

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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 SEARS CANADA INC., 9370-2751 QUÉBEC
INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT
SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488
CANADA INC., INITIUM TRADING AND SOURCING CORP.,
SEARS FLOOR COVERING CENTRES INC., 173470 CANADA
INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA
LTD., 4201531 CANADA INC., 168886 CANADA INC., AND
3339611 CANADA INC.

(the "**Applicants**")

**SECOND SUPPLEMENTAL MOTION RECORD
(CDTel Motion)
(returnable April 12, 2021)**

March 31, 2021

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TO: **THE SERVICE LIST**

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TAB 1

Companies Creditors Arrangement ACT and Sears Canada Inc.

Alain Harari
on Wednesday, March 24, 2021



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<p style="text-align: right;">Page 1</p> <p style="text-align: center;">Court File No. CV-17-11846-00CL ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST</p> <p>IN THE MATTER OF the COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED</p> <p>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.</p> <p style="text-align: center;">-----</p> <p>--- This is the Cross-Examination on Affidavit of Alain Harari, taken via Neesons, a Veritext Company's virtual platform, on the 24th day of March, 2021.</p> <p style="text-align: center;">-----</p>	<p style="text-align: right;">Page 3</p> <p style="text-align: center;">I N D E X</p> <p>WITNESS: ALAIN HARARI</p> <p style="text-align: right;">PAGE</p> <p>CROSS-EXAMINATION BY MR. MERSKEY..... 4</p> <p>**The following list of undertakings, advisements and refusals is meant as a guide only for the assistance of counsel and no other purpose**</p> <p style="text-align: center;">INDEX OF UNDERTAKINGS</p> <p>The questions/requests undertaken are noted by U/T and appear on the following pages: 20:3, 20:18, 28:16, 28:22</p> <p style="text-align: center;">INDEX OF ADVISEMENTS</p> <p>The questions/requests taken under advisement are noted by U/A and appear on the following pages: None.</p> <p style="text-align: center;">INDEX OF REFUSALS</p> <p>The questions/requests refused are noted by R/F and appear on the following pages: None.</p>
<p style="text-align: right;">Page 2</p> <p>A P P E A R A N C E S: (All via virtual platform) Alan Merskey, Esq., Peter Choi, Esq., for the Monitor, FTI Consulting Canada Inc. Daniel Naymark, Esq., for CDTel Inc.</p> <p style="text-align: center;">REPORTED BY: Joanne A. Lawrence, RPR</p>	<p style="text-align: right;">Page 4</p> <p>-- Proceedings commenced at 2:03 p.m.</p> <p>ALAIN HARARI: AFFIRMED.</p> <p>EXAMINATION BY MR. MERSKEY:</p> <p>Q. Mr. Harari, you're here to be cross-examined on two affidavits, the first sworn February 17th and the second sworn March 16th, both 2021; correct?</p> <p>A. Correct.</p> <p>MR. MERSKEY: And, Mr. Naymark, before I launch into the examination, I appreciate that the monitor's supplementary report made some suggested calculations and corrections to Mr. Harari's prior evidence, and I understand that you wish to express confirmation of those things on the record.</p> <p>MR. NAYMARK: That's correct. So specifically paragraphs 30 and 31 of the monitor's supplemental report, which is titled "Supplement to the 44th report," notes two reported errors to the calculations in Mr. Harari's initial affidavit and provides an updated set of calculations correcting for those identified errors. We've reviewed that in response to receiving that report, and we agree that those errors were, in fact, present as identified by the monitor. The monitor's</p>

