

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
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Velti Inc., <i>et al.</i> , <sup>1</sup>	:	Case No. 13-12878 (PJW)
	:	
	:	(Jointly Administered)
Debtors.	:	
	:	Hearing Date: 5/29/14 at 9:30 a.m. (EDT)
-----	X	Objection Deadline: 5/22/14 at 4:00 p.m. (EDT)

**APPLICATION OF DEBTORS AND DEBTORS IN POSSESSION PURSUANT TO  
SECTIONS 105(a) AND 363(b) OF THE BANKRUPTCY CODE FOR AN ORDER  
AUTHORIZING THEM TO ENTER INTO CONSULTING AGREEMENT WITH  
SALLY J. RAU NUNC PRO TUNC TO APRIL 1, 2014**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) hereby apply to the Court for entry of an order pursuant to sections 105(a) and 363(b) of title 11 of the United States Code (the “Bankruptcy Code”), authorizing them to enter into a consulting agreement (the “Agreement”) with Sally J. Rau, under which Ms. Rau would provide consulting services to the Debtors, *nunc pro tunc* to April 1, 2014. In support of this application (the “Application”), the Debtors: (i) submit the *Declaration of Sally J. Rau* (the “Rau Declaration”), a copy of which is attached hereto as Exhibit A and incorporated herein by reference; and (ii) further respectfully represent as follows:

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<sup>1</sup> The Debtors are the following six entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Velti Inc. (4475), Air2Web, Inc. (5572), Air2Web Interactive, Inc. (2364), Velti North America, Inc. (8900), Velti North America Holdings, Inc. (3953) and Velti US Holdings, Inc. (8299). The mailing address of each of the Debtors, solely for purposes of notices and communications, is 201 California Street, 14<sup>th</sup> Floor, San Francisco, California 94111.

### **Jurisdiction and Venue**

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

### **Background**

2. On November 4, 2013 (the “Petition Date”), each of the Debtors filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On November 12, 2013, the Office of the United States Trustee (the “U.S. Trustee”) appointed the Committee of Unsecured Creditors (the “Committee”) in these chapter 11 cases.

3. The Debtors are direct and indirect subsidiaries of Velti plc (“PLC” and together with its affiliates, the “Company”), which is incorporated under the laws of Jersey, Channel Islands and traded on the NASDAQ. The Company is a leading global provider of mobile marketing and advertising technology that enables brands, advertising agencies, mobile operators and media companies to implement highly targeted, interactive and measurable campaigns by communicating with and engaging consumers via their mobile devices. The Company currently operates through three separate business units, Mobile Marketing (“MMBU”), Performance Marketing and Advertising.

4. Velti, A2W and certain affiliates are parties or guarantors to a Credit Agreement dated as of August 10, 2012 (the “Credit Agreement”) with HSBC Bank USA, National Association, as Administrative Agent (“HSBC”). As of the Petition Date, the amount outstanding under the Credit Agreement was approximately \$57.5 million, exclusive of outstanding interest. Before the Petition Date the Company defaulted under the terms of the Credit Agreement. In response, the Company explored a number of strategic alternatives which

ultimately led to a series of transactions that began on November 1, 2013, when the debt outstanding under the Credit Agreement was purchased by GSO Credit-A Partners LP, GSO Palmetto Opportunistic Investment Partners LP and GSO Coastline Partners LP (together, “GSO”), which are owned by GSO Capital Partners, the credit division of Blackstone.

5. On the Petition Date, the Debtors filed a motion to approve, among other things, the procedures governing the competitive bidding process for the sale of the MMBU and the related assets owned by the Debtors (collectively, the “Assets”), and the sale of the Assets pursuant to such procedures (the “Sale”). On December 20, 2013, the Court entered an order approving the Sale of the Assets to GSO. The Sale closed on January 3, 2014.

6. Shortly after the Sale, almost all of the Debtors’ employees were either terminated or they resigned. Ms. Rau, aside from her current role as a director of the Debtors, has previously served as an employee and officer of the Debtors, although she gave up those roles following the Sale. Instead, following the Sale, Ms. Rau provided services to the Debtors up to and through March 31, 2014 pursuant to a Reverse Transition Services Agreement between GSO and affiliates of Velti Inc.

