

**SIDLEY AUSTIN LLP**

Michael G. Burke  
787 Seventh Avenue  
New York, NY 10019  
Tel: (212) 839-5300  
Fax: (212) 839-5599  
mgburke@sidley.com

*Proposed Counsel for the Official Committee of Unsecured Creditors*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

PARETEUM CORPORATION, *et al.*,  
  
Debtors.<sup>1</sup>

Chapter 11

Case No. 22-10615 (LGB)

(Jointly Administered)

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF THE OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' SALE MOTION**

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned chapter 11 cases (the "Chapter 11 Cases") of Pareteum Corporation and its affiliated debtors and debtors-in-possession (collectively, the "Debtors") submit this limited objection and reservation of rights (this "Limited Objection") in response to the *Motion of the Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sales of Debtors' Assets, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sales of Debtors' Assets, (D) Approving Form and Manner of Notice of Sale, Auction, and Sale Hearing, (E) Approving Assumption and Assignment Procedures and Form and manner of Notice of*

<sup>1</sup> The Debtors in the Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, if applicable, are: Pareteum Corporation (7538); Pareteum North America Corp. (f/k/a Elephant Talk North America Corp.) (9623); Devicescape Holdings, Inc. (2909); iPass, Inc. (4598); iPass IP LLC (2550); Pareteum Europe B.V.; Artidium Group Ltd. (f/k/a Artidium PLC); Pareteum Asia Pte. Ltd.; and Pareteum N.V. (f/k/a Artidium N.V.). The Debtors' corporate headquarters is located at 1185 Avenue of the Americas, 2nd Floor, New York, NY 10036.



*Assumption and Assignment; and (II)(A) Authorizing Sale of Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Docket No. 13] (the "Sale Motion").*<sup>2</sup>

### **PRELIMINARY STATEMENT**

1. The Committee is cognizant that the sale of the Debtors as a going concern is in the best interests of the Debtors, its employees, and the other stakeholders in these Chapter 11 Cases. To that end, the Committee has tried to play a meaningful role in attempting to ensure that a going concern sale can be accomplished, but at the same time trying to ensure that (a) the estates will not be left administratively insolvent post-sale, and (b) the Debtors have the ability to confirm a plan of liquidation that establishes a litigation trust that can pursue litigation claims for the benefit of unsecured creditors. Unfortunately, the terms of the Stalking Horse Agreement and the DIP financing do not permit such an outcome. Accordingly, and while the Committee will continue to engage with the Debtors and the Stalking Horse Purchasers in an effort to come to a global resolution, the Committee files this Limited Objection.

2. The Stalking Horse Purchasers, who are also the Debtors' prepetition secured lenders, are contracted to purchase substantially all of the Debtors' assets in exchange for a credit bid of over \$60 million and assumption of cure costs. Importantly, new money is not a component of the Purchase Price. Although Circles, one of the Stalking Horse Purchasers, has extended a DIP loan to the Debtors, it is likely that there will not be enough funds for the Debtors to meet its post-petition obligations to successfully consummate a plan of liquidation *and* provide for a meaningful contribution to a litigation trust in order to allow a litigation trustee to monetize the non-purchased

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<sup>2</sup> Capitalized terms used but not defined herein shall have the respective meanings given to them in the Sale Motion.

assets for the benefit of unsecured creditors. In other words, these Chapter 11 Cases will have been funded solely to complete a sale of the Debtors' assets to the Prepetition Secured Lenders – and the Debtors' unsecured creditors would be left without any source of recovery.

3. The Committee has repeatedly requested that the Stalking Horse Purchasers include some cash, other than the insufficient “Wind Down Amount,” and increase the pool of Excluded Assets to include, among other things, projected cash at Closing, post-Closing accounts receivable, and all claims and causes of action against the Debtors' current and former directors and officers. The Committee believes that such assets will help bridge the Debtors' liquidity gap and provide assets for a litigation trust. As of the date herein, these requests have repeatedly been denied.

4. As a result, and despite exhaustive negotiations over the last three weeks, the parties have still been unable to reach a compromise that would provide a global resolution to these Chapter 11 Cases. The Committee is left with no choice but to file this Limited Objection in order to ensure that its rights are reserved. Moreover, the Sale Order must (a) explicitly preserve the Committee's rights to initiate a Challenge Proceeding as set forth in the proposed final DIP Order so that such rights continue notwithstanding entry of the Sale Order and the Sale closing and (b) provide for security to be posted by the Stalking Horse Purchasers in the event of a successful Challenge Proceeding.

