immediate disclosure of same to the current DIP lenders. In Catalyst's view, such disclosure would have been inconsistent with a fair and level playing field and would have impaired the process sought by Catalyst to enable consideration of alternative DIP financing.

42. Now shown to me and marked as **Exhibit "F"** is a further letter that has been written to the Monitor about this issue. As appears from this letter, despite the foregoing concerns, Catalyst intends to deliver its proposed DIP financing to the Mobilicity Group. As noted in this letter Catalyst has outlined a suggested DIP solicitation process for the Monitor's consideration. If this process were to be implemented, Catalyst reserves the right to submit a modified DIP financing proposal, on potentially more attractive terms, as part of the process suggested in its correspondence.

43. The process described in this correspondence is meant to be efficient, simple and straightforward. The purpose is to allow the Monitor to review any proposals that are received and to report to the Mobilicity Group expeditiously (i.e. before the first draw contemplated in the cash flow forecast). In my view this does not create any "distraction": rather, it would create an opportunity for any party wishing to offer DIP financing to do so in accordance with a fair process, substantially different than the skewed procedure followed to date, in which all of the informational and other advantages were in favour of the Conflicted First Lien Holders. As noted above, the beneficiary would be the Mobilicity Group.

44. Catalyst disagrees with the statements contained in the Responding Affidavit that the Mobilicity Group has conducted a fair or thorough process to seek financing options.

45. In my view the "process" followed by the Mobilicity Group was fundamentally flawed. This "process" only favoured the Conflicted First Lien Holders. These parties had significant informational advantages by reason of the detailed information provided to them about Mobilicity's financial and business affairs. In addition, the Conflicted First Lien Holders also

were provided with the details of any conventional or DIP financing proposed by any other party, had an effective veto over any such financing proposals and a preferential opportunity to match such proposals if they chose to do so.

46. Catalyst's particular experience confirms my opinion that the process has not been fair and thorough, for the following reasons:

(a) in February 2013, the Mobilicity Board of Directors was advised that there was no need for any fiduciary out provisions in the financing then being considered because there was no other lender willing to consider bridge financing;

(b) in fact, emails between counsel at that time indicated that Catalyst was prepared to consider bridge financing;

(c) however, Catalyst was not advised of the change in circumstances which the Mobilicity Group says resulted in a need for a different form of financing at that time and was not given an opportunity to provide such financing;

(d) it is my understanding that, based upon the information referred to in subparagraph (a) above, Mobilicity Group's Board of Directors agreed to provisions which did not include any fiduciary out and which provided the Conflicted First Lien Holders with an effective veto over any alternative financing proposals;

(e) immediately after the Government's rejection of the Telus transaction Catalyst offered both conventional and DIP financing to the Mobilicity Group on highly advantageous terms, which included a resolution of Catalyst's oppression claims;

(f) the Mobilicity Group did not accept Catalyst's invitation to discuss its proposals; and

(g) Catalyst was also not advised that its proposed financing of $100 million was more than required.[7]

47. I further understand that, up until at least the end of August (and, possibly, throughout), the Mobilicity Group never entered into any discussions with any other perspective DIP lenders who, according to Mobilicity Group, had offered to provide DIP financing.

48. In light of the above, it is my opinion that the "process" followed was neither complete nor fair and was not in keeping with the care and attention required by the principles set out in *Soundair* and related authorities.

(c) Additional Components of the Responding Affidavit

49. Aziz also asserts in his Responding Affidavit that certain statements in my October 9th affidavit were inaccurate. The reasons for this assertion are set out in subparagraphs 69(a)-(e) of the Responding Affidavit.

50. I disagree with Aziz's conclusions.

51. In paragraph 69(a) of his Responding Affidavit, Aziz takes issue with the contents of Exhibit "C" to my prior affidavit. That Exhibit sets out a summary of the transactions, values,

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7 This level of financing was consistent with the $75 million recapitalization plan being advanced by the Mobilicity Group at the time (this plan stipulated that additional financing would be required by the Mobilicity Group before the end of 2013).

and obligations which would exist in the event of a sale of Opco's business, which is the course of action proposed to be followed in these CCAA proceedings.

52. The calculation of Opco's obligations in the context of such a sale transaction are substantially different than the snapshot recital of liabilities referred to by Aziz.