<p style="text-align: right;">Page 5</p> <p>1 calculations correcting for them are broadly 2 correct. There is a -- I would say de minimus 3 further errors in the cents column in a couple of 4 places that add up to a grand total of an 5 overstatement of \$0.91. I'm content to just ignore 6 that because it's de minimus. If the monitor 7 considers it important, I can point out what those 8 are at some future point, but I don't feel a need 9 to do that, and I'm content to just use the 10 monitor's figures and not spend time on \$0.91.</p> <p>11 MR. MERSKEY: No, if you're content on 12 the monitor's figures, that's fine. We'll rely, 13 then, on the monitor's restatement of Mr. Harari's 14 numbers for the purpose of both court and any other 15 discussion that you and might have around the 16 issue.</p> <p>17 MR. NAYMARK: That's acceptable.</p> <p>18 BY MR. MERSKEY:</p> <p>19 Q. Okay. So to begin with, there's 20 no particular mystery to this cross-examination, 21 Mr. Harari. I've already spoken to your counsel, 22 Mr. Naymark, as to the primary purpose, the 23 information that we're seeking. So really, to 24 avoid any undue necessity to set up the record - 25 and we'll ensure it's fully accurate -- I actually</p>	<p style="text-align: right;">Page 7</p> <p>1 Mr. Harari can speak to that. The other thing that 2 we're pulling from the database - and this just 3 came in in the last couple of hours - is people in 4 that group called the active group who haven't 5 received a bill because they haven't used the 6 service in the prior 24-month period, which tracked 7 some of the language in the governing services 8 agreement at various points in time, so 24 months 9 preceding and then, you know, any given month. I 10 hope that's clear. It will be easier if you see it 11 in a table than if you hear me describe it using 12 words, but hopefully that's clear enough for now.</p> <p>13 MR. MERSKEY: I think that's probably 14 right, and it may be that we end up with some 15 undertakings that are answered fairly quickly, but 16 it's necessary for me to set up the record to get 17 the appropriate context for both parties, so let me 18 do that. To the extent -- so my questions are 19 going to be based on portions of the contract 20 between CDTel and Sears, and rather than labouring 21 through trying to get the document pulled up and 22 the Zoom access that I have at the moment, what I'm 23 going to do is give you the reference, as soon as I 24 pull it up, to the pages in Mr. Harari's affidavit, 25 which I imagine you both have separate soft or hard</p>
<p style="text-align: right;">Page 6</p> <p>1 am going to address you, Daniel, just for a minute 2 on the point because we've discussed the issue, 3 which is probably the only issue I want to ask 4 about on the cross-examination, and that's the 5 questions around billed accounts and enrolled 6 customers. And, obviously, up to you, but have you 7 had the opportunity -- and I'm not asking for 8 privileged information. I'm just trying to make 9 this cross go smoothly and quickly and have a nice 10 clean record for everybody to use. Have you had 11 the opportunity to explore that with Mr. Harari?</p> <p>12 MR. NAYMARK: I have, and we've spent 13 the last few days pulling updated numbers. I would 14 say we are just about done, and we'll be able to 15 share them with you, and you can put that in the 16 record in a form you consider appropriate.</p> <p>17 MR. MERSKEY: Okay.</p> <p>18 MR. NAYMARK: And I can add that the 19 categories of data that we're in the process of 20 pulling are two things: One, what CDTel internally 21 backs in its database and calls active customers -- 22 Mr. Harari can confirm this if you want him to, but 23 essentially it's everybody who's ever signed up and 24 hasn't had their account terminated for one of the 25 reasons that an account can be terminated.</p>	<p style="text-align: right;">Page 8</p> <p>1 copies to you, to the contract --</p> <p>2 THE WITNESS: Can I look at that?</p> <p>3 MR. MERSKEY: Absolutely. Absolutely.</p> <p>4 THE WITNESS: Oh, okay.</p> <p>5 BY MR. MERSKEY:</p> <p>6 Q. This is not a memory test, 7 Mr. Harari. I'm just going to take a minute to get 8 you the page numbers about where the relevant terms 9 are going to start. And so this starts at page 369 10 of your affidavit. The numbers are in the record 11 Mr. Naymark has provided in the upper right-hand 12 corner. So just let me know when you get to that 13 document.</p> <p>14 A. 360?</p> <p>15 Q. 3-6-9, yes. This is in your first 16 affidavit --</p> <p>17 A. Yes.</p> <p>18 Q. -- the responding record.</p> <p>19 A. I don't -- I have page 16. I 20 don't --</p> <p>21 MR. NAYMARK: Oh, in the exhibits 22 that -- I can screen share if that makes this 23 easier.</p> <p>24 MR. MERSKEY: Sure, that's fine. It's 25 page 369 of the record, Mr. Naymark.</p>