### **RELEVANT BACKGROUND**

5. On May 15, 2022 (the “Petition Date”), each of the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code Sections 1107(a) and 1108. No trustee or examiner has been appointed.

6. The United States Trustee for Region 2 appointed the Committee. *See* Notice of Appointment of Official Committee of Unsecured Creditors [Docket No. 52]. The Committee's

membership presently consists of: (i) AT&T Mobility; (ii) Gogo LLC (Intelsat Inflight LLC); and (iii) TD Synnex.

7. On May 16, 2022, the Debtors filed the Sale Motion, through which the Debtors first asked the Court to approve bidding procedures. The Court entered an order approving the bidding procedures. [Docket No. 76] (the “Bidding Procedures Order”). The Debtors did not receive any other Qualified Bids, so they cancelled the Auction and designated Circles MVNE Pte. Ltd. (“Circles”) and Channel Ventures Group LLC (“CVG” and together with Circles, the “Stalking Horse Purchasers”) as the Successful Bidder [Docket No. 110]. The hearing on the Sale Motion is scheduled for June 23, 2022 at 9:00 a.m. ET.

### **OBJECTION**

#### **I. Case Should Not be Run Solely for Benefit of Stalking Horse Purchasers/Lenders.**

8. While the Committee understands that, without any other bids for the Debtors’ assets, the sale to the Stalking Horse Purchasers is the only path to ensure the company continues to operate as a going concern, there is a significant likelihood that there will be insufficient funding for the Debtors to meet its post-petition obligations, to consummate a plan of liquidation, and to provide for meaningful funding of a litigation trust given the Debtors’ current projections. Although the Stalking Horse Agreement references a Wind Down Amount, such amount is contingent on cash being left in the estates and there is no backstop or guarantee that *any* funds will be left as a Wind Down Amount – especially in light of the increased administrative expenses resulting from the contested nature of every facet of this case including disagreements about the Approved DIP budget, which has now been agreed upon by the Debtors and DIP Lender. Indeed, there must be an agreement on a sum certain on the Wind Down Amount and funding for the litigation trust.

9. Accordingly, these Chapter 11 Cases face a risk of dismissal or conversion. As it

currently stands, these cases appear to have been specially crafted for the benefit of two creditors. The Committee believes that such a dire outcome can be avoided with some additional funding and changes to the Stalking Horse Agreement, first and foremost by expanding the pool of Excluded Assets that will be left to the Debtors and their estates after the sale closing.

10. The Debtors have admitted that their financial troubles were caused at least in part by the malfeasance of certain of their officers and directors, and a number of lawsuits have been initiated premised on such malfeasance.<sup>3</sup> Notably, the individual who served as both chief executive officer and chairman of the board when such misdeeds occurred remains on the Debtors' board.<sup>4</sup> Even so, the Stalking Horse Agreement contemplates that the claims and causes of actions against certain of the Debtors' affiliates, employees, and current officers and independent directors are assets to be purchased. Stalking Horse Agreement § 2.1(a)(xvi). Additionally, the list of Purchased Assets have broad catchall categories that may encompass assets that are not specifically listed as Excluded Assets, therefore leaving open the possibility that other claims and causes of actions are inappropriately transferred to the Stalking Horse Purchasers. *Id.* at §§ 2.1(a)(i), (iii), (xv), 2.1(b)(i)-(iv), (xvi). Claims and causes of action ("Claims") do not provide value to the Stalking Horse Purchasers as they likely do not have standing to pursue such claims. In contrast, the Claims likely provide significant value to the Debtors and their estates. Notably, among the Excluded Liabilities is "any Liability of any Seller or any Affiliate (other than relating to the Purchased Equity Interests) relating to any Legal Proceeding arising out of or in connection with the conduct of the Business or any other conduct of any Affiliate or any of its officers, directors, employees, consultants, agents or advisors, in each case, for the period prior to Closing

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<sup>3</sup> Thomas Declaration ¶¶ 9, 75-83, 99, Exhibit J, ECF No. 3.

