

EVOLVING SYSTEMS INC

Form 8-K

November 17, 2005

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

FORM 8-K

**CURRENT REPORT
PURSUANT TO SECTION 13 OR 15(d) OF THE
SECURITIES EXCHANGE ACT OF 1934**

Date of Report (Date of earliest event reported)
November 14, 2005

Evolving Systems, Inc.

(Exact name of registrant as specified in its charter)

Delaware
(State or other jurisdiction of
incorporation)

0-24081
(Commission File Number)

84-1010843
(I.R.S. Employer Identification No.)

9777 Pyramid Court, Suite 100

Englewood, Colorado 80112

(Address of principal executive offices)

Registrant's telephone number, including area code **(303) 802-1000**

N/A

Former Name or Former Address, if Changed Since Last Report

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10.4

Amendment and Waivers

10.5

Survival and Termination

XI. AGENT PROVISIONS; SETTLEMENT

11.1

Agent

11.2

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

o Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

o Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

o Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

o Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 1.01 Entry into a Material Definitive Agreement.

On November 14, 2005, Evolving Systems, Inc. ("Evolving Systems") and certain of its subsidiaries, as borrowers and/or guarantors, entered into a series of agreements with CapitalSource Finance, LLC, as Agent ("CapitalSource") for the extension of a term loan in the amount of \$8.5 million (the "Senior Term Loan"), and a revolving credit facility in the amount of \$4.5 million (the "Senior Revolving Facility").

In connection with the Senior Term Loan, Evolving Systems and its U.S. subsidiaries entered into a Security Agreement, a Pledge Agreement, a Charge over Shares and an Acknowledgment of Intellectual Property Collateral Lien with CapitalSource, whereby the Senior Term Loan is secured by certain assets of Evolving Systems, and a pledge, subject to certain limitations, of stock of the subsidiaries of Evolving Systems.

In connection with the Senior Revolving Facility, Evolving Systems Holdings Ltd. and Evolving Systems Ltd. entered into a Debenture and a Charge over Shares with CapitalSource whereby the Senior Revolving Facility is secured by certain assets of the U.K. subsidiaries and a pledge, subject to certain limitations, of stock of the subsidiaries of Evolving Systems. Evolving Systems and its U.S. subsidiaries entered into a Guaranty with CapitalSource, whereby the entities guaranty the obligations of Evolving idth:79.9%;">

Set-off and Sharing of Payments

11.3

Settlements; Payments; and Information

11.4

Dissemination of Information

Systems Holdings Ltd. and Evolving Systems Ltd. under the Senior Revolving Facility.

In connection with the transactions described above, Evolving Systems formed a wholly owned subsidiary, Evolving Systems Holdings, Inc., a Delaware corporation, whose sole purpose is to hold the stock in Evolving Systems Holdings, Ltd. Copies of the Certificate of Incorporation and the Bylaws of Evolving Systems Holdings, Inc. are attached to this Report as Exhibits 3.1(a) and 3.1(b), respectively.

A further description of the above agreements is contained in Item 2.03 of this Current Report on Form 8-K and incorporated

herein by reference.

On November 14, 2005, Evolving Systems entered into subordinated debt agreements (the Subordinated Notes) and a subordination agreement (t

XII.

MISCELLANEOUS

12.1

Governing Law; Jurisdiction; Service of Process; Venue

12.2

Successors and Assigns; Assignments and Participations

12.3

Reinstatement; Application of Payments

12.4

Indemnity

12.5

Notice

12.6

Severability; Captions; Counterparts

12.7

Expenses

12.8

Entire Agreement

12.9

Approvals and Duties

12.10

Confidentiality and Publicity

12.11

No Consequential Damages

12.12

Borrower Funds Administrator

12.13

Joint and Several Liability

XIII.

TAXES

13.1

Taxes

13.2

Certificates of Lenders

13.3

Survival

XIV.

GUARANTY

14.1

Guaranty

14.2

Guaranty Absolute

14.3

Waiver

14.4

Continuing Guaranty; Assignments

14.5

Maximum Liability

14.6

Subordination

14.7

Subrogation

CREDIT AGREEMENT

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This **CREDIT AGREEMENT** (this Agreement), dated as of November 14, 2005, is entered into by and among, (i) Evolving Systems, Inc. (Evolving Systems), a Delaware corporation and Telecom Software Enterprises, LLC, a Colorado limited liability company (together with Evolving Systems each a Borrower); (ii) Evolving Systems Holdings, Inc., a Delaware corporation (Intermediate Holdco), as a Guarantor and additional Credit Party; (iii) CAPITALSOURCE FINANCE LLC, a Delaware limited liability company (in its individual capacity, CapitalSource), as administrative and payment agent for the Lenders (CapitalSource, in such capacity, Agent); and (iv) the LENDERS from time to time parties hereto.

WHEREAS, the Credit Parties have requested that Lenders make available to Borrower a term loan in an aggregate original principal amount of Eight Million Five Hundred Thousand Dollars (\$8,500,000), the proceeds of which, in each case, shall be used by Borrower for purposes permitted under, and otherwise in accordance with and subject to the terms of, this Agreement.

WHEREAS, Lenders are willing to make the loan available to Borrower, upon the terms and subject to the conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt, sufficiency and adequacy of which hereby are acknowledged, the parties hereto hereby agree as follows:

I. **DEFINITIONS**

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For purposes of the Loan Documents and all schedules, exhibits, annexes and attachments thereto, in addition to the definitions elsewhere in this Agreement and the other Loan Documents, the terms listed in Appendix A hereto shall have the respective meanings assigned to such terms in Appendix A hereto, which is incorporated herein and made a part hereof. All capitalized terms used which are not specifically defined herein shall have the respective meanings assigned to them in Article 9 of the UCC to the extent the same are used or defined therein. Unless otherwise specified in any Loan Document, this Agreement, any other Loan Document and any agreement or contract referred to herein or in Appendix A hereto shall mean such agreement or contract, as modified, amended, supplemented or restated and in effect from time to time, subject to any applicable restrictions set forth in such Loan Document. Unless otherwise specified, as used in the Loan Documents or in any certificate, report, instrument or other document made or delivered pursuant to any of the Loan Documents, all accounting terms not defined in Appendix A hereto or elsewhere in this Agreement or any other Loan Document shall have the meanings assigned to such terms in and shall be interpreted in accordance with GAAP. If any change in GAAP results in a change in the calculation of the financial covenants or interpretation of related provisions of this Agreement or any other Loan Document, then Borrower, Agent, Lenders and the other Credit Parties agree to amend such provisions of this Agreement so as to equitably reflect such changes in GAAP with the desired result that the criteria for evaluating the Credit Parties' financial condition shall be the same after such change in GAAP as if such change had not been made, provided that, notwithstanding any other provision of this Agreement, the Requisite Lenders' agreement to any amendment of such

provisions shall be sufficient to bind all Lenders; and, provided further, until such time as the financial covenants and the related provisions of this Agreement have been amended in accordance with the terms of this paragraph, the calculations of financial covenants and the interpretation of any related provisions shall be calculated and interpreted in accordance with GAAP as in effect immediately prior to such change in GAAP. The term "Borrower" used in the singular shall mean each of Evolving Systems and Telecom Software Enterprises, LLC.