53. In particular, in a scenario involving a sale of Opco as currently being pursued by the Mobilicity Group, the obligations at the Opco level would include the Make Whole (Catalyst also believes that the Make Whole premium is currently due and owing).

54. Opco's liabilities upon such a sale also include trade and unsecured obligations which are substantially in excess of the $18 million figure referred to in paragraph 69(a) of Aziz's Responding Affidavit. Specifically, the $80.5 million figure attributed to the obligations consequent upon a sale transaction is based upon a combination of the following:

(a) a discounted and reduced estimate of the Mobilicity Group's accounts payable and accrued liabilities ($28,512,669 according to the Mobilicity Group's consolidated balance sheet as at July 31, 2013). This component was estimated to be $15 million;

(b) 50% of Opco's operating lease commitments as set forth in notes 6 and 16 to the Mobilicity Group's December 31, 2012 financial statements, based on a 10% discount and calculated to be $22,300,000;

(c) 50% of the net present value of Opco's service support commitments as set forth in said notes 6 and 16, based on a 10% discount and calculated to be $43,200,000.

55. I believe the above figures represent conservative estimates. Moreover, the above components do not include other relevant liabilities such as the cost of the CCAA proceedings and KERP obligations. With additional information, the obligations payable at Opco could be further refined.

56. The foregoing components were used to arrive at the estimate of $80.5 million of Opco obligations which would have to be paid or assumed in any sale transaction, as set out in Exhibit "C" to my prior affidavit. Aziz's analysis and assertions do not include these components. In the result, I confirm the estimates contained in Exhibit "C" in my prior affidavit and the conclusions reflected therein. From a practical and realistic standpoint, it is highly unlikely that the economic interests of the stakeholders at Holdco will derive any return from a sale of Opco.

57. In paragraph 69(b) of the Responding Affidavit, Aziz contends that my prior affidavit was inaccurate because the Proposed Transaction would pay all of Opco's obligations and "preserve any First Lien Note Holders right to argue for an entitlement to a 'Make Whole Premium'".

58. For the reasons previously stated, I believe that there is a very substantial risk that even if the "Proposed Transaction" ever becomes real, it will never be approved or implemented. In any event, there is no guarantee that all of Opco's obligations could be satisfied in any such prospective transaction. Nor is there any guarantee that the rights and interests of <u>unconflicted</u> First Lien Note Holders (like Catalyst) to the Make Whole would be preserved: as described below, no such guarantee existed in the structure of the prior transaction for which the Mobilicity Group initially sought approval. I also note Aziz's reference to "indications of value" of

Mobility's assets from "<u>other potential</u> transactions". I have no idea what this means. I do not believe that there are any "other transactions" that provide any reliable "indications of value".

59. Paragraph 59(c) of Aziz's Responding Affidavit claims that the objective of the Mobilicity Group is to maximize value for all stakeholders. Nowhere does Aziz acknowledge the fundamental conflict that exists in the Mobilicity Group structure. The reality is that the Mobilicity Group has committed itself to transactions and entered into covenants that favour the creditors at the Holdco level to the exclusion of and in a manner detrimental to the interests and rights of the unconflicted First Lien Note Holders of Opco.

60. Regarding paragraph 59(d) of the Responding Affidavit, because Catalyst has been totally excluded from and been denied information about the sale process, Catalyst does not know how any bids have been solicited. The simple fact is that the Mobilicity Group was unsuccessful in attracting any prospective buyers over a lengthy process late last year. I do not know whether, in that process, or subsequently, any attempt was made to sell Opco as a stand-alone entity. Given the merging of Opco and Holdco interests described previously, I question whether this was attempted.

61. I have previously commented upon my and Catalyst's belief that the value of Opco is deteriorating and the security for the First Lien Notes has been placed at risk. I disagree with the statements made by Aziz in paragraph 59(e) of the Responding Affidavit.

62. Aziz's Responding Affidavit also contains allegations regarding certain events relating to Catalyst's oppression application, in particular, with reference to the $71 million fund provided for in the May 28, 2013 CBCA Order issued by Justice Campbell.