<p>1 MR. NAYMARK: Okay. Can everybody see 2 that up on their screens right now? 3 THE WITNESS: Okay. Yeah. Oh, this is 4 the original agreement. Okay. 5 BY MR. MERSKEY: 6 Q. Correct. 7 A. Okay. 8 Q. So whatever's easiest for you, 9 Mr. Harari, whether -- 10 A. No, I got it. I got it now. I 11 don't have the 369, but I have the agreement in 12 front of me, and if you can take me to the 13 particular page of this agreement, I can look to 14 it. 15 Q. Yes. So we're going to start at 16 page 1 of the agreement. And I'm not necessarily 17 going to have questions immediately. This is to 18 situate you with the contract, that's all. But 19 starting on page 1 of the agreement, page 369 of 20 the record, at the bottom of the first page, 21 there's a definition called "churn table." Do you 22 see that, sir? 23 A. Yes. 24 Q. And that says, "Means the chart 25 attached hereto at Schedule 2." On the following</p>	<p>Page 9 1 A. Right. 2 Q. Okay. I'm now going to pause for 3 a second. This is going to take me a minute to get 4 through the document, to the Schedule 2 that was 5 referred to as the churn table, but if -- you're 6 welcome to, if you know where it is, flip forward 7 to it at the same time. Okay. Let me know when 8 you get to Schedule 2. It is page -- 9 A. Got it. 10 Q. Okay. 40 of the document, and 11 it's page 408 of the record. And you'll see in the 12 second line, it indicates that residual percentage 13 based on, capital 'E', Enrolled, capital 'C', 14 Customer accounts at the end of each year? 15 A. Yes. 16 Q. And without taking you back to the 17 termination provisions in the contract, Mr. Harari, 18 you understand, I take it, that during the 19 operational life of the contract, CDTel was paying 20 certain percentages to Sears based on the net 21 revenues from the enrolled customer base; correct? 22 A. Yeah, from collected revenues. 23 Q. Collected revenues? And then 24 after the termination of the contract, however that 25 occurred, there was a provision for ongoing -- you</p>
<p>Page 10 1 page, page 2, page 370 of the record, there's a 2 definition of "enrolled customer." 3 A. Yes. 4 Q. And that says, Means a customer 5 enrolled in the LD program and/or the ComparAction 6 program and for greater certainty includes a 7 capital 'L' Legacy Customer and a capital 'N' -- 8 sorry, capital 'L', capital 'C', Legacy Customer, 9 and a capital 'N', capital 'C', New Customer. You 10 see that, sir? 11 A. Yes. 12 Q. And without taking you to the 13 definitions much further, am I correct in 14 understanding that a "Legacy Customer" is an 15 individual who was part of the long distance 16 program with Sears prior to the entry into the 17 agreement and essentially a subscriber who CDTel 18 bought, for want of a better phrase? 19 A. Yeah, is a -- is a -- I agree, 20 it's a prior -- it's -- it's a subscriber of the 21 Sears Connect database prior to acquiring them. 22 Q. Okay. Right. And then "New 23 Customer" is simply any customer who became 24 enrolled in the program after the purchase of the 25 program by CDTel from Sears; correct?</p>	<p>Page 12 1 could call them tail fees, but they were to be 2 based potentially on different percentages 3 depending upon what is referred to as the "enrolled 4 customer count." That's the reference in the 5 second line I just took you to. So do you agree 6 with that so far, Mr. Harari? 7 A. Well, I -- I just want to caution 8 about -- caution you about the enrollment [sic] 9 customer, as I understand it is a technical meaning 10 to the contract, and for all intents and purpose, 11 we have never used this term, and the meaning that 12 we're constantly using in our business has been 13 active and billable, and that's the same term that 14 we've used many times in conversation, discussion 15 with Sears. So there was never any conversation 16 about enrolled customer. We always talk about 17 active and billable customer. 18 Q. You're getting a little ahead of 19 me, actually, Mr. Harari, but was there really any 20 reason to talk about enrolled customer until you 21 get to the application of the churn table? The 22 reason I say that is -- 23 A. No, because that's -- because I -- 24 I want to make sure that you realize that the word 25 "customer" is a very difficult -- my understanding</p>

