

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

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

**MOTION OF THE DEBTORS AND DEBTORS IN POSSESSION
FOR ENTRY OF AN ORDER AUTHORIZING THE ASSUMPTION
AND ASSIGNMENT OF THE COOPERATION AGREEMENT**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”), by and through their counsel, DLA Piper LLP (US), hereby move the Court (the “Motion”) pursuant to sections 105 and 365 of title 11 of the United States Code (the “Bankruptcy Code”) for entry of an order authorizing and approving the assumption and assignment of the Cooperation Agreement (defined below) to Velti S.A. (the “Assignee”). In support of this Motion, the Debtors respectfully state as follows:

Jurisdiction and Venue

1. The Court has jurisdiction over these chapter 11 cases and this matter under 28 U.S.C. §§ 157 and 1334. 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.

¹ 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 DLA Piper LLP (US), Attn: Chun I. Jang, 203 N. LaSalle Street, Suite 1900, Chicago, Illinois 60601.

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 was a leading global provider of mobile marketing and advertising technology that enabled 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. Prior to the Petition Date, the Company operated 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. 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.

7. On December 30, 2011, Velti USA Inc., a/k/a Velti Inc., entered into the Cooperation Agreement between it and 3G Motion. A copy of the Cooperation Agreement and its subsequent amendments (the “Cooperation Agreement”) is attached hereto as Exhibit A. Under the terms of the Cooperation Agreement 3G Motion agreed to provide supply services and solutions to Velti Inc. in connection with mobile campaigns that Velti Inc. performed for its clients in Latin America.

Requested Relief

8. By this Motion, the Debtors request the authority, pursuant to sections 105 and 365 of the Bankruptcy Code, to assume the Cooperation Agreement and assign such Cooperation Agreement to the Assignee.

Argument

9. Section 105(a) of the Bankruptcy Code provides, in relevant part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

10. Section 365(f)(2) of the Bankruptcy Code provides in pertinent part that:

The trustee may assign an executory contract or unexpired lease of the debtor only if -

- (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
- (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). Under section 365(a) of the Bankruptcy Code, a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”

11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code, in turn, codifies the requirements for assuming an unexpired lease or executory contract of a debtor. Such subsection provides:

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee -

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other

than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

A. The Cooperation Agreement May Be Assumed.

11. A debtor's assumption or rejection of an executory contract is subject to review under the business judgment standard. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984); Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 39-40 (3d Cir. 1989); In re Federated Dep't Stores, Inc., 131 B.R. 808, 811 (S.D. Ohio 1991); In re HQ Global Holdings, Inc., 290 B.R. 507, 511 (Bankr. D. Del. 2003) ("A debtor's decision to reject an executory contract under section 365 is governed by the business judgment standard."); In re ANC Rental Corp., 278 B.R. 714, 723 (Bankr. D. Del. 2002) ("In order to assume and assign an executory contract or unexpired lease under section 365(f), the debtor must establish that the decision is one made in its sound business judgment.").

12. The business judgment rule shields a debtor's management from judicial second-guessing. Once a debtor articulates a valid business justification, "[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 action taken was in the best interests of the company.'" Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)).

13. Indeed, when applying the "business judgment" rule, courts show great deference to a debtor's decision to assume an executory contract. See Richmond Leasing Co. v. Capital

Bank, N.A., 762 F.2d 1303, 1309 (5th Cir. 1985) (stating that a court should not interfere with assumption of an executory contract unless the decision to do so “is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code”) (quoting Allied Tech. v. R.B. Brunemann & Sons, 25 B.R. 484, 495 (Bankr. S.D. Ohio 1982)); see also In re III Enters., Inc. V, 163 B.R. 453, 469 (Bankr. E.D. Pa.) (“Generally, a court will give great deference to a debtor’s decision to assume or reject an executory contract. A debtor need only show that its decision to assume or reject the contract is an exercise of sound business judgment - a standard which we have concluded many times is not difficult to meet.”), aff’d, 169 B.R. 551 (E.D. Pa. 1994); Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume an executory contract “should be granted as a matter of course”).

14. Assumption and assignment of the Cooperation Agreement represents a sound exercise of the Debtors’ business judgment. The Cooperation Agreement was not an Asset purchased by GSO under the Sale, but rather the Cooperation Agreement has been left behind for use by the Debtors. The Debtors will not incur any liabilities by assuming the Cooperation Agreement because the Debtors intend to immediately assign the Cooperation Agreement to the Assignee. Rather, by assuming and assigning the Cooperation Agreement the Debtors will benefit their bankruptcy estates by preventing the counterparty to the Cooperation Agreement, 3G Motion, from asserting a rejection damages claim.

B. The Cooperation Agreement May Be Assigned.

15. Section 365(b)(1)(C) of the Bankruptcy Code requires that the Debtors demonstrate adequate assurance of future performance by the Assignee as a condition of assigning the Cooperation Agreement to the Assignee. The meaning of “adequate assurance of

future performance” depends on the facts and circumstances of each case, but should be given “practical pragmatic construction.” EBG Midtown S. Corp. v. McLaren/Hart Env'tl. Eng'g Corp. (In re Sanshoe Worldwide Corp.), 139 B.R. 585, 592 (S.D.N.Y. 1992) (citations omitted), aff'd, 993 F.2d 300 (2d Cir. 1993); see also Carlisle Homes, Inc. v. Azzari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1988) (“Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.”).

16. Among other things, adequate assurance may be provided by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. See, e.g., In re Bygaph, Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (stating that adequate assurance of future performance is present when prospective assignee of lease from debtor has financial resources and has expressed willingness to devote sufficient funding to business in order to give it strong likelihood of succeeding). The Debtors will adduce facts at the hearing on this Motion, if necessary, to show the Assignee’s financial credibility, experience in the industry, and willingness and ability to perform under the contracts to be assumed and assigned to it. There have been no defaults or breaches of the Cooperation Agreement, and consequently the Debtors are not required to take any actions to cure pursuant to section 365(b)(1)(A) of the Bankruptcy Code.

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WHEREFORE, the Debtors respectfully request that this Court enter an order authorizing and approving the assumption and assignment of the Cooperation Agreement and granting such other and further relief as is just and proper.

Dated: May 8, 2014
Wilmington, Delaware

Respectfully submitted,

/s/ Stuart M. Brown

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ATTORNEYS FOR DEBTORS AND DEBTORS IN
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