7. On April 10, 2014, the Court entered the *Agreed Order Authorizing the Debtors to Retain Craig Boucher and Deloitte Financial Advisory Services LLP Nunc Pro Tunc to December 3, 2013* [Docket No. 355] (the “Deloitte Order”). Although the Deloitte Order authorized the Debtors to engage Craig M. Boucher as the bankruptcy administrative officer of the Debtors and for the personnel of Deloitte Financial Advisory Services LLP and Deloitte Transactions and Business Analytics LLP (together, “Deloitte”) to assist Mr. Boucher, the scope of services provided by Mr. Boucher and Deloitte does not encompass all of the tasks that the Debtors need to complete before these chapter 11 cases are closed.

8. On March 6, 2014, the Debtors filed the *Debtors' Plan of Liquidation Under Chapter 11 of the Bankruptcy Code* [Docket No. 295] (as amended from time to time, the "Plan") and the *Disclosure Statement for the Debtors' Plan of Liquidation Under Chapter 11 of the Bankruptcy Code* [Docket No. 297] (as amended from time to time, the "Disclosure Statement"). On April 10, 2014, the Court entered its *Order (I) Approving Disclosure Statement, (II) Approving Notice and Objection Deadline and Procedures for the Disclosure Statement Hearing, (III) Establishing Solicitation and Voting Procedures, (IV) Scheduling a Confirmation Hearing, and (V) Establishing Notice and Objection Deadline and Procedures for Confirmation of the Proposed Plan* [Docket No. 356] (the "Disclosure Statement Order"). A hearing to consider confirmation of the Plan is set for May 29, 2014.

### **Relief Requested**

9. The Debtors hereby seek the entry of an order, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code authorizing them to enter into the Agreement with Ms. Rau, a copy of which is attached as Exhibit C hereto, under which Ms. Rau would provide consulting services to the Debtors.

10. The Debtors believe that they do not need authorization from this Court to enter into the Agreement for Ms. Rau to provide them services, as section 363(c) of the Bankruptcy Code authorizes the Debtors' to use estate property in the ordinary course of business and it is in the ordinary course of the Debtors' business to retain individuals to provide them services. Further, the Debtors do not believe that Ms. Rau is a "professional" who must be retained under sections 327 and 328 of the Bankruptcy Code. Nevertheless, out of an abundance of caution, the Debtors have filed this motion to give sufficient notice of their proposed retention of Ms. Rau to all parties in interest.

**Ms. Rau's Engagement and Qualifications**

11. Under the circumstances, the Debtors have determined that by entering into the Agreement for Ms. Rau to provide them services is necessary so that the Debtors can (a) meet their administrative obligations in these cases, (b) preserve and maximize the value of their estates, and (c) confirm and implement a plan. As such, the Debtors have chosen to employ Ms. Rau pursuant to the terms of the Agreement.

12. Ms. Rau is uniquely well qualified to provide services to the Debtors. As a director of the Debtors, as a former officer and director of the Debtors, and as one of the only people to work with and for the Debtors since the closing of the Sale, Ms. Rau has information about the Debtors that no one else has and that it would take months for another person to acquire. Given the Debtors' immediate and ongoing need to provide monthly operating reports, coordinate with their professionals and work towards confirmation of a plan, the Debtors cannot afford the delay of hiring someone else to provide them with the necessary services that Ms. Rau proposes to perform. What is more, because the Debtors are liquidating and these chapter 11 cases are nearing completion, it would be very difficult for the Debtors to attract another qualified person even if they tried on an expedited time frame.

13. Ms. Rau is not turnaround or restructuring professional, but she is more than qualified to provide the services described in the Agreement. Ms. Rau is an attorney and an experienced businesswoman who has already demonstrated her acumen in these cases.

14. As such, the Debtors believe that Ms. Rau is well qualified and able to provide them services in a cost-effective, efficient and timely manner. The Debtors have been advised by Ms. Rau that she will endeavor to coordinate with the other professionals retained in these cases to eliminate unnecessary duplication or overlap of work. Specifically, Ms. Rau will be in

constant communication with Mr. Boucher, Deloitte, and the Debtors' counsel, DLA Piper LLP (US), to ensure that all necessary tasks are completed in the most efficient and cost-effective method possible. Therefore, the Debtors submit that the retention and employment Ms. Rau as described in the Agreement is in the best interests of their estates, creditors and other stakeholders in these cases.