63. It is true that the Mobilicity Group's CBCA application contained provisions which might have resulted in such a fund. What Aziz fails to explain is that up until the day before the return of that application, the Mobilicity Group's Acquisition Transaction contained provisions that enabled the Conflicted First Lien Holders to exercise an election by which they could unilaterally extinguish any such potential fund and eliminate any possibility for a Make Whole payment. The ability of the Conflicted First Lien Holders to exercise an election having this result was only abandoned as a result of Catalyst's strenuous opposition to these provisions: previously the Mobilicity Group had made it clear that the intent of the Telus Acquisition Transaction for which it was seeking approval was NOT to pay any Make Whole premium.

64. Aziz's affidavits also fail to refer to the fact that even after the above stratagem was abandoned by the Conflicted First Lien Holders, extensive negotiations continued between Catalyst and the Mobilicity Group regarding the form of the approval order being sought. As a result of these negotiations, specific provisions setting out the terms of the $71 million fund in a manner preserving Catalyst's ability to fully and effectively argue in favour of its entitlement to be paid its share of the Make Whole premium were agreed upon. But for Catalyst's strenuous opposition to the approval order originally sought by the Mobilicity Group, the above provisions would never have found their way into Justice Campbell's May 28, 2013 Order.

65. In my view, a description of Justice Campbell's Order and the process leading up to its issuance which omits the above facts is incomplete.

66. In paragraphs 42-54 of the Responding Affidavit, Aziz refers to certain correspondence regarding Catalyst's unsuccessful efforts to engage the Mobilicity Group in a dialogue about

financing options. Now shown to me and marked as **Exhibit "G"** is a true copy of additional communications to the Mobility Group's counsel which provide a fuller picture of what happened.

67. As indicated by the above communications, Catalyst took steps to schedule the cross-examination of Aziz because it wanted to avoid a repetition of the Mobilicity Group's earlier efforts to proceed with approval hearings in a manner which prejudiced Catalyst's ability to place all the facts before the Court. The above communications also show that Catalyst initiated the above steps after the Mobilicity Group had brushed off Catalyst's attempts at a dialogue in early June. Exhibit "G" above also demonstrates that despite the Mobilicity Group's continued unwillingness to engage in any dialogue, in early August Catalyst still sought to do so. The reason that no meeting took place prior to Aziz's cross-examination on August 16, 2013 was because Catalyst was advised that this was the <u>only</u> date that Aziz had available for any purpose.

68. The Responding Affidavit also makes reference to Exhibit N, a "side letter" sent to Catalyst in September 2013. As paragraph 55 of the Responding Affidavit and Exhibit N both indicate, the context was that a non-disclosure agreement already existed. In these circumstances, the substantive effect of the proposed "side letter" would have required Catalyst to agree to specific terms of the February Financing which favoured the Conflicted First Lien Holders and which Catalyst was contesting in its pending court application.

69. Finally, paragraph 58 of the Responding Affidavit again makes reference to a communication from Mr. Kestenberg to Mr. Moore on September 19, 2013. For some reason, as was the case in Aziz's September 29, 2013 affidavit, the information provided about this

communication is incomplete. Now shown to me and marked as **Exhibit "H"** is a true copy of communications with Mr. Kestenberg on September 19, 2013, which accurately summarized the discussion which took place between Mr. De Alba and Mr. Goldberg. I am advised by David C. Moore and verily believe that no reply was ever received to the communications contained in Exhibit "H".

CONCLUSION

70. I reaffirm the contents of my October 9, 2013 affidavit.

71. An Opco Creditor Committee established on terms of reference arrived at after further discussion with the Monitor is important to ensure a fair and balanced process going forward. In my view an opportunity for a fair and even handed DIP financing solicitation process is also important. I expect that any DIP financing resulting from such a process would be on more favourable financial terms, would not be subject to subjective conditions that make the current DIP financing available only at the option of the DIP lenders. Such a process would provide the Court with confidence that the DIP loan is the best facility available and was arrived at as a result of a fair and even-handed process, which took into account the interests of all stakeholders.

72. This affidavit is sworn in support of the relief sought in Catalyst's Notice of Motion dated October 8, 2013, and for no improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario this 19th day of October, 2013.

Commissioner for Taking Affidavits
(or as may be)

James Riley

Commercial List No CV 13-10274-00CL

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 8440522 Canada Inc., Data & Audio-Visual Enterprises Wireless Inc., and Data & Audio-Visual Enterprises Holdings Inc.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

REPLY
AFFIDAVIT OF JAMES RILEY
SWORN OCTOBER 19, 2013

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