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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	
PARETEUM CORPORATION, *et al.*,	Chapter 11
	Case No. 22-10615 (LGB)
Debtors.[1]	Jointly Administered

SECURITIES LEAD PLAINTIFF'S LIMITED OBJECTION TO DEBTORS' SALE MOTION

The Pareteum Shareholder Investment Group[2] ("Lead Plaintiff"), the court-appointed lead plaintiff in the securities class action captioned as *In re Pareteum Securities Litigation,* Case No. 1:19-cv-09767 (AKH) (GWG) (the "Securities Litigation") pending in the United States District Court for the Southern District of New York (the "District Court"),[3] for itself and the

[1] 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.; Artilium Group Ltd. (f/k/a Artilium PLC); Pareteum Asia Pte. Ltd.; and Pareteum N.V. (f/k/a Artilium N.V.).

[2] The Pareteum Shareholder Investment Group is comprised of Kevin Ivkovich, Stephen Jones, Keith Moore, Nicholas Steffey, and Robert E. Whitley, Jr.

[3] Citations and references to ECF documents filed in the Securities Litigation will be identified as "SDNY Docket No. --".

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proposed class in the Securities Litigation (the "Proposed Class"), hereby submits this limited objection to the *Motion of 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 Assumption and Assignment; and (II)(A) Authorizing Sale Of Debtors Assets Free and Clear Of Liens, Claims, Interests, and Encumbrances* [Docket No. 13] (the "Sale Motion"), and respectfully states as follows:

RELEVANT BACKGROUND

A. The Securities Litigation

1. The Securities Litigation was commenced on October 22, 2019. The operative complaint in the Securities Litigation, the First Amended Consolidated Complaint (the "FAC"), asserts claims on behalf of purchasers and/or acquirers of Pareteum Corporation ("Pareteum") securities between December 14, 2017 and October 21, 2019, inclusive (the "Class Period"), against Pareteum, Robert H. Turner, Edward O'Donnell, Victor Bozzo, Denis McCarthy, Dawson James Securities Inc., and Squar Milner (together, the "Securities Litigation Defendants") for violations of Sections 10(b) and 20(a) the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (17 C.F.R. §240.10b-5) and/or violations of Section 11, 12, and 15 of the Securities Act of 1933. See SDNY Docket No. 168.

2. The FAC alleges that as a result of revelations that Pareteum had overstated its reported revenues (by as much as 42%), overstated its realized revenue growth rates, and overstated its contractual revenue backlog for every quarter and year encompassed by the Class Period until Pareteum finally disclosed a pending restatement, shares of Pareteum stock

collapsed, falling 90%—from $3.60 per share to just $0.37 per share—and wiping out hundreds of millions of dollars of investor equity. See SDNY Docket No. 168.

3. On August 11, 2021, the District Court denied Defendants' motions to dismiss the FAC in their entirety [SDNY Docket No. 201], and the Securities Litigation Defendants filed their answers to the FAC on September 10, 2021 [SDNY Docket Nos. 202-205]. On October 15, 2021, the District Court approved the parties' case management plan (the "Scheduling Order"), which set September 30, 2022 as the completion deadline for all non-expert discovery. SDNY Docket No. 222.

4. On February 4, 2022, Pareteum filed an *Unopposed Motion to Stay Further Proceedings* [SDNY Docket No. 238], seeking an order staying further proceedings, including remaining Scheduling Order deadlines and related hearings due to (i) an ongoing governmental investigation related to the subject matter of the Securities Litigation, (ii) Pareteum's precarious financial status, and (iii) ongoing efforts to mediate a settlement of the Securities Litigation. On February 10, 2022, the District Court entered an order granting the stay [SDNY Docket No. 239] (the "Securities Litigation Stay Order").

5. On May 18, 2022, Pareteum filed a *Suggestion of Bankruptcy* in the District Court. SDNY Docket No. 244. On June 1, 2022, the District Court entered a post-conference order indicating the Securities Litigation would proceed against all defendants other than Pareteum (the "Non-Debtor Defendants"). SDNY Docket No. 249.

B. The Chapter 11 Cases and the Sale Motion[4]

6. On May 15, 2022 (the "Petition Date"), Pareteum and its affiliated debtors (the "Debtors") filed voluntary petitions under chapter 11 of the Bankruptcy Code (the "Chapter 11 Cases").

[4] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Sale Motion.

7. On May 16, 2022, the Debtors filed the Sale Motion. The Sale Motion states that the Debtors have secured a stalking horse bid from their two prepetition secured lenders, Circles MVNE Pte. Ltd. ("Circles") and Channel Ventures Group LLC ("CVG," and with Circles, the "Stalking Horse Bidders"), to acquire substantially all of the Debtors' assets as set forth in the stalking horse asset purchase agreement (the "APA").[5] Sale Motion ¶ 1.

