

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DANIAL RAST,

Plaintiff,

v.

CINCINNATI BELL INC., LYNN A.
WENTWORTH, MEREDITH J. CHING,
WALTER A. DODS, JR., JOHN W. ECK,
LEIGH R. FOX, JAKKI L. HAUSSLER,
CRAIG F. MAIER, RUSSEL P. MAYER,
THEODORE H. TORBECK, and MARTIN J.
YUDKOVITZ,

Defendants.

Case No. _____

**COMPLAINT FOR VIOLATIONS OF
THE FEDERAL SECURITIES LAWS**

JURY TRIAL DEMANDED

Plaintiff Danial Rast (“Plaintiff”), upon information and belief, including an examination and inquiry conducted by and through his counsel, except as to those allegations pertaining to Plaintiff, which are alleged upon personal belief, alleges the following for his Complaint:

NATURE AND SUMMARY OF THE ACTION

1. Plaintiff brings this action against Cincinnati Bell Inc. (“Cincinnati Bell” or the “Company”) and the members of its Board of Directors (the “Board” or the “Individual Defendants”) for their violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78n(a), 78t(a), and U.S. Securities and Exchange Commission (“SEC”) Rule 14a-9, 17 C.F.R. § 240.14a-9, arising out of their attempt to sell the Company to Macquarie Infrastructure Partners (“Macquarie”) (the “Proposed Transaction”).

2. On March 13, 2020, the Company announced it had entered into an Agreement and Plan of Merger with Macquarie (the “Merger Agreement”) pursuant to which each Cincinnati Bell stockholder will receive \$15.50 in cash for each share of Cincinnati Bell common stock they own.

3. On March 25, 2020, defendants filed a Definitive Proxy Statement with the SEC (the “Proxy”). The Proxy is materially deficient and misleading because, *inter alia*, it fails to disclose material information regarding Cincinnati Bell’s financial projections, and the financial analyses performed by the Company’s financial advisors, Morgan Stanley & Co. LLC (“Morgan Stanley”) and Moelis & Company LLC (“Moelis”). Accordingly, without additional information the Proxy is materially misleading in violation of federal securities laws.

4. By unanimously approving the Proposed Transaction and authorizing the issuance of the Proxy, the Individual Defendants participated in the solicitation even though they knew, or should have known, that the Proxy was materially false and/or misleading. The Proxy is an essential link in accomplishing, and receiving stockholder approval for, the Proposed Transaction.

5. The stockholder vote to approve the Proposed Transaction is forthcoming. Under the Merger Agreement, following a successful stockholder vote, the Proposed Transaction will be consummated. For these reasons and as set forth in detail herein, Plaintiff seeks to enjoin defendants from conducting the stockholder vote on the Proposed Transaction unless and until the material information discussed below is disclosed to the holders of the Company common stock, or, in the event the Proposed Transaction is consummated, to recover damages resulting from the defendants’ violations of the Exchange Act.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the claims asserted herein for violations of Sections 14(a) and 20(a) of the Exchange Act and SEC Rule 14a-9 promulgated thereunder pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331 (federal question jurisdiction).

7. This Court has jurisdiction over the defendants because each defendant is either a corporation that conducts business in and maintains operations within this District, or is an

individual with sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because defendants are found or are inhabitants or transact business in this District. Cincinnati Bell's common stock trades on the New York Stock Exchange, which is headquartered in this District, rendering venue in this District appropriate in this District.

PARTIES

9. Plaintiff is, and has been at all times relevant hereto, a continuous stockholder of Cincinnati Bell.

10. Defendant Cincinnati Bell is an Ohio corporation, with its principal executive offices located at 221 East Fourth Street, Cincinnati, Ohio 45202. Cincinnati Bell's common stock trades on the New York Stock Exchange under the ticker symbol "CBB."

11. Defendant Lynn A. Wentworth has served as Chairman of the Board since May 2019 and a director of the Company since 2008.

12. Defendant Meredith J. Ching has served as a director of the Company since 2018.

13. Defendant Walter A. Dods, Jr. has served as a director of the Company since 2018.

14. Defendant John W. Eck has served as a director of the Company since 2014.

15. Defendant Leigh R. Fox has served as the Company's President and Chief Executive Officer since June 2017 and a director of the Company since 2018.

16. Defendant Jakki L. Haussler has served as a director of the Company since 2008.

17. Defendant Craig F. Maier has served as a director of the Company since 2008.

18. Defendant Russel P. Mayer has served as a director of the Company since 2013.

19. Defendant Theodore H. Torbeck has served as a director of the Company since 2013.

20. Defendant Martin J. Yudkovitz has served as a director of the Company since 2015.

21. Defendants identified in paragraphs 11-20 are referred to herein as the “Board” or the “Individual Defendants.”

22. Relevant non-party Macquarie is a fund managed by Macquarie Infrastructure and Real Assets, an alternative asset manager with approximately \$135.6 billion in assets under management as of September 30, 2019.