<sup>4</sup> Thomas Declaration ¶ 88, ECF No. 3.

(other than the Assumed Liabilities).” *Id.* at § 2.3(c). Exclusion of such liability underscores why it is inequitable for the Stalking Horse Purchasers to purchase the Claims – they are taking away potential defenses. Additionally, the Debtors and the Stalking Horse Purchasers have not made any showing to support the sale of the Claims. Courts have closely scrutinized sales of such claims and causes of action. *See In re Metropolitan Elec. Mfg. Co.*, 295 B.R. 7, 16 (Bankr. E.D.N.Y. 2003) (“The Trustee’s statutory rights to commence avoidance actions pursuant to Section 544(b) of the Bankruptcy Code and the enabling statutes cannot be sold or assigned where the only benefit to the estate is the purchase price received for that purchase.”); *see also In re Milazzo*, 450 B.R. 363, 372 (Bankr. D. Conn. 2011) (“Permitting the highest bidder at an auction to usurp the Trustee’s unique statutory powers not only exceeds the scope of the narrowly defined, judicially created exception for derivative actions, but contravenes both the provisions and the underlying policy of the Bankruptcy Code itself.”).

11. To address the Stalking Horse Purchasers’ reluctance to add a new money component to the Purchase Price, the Committee has suggested, among other things, that the Stalking Horse Purchasers agree that a specific time period of post-closing accounts receivables be an Excluded Asset and provide a backstop for post-petition obligations and the Wind Down Amount. With these changes, the Committee believes that the Debtors will not only successfully administer their cases to conclusion, but also fund a litigation trust that will provide some recovery to unsecured creditors. Further, there are a number of additional issues with the Stalking Horse Agreement, namely:

12. *Conveyance of Assets Subsequent to Closing.* The Stalking Horse Agreement provides that if, for up to 90 days after the Closing Date, the Stalking Horse Purchasers believe (for any reason) that an asset is material or necessary for the Business or its post-closing operations

and such asset is not a Purchased Asset, then the Seller is obligated to convey such asset to the Stalking Horse Purchaser. Stalking Horse Agreement § 2.4(c). This provision does not contemplate any additional consideration for such conveyances and gives the Stalking Horse Purchasers undue power as all that is required to trigger such obligation is a Stalking Horse Purchaser's belief. Such provision is not only unusual, but it provides uncertainty as to what assets are actually left to the estates.

13. *Liabilities Relating to Employees.* The Debtors are required to pay certain amounts owed to employees that are hired by Circles, including “all wages, bonuses, commissions, and other amounts that become owing to any Business Employee due to the termination of such Business Employee's employment with any Seller or Affiliate effective upon Closing” without any condition that such payments shall only be in accordance with the Bankruptcy Code or applicable law. *Id.* § 8.8. Additionally, the Debtors and their estates, including any litigation trustee or other successor-in-interest, should have reasonable access to the employees hired by the Stalking Horse Purchasers for the purposes of the administration of the estates and any litigation trust.

14. *Access to Books and Records.* Access to the Debtors' transferred books and records are only allowed for the purposes of “(a) preparing any Tax Returns or (b) complying with the requirements of, or responding to inquiries by, any Governmental Authority.” *Id.* § 8.5. The Debtors and their estates, including any litigation trustee or other successor-in-interest, should have unfettered access for any reason, including subpoenas, other lawful demands, and access necessary for the purposes of any future litigation.

**II. Challenge Rights under the DIP Order Should be Expressly Reserved and Any Sale Order Must Provide for Security.**

15. The Bankruptcy Code only permits a secured creditor to credit bid the value of its

allowed secured claim, which is determined by the value of the creditor's collateral. *See* 11 U.S.C. §§ 363(k), 506(a). Although the Committee continues to work with the Debtors, Circles, and CVG, information provided by Debtors' management has raised significant concerns about the validity, priority, and nature of the asserted amount of debt held by the Prepetition Secured Parties. Section 363(k) provides that, unless the court for cause orders otherwise, when property is subject to a lien that secures an allowed claim, the holder of the claim can add such property to the holder's bid, and, if the holder is the successful purchaser, it can offset the claim against the purchase price. Typically, when a sale order is entered, the "allowed" amount of a claim remains subject to a committee's challenge rights. The Committee's objection to the credit bid is limited – while it did not object to the Stalking Horse Purchasers' ability to credit bid for "cause", due to, among other things, the accelerated sale timeline, it asks that the right to challenge the allowance of the Stalking Horse Purchasers' underlying claims or any other challenge that may be asserted under the DIP Order be expressly reserved in the Sale Order, as it was contemplated in the agreed form of Final DIP Order.