<p>1 is that it's a -- has a meaning in the -- with the 2 contract, and there is a dispute or a -- a 3 disagreement between the two of you about -- the 4 two lawyers about what the exact meaning of the -- 5 you know, what "customer" means, so I don't want 6 to -- don't want to be in the position to answer 7 either way on this --</p> <p>8 Q. No, and I'm not trying to get an 9 indirect admission from you, and you are quite 10 correct that any argument about the meaning of 11 "enrolled customer" is ultimately one for the 12 lawyers. I'm not asking you to interpret as the 13 witness.</p> <p>14 A. Okay.</p> <p>15 Q. Some of the background is helpful, 16 though, because what the dispute or, at least, 17 ambiguity and uncertainty is is when we look at 18 this churn table, it indicates the level of 19 percentage that's going to be applied, not the 20 amount of revenue. So I want to clarify. I want 21 to be clear that we're not talking about the amount 22 of the revenue that's being applied to determine 23 ultimately what's payable, but to determine the 24 rate that's applied, the churn table suggests you 25 look first to the enrolled customer base. So I</p>	<p>Page 13</p> <p>1 different from the people who came over, but let's 2 talk about what you mean by "active" now, then, 3 because I understand that's where your first 4 conclusion goes to. Can you --</p> <p>5 A. Well, in the conclusions, it's 6 active or customer who are -- have not been 7 churned -- "churn" meaning that they have not been 8 picked up by a competitor, we have not terminated 9 them because they haven't paid, and -- and they may 10 or may not have had a bill, usage on the -- a long 11 distance usage. So --</p> <p>12 Q. Okay. So let's -- can I --</p> <p>13 A. Sure.</p> <p>14 Q. Do they have to have -- so let's 15 break that down --</p> <p>16 A. Yes.</p> <p>17 Q. -- because I take it if they've 18 been picked up by a competitor, they're no longer 19 with you. Have they given you some kind of 20 notification that they're no longer --</p> <p>21 A. No, their line is picked, and it's 22 gone.</p> <p>23 Q. Okay. But -- so you have some 24 kind of positive way of knowing that their line has 25 been picked.</p>
<p>1 guess my first question is, is it possible to 2 determine, sitting here today, who is still -- has 3 not terminated as a customer who came over either 4 from the Sears Connect program historically or 5 became a new customer before the end of the 6 contract?</p> <p>7 A. I'm getting confused what you're 8 asking me. You're asking me to -- if we can 9 determine what active customers are currently 10 existing in the database?</p> <p>11 Q. Not active customer, and I 12 will not just allow you but ask you to explain why 13 you were using that term when we've approached this 14 discussion through correspondence in the past, but 15 I also need to understand the implementation of 16 this schedule or how and whether it is 17 implementable. So my first question is really 18 concerned with the fact that you know that on a 19 given date in 2015, you had a certain number of 20 customers that you assumed from Sears; correct?</p> <p>21 A. Yes, we -- we can determine -- if 22 I can help you, we can determine every month how 23 many active and -- customers are in our database.</p> <p>24 Q. Okay. Well, I want to be clear -- 25 well, I want to understand if that's -- "active" is</p>	<p>Page 14</p> <p>1 A. Absolutely. Well, we can -- they 2 can call. I mean, we don't get the -- we don't get 3 the -- the information -- they're not on our system 4 anymore, period. They're disconnected. They've 5 been picked by another -- by another provider.</p> <p>6 Q. Okay. And remind me, you said 7 a -- you told me three things: that they've been 8 picked by another provider, they've gotten a bill 9 or that you said something in the --</p> <p>10 A. They haven't paid their bill, so 11 maybe for -- they are delinquent, and so we 12 terminate them. We just stop the -- we --</p> <p>13 Q. And you would --</p> <p>14 A. -- they are not allowed to make a 15 phone call anymore.</p> <p>16 Q. And you would know the number of 17 people that have terminated; correct?</p> <p>18 A. Yes.</p> <p>19 Q. That you have terminated, I --</p> <p>20 A. Yeah, we terminate them, and we 21 know that -- we know the number of people that have 22 been picked from a competitor.</p> <p>23 Q. Okay. And then, finally, you 24 referred to whether they've used the service. Is 25 that -- over what time period?</p>
	<p>Page 15</p>