SUBSTANTIVE ALLEGATIONS

Background of the Company and the Proposed Transaction

23. Cincinnati Bell together with its subsidiaries, provides diversified telecommunications and technology services to residential and business customers in the United States. The Company operates in two segments: Entertainment and Communications, and IT Services and Hardware. The Entertainment and Communications segment offers data services, including high-speed Internet access, data transport, and interconnection services, as well as metro-Ethernet products; and voice local services, as well as long distance, digital trunking, switched access, and other value-added services, such as caller identification, voicemail, call waiting, and call return, among other things. The IT Services and Hardware segment provides consulting services consisting of IT staffing and project-based engagements, including engineering and installation of voice, connectivity and IT technologies, development of digital application solutions, and staff augmentation; and hosted solutions comprising converged IP communications platforms of data, voice, video, and mobility applications, among other things.

24. On November 11, 2019, Cincinnati Bell announced its third quarter 2019 financial results, including revenue of \$383 million, operating income of \$23 million, and Adjusted EBITDA of \$102 million. With respect to the Entertainment and Communications segment, revenue for the quarter was \$249 million, generating Adjusted EBITDA of \$93 million, 2% over

the third quarter 2018. With respect to the IT Services and Hardware segment, revenue was \$141 million, generating Adjusted EBITDA of \$12 million. Defendant Fox commented on the results, stating: “[o]ur solid third quarter results demonstrate the superior quality of our fiber assets and ability to capitalize on the expanded scale of our IT services business. Looking ahead, we remain committed to our full year 2019 financial guidance.”

25. On March 13, 2020, Cincinnati Bell and Macquarie issued a joint press release announcing the Proposed Transaction. The press release states, in relevant part:

CINCINNATI, March 13, 2020 -- Cincinnati Bell Inc. (NYSE:CBB) (“Cincinnati Bell” or “the Company”), together with Macquarie Infrastructure Partners (“MIP”), today announced an agreement through which a MIP-controlled subsidiary will acquire all outstanding shares of Cincinnati Bell for \$15.50 per share in a cash transaction valued at approximately \$2.9 billion, including debt (the “Transaction”). MIP is a fund managed by Macquarie Infrastructure and Real Assets (“MIRA”). Certain Special Opportunities funds (“Ares Funds”) managed by the Private Equity Group of Ares Management Corporation (NYSE: ARES) (“Ares Management”) have agreed to provide equity financing for the Transaction.

Pursuant to the agreement, each issued and outstanding share of Cincinnati Bell common stock will be converted into the right to receive \$15.50 in cash at closing of the Transaction. The Transaction price of \$15.50 per share of Cincinnati Bell common stock represents a 101% premium to the closing per share price of \$7.72 on December 20, 2019, the last trading day prior to the date when Cincinnati Bell's original merger agreement with Macquarie (NYSE: BIP; TSX: BIP.UN) (“Brookfield”) was executed, a 172% premium to the 60-day volume weighted average price up to and including December 20, 2019 and a 7% premium to Brookfield's prior binding agreement to acquire the Company.

The Transaction follows the determination by Cincinnati Bell's Board of Directors, after consultation with its legal and financial advisors, that the MIP proposal constituted a "Superior Proposal" as defined in Cincinnati Bell's previously announced merger agreement with Brookfield. Consistent with that determination and following the expiration of the negotiation period during which Brookfield declined to propose an amendment to the merger agreement, Cincinnati Bell terminated that agreement. In connection with the termination, Cincinnati Bell has paid Brookfield a \$24.8 million break-up fee.

Lynn A. Wentworth, Chairman of the Cincinnati Bell Board of Directors, said, “After carefully evaluating MIP's revised offer, we are confident that this transaction is in the best interest of Cincinnati Bell and its shareholders.

Importantly, the new transaction price of \$15.50 per share represents a 7% increase from our previous merger agreement with Brookfield at \$14.50 per share and a 101% premium to Cincinnati Bell's closing per share price of \$7.72 on December 20, 2019, the last trading day prior to the date when the original merger agreement with Brookfield was entered into. This underscores the robust and disciplined process that we executed to ensure immediate and maximum value creation for our shareholders."