II. CREDITS

2.1 **Loan**

Subject to the terms and conditions set forth in this Agreement, each Lender agrees to loan to Borrower on the Closing Date such Lender's Pro Rata Share of the Loan, which, in the aggregate for all Lenders, shall be in the original principal amount of Eight Million Five Hundred Thousand Dollars (\$8,500,000). The Loan is not a revolving credit facility and may not be drawn, repaid and redrawn and any repayments or prepayments of principal on the Loan shall permanently reduce the Loan. The obligations of Lenders hereunder are several and not joint or joint and several. Borrower irrevocably authorizes Agent and Lenders to disburse the proceeds of the Loan on the Closing Date.

2.2 Evidence of Loan

(a) **Each Lender shall maintain, in accordance with its usual practice, electronic or written records evidencing the indebtedness and obligations to such Lender resulting from the Loan made by such Lender, including, without limitation, the amounts of principal and interest payable and paid to such Lender from time to time under this Agreement.**

(b) **Agent shall maintain electronic or written records in the Subordination Agreement) (collectively, the Subordinated Debt), with the holders of the notes issued by Evolving Systems in connection with its November 2, 2004 acquisition of Tertio Telecoms Ltd. (the Tertio Sellers), as described below in Items 1.02 and 2.03 of this Current Report on Form 8-K and incorporated herein by reference.**

Item 1.02 Termination of a Material Definitive Agreement

On November 14, 2005, Evolving Systems terminated its long-term Senior Secured Notes, in the aggregate principal amount of \$11,950,000, together with the related Security Agreement, Pledge Agreement, Patent Security Agreement and Trademark Security Agreement (together, the Old Credit Facility) which were executed in connection with the its November 2, 2004 acquisition of Tertio Telecoms Ltd. from Tertio Telecoms Holdings, Ltd. (Following the acquisition, which it will record (i) the amount of each Loan made hereunder, the class and type of each Loan made and any applicable interest rate periods, (ii) the amount of any principal and/or interest due and payable and/or to become due and payable from Borrower to each Lender hereunder and (iii) all amounts received by Agent hereunder from Borrower and each Lender s share thereof.

(c) **The entries in the electronic or written records maintained pursuant to Section 2.2(b) (the Register), which shall include the promissory notes, if any, issued pursuant to Section 2.2(d) hereof, shall, in the absence of manifest error, be prima facie evidence of the existence and amounts of the obligations and indebtedness therein recorded; provided, however, that the failure of Agent to maintain such records or any error therein shall not in any manner affect the obligations of Borrower to repay the Loans or Obligations in accordance with their terms. The Register shall be subject to the terms of Section 12.2(c).**

(d) **Borrower agrees that:**

(a) Each Lender shall maintain, in accordance with its usual practice, electronic or written records evidencing

(i) **upon written notice by Agent to Borrower that a promissory note or other evidence of indebtedness or replacement of a lost Note is requested by Agent (for itself or on behalf of any Lender) to evidence the Loan and other Obligations owing or pTertio Telecoms Holdings Ltd. was liquidated, and its assets, including the agreements comprising the Old Credit Facility, were distributed to its stockholders, described herein as the Tertio Sellers.) Evolving Systems incurred no early termination penalties.**

The outstanding principal portion of the Old Credit Facility was due and payable in installments as follows: \$1,161,147 on March 31, 2006; \$2,694,900 on June 30, 2006; \$1,239,134 on December 31, 2006; \$1,620,406 on March 31, 2007; \$2,694,900 on June 30, 2007; and the remainder on December 31, 2007. The Old Credit Facility's interest rate equaled 11% until November 2, 2006, and 14% thereafter. Upon an event of default, the Old Credit Facility would bear interest at the greater of (a) 14% or (b) the London Interbank Offering Rate (LIBOR) plus 8%.

The Old Credit Facility was secured by substantially all of the assets of Evolving Systems and a pledge, subject to certain limitations, of the shares of its subsidiaries. Additionally, the Old Credit Facility contained customary affirmative and negative covenants including, among others, covenants relating to financial and legal requirements, capital expenditures, restrictions on dividends, maintenance of certain financial ratios, incurrence of liens, sale or disposition of assets and incurrence of other debt. A default

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under the notes would have permitted the holders thereof to require the immediate repayment of any outstanding principal amount with interest at the applicable default rate, together with an exercise of their remedies under the various security and pledge agreements.

The foregoing descriptions are qualified in their entirety by reference to our Current Report on Form 8-K dated November 2, 2004 and incorporated herein by reference.

Evolving Systems also terminated the Escrow Agreement entered into by and among Evolving Systems, Wells Fargo Bank and Tertio Telecoms Holdings, Ltd. Stock, notes and cash held in escrow were distributed to the Tertio Sellers.

receipt of customary affidavits and indemnities) execute and deliver to Agent an appropriate promissory note or notes in form and substance reasonably satisfactory to Agent and Borrower, payable to the order of such Lender in a principal amount equal to the amount of the Loan owing or payable to such Lender;

(ii) all references to Notes in the Loan Documents shall mean Notes, if any, to the extent issued (and not returned to Borrower for cancellation) hereunder, as the same may be amended, supplemented, modified, divided and/or restated and in effect from time to time which shall be included in the Register maintained by the Agent; and

(iii) upon Agent's written request (for itself or on behalf of any Lender), and in any event within five (5) Business Days of any such request, Borrower shall execute and deliver to Agent new Notes and/or split or divide the Notes, or any of them, in exchange for the then existing subject Notes, in such smaller amounts or denominations as Agent or such Lender shall specify; provided, that the aggregate principal amount of such new, split or divided Notes shall not exceed the aggregate principal amount of the Notes outstanding at the time such request is made; and provided, further, that such Notes that are replaced shall then be deemed no longer outstanding hereunder and replaced by such new Notes, promptly cancelled and returned to Borrower within a reasonable period of time after Agent's receipt of the replacement Notes.