8. More specifically, the assets to be acquired ("Purchased Assets") in the sale (the "Sale") are defined in Section 2.1 of the APA, which contemplates (i) acquisition by Circles of certain assets related to the Debtors' mobile virtual network enabler business ("MVNE Business"), including, *inter alia*, "all books and records including customer or client lists, files, documentation, records and the related documentation primarily related to the MVNE Business or Circles Assumed Liabilities . . . " (See APA § 2.1(a)(xii)), and (ii) acquisition by CVG of the non-MVNE Business assets, including, *inter alia*, "all books and records including customer or client lists, files, documentation, records and the related documentation related to the Sellers' Non-MVNE Business, or CVG Assumed Liabilities . . . " (See APA § 2.1(b)(xiii)).

9. Excluded Assets (which are specifically excluded from the definition of Purchased Assets) are defined in Section 2.2 of the APA, and include the following books and records of the Debtors:

> corporate seals, organizational documents, corporate governance agreements, minute books, stock books, books of account or other records having to do with the corporate organization or governance of any Seller, all employee-related or employee benefit-related files or records (other than personnel files of Transferred Employees identified by the Purchasers as being included in the Purchased Assets), and any other books and records which any Seller is prohibited from disclosing or transferring to the Purchasers under applicable Law and is required by applicable Law to retain . . .

[5] The APA is attached to the Sale Motion as **Exhibit C**.

Sale Motion ¶ 22; APA § 2.2(f) (the "Excluded Books and Records"). Section 2.7 of the APA provides the Debtors "shall be solely responsible for the disposition, disposal or maintenance of Excluded Assets."

10. The Sale Motion also states that the APA "provides that the Stalking Horse Bidders will acquire the books and records related to the Stalking Horse Package," and grants the Debtors "reasonable access to such records . . . notwithstanding the sale of any books and records." Sale Motion ¶ 32(i). More specifically, the APA states that the Purchasers will maintain certain records for six years following the Closing Date, including books and records, contracts, and documents of or related to the Purchased Assets or the Assumed Liabilities, and will provide the Debtors and their representatives reasonable access to such records upon request, for the purposes of preparing any tax returns or complying with the requirements of, or responding to inquiries by, any governmental authority. APA § 8.5.

11. On May 31, 2022, the Court entered an order approving bidding procedures for the Sale [Docket No. 76] (the "Bidding Procedures Order"). The Bidding Procedures Order provides that an auction, if any, will take place on June 15, 2022, and establishes the deadline to file and serve objections to (i) the sale of assets to the Stalking Horse Bidders as June 14, 2022, and (ii) the sale of assets to a Successful Bidder other than the Stalking Horse Bidders as June 17, 2022. See Docket No. 76.

12. Although the deadline to file claims in the Chapter 11 Cases has not yet been scheduled, Lead Plaintiff currently intends to file individual and class proofs of claim (the "Class Proof of Claim," and together with the individual proofs of claim, the "Proofs of Claim") against Pareteum in these Chapter 11 Cases based upon the allegations and conduct underlying the Securities Litigation.

LIMITED OBJECTION

13. Lead Plaintiff does not object to the Sale of the Debtors' assets. However, it is unclear, from the summary of material terms provided in the Sale Motion and from the APA itself, whether those assets (which, as indicated above, include certain books and records) include any books, records, documents, or other evidence potentially relevant to the Securities Litigation ("Potentially Relevant Books and Records"). Additionally, the document preservation provision in Section 8.5 of the APA does not provide Lead Plaintiff and the Proposed Class with sufficient protections to ensure preservation of the Potentially Relevant Books and Records.

14. The Bankruptcy Code requires the Debtors to maintain and preserve their assets, including the Potentially Relevant Books and Records, unless authorized by order of the Court to abandon or sell them after notice and an opportunity to be heard. See 11 U.S.C. §§ 363(b)(1) and 554(a); see also Fed. R. Bankr. P. 6004 and 6007(a).

15. Additionally, Federal Rule of Civil Procedure 26(b) entitles Lead Plaintiff and the Proposed Class to discovery regarding any nonprivileged matter that is relevant to their claims and proportional to the needs of the Securities Litigation and the Proofs of Claim. Federal Rule of Civil Procedure 37(e) and common law require Pareteum to preserve electronically stored information and other potentially relevant evidence in connection with anticipated litigation.[6] See, e.g., Crown Battery Mfg. Co. v. Club Car, Inc., 185 F.Supp.3d 987, 998 (N.D. Ohio 2016) ("All parties therefore have a duty to preserve material evidence during litigation as well as during the time before litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.") (internal quotations and citations omitted); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010).

[6] Rules 26 and 37 of the Federal Rules of Civil Procedure are made applicable to contested matters in chapter 11 cases pursuant to Rules 7026, 7037, and 9014 of the Federal Rules of Bankruptcy Procedure.