Leigh Fox, President and Chief Executive Officer of Cincinnati Bell, continued, "This transaction with MIP represents an exciting opportunity to enhance our financial position and expand our resources to better serve our customers. MIP exhibits deep telecommunications expertise and a strong track record of investing in capital intensive businesses, which will be critical as we deliver on our strategy to drive next generation, integrated communications through an expanded fiber network as well as our IT services platform. We firmly believe this transaction will allow us to enhance our services and drive long-term value for our customers in Hawaii, Ohio, Kentucky, and Indiana, and across North America."

"Given the significant investment that the Company has made into its fiber network, Cincinnati Bell represents a truly differentiated platform compared to other network providers," said Karl Kuchel, Chief Executive Officer of MIP. "We are pleased to partner with the experienced management team to continue to expand the fiber footprint and bring high bandwidth connectivity to homes and businesses in the Company's service territories. The investment in Cincinnati Bell represents an exciting addition to our portfolio of fiber and communications infrastructure assets, both in the United States and globally."

"On behalf of the Ares Special Opportunities funds, we are excited to partner with two world class organizations in Cincinnati Bell and MIRA," said Scott Graves, Partner, Co-Head of Private Equity and Head of Special Opportunities.

MIRA is one of the world's leading alternative asset managers and a highly experienced investor in the communications infrastructure industry. For more than two decades, MIRA has partnered with investors, governments and communities to manage, develop and enhance assets relied on by more than 100 million people each day. As of September 30, 2019, MIRA managed \$135.6 billion in assets that are essential to the sustainable development of economies and communities, including; 155 portfolio businesses, ~600 properties and 4.7 million hectares of farmland. For more information, go to www.mirafunds.com.

Ares Management is a leading global alternative investment manager operating three integrated businesses across Credit, Private Equity and Real Estate. Ares Management's global platform had \$149 billion of assets under management as of December 31, 2019 and employs approximately 1,200 employees in over 20 offices in more than 10 countries. Please visit www.aresmgmt.com for additional information.

The Transaction, which is expected to close in the first half of 2021, is subject to certain customary closing conditions, including the approval by Cincinnati Bell's shareholders, expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and receipt of certain other regulatory approvals. Cincinnati Bell will file a current report on Form 8-K with the U.S. Securities and Exchange Commission containing a summary of the terms and conditions of the proposed acquisition as well as a copy of the merger agreement.

The Proxy Misleads Cincinnati Bell Stockholders by Omitting Material Information

26. On March 25, 2020, defendants filed the materially misleading and incomplete Proxy with the SEC. Designed to convince the Company's stockholders to vote in favor of the Proposed Transaction, the Registration Statement is rendered misleading by the omission of critical information concerning: (i) Cincinnati Bell's financial projections; and (ii) the financial analyses performed by the Company's financial advisors, Morgan Stanley and Moelis.

Material Omissions Concerning Financial Projections

28. The Proxy omits material information regarding the Company's financial projections provided by Cincinnati Bell's management and relied upon by Morgan Stanley and Moelis for their financial analyses.

29. For example, with respect to each of the Company's September Projections and December Projections, the Proxy fails to disclose all line items underlying unlevered free cash flows, including: (i) stock based compensation; (ii) depreciation and amortization; (iii) taxes; (iv) pension and OPEB payments; (v) changes in working capital; (vi) restructuring and severance costs; and (vii) integration costs.

30. Omission of the above-referenced projections renders the financial projections included on pages 59-60 of the Proxy materially incomplete and misleading. If a proxy statement discloses financial projections and valuation information, such projections must be complete and accurate.

Material Omissions Concerning Morgan Stanley's and Moelis' Financial Analyses

27. The Proxy describes Morgan Stanley's and Moelis' fairness opinions and the various valuation analyses performed in support of their opinions. However, the descriptions of Morgan Stanley's and Moelis' fairness opinions and analyses fail to include key inputs and assumptions underlying these analyses. Without this information, as described below, Cincinnati Bell's public stockholders are unable to fully understand these analyses and, thus, are unable to determine what weight, if any, to place on Morgan Stanley's and Moelis' fairness opinions in determining whether to vote in favor of the Proposed Transaction or seek appraisal.

28. With respect to Morgan Stanley's *Discounted Cash Flow Analysis*, the Proxy fails to disclose: (i) the Company's terminal year Adjusted EBITDA; (ii) the estimated terminal value of the Company; (iii) the inputs and assumptions underlying the discount rates ranging from 7.0% to 7.4%; and (iv) the value of the Company's utilization of net operating losses.

29. With respect to Morgan Stanley's *Discounted Future Equity Value Analysis*, the Proxy fails to disclose: (i) the range of AV/EBITDA Ratios Morgan Stanley applied in the analysis; and (ii) the inputs and assumptions underlying the discount rates ranging from 10.6% to 11.8%.