2.3 Interest

(a) **Subject to Section 2.3(c), the Loan shall bear interest on the outstanding principal amount thereof from the date made at a rate per annum equal to (i) the greater of (A) LIBOR Rate in effect from time to time or (B) 3.75%, plus (ii) the Applicable Margin in effect from time to time.**

(b) **Interest on the Loan shall be due and payable in cash in arrears on each Interest Payment Date and on the date of any prepayment (actual or due) of the Loan pursuant to Sections 2.4 and 2.5.**

(c) **Upon the occurrence and during the continuance of any Event of Default, the Obligations shall bear interest at the Default Rate upon written notice of such increase given by Agent to Borrower; provided, that, from and after the occurrence of any Event of Default under Sections VIII (a), (g) or (h), such increase shall be automatic and without any notice from Agent, Requisite Lenders, or any other person. In all such events unless otherwise provided in the applicable notice by Agent to Borrower, and notwithstanding the date on which application of the Default Rate is communicated to Borrower, the Default Rate shall accrue from the initial date of such Event of Default until that Event of Default is waived in writing in accordance with the terms of this Agreement and shall be payable in cash upon demand. Neither Agent nor Lenders shall be required to (i) accelerate the maturity of the Loan, (ii) terminate any Commitment or (iii) exercise any other rights or remedies under the Loan Documents or applicable law in order to charge interest hereunder at the Default Rate.**

2.4 **Voluntary Prepayments**

(c) Upon the occurrence and during the continuance of any Event of Default, the Obligations shall bear interest

(a) **Subject to the terms of this Section 2.4 and Section 3.2, Borrower may prepay to Agent, for the ratable benefit of the applicable Lenders, the outstanding principal amount of the Loan, in whole or in part, at any time or from time to time.**

(b) **If Borrower elects to make any prepayment of the Loan pursuant to this Section 2.4, Borrower Funds Administrator shall give irrevocable notice of such prepayment to Agent not less than three (3) Business Days prior to the date such prepayment is to be made, specifying (i) the date on which such prepayment is to be made, (ii) the amount of such prepayment and (iii) the amount of the Prepayment Premium, if any, and accrued interest applicable to such prepayment. Such notice shall be accompanied by a certificate of a Responsible Officer of Borrower Funds Administrator on behalf of Borrower Funds Administrator stating that such payment is being made in compliance with this Section 2.4. Notice of prepayment having been so given, the aggregate principal amount of the Loan so specified to be prepaid, together with accrued interest thereon and the applicable Prepayment Premium, shall be due and payable on the prepayment date set forth in such notice.**

(c) **Any voluntary partial prepayment with respect to the Loan shall be applied in the following order of priority to the payment of: (i) first, to all then unpaid fees and expenses of Agent under the Loan Documents, (ii) second, to all then unpaid fees and expenses of Lenders under the Loan Documents, including any Prepayment Premium, (iii) third to any and all Obligations that are due and owing pursuant to the terms of the Loan Documents, except the principal balance of the Loan and accrued and unpaid interest thereon; (iv) fourth to accrued and unpaid interest on the portion of the principal balance of the Loan being prepaid; and (v) fifth to the principal balance of the Loan, which shall be applied to the scheduled installments thereof in inverse order of maturities.**

(d) **All prepayments made pursuant to this Section 2.4 shall be designated as a prepayment pursuant to this Section 2.4 on the applicable wire. The amount of any partial prepayment of the principal balance of the Loan shall not be less than \$100,000 or, if in excess thereof, in integral multiples of \$100,000 in excess thereof.**

(a) Subject to the terms of this Section 2.4 and Section 3.2, Borrower may prepay to Agent, for the ~~ra~~table be

2.5 **Mandatory Payments and Prepayments**

(a) **The principal amount of the Loan shall be paid in installments on the dates and in the respective amounts set forth below:**

Payment Date	Amount of Principal Payment
January 1, 2006	\$ 250,000
April 1, 2006	\$ 250,000
July 1, 2006	\$ 250,000
October 1, 2006	\$ 250,000
January 1, 2007	\$ 500,000
April 1, 2007	\$ 500,000
July 1, 2007	\$ 500,000
October 1, 2007	\$ 500,000
January 1, 2008	\$ 625,000
April 1, 2008	\$ 625,000
July 1, 2008	\$ 625,000
October 1, 2008	\$ 625,000
January 1, 2009	\$ 500,000
April 1, 2009	\$ 500,000
July 1, 2009	\$ 500,000
October 1, 2009	\$ 500,000
January 1, 2010	\$ 250,000
April 1, 2010	\$ 250,000
July 1, 2010	\$ 250,000
October 1, 2010	\$ 250,000

(a) The principal amount of the Loan shall be paid in installments on the dates and in the respective amounts

(b) The then remaining unpaid principal amount of the Loan and all other Obligations under or in respect of the Loan shall be due and payable in full, if not earlier in accordance with this Agreement, on the Maturity Date.

(c) If a Change of Control occurs that has not been consented to in writing by Agent prior to consummation thereof, or any Credit Party or any Subsidiary of any Credit Party (other than the Revolving Borrower and its Subsidiaries), whether in a single transaction or a series of transactions:

(i) sells or transfers any Property (other than any Qualified Asset Sale);

(ii) sells or issues any Capital Stock (excluding sales or issuances of Permitted Securities to the extent no Default or Event of Default has occurred and is continuing or would be caused thereby or result therefrom, but specifically including any sale or issuance of Capital Stock pursuant to a Public Offering);

(iii) receives any property damage insurance award or any other insurance proceeds of any kind, including, without limitation, proceeds from any life insurance (including the Life Insurance Policy) or business interruption insurance in excess of \$100,000; or

(iv) incurs any Indebtedness other than Permitted Indebtedness.

then Borrower shall prepay the Loan and the other Obligations in an amount equal to one hundred percent (100%) of the Net Proceeds received by the Credit Parties and their Subsidiaries in connection therewith (or such lesser amount as is required to irrevocably pay in cash in full the Obligations)), which prepayment shall be applied thereto in accordance with Section 2.5(e); provided, that, the foregoing notwithstanding, if Borrower reasonably expects the Net Proceeds of any such sale or transfer in respect of the foregoing clause (i) or any such property damage

insurance award under the foregoing clause (iii), or a portion thereof, to be reinvested in productive assets of a kind then used or usable in the Business, and, within one hundred eighty (180) days after such occurrence, enters into a binding commitment to make such reinvestment (which reinvestment shall be made within two hundred seventy (270) days after such occurrence), then Borrower shall deliver an amount equal to such Net Proceeds, or applicable portion thereof, to Agent to be held by Agent in a cash collateral account pending such reinvestment.

(d) On the day of the delivery to Agent of Borrower's annual audited financial statements in accordance with the terms of this Agreement, but in any event no later than the ninetieth (90th) day after the end of each fiscal year of Borrower (commencing with the fiscal year of Borrower ending December 31, 2006), Borrower shall furnish to Agent a written calculation of Excess Cash Flow for such fiscal year and deliver to Agent, for distribution to Lenders, an amount equal to fifty percent (50%) of such Excess Cash Flow, for application to the Loan and the other Obligations in accordance with Section 2.5(e).

(e) All prepayments pursuant to Sections 2.5(c), and 2.5(d) shall be applied in the following order of priority: (i) first, to all then unpaid fees and expenses of Agent under the Loan Documents, (ii) second, to all then unpaid fees and expenses of Lenders under the Loan Documents, including any Prepayment Premium, (iii) third to any and all Obligations that are due and owing pursuant to the terms of the Loan Documents, except the principal balance of the Loan and accrued and unpaid interest thereon; (iv) fourth to accrued and unpaid interest on the portion of the principal balance of the Loan being prepaid or required to be prepaid; and (v) fifth to the principal balance of the Loan, which shall be applied to the scheduled installments thereof in inverse order of maturities.