<p style="text-align: right;">Page 17</p> <p>1 A. Well --</p> <p>2 Q. Is that in a month?</p> <p>3 A. In a current month, there is</p> <p>4 people who are billable - in other words, they have</p> <p>5 used the system - and some people who have not. So</p> <p>6 that's the difference between an active customer</p> <p>7 and a billable customer. A billable customer --</p> <p>8 Q. Okay.</p> <p>9 A. -- in this particular month has</p> <p>10 used our services, and we have a standard -- a</p> <p>11 summary usage, send them a bill, and hopefully they</p> <p>12 are part of our receivable.</p> <p>13 Q. Okay. So you can have people --</p> <p>14 let's actually -- can you just give me a brief</p> <p>15 explanation as to how the service works? As I</p> <p>16 understand it, it's a flat-rate long distance plan?</p> <p>17 A. No.</p> <p>18 Q. No?</p> <p>19 A. It's a -- see, it is -- it is a</p> <p>20 flat rate -- different plans, there is some flat</p> <p>21 rate, there is some usage, but mostly is cents per</p> <p>22 minute, let's put it this way. And they pick up</p> <p>23 the line, and they -- when they call, we receive</p> <p>24 from our vendor - which is Bell, generally - their</p> <p>25 usage, and we -- we take this information, and we</p>	<p style="text-align: right;">Page 19</p> <p>1 discuss, if you want, what the dates should be.</p> <p>2 But you understand -- I'm saying this to both of</p> <p>3 you. And, counsel, you understand that the monitor</p> <p>4 has expressed the view that the termination is</p> <p>5 in -- as of the end of -- as of December 2019, so I</p> <p>6 think we would be looking at customer counts --</p> <p>7 we'll come to how to define them -- for December</p> <p>8 2020, and that will be all that you have to date.</p> <p>9 MR. NAYMARK: I --</p> <p>10 MR. MERSKEY: Sorry, Daniel, I need to</p> <p>11 keep going because I just remembered --</p> <p>12 MR. NAYMARK: Go ahead.</p> <p>13 MR. MERSKEY: -- on your theory of the</p> <p>14 case, we would need to look for the dates in --</p> <p>15 rolling forward from 2017.</p> <p>16 MR. NAYMARK: Okay. So I think, on our</p> <p>17 theory, the relevant customer count months are</p> <p>18 every October, beginning in October 2017, because</p> <p>19 on our theory, there's a valid termination in</p> <p>20 November 2017.</p> <p>21 MR. MERSKEY: Right.</p> <p>22 MR. NAYMARK: And on the monitor's</p> <p>23 theory, where the termination is the end of 2019,</p> <p>24 you need to see every December, starting December</p> <p>25 2019, which is the two that have happened so far,</p>
<p style="text-align: right;">Page 18</p> <p>1 bill them based on their usage, based on the rate</p> <p>2 that we have -- they've agreed to be charged with,</p> <p>3 and we send an invoice.</p> <p>4 Q. I see. So if I can just put that</p> <p>5 back to you to make sure my understanding is clear,</p> <p>6 you are essentially a long-distance reseller?</p> <p>7 A. Correct.</p> <p>8 Q. And many of your plans work by a</p> <p>9 per-minute or usage charge.</p> <p>10 A. Correct.</p> <p>11 Q. And so if the customer uses you in</p> <p>12 a given month, they get a bill. If they don't use</p> <p>13 you in a given month, they don't get a bill.</p> <p>14 A. Correct.</p> <p>15 Q. And is it common to have customers</p> <p>16 that don't use your service in a given month who</p> <p>17 have not -- you have not terminated and they have</p> <p>18 not gone to other providers?</p> <p>19 A. Of course, yes. They -- they</p> <p>20 don't use the -- there is -- in fact, there is</p> <p>21 quite a few of people that don't -- that don't</p> <p>22 necessarily use the services.</p> <p>23 MR. MERSKEY: Okay. So are you able to</p> <p>24 provide me with the -- for the applicable dates in</p> <p>25 the churn table - and, Daniel, you and I can</p>	<p style="text-align: right;">Page 20</p> <p>1 '19 and '20.</p> <p>2 MR. MERSKEY: Correct.</p> <p>3 U/T MR. NAYMARK: I think those are the</p> <p>4 relevant dates. If, you know, sorting through it,</p> <p>5 we decide we think differently, we will be</p> <p>6 cooperative and --</p> <p>7 MR. MERSKEY: Okay. So I think that's</p> <p>8 workable for the time being. So the last place I</p> <p>9 was going to go, then, is I'd like to get the</p> <p>10 number of people who have not been terminated,</p> <p>11 either by CDTel or as a result of them going to a</p> <p>12 different provider, and the number that CDTel</p> <p>13 believes are active users, because at least from</p> <p>14 the witness's description, those may be two</p> <p>15 different things. I don't know yet if they're</p> <p>16 material, but I can't tell you that without seeing</p> <p>17 the numbers.</p> <p>18 U/T MR. NAYMARK: Okay. I'm going to give</p> <p>19 an undertaking, but let's just clarify. I think</p> <p>20 that your, you know, general description of</p> <p>21 customers who have not been terminated is the same</p> <p>22 as the thing that CDTel refers to as an active</p> <p>23 customer.</p> <p>24 MR. MERSKEY: Okay. So we'll get that</p> <p>25 confirmed in the undertaking when we see the</p>