30. With respect to Morgan Stanley's *Equity Research Analysts' Price Targets* analysis, the Proxy fails to disclose: (i) the price targets observed by Morgan Stanley in the analysis; and (ii) the sources thereof.

31. With respect to Moelis' *Discounted Cash Flow Analysis*, the Proxy fails to disclose: (i) the Company's terminal year Adjusted EBITDA; (ii) the estimated terminal value of the Company; and (iii) the inputs and assumptions underlying the discount rates ranging from 7.0% to 8.0%.

32. With respect to Moelis' analysis of one-year forward stock price targets for the

Company common shares, the Proxy fails to disclose: (i) the price targets observed by Moelis in the analysis; and (ii) the sources thereof.

33. The omission of this information renders certain portions of the Proxy materially misleading, including, inter alia, the following sections of the Proxy: “Opinion of the Company’s Financial Advisors” and “Financial Forecasts.”

34. Accordingly, Plaintiff seeks injunctive and other equitable relief to prevent the irreparable injury that Company stockholders will continue to suffer absent judicial intervention.

CLAIMS FOR RELIEF

COUNT I

Claims Against All Defendants for Violations of Section 14(a) of the Exchange Act and Rule 14a-9 Promulgated Thereunder

35. Plaintiff repeats all previous allegations as if set forth in full.

36. During the relevant period, defendants disseminated the false and misleading Proxy specified above, which failed to disclose material facts necessary to make the statements, in light of the circumstances under which they were made, not misleading in violation of Section 14(a) of the Exchange Act and SEC Rule 14a-9 promulgated thereunder.

37. By virtue of their positions within the Company, the defendants were aware of this information and of their duty to disclose this information in the Proxy. The Proxy was prepared, reviewed, and/or disseminated by the defendants. It misrepresented and/or omitted material facts, including material information about the Company’s financial projections and the financial analyses that support the fairness opinions provided by the Company’s financial advisors. The defendants were at least negligent in filing the Proxy with these materially false and misleading statements.

38. The omissions and false and misleading statements in the Proxy are material in that

a reasonable stockholder would consider them important in deciding how to vote on the Proposed Transaction or whether to seek to exercise their appraisal rights.

39. By reason of the foregoing, the defendants have violated Section 14(a) of the Exchange Act and SEC Rule 14a-9(a) promulgated thereunder.

40. Because of the false and misleading statements in the Proxy, Plaintiff is threatened with irreparable harm, rendering money damages inadequate. Therefore, injunctive relief is appropriate to ensure defendants' misconduct is corrected.

COUNT II

Claims Against the Individual Defendants for Violations of Section 20(a) of the Exchange Act

41. Plaintiff repeats all previous allegations as if set forth in full.

42. The Individual Defendants acted as controlling persons of Cincinnati Bell within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers and/or directors of Cincinnati Bell, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false statements contained in the Proxy filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading.

43. Each of the Individual Defendants was provided with or had unlimited access to copies of the Proxy and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

44. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had

the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same. The Proxy at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were, thus, directly involved in the making of the Proxy.

45. In addition, as the Proxy sets forth at length, and as described herein, the Individual Defendants were each involved in negotiating, reviewing, and approving the Proposed Transaction. The Proxy purports to describe the various issues and information that they reviewed and considered—descriptions the Company directors had input into.

46. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

47. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(a) and SEC Rule 14a-9, promulgated thereunder, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of defendants' conduct, Cincinnati Bell's stockholders will be irreparably harmed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment and preliminary and permanent relief, including injunctive relief, in his favor on behalf of Cincinnati Bell, and against defendants, as follows:

- A. Preliminarily and permanently enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;

- B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages to Plaintiff;
- C. Directing the Individual Defendants to disseminate a Proxy that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;
- D. Declaring that defendants violated Sections 14(a) and/or 20(a) of the Exchange Act, as well as SEC Rule 14a-9 promulgated thereunder;
- E. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
- F. Granting such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: April 21, 2020

WEISS LAW LLP

By 

Richard A. Acocelli
1500 Broadway, 16th Floor
New York, New York 10036
Tel: (212) 682-3025
Fax: (212) 682-3010
Email: racocelli@weisslawllp.com

OF COUNSEL:

BRAGAR EAGEL & SQUIRE, P.C.
Alexandra B. Raymond
885 Third Avenue, Suite 3040
New York, New York 10022
Tel: (646) 860-9158
Fax: (212) 214-0506
Email: raymond@bespc.com

Attorneys for Plaintiff

Attorneys for Plaintiff