**Services to be Provided by Ms. Rau**

15. Consistent with the terms of the Agreement, Ms. Rau will be engaged to provide consulting services to the Debtors in connection with these chapter 11 cases, including: (i) preparation and filing of monthly operating reports, as required by applicable law; (ii) working with the Debtors' financial consultants, including Deloitte, managing the debtor-in possession financing and payment of all Debtors' expenses; (iii) assisting the Debtors' counsel and counsel to the Committee in reviewing claims and object to claims; and (iv) such other services as may be required to wind up these chapter 11 cases.

**Ms. Rau's Fees**

16. As set forth in the Engagement Letter, in exchange for her services, the Debtors shall pay Ms. Rau a fee of \$20,000 per month. Payments shall commence on April 1, 2014 and shall be made stop only after the confirmation of a plan in these cases. Such monthly fee shall be paid on the 15th day of each month.

17. In addition, the Debtors will reimburse Ms. Rau for her reasonable direct expenses, including customary out-of-pocket expenses, telephone, overnight mail, messenger, travel, meals, accommodations and other expenses directly related to the engagement, in accordance with the applicable rules and guidelines of this Court. The Debtor will reimburse Ms. Rau within thirty days of Ms. Rau submitting her expenses to the Debtor for reimbursement,

and Ms. Rau will submit all of her expenses to the Debtor not later than 30 days after the confirmation of a plan in these cases.

18. Because Ms. Rau is not being employed as a professional under section 327 of the Bankruptcy Code, she will not be submitting regular fee applications pursuant to sections 330 and 331 of the Bankruptcy Code.

### **Legal Basis for Relief Requested**

#### **A. The Debtors Have Exercised Their Sound and Prudent Business Judgment.**

19. Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor in possession “after notice and hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b). The Debtors’ proposed use of its assets pursuant to section 363(b) of the Bankruptcy Code to employ Ms. Rau under the terms set forth in the Agreement represents the Debtors’ reasonable exercise of its business judgment and should be approved. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *Stephens Indus., Inc., v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (Bankr. D. Del. 1999); *In re Delaware & Hudson R.R. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (courts have applied the “sound business purpose” test to evaluate motions brought pursuant to section 363(b)); *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)) (“[T]he business judgment rule is ‘a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the actions was in the best interests of the company.’”).

20. Bankruptcy courts have analyzed the propriety of a debtor's employment of corporate restructuring officers, advisors and professionals under section 363 on numerous occasions and have determined it is an appropriate exercise of the debtor's business judgment to employ a professional in this manner.<sup>2</sup> See, e.g., *In re Fairfield Residential LLC*, No. 09-14378 (Bankr. D. Del. Jan. 13, 2010); *In re Motor Coach Industries International, Inc.*, No. 08-12136 (Bankr. D. Del. Oct. 15, 2008) (approving retention of CRO and crisis managers); *In re Pappas Telecasting, Inc.*, Case No. 08-10916 (Bankr. D. Del. June 26, 2008); *In re Linens Holding Co.*, No. 08-10832 (CSS) (Bankr. D. Del. May 28, 2008); *In re Hoop Holdings, LLC*, No. 08-10544 (BLS) (Bankr. D. Del. Apr. 22, 2008); *In re Leiner Health Products, Inc.*, No. 08-10446 (KJC) (Bankr. D. Del. Apr. 8, 2008); *In re TOUSA, Inc.*, No. 08-10928 (Bankr. S.D. Fla. Mar. 26, 2008); *In re American Home Mortgage Holdings, Inc.*, No. 07-11047 (Bankr. D. Del. Sept. 5, 2007); *In re Calpine Corp.*, No. 05-60200 (Bankr. S.D.N.Y. Jan. 17, 2007). Further, a debtor may employ one or more professionals pursuant to section 363(b) to act as their restructuring officers or managers or crisis officers or managers. See *In re Tokheim Corp.*, No. 02-13437 (RJN) (Bankr. D. Del. February 25, 2003). The retention of interim corporate officers and other temporary employees is proper under section 363 of the Bankruptcy Code. Numerous courts in this district have authorized retention of officers utilizing this provision of the Bankruptcy Code. See *In re Fairfield Residential LLC*, No. 09-14378 (Bankr. D. Del. Jan. 13, 2010); *In re The Holliston Mill, Inc.*, No. 07-10687 (MFW) (Bankr. D. Del. June 6, 2007); *In re Sea Containers Ltd.*, No. 06-11156 (KJC) (Bankr. D. Del. May 8, 2007); *In re Adva-Lite, Inc.*, No. 07-10264 (KJC) (Bankr. D. Del. Mar. 16, 2007); *In re Global Home Products LLC*, No. 06-