2.6 Promise to Pay; Manner of Payment.

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Borrower absolutely and unconditionally promises to pay, when due and payable pursuant hereto, principal, interest and all other amounts and Obligations payable hereunder and under any other Loan Document, without any right of rescission and without any deduction whatsoever, including any deduction for set-off, recoupment or counterclaim, notwithstanding any damage to, defects in or destruction of the Collateral or any other event, including obsolescence of any property or improvements. Any payments made by the Credit Parties shall be made by wire transfer on the date when due, without offset, deduction or counterclaim, in Dollars, in immediately available funds to such account as may be indicated in writing by Agent to Borrower from time to time. Any such payment received after 2:00 p.m. (New York City time) on any date shall be deemed received on the next succeeding Business Day, and any applicable interest or fees shall continue to accrue in respect thereof. Whenever any payment under any Loan Document shall be stated to be due or shall become due and payable on a day other than a Business Day, the due date thereof shall be extended to, and such payment shall be made on, the next succeeding Business Day, and such extension of time in such case shall be included in the computation of payment of any interest (at the interest rate in effect during such extension) and/or fees, as the case may be.

2.7 **Payments by Agent**

Should any Obligation required to be paid under any Loan Document remain unpaid beyond any applicable cure period, such Obligation may be paid by Agent, on behalf of Lenders. Any sums expended or amounts paid by Agent and/or Lenders as a result of any Credit Party's failure to pay, perform or comply with any Loan Document or any of the Obligations may be charged to Borrower's account and added to the Obligations.

2.8 **Computation of Interest and Fees; Lawful Limits**

All interest and fees owing from time to time under the Loan Documents shall be computed on the basis of a year of 360 days and for the actual number of days elapsed in each calculation period, as applicable. In no contingency or event whatsoever, whether by reason of acceleration or otherwise, shall the interest and other charges paid or agreed to be paid to Agent, for the benefit of Lenders, or Lenders for the use, forbearance or detention of money hereunder exceed the maximum rate permissible under applicable law which a court of competent jurisdiction shall, in a final determination, deem applicable hereto. If, due to any circumstance whatsoever, fulfillment of any provision hereof, at the time performance of such provision shall be due, shall exceed any such limit, then, the obligation to be so fulfilled shall be reduced to such lawful limit, and, if Agent or Lenders shall have received interest or any other charges of any kind which might be deemed to be interest under applicable law in excess of the maximum lawful rate, then such excess shall be applied first to any unpaid fees and charges hereunder, then to the unpaid principal balance owed by Borrower hereunder, and if the then remaining excess interest is greater than the previously unpaid principal balance, Agent and Lenders shall promptly refund such excess amount to Borrower and the provisions hereof shall be deemed amended to provide for such permissible rate. The terms and provisions of this Section 2.8 shall control to the extent any other provision of any Loan Document is inconsistent herewith.

2.9 Reallocation of Commitments

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The Credit Parties, Agent and the Lenders agree and acknowledge that, on terms and conditions satisfactory to each Borrower, Revolving Borrower, Agent, each of the Lenders, and the Revolving Lender, any Commitment of any Lender hereunder and the Revolving Lender under the Revolving Loan Agreement for the benefit of any Borrower or Revolving Borrower may be reallocated and adjusted from time to time with any other Commitment or Commitments of such Lender under this Agreement or Revolving Lender for the benefit of the other Borrower or Revolving Borrower, and the outstanding Loans thereunder and hereunder reclassified or re-categorized in connection therewith and herewith to evidence or effectuate any such reallocation and adjustment, without constituting a novation, for any purpose, including, without limitation, for purposes of accurately reflecting each Borrower's or Revolving Borrower's relative contribution to, or allocable amount or share of, Evolving System's Consolidated EBITDA, earnings, revenue, assets and/or liabilities. For clarification purposes, any such reallocation and adjustment shall require the written consent of each Borrower, Revolving Borrower, Agent, each Lender and Revolving Lender and shall not, in any event, result in a reduction of the aggregate Commitments contained herein and in the Revolving Loan Agreement.

III. **FEES**

3.1 **Commitment Fee**

On the Closing Date, Borrower shall pay to Agent, for the ratable benefit of Lenders, a nonrefundable commitment fee equal to One Hundred Twenty Seven Thousand Five Hundred Dollars (\$127,500), which commitment fee shall be deemed fully earned and due and payable on the Closing Date and in addition to any other fee from time to time payable under the Loan Documents.

3.2 **Prepayment Premium.**

If the Obligations are accelerated as a result of either (i) an Event of Default under Article VIII(a), (g)(ii) (g)(v) or (h) or (ii) an Event of Default resulting from violation of any of the financial covenants set forth in Exhibit B-1 hereto or Borrower otherwise prepays, or is required to prepay, the Loan in full or in part (other than as a result of any mandatory prepayment under Sections 2.5(c)(iii) or 2.5(d)), then, on the effective date of such acceleration or prepayment, Borrower shall pay to Agent, for the ratable benefit of Lenders (in addition to the then outstanding principal, accrued interest and other Obligations owing pursuant to the terms of this Agreement and any other Loan Document), as yield maintenance for the loss of bargain and not as a penalty, an amount equal to the Prepayment Premium (prior to giving effect to any payment of Obligations as a result thereof). For purposes of determining the Prepayment Premium, if any, due upon acceleration of the Obligations, such acceleration shall be deemed to have occurred on the date the Event of Default giving rise to such acceleration first occurred.

IV. CONDITIONS PRECEDENT

4.1 **Conditions to Funding of the Loan and the Closing**

The obligations of Agent and Lenders to consummate the transactions contemplated herein and to fund the Loan in each case are subject to the delivery of all documents listed on, the taking of all actions set forth on and the satisfaction of each of the conditions precedent listed on Exhibit D hereto, all in a manner, form and substance satisfactory to Agent in its sole discretion.

v. **REPRESENTATIONS AND WARRANTIES**

Each Credit Party, jointly and severally, represents and warrants to the Lender Parties as follows as of the Closing Date and except as set forth in the disclosure schedule corresponding to such Section:

5.1 **Organization and Authority**

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Each Credit Party, and each Subsidiary of each Credit Party, is a corporation, partnership or limited liability company, or other form of entity, as the case may be, duly organized or formed, validly existing and in good standing (to the extent such concept applies) under the laws of its jurisdiction of organization or formation. Each Credit Party, and each Subsidiary of each Credit Party, (a) has all requisite corporate, partnership, limited liability company or other type

of entity, as the case may be, power and authority to own its Properties and carry on its business as now being conducted and as contemplated in the Loan Documents, the Revolving Loan Documents and the Related Documents, (b) is duly qualified and licensed to do business in and in good standing (to the extent such concept applies) in each jurisdiction where the failure so to qualify or be licensed or qualified would reasonably be expected to result in a Material Adverse Effect, and (c) has all requisite corporate, partnership, limited liability company or other type of entity, as the case may be, power and authority (i) to execute, deliver and perform the Loan Documents, the Revolving Loan Documents and the Related Documents to which it is a party, (ii) with respect to Borrower, to borrow hereunder, (iii) to consummate the transactions contemplated by the Loan Documents, the Revolving Loan Documents and the Related Documents and (iv) to grant the Liens pursuant to the Security Documents to which it is a party.