<p style="text-align: right;">Page 21</p> <p>1 numbers, but I will ask the witness that question 2 for clarification because I understood something 3 different from his evidence just now. So -- but 4 let's --</p> <p>5 BY MR. MERSKEY: 6 Q. So, Mr. Harari, I'm going to ask 7 you this question, then. You have essentially 8 described three aspects of a potential customer 9 base or that there's an active customer, someone 10 who has used the service in the past month and they 11 get a bill, and my understanding is that's the 12 numbers we've been provided with in the past as to 13 active customers. So that's the starting point, 14 okay?</p> <p>15 A. Right. 16 Q. But the second part is in relation 17 to -- are there any additional people who have not 18 terminated because you haven't terminated them or 19 because a competitor hasn't picked them up but who 20 haven't used the service in a month?</p> <p>21 A. Yes, there is. Those -- 22 Q. Okay. 23 A. -- those don't -- the difference 24 is -- what you're describing is "active." "Active" 25 can be a billable customer, a nonbillable</p>	<p style="text-align: right;">Page 23</p> <p>1 a term they use, but it works. So active customers 2 are all customers who have not been terminated. 3 Termination, I understand it, happens in the two 4 ways you've heard described. Billable customers is 5 the subset of active customers who are getting a 6 bill in the month being looked at. So if you've 7 used the service in the last month, then you will 8 be getting a bill and are a billable customer. If 9 you still have an account, but you haven't used it 10 in the past month, then you will not be getting a 11 bill and are not a billable customer, but you are 12 nevertheless an active customer. Both categories 13 are active customers.</p> <p>14 Is that accurate, Mr. Harari? 15 THE WITNESS: Yes. 16 MR. NAYMARK: Is that clear to you, 17 Alan? 18 MR. MERSKEY: Well, I'm going to ask 19 you to confirm this, then, Daniel. I think you are 20 telling me that anybody who is an enrolled 21 customer - a current enrolled customer, just 22 without defining "current" - is an active customer. 23 MR. NAYMARK: Well, we disagree about 24 what an enrolled customer is, so let's just avoid 25 the -- there's a debate on the interpretation of</p>
<p style="text-align: right;">Page 22</p> <p>1 customer - like, in this particular month is 2 active, but this month is not -- it doesn't have 3 any usage. The next month, they have some usage, 4 the next month it doesn't have usage, and so on and 5 so forth. So --</p> <p>6 MR. NAYMARK: Okay. I'm going to do 7 something that I think will help. And, Alan, if 8 it's not helpful, I'll knock it off, but --</p> <p>9 MR. MERSKEY: That's fine. 10 MR. NAYMARK: -- my intention is to 11 assist. Because of my familiarity with these 12 internal concepts and the jargon, I'm going to try 13 to just explain "active" and "billable" in plain 14 lawyer-to-lawyer language, and Mr. Harari can then 15 confirm that that's right, but I see there's a bit 16 of a struggle to do that.</p> <p>17 MR. MERSKEY: You can explain it. I 18 think what I heard him just saying, Daniel, if it 19 helps, is that "active" includes nonbillable and 20 billable. And maybe you're about to tell me that 21 nonbillable are the people who have not received a 22 bill and have not been terminated as a result of 23 going to a different provider or terminated by 24 CDTel. 25 MR. NAYMARK: Yeah, not billable is not</p>	<p style="text-align: right;">Page 24</p> <p>1 the contract what -- as to what an enrolled 2 customer is as it relates to the types of metrics 3 that CDTel crafts. So staying away from that 4 defined term, we do not agree that an enrolled 5 customer is -- within the meaning of the contract 6 equates with an active customer, and as 7 Mr. Harari's affidavit sets out, we think a 8 billable customer is the better method. I 9 appreciate from your supplementary report that the 10 monitor doesn't agree and thinks, I think, that 11 it's more like an active customer within the jargon 12 that CDTel internally uses.</p> <p>13 MR. MERSKEY: Yeah, it might be a 14 subject matter for argument -- 15 MR. NAYMARK: It is. 16 MR. MERSKEY: -- but I want to make 17 sure we've got the appropriate numbers. So you're 18 not making an admission, that's fine, but what 19 we're trying to determine is -- you have given us 20 numbers in the past which we don't necessarily 21 agree generate what the tail fee under the contract 22 would be, in particular - among other things - 23 because they are not using the correct residual 24 rate because they're using the wrong reference 25 base. And I understand that that is not agreed,</p>