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<sup>2</sup> Because of the voluminous nature of the orders cited herein, they are not annexed to this Motion. Copies of these orders are available upon request made to the Debtors' proposed counsel.



10340 (KG) (Bankr. D. Del. May 4, 2006); *In re World Health Alternatives, Inc.*, No. 06-10166 (PJW) (Bankr. D. Del. Mar. 15, 2006).

21. Additionally, the Court's general equitable powers codified in section 105(a) of the Bankruptcy Code provide ample authority for the relief requested herein. Section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary to carry out the provisions of this title." *See* 11 U.S.C. § 105(a). *See also United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990); *In re Continental Airlines*, 203 F.3d 203, 211 (3d Cir. 2000) ("Section 105(a) of the Bankruptcy Code supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code."); *Baron & Budd, P.C. v. Unsecured Asbestos Claimants Comm.*, 2005 WL 435207, \*14 (D.N.J. Feb. 25, 2005) (reciting the power of the bankruptcy court to "... issue any order ... that is necessary or appropriate to carry out the provisions of ... [title 11]").

22. The terms and conditions of the Agreement were negotiated by the Debtors and Ms. Rau at arm's-length and in good faith. Given Ms. Rau's significant experience with the Debtors, her professional acumen, and the status of these chapter 11 cases, Ms. Rau is the only person able to immediately and competently provide the services described in the Agreement. What is more, to the extent that any of the services could be provided by Deloitte or DLA Piper LLP (US), that Ms. Rau will provide the services in a more cost-efficient manner as her fees are fixed at \$20,000 a month. Accordingly, the Debtors submit that the employment of Ms. Rau is a sound exercise of their business judgment and satisfies section 363 of the Bankruptcy Code as Ms. Rau's services are necessary and essential to the Debtors' restructuring efforts.

**B. Retention of Ms. Rau is Critical to the Debtors' Success.**

23. Denying the relief requested herein would deprive the Debtors of the assistance of a highly qualified person and disadvantage the Debtors and all parties in interest. Indeed, it would be difficult for the Debtors to even prepare monthly operating reports without Ms. Rau's services, and without her assistance the confirmation of the Plan might be complicated as Deloitte and the Debtors' counsel would lose an invaluable resource with historical knowledge of the Debtors, their businesses and records. Even if the Debtors' were able to engage another person to provide the services described in the Agreement, that person almost certainly wouldn't have the thorough understanding of the Debtors' business and restructuring initiatives that Ms. Rau does. What is more, the delay in identifying and engaging another person might delay the confirmation of a plan in these cases. Accordingly, the services provided by Ms. Rau are critical to the success of these cases. The Debtors' decision to enter into the Engagement Letter reflects an exercise of the Debtors' sound business judgment, and should the Court approve the Agreement in substantially the form attached hereto.

**Notice**

24. Notice of this Application shall be provided to: (a) the U.S. Trustee; (b) counsel to the Committee; (c) counsel to HSBC; (d) counsel to GSO; (e) the United States Attorney's Office for the District of Delaware; (f) the Internal Revenue Service; (g) the Securities and Exchange Commission; (h) Ms. Rau; and (i) those parties requesting notice pursuant to Bankruptcy Rule 2002. Due to the nature of the relief requested herein, the Debtors respectfully submit that no further notice of this Application is required.

WHEREFORE, the Debtors respectfully request that the Court (i) enter an order substantially in the form attached hereto as Exhibit B, granting the relief requested herein and (ii) granting such other and further relief as the Court may deem proper.

Dated: April 28, 2014  
Wilmington, Delaware

Respectfully submitted,

/s/ Stuart M. Brown  
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