5.2 Loan Documents, Revolving Loan Documents and Related Documents

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The execution, delivery and performance by each Credit Party of the Loan Documents, the Revolving Loan Documents and the Related Documents to which it is a party, and the consummation by such Credit Party of the transactions contemplated thereby, (a) have been duly authorized by all requisite corporate, partnership, limited liability company or other form of entity, as the case may be, action of such Credit Party, and such Loan Documents, Revolving Loan Documents and Related Documents to which it is a party have been duly executed and delivered by or on behalf of such Credit Party; (b) do not violate any provisions of (i) any applicable law, statute, rule, regulation, ordinance or tariff, (ii) any order, injunction, writ or decree of any Governmental Authority binding on such Credit Party or any of their respective Properties, or (iii) the Organizational Documents of such Credit Party, or any agreement between such Credit Party and its shareholders, members, partners or equity owners or, to the knowledge of the Credit Parties, among any such shareholders, members, partners or equity owners; (c) are not in conflict with, and do not result in a breach or default of or constitute an event of default, or an event, fact, condition or circumstance which, with notice or passage of time, or both, would constitute or result in a conflict, breach, default or event of default under, any indenture, agreement or other instrument to which such Credit Party is a party, or by which the Properties of such Credit Party are bound, the effect of which would reasonably be expected to result in, either individually or in the aggregate, a Material Adverse Effect; (d) except as contemplated or expressly permitted by the Loan Documents and the Revolving Loan Documents, will not result in the creation or imposition of any Lien of any nature upon any of the Collateral or other material Properties of any Credit Party; and (e) except for filings in connection with the perfection and/or registration of the Liens created by the Security Documents, filings required to be made by Evolving Systems with the SEC, as defined herein, under the Securities Exchange Act of 1934, as amended, and rules and regulations thereunder, and consents, approvals, authorizations, filings, registrations and qualifications that have been obtained, made or done, do not require the consent, approval or authorization of, or filing, registration or qualification with, any Governmental Authority or any other Person. Each of the Loan Documents, the Revolving Loan Documents and the Related Documents to which each Credit Party, is a party constitutes the legal, valid and binding obligation of such Credit Party, enforceable against such Credit Party in accordance with its terms, subject to the effect of any applicable bankruptcy, moratorium, insolvency, reorganization or other similar law affecting the enforceability of creditors' rights generally and to the effect of general principles of equity which may limit the availability of equitable remedies (whether in a proceeding at law or in equity).

5.3 **Subsidiaries, Capitalization and Ownership Interests**

As of the Closing Date, no Credit Party has any Subsidiaries other than those Persons listed as Subsidiaries on Schedule 5.3. Schedule 5.3 states the authorized and issued capitalization of each Credit Party, the number and class of equity securities and/or ownership, voting or partnership interests issued and outstanding of such Credit Party, the number and class of Capital Stock authorized and issued pursuant to each employee stock option plan and stock purchase plan and, except as to the holders of the common stock of Evolving Systems and Capital Stock issued pursuant to employee stock option plans and stock purchase plans, the beneficial and record owners thereof (including options, warrants, convertible notes and other rights to acquire, or exchangeable or exercisable for, any of the foregoing) as of the Closing Date. Except as listed on Schedule 5.3, the outstanding equity securities and/or ownership, voting or partnership interests of each Credit Party have been duly authorized and validly issued and are fully paid and nonassessable and each Credit Party listed on Schedule 5.3 owns beneficially and of record all of the equity securities it is listed as owning free and clear of any Liens other than Liens created by the Security Documents and Permitted Liens. Schedule 5.3 lists the directors and managers of each Credit Party as of the Closing Date. Except as listed on Schedule 5.3, no Credit Party (a) owns any interest or participates or engages in any joint venture, partnership or similar arrangements with any Person, (b) is a party to or has knowledge of any agreements restricting the transfer of its equity securities, excluding the equity securities of Evolving Systems, (c) has issued any rights which can be convertible into or exchangeable or exercisable for any of its equity securities, or any rights to subscribe for or to purchase, or any options for the purchase of or any rights of pre-emption or conversion of, or any agreements providing for the issuance (contingent or otherwise) of, or any calls, or other commitments or claims of any character relating to, any of its equity securities or any securities convertible into or exchangeable or exercisable for any of its equity securities and (d) is subject to any obligation (contingent or otherwise) to repurchase or otherwise acquire, repay, redeem or retire any of its equity securities or other convertible rights or options or debt securities. No Credit Party has any stock appreciation rights, phantom stock plan or similar rights or obligations outstanding.

5.4 Properties

Each Credit Party is the sole owner and has good, valid and marketable title to, or a valid leasehold interest in, license of, or right to use, all of its material Properties, whether personal or real, in each instance, necessary or used in the Ordinary Course of Business, free and clear of all Liens other than Permitted Liens. All material tangible personal Property of each Credit Party is in good repair, working order and condition (normal wear and tear excepted) and is suitable and adequate for the uses for which they are being used or are intended.

5.5 **Other Agreements**

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Other than as listed in Schedule 5.5, no Credit Party is (a) a party to any judgment, order or decree or any agreement, document or instrument, or subject to any restriction, which adversely affects its ability to grant a security interest in the Collateral, take actions necessary to perfect the Lender's Liens, execute and deliver, or perform its payment, guaranty, indemnification, release, waiver, and any material obligations under, any Loan Document, Revolving Loan Document or Related Document to which it is a party or to pay the Obligations,

(b) in default in any material respect in the performance, observance or fulfillment of any obligation, covenant or condition contained in any Related Document, nor is there any event, fact, condition or circumstance which, with notice or passage of time or both, would constitute or result in a material conflict, breach, default or event of default under, any of the Related Documents, (c) in default in the performance, observance or fulfillment of any obligation, covenant or condition contained in any other agreement, document or instrument to which it is a party or to which any of its Properties are subject, which default would reasonably be expected to result in a Material Adverse Effect, nor is there any event, fact, condition or circumstance which, with notice or passage of time or both, yle="font-size:10.0pt;font-weight:bold;">Item 2.03 Creation of a Direct Financial Obligation

On November 14, 2005, Evolving Systems entered into an \$8.5 million Senior Term Loan with CapitalSource, bearing interest at LIBOR plus an applicable margin. The LIBOR rate varies, but can be no less than 3.75%. The standard applicable margin of 6.25% may be reduced to 5.25% if the Company meets and maintains certain financial requirements. The Senior Term Loan is secured by substantially all of the assets of Evolving Systems and its U.S. subsidiaries, as well as a pledge, subject to certain limitations, of stock of the foreign subsidiaries of Evolving Systems. The Senior Term Loan requires quarterly principal and monthly interest payments through October 2010. If the Company is in compliance with all financial covenants, no events of default have occurred, and certain minimum liquidity conditions are met, early payment is allowed.