16. It is also important that such challenge rights are not limited or otherwise prejudiced by, among other things, any releases, "good faith" findings, or "free and clear" provisions provided under either the Sale Order or Stalking Horse Agreement. As this Court expressed at the bidding procedures hearing, it is important for the Debtors, the Stalking Horse Purchasers, and the Committee to determine the appropriate mechanism to address a potential challenge to the debt underlying the Stalking Horse Purchasers' credit bid:

**Court:** "If [the Committee], who has that challenge right, doesn't come forward and challenge at that time, but he waits until it's after the sale, and he still has his legal challenge period and then he challenges it, and then I find out he's right, what's going to happen then? There's nothing in this process that deals with that . . . So one thing is there could be . . . where [the Stalking Horse Purchasers]

could pay the cash if they had to do it at that time and that that cash, they have ample cash where that is not a problem for them to be -- to have this money if on some day it turns out that they couldn't have credit bid . . . I also note that there are other ways of this. I have seen people have to put up deposits that stay until the challenge period ends . . . They have to put up an LC . . . I am open to whatever the parties want . . . But I think that ***there has to be a certainty here that if this gets all unwound, that there's not going to be a problem here.*** And the Debtor has to be satisfied by that, and the Committee has to be satisfied by that . . . But it is something that worries me only because of the interface.”

See May 31, 2022 H'rg Tr. 31:5-33:2, ECF No. 81 (emphasis added).<sup>5</sup>

17. Indeed, such a mechanism is critical given that a successful challenge that occurs after entry of a sale order will result in recovery that can be used to fund a litigation trust. See, e.g., *Emerald Capital Advisors v. Victory Park Capital Advisors (In re KII Liquidating, Inc.)*, 607 B.R. 398 (D. Del. 2019), *rev'g in part sub nom., In re Katy Indus., Inc.*, 590 B.R. 628 (Bankr. D. Del. 2018) (reversing bankruptcy court and holding that stalking horse bidder could be obligated to pay full purchase price for the debtors' assets when unsecured creditors committee, whose claims for recharacterization or equitable subordination were specifically preserved by the terms of the sales order and if ultimately successful, could eliminate the stalking horse bidder's ability to apply entire credit bid to purchase price).

18. Though the Committee acquiesced to allowing the Debtors' accelerated sale process timeline, the Committee has on numerous occasions clearly and unequivocally reserved its challenge rights. See Bidding Procedures Order ¶¶ 46, 49; proposed Final DIP Order ¶¶ 34, 35.

### RESERVATION OF RIGHTS

19. The Committee hereby reserves any and all rights with respect to the Sale Motion, the Sale Order (including any form of Sale Order subsequently proposed), the Stalking Horse

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<sup>5</sup> As of the date hereof, the Committee and the Stalking Horse Purchasers have not agreed to such a mechanism.

Purchase Agreement, and all bases of objection thereto that it may raise at the hearing on the Sale Motion or in a subsequent pleading.

New York, New York  
Dated: June 20, 2022

Respectfully submitted,

**SIDLEY AUSTIN LLP**

/s/ Michael G. Burke

Michael G. Burke  
787 Seventh Avenue  
New York, New York 10019  
Telephone: (212) 839-5300  
Facsimile: (212) 839-5599  
mgburke@sidley.com

*and*

Matthew A. Clemente (admitted *pro hac vice*)  
1 S Dearborn Street  
Chicago, Illinois 60603  
Telephone: (312) 853-7000  
Facsimile: (312) 853-7036  
mclemente@sidley.com

*and*

Michael Fishel (admitted *pro hac vice*)  
Maegan Quejada (admitted *pro hac vice*)  
1000 Louisiana Street, Suite 5900  
Houston, Texas 77002  
Telephone: (713) 495-4500  
Facsimile: (713) 495-7799  
mfishel@sidley.com  
mquejada@sidley.com

*Proposed Counsel for the Official Committee  
of Unsecured Creditors*