16. Pareteum was named as a Securities Litigation Defendant prior to the filing of the Debtors' Chapter 11 Cases. Although the automatic stay under section 362 of the Bankruptcy Code and the Securities Litigation Stay Order presently prevent the continued prosecution of the Securities Litigation with respect to Pareteum, its preservation obligations remain. Additionally, as noted above, Lead Plaintiff intends to file the Proofs of Claim, and the filing of a Rule 7023 motion (a contested matter) is reasonably foreseeable in these Chapter 11 Cases.

17. Accordingly, Pareteum is obligated by the Federal Rules of Civil Procedure and federal common law to preserve documents, electronically stored information, and other evidence potentially relevant to both the Securities Litigation and the anticipated Proofs of Claim in connection with the Chapter 11 Cases. See, e.g., Fed. R. Civ. P. 37(e) (defining remedies for failure to preserve electronically stored information that should have been preserved in anticipation of litigation); Leon v. IDX Systems Corp., 464 F.3d 951, 959 (9th Cir. 2006) ("A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the ligation before they were destroyed.'") (quoting U.S. v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002)). There exists no valid basis to absolve the Debtors of that duty prior to the conclusion of the Securities Litigation, particularly while the Securities Litigation is continuing to proceed against the Non-Debtor Defendants, and before reconciliation of any Proofs of Claim.

18. Thus, permitting the potential loss, destruction, or unavailability of any Potentially Relevant Books and Records through the Sale, even if inadvertent, would materially prejudice Lead Plaintiff and the Proposed Class in the future prosecution of their claims, both in the Securities Litigation and in the Chapter 11 Cases.

19. The severity of the harm that any such destruction or loss would cause warrants the express imposition of an affirmative duty to adequately preserve any Potentially Relevant

Books and Records and, at the very least, to provide counsel for Lead Plaintiff and the Proposed Class with sufficient notice and an opportunity to be heard with respect to any potential destruction or other disposition thereof. Cf. In re Royal Ahold N.V. Sec. & ERISA Litig., 220 F.R.D. 246, 251 (D. Md. 2004) (recognizing that "plaintiffs' showing of necessity to preserve evidence appear[ed] substantial" where the company was "undertaking a wide ranging corporate reorganization" which "create[s] a reasonable concern that documents may be lost"); see also In re Massey Energy Co. Sec. Litig., 2011 U.S. Dist. LEXIS 111175, at *23 (S.D. W. Va. Sept. 28, 2011) (permitting plaintiff in securities class action to issue evidence preservation subpoenas); In re Nat'l Century Fin. Enters., 347 F. Supp. 2d 538, 541-52 (S.D. Ohio 2004) (granting securities plaintiffs' motion for authority to issue preservation subpoena to non-party where relevant documents would likely be destroyed because of that party's bankruptcy); Vezzetti v. Remec, Inc., 2001 U.S. Dist. LEXIS 10462, at *9 (S.D. Cal. July 23, 2001) (granting securities plaintiff's motion to issue preservation subpoenas to non-parties).[7] Moreover, to the extent any Purchaser takes possession of the Potentially Relevant Books and Records, similar preservation obligations should be imposed on the Purchaser.

20. Accordingly, in an abundance of caution and to prevent the significant harm that would befall the Lead Plaintiff and the Proposed Class from the destruction, loss, or unavailability of Potentially Relevant Books and Records, any order approving the Sale (whether to the Stalking Horse Bidders or another Purchaser) should include the following provision:

> Notwithstanding anything herein, in the Asset Purchase Agreement (including but not limited to section 8.5 therein), or related documents to the contrary, until the entry of a final order of judgment or settlement in the litigation captioned as *In re Pareteum Securities Litigation,* Case No. 1:19-cv-09767 (AKH)

[7] Although the cases cited in this paragraph arose in the context of a stay pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, here, where the Bankruptcy Code's automatic stay and the Securities Litigation Stay Order both currently apply to stay the Securities Litigation as to Pareteum, substantially the same considerations warrant mandatory preservation of the Potentially Relevant Books and Records.

(GWG) (S.D.N.Y.) (the "Securities Litigation"), the Debtors (before the Closing Date, and after the Closing Date with respect to the Excluded Assets) and the Purchaser and any other transferee of the Debtors' books, records, documents, files, electronic data (in whatever format, including native format), or any tangible object potentially relevant to the Securities Litigation, wherever stored (collectively, the "Potentially Relevant Books and Records") shall preserve and maintain the Potentially Relevant Books and Records, and shall not destroy, abandon, transfer, or otherwise render unavailable such Potentially Relevant Books and Records without providing counsel to the plaintiffs in the Securities Litigation not less than sixty days' advance written notice of such proposed destruction with an opportunity to object and be heard by a court of competent jurisdiction. In the event the plaintiffs in the Securities Litigation timely object to any such destruction, abandonment, or transfer, the Potentially Relevant Books and Records shall be preserved pending a final order of the Bankruptcy Court or other court of competent jurisdiction.

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Dated: June 14, 2022

LOWENSTEIN SANDLER LLP

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