On November 14, 2005, Evolving Systems Holdings Ltd. and Evolving Systems Ltd. entered into a \$4.5 million Senior Revolving Facility with CapitalSource, bearing interest at LIBOR plus 4.0%. The LIBOR rate varies, but can be no less than 3.75%. The Senior Revolving Facility is secured by substantially all of the assets of Evolving Systems Holdings Ltd. and Evolving Systems Limited. Borrowings under the Senior Revolving Facility are limited to a multiple of the Company's EBITDA, as defined, less the balance of the Senior Term Loan, described above. The multiple ranges from 2.50 in the first year to 1.75 in the fourth year. The agreement mandates an initial borrowing of \$2.0 million. The Senior Revolving Facility requires monthly payments of interest and fees, with the unpaid balance due in October 2010. Evolving Systems and its U.S. subsidiaries executed a Guaranty of the Senior Revolving Facility.

The Senior Term Loan and Senior Revolving Facility include negative covenants that place restrictions on the Company's ability to: incur additional indebtedness; create liens or other encumbrances on assets; make loans, enter into letters of credit, guarantees, investments and acquisitions; sell or otherwise dispose of assets; declare dividends; cause or permit a change of control; merge or consolidate with another entity; change its method of accounting and record keeping; make negative pledges; make capital expenditures; and change the nature of its business materially. The Senior Term Loan and Senior Revolving Facility also include financial covenants that require the Company to maintain a specified ratio of debt to EBITDA, as defined; minimum EBITDA for the trailing twelve months; and ratio of fixed charges, as defined, to EBITDA.

Outstanding amounts under the Senior Term Loan and Senior Revolving Facility may be accelerated by notice from CapitalSource upon the occurrence and continuance of certain events of default, including: payment defaults, breach of covenants beyond applicable grace periods, and breach of representations and warranties.

Text of Agreements. The full text of the Senior Loan Facility, and the Senior Revolving Facility, as well as ancillary agreements are attached as Exhibits 10.1(a) through 10.1(i) to this Current Report on Form 8-K. The foregoing descriptions are qualified in their entirety by reference to such exhibits.

Evolving Systems applied the proceeds from the Senior Term Loan to the Old Credit Facility and entered into a Subordination Agreement and Subordinated Notes with the Tertio Sellers for approximately \$4.9 million, bearing interest at 11% through December 31, 2007, and 14% thereafter. The Subordinated Notes

are subordinate to the Senior Term Loan and Senior Revolving Facility. Principal and interest are due in May 2011.

The Subordinated Notes include negative covenants that place restrictions on Evolving Systems' ability to: incur additional indebtedness; create liens or other encumbrances on assets; make loans, enter into letters of credit, guarantees, investments and acquisitions; sell or otherwise dispose of assets; declare dividends; cause or permit a change of control; merge or consolidate with another entity; change its method of accounting and record keeping; make negative pledges; make capital expenditures; and change the nature of its business materially. The Subordinated Notes also include a financial covenant requiring Evolving Systems to maintain a specified ratio of debt to EBITDA, as defined.

Outstanding amounts under the Subordinated Notes may be accelerated by notice from the Tertio Sellers upon the occurrence and continuance of certain events of default, including: payment defaults, breach of covenants beyond applicable grace periods, and breach of representations and warranties. Certain clauses, however, are not in effect until the Senior Term Loan and Senior Revolving Facility are paid.

Text of Agreements. The full text of the Subordinated Loan Facility are attached as Exhibits 10.1(j) and 10.1(k) to this Current Report on Form 8-K. The foregoing descriptions are qualified in their entirety by reference to such exhibits.

Item 3.03 Material Modifications to Rights of Security Holders

In connection with the transactions described herein, the Tertio Sellers, as holders of Evolving Systems' Series B Convertible Preferred Stock (the Preferred Stockholders), agreed that until the credit facility termination date, they would not seek to restrain, challenge, contest, assert a defense to, delay, impair, or otherwise prevent or impede the exercise by CapitalSource of its rights and remedies under any Pledge Agreement or other Security Document. See item 5.03 below.

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year

In connection with the modification of the rights of the Preferred Stockholders described in Item 3.03 above, the Preferred Stockholders and Evolving Systems agreed to amend the Certificate of Designation of Series B Convertible Preferred Stock. A copy of the amendment is attached as Exhibit 3.1(c). The amendment was filed with the State of Delaware on November 15, 2005.

Item 9.01 Financial Statements and Exhibits

(c) **Exhibits.** The following exhibits are filed with this report.

Exhibit Number	Description
3.1(a)	Certificate of Incorporation of Evolving Systems Holdings, Inc.
3.1(b)	Bylaws of Evolving Systems Holdings, Inc.

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- 3.1(c) Certificate of Amendment to Certificate of Designation of Series B Convertible Preferred Stock
- 10.1(a) Credit Agreement among Evolving Systems, Inc., Telecom Software Enterprises, LLC, Evolving Systems Holdings, Inc. and CapitalSource Finance LLC, as Agent
- 10.1(b) Security Agreement among Evolving Systems, Inc., Telecom Software Enterprises, LLC, Evolving Systems Holdings, Inc. and CapitalSource Finance LLC, as Agent
- 10.1(c)

5.6 **Litigation**

Except as set forth on Schedule 5.6, (i) there are no actions, suits, or proceedings pending against any Credit Party, (ii) to the knowledge of the Credit Parties, there are no investigations pending against any Credit Party and (iii) to the knowledge of the Credit Parties, there are no actions, suits, investigations or proceedings threatened against any Credit Party that, in each case, (a) questions or would reasonably be expected to prevent the validity of any of the Loan Documents, Revolving Loan Documents or Related Documents or the right of such Credit Party to enter into any Loan Document, any Revolving Loan Document or any Related Document to which it is a Party or to consummate the transactions contemplated thereby, or (b) would reasonably be expected to result in, either individually or in the aggregate, a Material Adverse Effect. Except as listed on Schedule 5.6, no Credit Party is a party or subject to any order, writ, injunction, judgment or decree of any Governmental Authority.

5.7 **Environmental Matters**

Each Credit Party is, and the operations of each Credit Party are, in compliance with all applicable Environmental Laws in all material respects. No Credit Party has been notified in writing of any action, suit, proceeding or investigation (a) relating in any way to compliance by or liability of such Credit Party under any Environmental Laws, (b) which otherwise deals with any Hazardous Substance or any Environmental Law, or (c) which seeks to suspend, revoke or terminate any license, permit or approval necessary for the generation, handling, storage, treatment or disposal of any Hazardous Substance.

5.8 **Tax Returns; Governmental Reports**

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Except as set forth in Schedule 5.8, each Credit Party (a) has filed all federal and all material state, foreign and local tax returns and other material reports which are required by law to be filed by such Credit Party, and (b) has paid all taxes, assessments, fees and other governmental charges, including, without limitation, payroll and other employment related taxes, in each case that are due and payable, except for items that such Credit Party currently is

contesting in good faith by appropriate proceedings and for which adequate reserves have been established in accordance with GAAP and no notice of Lien has been filed or recorded.