<p style="text-align: right;">Page 25</p> <p>1 but what I am trying to determine is -- whether or 2 not "enrolled customer" has ever been applied in 3 the operation of the business, it is the defined 4 term in the contract. If you give us the active 5 customer numbers - and those haven't been given to 6 us in the past or used in the past - we can at 7 least have both the negotiation and the dispute in 8 front of the judge as to which is appropriate, and 9 what I think you're telling me is CDTel's position 10 is it's not active customers that is the 11 appropriate number to measure the residual base. 12 It is, in CDTel's view, billable customers.</p> <p>13 MR. NAYMARK: That's right, and then, 14 for present purposes, to cut through -- you know, 15 here we are with our fact witness. I think what 16 you want is the numbers from CDTel for active 17 customers.</p> <p>18 MR. MERSKEY: That is correct. So --</p> <p>19 MR. NAYMARK: So we'll give that you 20 for the relevant months, being -- unless we have a 21 side discussion, which I'm open to, its every 22 October starting in October 2017 and every December 23 starting in December '19. We'll give you active 24 customers. And the other thing that -- I could 25 just give it to you by way of undertaking, because</p>	<p style="text-align: right;">Page 27</p> <p>1 24-month period prior to a trigger.</p> <p>2 MR. NAYMARK: Yeah, put it this way:</p> <p>3 I'm not taking a position right now, I'm just -- I 4 think the additional data that needs to go in the 5 record and which we can do by way of an undertaking 6 that I give you right now is, Number 1, active 7 customers in the relevant months, and Number 2 -- 8 which you have my undertaking to provide. Okay?</p> <p>9 MR. MERSKEY: M-hm.</p> <p>10 MR. NAYMARK: And then, Number 2, 11 active customers who, by reference to each of the 12 relevant months, has been -- well, has been 13 rendered a usage summary, which is the same 14 thing as -- that's the language of the contract, 15 that it means --</p> <p>16 MR. MERSKEY: That's fine.</p> <p>17 MR. NAYMARK: Yeah, within the prior 18 24 months.</p> <p>19 MR. MERSKEY: So can I --</p> <p>20 MR. NAYMARK: And --</p> <p>21 MR. MERSKEY: Go on.</p> <p>22 MR. NAYMARK: Just to finish my -- if 23 you'll permit me to give you that information by 24 way of undertaking, then that's a tidy way of 25 getting that into the record without having to put</p>
<p style="text-align: right;">Page 26</p> <p>1 it might be important to put in the record. It's a 2 third metric that could be what an enrolled 3 customer is found to be. So it might be active. 4 It might be billable. The third thing it might be 5 is active customers who have been billed at all, 6 whether they're billable in the current period or 7 not, who have been billed at all in the prior 8 24 months, and the reason I say that is because of 9 the language in the definition of "Legacy Customer" 10 on page 2 of the services agreement. So --</p> <p>11 MR. MERSKEY: I think I know what 12 you're referring to. I think you're saying there's 13 a subsidiary level of argument here --</p> <p>14 MR. NAYMARK: Yeah.</p> <p>15 MR. MERSKEY: -- which is if you're 16 wrong -- not admitted, but if you're wrong on 17 billed customer not being the appropriate metric 18 for the churn table, you would say it actually is 19 not the case under the contract that you go back to 20 the legacy customers starting on Day 1 of the 21 contract. You go back to anybody who has been -- 22 who was a legacy customer or a new customer but has 23 been billed in the 24 months prior to termination 24 or don't -- I haven't looked at the definition, so 25 I won't hold you to that, but billed in some</p>	<p style="text-align: right;">Page 28</p> <p>1 it into an affidavit or --</p> <p>2 MR. MERSKEY: That's fine. There's no 3 point in having Mr. Harari recite numbers on the 4 transcript, which will be very hard to follow. Can 5 I ask for it this way, then, though? Can you put 6 this into a table which has -- we have three 7 different possible data sets: We've got billed, 8 we've got 24-month active, and we've got lifetime 9 active.</p> <p>10 MR. NAYMARK: Yes, with you so far.</p> <p>11 MR. MERSKEY: So what I would suggest 12 is you put those into a table with the headings for 13 each of those definitions and then identify the 14 numbers for each of the relevant months which 15 you've already -- we've already agreed on.</p> <p>16 U/T MR. NAYMARK: Yes.</p> <p>17 MR. MERSKEY: Okay.</p> <p>18 MR. NAYMARK: And then, madam court 19 reporter, sorry for the difficult back and forth, 20 but that last thing that Mr. Merskey just framed, 21 that will be the undertaking. You can put the 22 little U/T next to it.</p> <p>23 MR. MERSKEY: Okay. That's fine.</p> <p>24 There's just one more issue that I'm looking at, 25 Mr. Harari and Mr. Naymark, that -- to be blunt,</p>

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1 I'm trying to -- well, one's easy, so I'll ask
 2 that. There's reference in an amending
 3 agreement -- and I don't think I need to pull it
 4 up. You and I have talked about it, Mr. Naymark.
 5 There's reference in an amending agreement to a
 6 credit monitoring services program.

7 THE WITNESS: Right.
 8 BY MR. MERSKEY:

9 Q. And, Mr. Harari, Mr. Naymark has
 10 advised me in prior discussions, his view -- his
 11 understanding is that that program was either never
 12 implemented or that no revenues ever arose under
 13 that program; is that correct?

14 A. I can confirm that it was never --
 15 never implemented on the basis that we could not
 16 find a vendor or secure a relationship. There was
 17 no revenue whatsoever that has been generated from
 18 this program.

19 Q. Okay. Then my final question,
 20 hopefully, or area of questions is on just some
 21 prior information you've provided, and it may be,
 22 frankly, superseded by the undertaking that's been
 23 given. But there was, at the time, what we could
 24 only see as some inconsistency, so I'm just trying
 25 to pull it up in my notes.

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1 I'm going to frame this a little
 2 globally, Mr. Naymark, and we can go to the
 3 documents if you want, but I think you've seen the
 4 comment about the inconsistency in the monitor's
 5 report, and that is at one point we received
 6 information from CDTel that it had 40,566 active
 7 status customers as of February 16, 2018.