5.9 **Financial Statements and Reports**

All financial statements relating to any Credit Party that have been and hereafter may be delivered to Agent or any Lender by any Credit Party (a) are consistent with the books of account and records of such Credit Party, (b) have been prepared in accordance with GAAP on a consistent basis throughout the indicated periods, subject to, in the case of interim unaudited financial statements, the lack of footnote disclosure and normal year-end adjustments, and (c) present fairly in all material respects the consolidated financial position and results of operations of such Credit Party and its consolidated Subsidiaries at the dates and for the relevant periods indicated in accordance with GAAP on a basis consistently applied. Except as (a) listed on Schedule 5.9 and (b) permitted under this Agreement and not required to be disclosed on a Credit Party's financial statements under GAAP, the Credit Parties have no material obligations or liabilities of any kind that are not disclosed in such financial statements, and since the date of the most recent financial statements submitted to Agent and Lenders, there has not occurred any Material Adverse Effect or, to Credit Parties' knowledge, any event or condition that would reasonably be expected to result in a Material Adverse Effect.

5.10 **Compliance with Law; ERISA; Business**

(a) Except as set forth on Schedule 5.10(c), each Credit Party (a) is in compliance with all laws, statutes, rules, regulations, ordinances and tariffs of any Governmental Authority applicable to such Credit Party, the Business and/or such Credit Party's Properties or operations, including, without limitation, ERISA and any other laws or regulations pertaining to the Business, and (b) is not in violation of any order of any Governmental Authority or other board or tribunal, except, in the case of both (a) and (b), where any such noncompliance or violation would not reasonably be expected to result in, either individually or in the aggregate, a Material Adverse Effect. There is no event, fact, condition or circumstance which, with notice or passage of time, or both, would constitute or result in any noncompliance with, or any violation of, any of the foregoing, in each case except where any such noncompliance or violation would not reasonably be expected to result in, either individually or in the aggregate, a Material Adverse Effect.

(b) Evolving Systems has filed all material reports, schedules, forms, statements and other documents (including exhibits and other information incorporated therein) with the U.S. Securities and Exchange Commission (SEC) required to be filed by Evolving Systems since December 31, 2002 (such documents, the SEC Documents). No Subsidiary of Evolving Systems is required to file, or files, any form, report or other document with the SEC or similar foreign Governmental Authority regulating public issuance of securities. As of their respective dates, the SEC Documents complied in all material respects with the requirements of the Securities Act, or the Exchange Act, as the case may be, applicable to such SEC Documents, and none of the SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not materially misleading as of their respective dates; provided that notwithstanding anything else contained in this

Agreement or any Loan Document, none of the Credit Parties make any representation, warranty or guaranty as to any projections furnished to Agent or the Lenders (except that such projections have been prepared by the applicable Credit Party or Subsidiary of a Credit Party on the basis of assumptions which were believed to be reasonable as of the date of such projections in light of current and reasonably foreseeable business conditions). The financial statements of Evolving Systems included in the SEC Documents comply as to form in all material respects with applicable accounting requirements and the published rules and regulations of the SEC with respect thereto, have been prepared in accordance with GAAP (except, in the case of unaudited statements, as permitted by Form 10-Q of the SEC) applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto) and fairly present in all material respects the consolidated financial position of Evolving Systems and its consolidated Subsidiaries as of the dates thereof and the consolidated results of their operations and cash flows for the periods then ended (subject, in the case of unaudited statements, to the absence of footnote disclosure and to normal and recurring year-end audit adjustments).

(c) **Except as set forth on Schedule 5.10(c), no Credit Party has (i) engaged in any Prohibited Transactions, as defined in Section 406 of ERISA and Section 4975 of the Internal Revenue Code of 1986, as amended, and the rules and regulations promulgated thereunder, (ii) failed to meet any applicable minimum funding requirements under Section 302 of ERISA in respect of its plans and no funding requirements have been postponed or delayed, (iii) knowledge of any event or occurrence which would cause the Pension Benefit Guaranty Corporation to institute proceedings under Title IV of ERISA to terminate any of its employee benefit plans, (iv) any fiduciary responsibility under ERISA for investments with respect to any plan existing for the benefit of Persons other than its employees or former employees, or (v) withdrawn, completely or partially, from any multi-employer pension plans so as to incur liability under the MultiEmployer Pension Plan Amendments of 1980. With respect to each Credit Party, there exists no event described in Section 4043 of ERISA, excluding Subsections 4043(b)(2) and 4043(b)(3) thereof, for which the thirty (30) day notice period contained in 12 C.F.R. § 2615.3 has not been waived. Each Credit Party has maintained all material records required to be maintained by any applicable Governmental Authority. Intermediate Holdco has not engaged, does not presently engage and does not propose to engage in any business other than the ownership of the equity securities of Evolving Systems Holdings Limited, a company organized under the laws of England and Wales, and activities incidental thereto.**

5.11 Intellectual Property

(b) Evolving Systems has filed all material reports, schedules, forms, statements and other documents (including

(a) **Except as set forth on Schedule 5.11, as of the Closing Date, or as thereafter otherwise disclosed in writing to Agent from time to time, no Credit Party or Subsidiary of a Credit Party owns or licenses any material patents, patent applications, registered trademarks, trademark applications, trade names, registered service marks, service mark applications, registered copyrights or copyright applications other than off-the-shelf licenses readily available in the open market. Each Credit Party and each Subsidiary of a Credit Party owns directly, or is entitled to use by license or otherwise, all Intellectual Property necessary for or material to the conduct of such Credit Party s business (such Intellectual Property, the Necessary Intellectual Property). The ownership or license interests of all of the Credit Parties and each of their Subsidiaries interests in the items listed on Schedule 5.11 as of the Closing Date are and, at all times after the Closing Date (except to the extent no longer deemed**

necessary for or material to the conduct of the business of the Credit Parties and their Subsidiaries in the good faith business judgment of the Credit Parties) will be: (a) subsisting and have not been adjudged invalid or unenforceable, in whole or part; and (b) valid, in full force and effect and not in known conflict with the rights of any Person. Each Credit Party and Subsidiary of a Credit Party has made all filings and recordings necessary in the exercise of reasonable business judgment to protect its ownership or license interest in the Necessary Intellectual Property of such Credit Party or Subsidiary of a Credit Party in the United States Patent and Trademark Office, and the United States Copyright Office and in corresponding offices throughout the world, as appropriate. Each Credit Party and Subsidiary of a Credit Party has performed all acts and has paid and will continue to pay all required fees and taxes to maintain each and every item of its ownership or license interest in Necessary Intellectual Property in full force and effect, except such items of its Necessary Intellectual Property as are no longer deemed necessary for or material to the conduct of its businesses in its reasonable business judgment. As of the Closing Date, no litigation is pending or, to the knowledge of each Credit Party, threatened against any Credit Party or Subsidiary thereof, which contains allegations respecting the validity, enforceability, infringement or ownership of the interest of any Credit Party or Subsidiary of a Credit Party in the Necessary Intellectual Property. No Credit Party or Subsidiary of a Credit Party is in breach of or default under the provisions of any of the licenses under which it has obtained rights to license any Necessary Intellectual Property, nor is there any event, fact, condition or circumstance which, with notice or passage of time or both, would constitute or result in a conflict, breach, default or event of default under, any such license agreement which would reasonably be expected to result in, either individually or in the aggregate, a Material Adverse Effect. All personnel (including employees, agents, consultants and contractors) of the Credit Parties and each Subsidiary thereof, who have contributed to or participated in the conception or development of the Necessary Intellectual Property used in the business of the Credit Parties and their Subsidiaries either (i) have been a party to a work-for-hire or other arrangements or agreements with the Credit Parties or their Subsidiaries in accordance with applicable international, national and other applicable laws that has accorded the Credit Parties and their Subsidiaries full, effective, exclusive and original ownership of all tangible and intangible property and intellectual property rights thereby arising or relating thereto, or (ii) have executed appropriate instruments of assignment in favor of the Credit Parties or their Subsidiaries as assignee that have conveyed to such Person effective and exclusive ownership of all intellectual property rights thereby arising and related thereto.

5.12 Permits; Labor

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Each Credit Party is in compliance with, and has, all Permits necessary or required by applicable law or Governmental Authorities for the operation of its Business as presently conducted and as proposed to be conducted, and for the execution, delivery and performance by, and enforcement against, such Credit Party of each Loan Document, Revolving Loan Document and Related Document, except where noncompliance, violation or lack thereof would not reasonably be expected to result in, either individually or in the aggregate, a Material Adverse Effect. Except as listed in Schedule 5.12, (a) there is not any event, fact, condition or circumstance which, with notice or passage of time or both, would constitute or result in a conflict, breach, default or event of default under, any of the foregoing Permits, in each case which would reasonably be expected to result in, either individually or in the aggregate, a

Material Adverse Effect, and (b) no Credit Party is nor has been involved in any group labor dispute, strike, walkout or union organization.

5.13 **No Default; Solvency**

No Default or Event of Default exists. Each Credit Party is and, after giving effect to the transactions and the Indebtedness contemplated by the Loan Documents and the transactions contemplated by the Revolving Loan Document and the Related Documents, will be Solvent.

5.14 **Insurance**

All insurance policies of the Credit Parties or otherwise relating to their Properties as of the Closing Date are listed and described on Schedule 5.14.

5.15 **Margin Stock; Regulated Entities; Tax Regulations; OFAC; Patriot Act**

(a) **The Credit Parties are not engaged in the business of extending credit for the purpose of purchasing or carrying any margin stock or margin security (within the meaning of Regulations T, U or X issued by the Board of Governors of the Federal Reserve System), and no proceeds of the Loan will be used to purchase or carry any margin stock or margin security or to extend credit to others for the purpose of purchasing or carrying any margin stock or margin security within the meaning of such Regulations T, U or X.**

(b) **No Credit Party or any Person controlling any Credit Party is (a) an investment company within the meaning of the Investment Company Act of 1940; or (b) subject to regulation under the Public Utility Holding Company Act of 1935, the Federal Power Act, the Interstate Commerce Act, any state public utilities code, or any other Federal or state statute or regulation limiting its ability to incur Indebtedness.**

(c) **No Credit Party intends to treat the Loan, the Commitments and/or any letters of credit and related transactions as being a reportable transaction (within the meaning of Treasury Regulation Section 1.6011-4).**

(d) **No Credit Party (i) is a Person whose property or interest in property is blocked or subject to blocking pursuant to Section 1 of Executive Order 13224 of September 23, 2001 Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (66 Fed. Reg. 49079 (2001)), (ii) engages in any dealings or transactions prohibited by Section 2 of such executive order, or is otherwise associated with any such Person in any manner violative of such Section 2, or (iii) is a Person on the list of Specially Designated Nationals and Blocked Persons or subject to the limitations or prohibitions under any other U.S. Department of Treasury's Office of Foreign Assets Control regulation or executive order (OFAC).**

(e) **Each Credit Party is in compliance, in all material respects, with the Patriot Act. No part of the proceeds of the Loan will be used, directly or indirectly, for any payments to any governmental official or employee, political party, official of a political party, candidate for political office, or anyone else acting in an official capacity, in order to obtain,**

(a) **The Credit Parties are not engaged in the business of extending credit for the purpose of purchasing or carrying**

(e) Each Credit Party is in compliance, in all material respects, with the Patriot Act. No part of the proceeds of

retain or direct business or obtain any improper advantage, in violation of the United States Foreign Corrupt Practices Act of 1977, as amended.

5.16 **Broker s or Finder s Commissions**

Except as set forth on Schedule 5.16 no broker's, finder's or placement fee or commission is or will be payable to any broker, investment banker or agent engaged by any Credit Party or any of its officers, directors or agents with respect to the transactions contemplated by this Agreement, the other Loan Documents, the Revolving Loan Documents and the Related Documents, except for fees payable to Agent and Lenders.

5.17 **Disclosure**

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No Loan Document or any other agreement, document, written report, certificate or statement furnished to Agent or any Lender by or on behalf of any Credit Party in connection with the transactions contemplated by or pursuant to the Loan Documents, nor any representation or warranty made by any Credit Party in any Loan Document, contains any untrue statement of a material fact or omits to state any material fact necessary to make the factual statements therein taken as a whole not materially misleading as of the time made or delivered in light of the circumstances under">

Pledge Agreement between Evolving Systems, Inc. and CapitalSource Finance LLC, as Agent

10.(d)

Acknowledgment of Intellectual Property Collateral Lien among Evolving Systems, Inc., Telecom Software Enterprises, LLC, Evolving Systems Holdings, Inc. and CapitalSource Finance LLC, as Agent

10.1(e)

Revolving Facility Agreement among Evolving Systems Ltd, Evolving Systems Holdings Ltd.,

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- 10.1(f) Evolving Systems, Inc., Telecom Software Enterprises, LLC, Evolving Systems Holdings, Inc. and CSE Finance, Inc., as Lender, CapitalSource Finance LLC, as Agent
Charge Over Shares (US Secured Obligations) between Evolving Systems Holdings, Inc. and CapitalSource Finance LLC, as Collateral Agent
- 10.1(g) Charge Over Shares (UK Secured Obligations) between Evolving Systems Holdings, Inc. and CapitalSource Finance LLC, as Collateral Agent
- 10.1(h) Debenture among Evolving Systems Holdings Ltd., Evolving Systems Ltd. and CapitalSource Finance LLC, as Collateral Agent
- 10.1(i) Guaranty among Evolving Systems, Inc., Telecom Software Enterprises, LLC, Evolving Systems Holdings, Inc. and CapitalSource Finance LLC, as Agent
- 10.1(j) Subordination Agreement among Evolving Systems, Inc., Telecom Software Enterprises, LLC, Evolving Systems Holdings, Inc., the Junior Creditors (as listed in the agreement) and CapitalSource Finance LLC, as Agent
- 10.1(k) Form of Subordinated Note

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Dated: November 16, 2005

EVOLVING SYSTEMS, INC.

By: /s/ ANITA T. MOSELEY
Anita T. Moseley
Sr. Vice President & General Counsel