8 MR. NAYMARK: Yes. You're talking
 9 about paragraph 26 and following in the
 10 supplemental report?

11 BY MR. MERSKEY:

12 Q. Yes, the -- because then there's a
 13 reference to a number in a PowerPoint document that
 14 was provided to us by CDTel subsequently which
 15 states that there were 24,723 billed accounts for
 16 the period. Is the discrepancy because of the
 17 difference that we've just discussed between the
 18 understanding of active customers versus billed
 19 customers?

20 MR. NAYMARK: He's asking you,
 21 Mr. Harari.

22 THE WITNESS: Oh. Yes. Yes, that's
 23 the -- that's the difference between active and --

24 BY MR. MERSKEY:

25 Q. Okay.

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1 A. -- billed.
 2 Q. All right. So anything else,
 3 then, is just the subject of argument between
 4 lawyers, possibly for the judge to decide, as to
 5 whether it's -- active is the appropriate metric
 6 versus billed.

7 Is that a fair summary, Mr. Naymark?
 8 MR. NAYMARK: Agreed.
 9 MR. MERSKEY: Okay. Let me pause for a
 10 second.

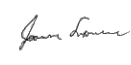
11 -- RECESS AT 2:36 --
 12 -- UPON RESUMING AT 2:39 --
 13 MR. MERSKEY: Okay. So thank you very
 14 much, Mr. Harari, Mr. Naymark, madam reporter.
 15 That concludes my questions. Daniel, if you want
 16 to take a minute --

17 MR. NAYMARK: Let me just say for the
 18 record, no re-exam, shockingly, and then, yes,
 19 let's talk.
 20 -- Whereupon the cross-examination concluded at
 21 2:40.

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1 REPORTER'S CERTIFICATE
 2
 3 I, JOANNE A. LAWRENCE, Registered
 4 Professional Reporter, certify;
 5 That the foregoing proceedings were
 6 taken before me at the time and place therein set
 7 forth, at which time the witness was put under oath
 8 by me;
 9 That the testimony of the witness
 10 and all objections made at the time of the
 11 examination were recorded stenographically by me
 12 and were thereafter transcribed;
 13 That the foregoing is a true and
 14 correct transcript of my shorthand notes so taken.

15
 16 Dated this 30th day of March, 2021.

17
 18 
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 22 REGISTERED PROFESSIONAL REPORTER
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TAB 2

Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 185, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., 9370-2751
QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS
CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES
INC., 9845488 CANADA INC., INITIUM TRADING AND
SOURCING CORP., SEARS FLOOR COVERING CENTRES
INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741
CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO
LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC.,
168886 CANADA INC., AND 3339611 CANADA INC.

UNDERTAKINGS, UNDER ADVISEMENTS, AND REFUSALS CHART
FROM THE CROSS-EXAMINATION OF A. HARARI
(HELD ON MARCH 24, 2021)

March 25, 2021

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Answers to undertakings, under advisements and refusals
from the cross-examination of A. Harari
(Held on March 24, 2021)

No.	Undertaking	Response
1.	To provide a table with the number of “active” customers, the number of “active” customers who have received a usage summary in the past 24 months, and the number of billable customers for the months of October 2017, October 2018, October 2019, October 2020, December 2019, and December 2020.	See attached table at Appendix A.

No.	Under advisement	Response
	N/A	

No.	Refusal	Response
	N/A	

Appendix A

Answer to Undertaking from the Cross-examination of A. Harari held on March 24, 2021

Month	Active Customers	Active Customers Billed in Preceding 24 Months	Billable Customers	Net LD Program Revenue for Year Ending*
October 2017	45,159	40,480	23,808	N/A
October 2018	35,396	32,318	19,480	\$ 3,438,412.57
October 2019	30,767	27,122	16,780	\$ 2,824,107.95
October 2020	26,974	23,039	14,809	\$ 2,515,865.09
December 2019	30,083	26,336	16,838	N/A
December 2020	26,441	22,366	14,677	\$ 2,491,954.70

* To assist in the Monitor's calculation we have included the Net LD Program Revenue for the year ending on each relevant month, e.g., Net LD Program Revenue for November 2017 to October 2018 was \$3,438,412.57. This information was previously included in CDTel's Responding Record. We have not included figures for years ending on October 2017 and December 2019 as those months precede the proposed termination dates and are thus not at issue.

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

Court File No.: CV-17-11846-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., et al.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

**SECOND SUPPLEMENTAL MOTION RECORD
(CDTel Motion)
(returnable April 12, 2021)**

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