Docket #1102 Date Filed: 12/15/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Chapter 11**
SPEEDCAST INTERNATIONAL LIMITED, *et al.*,	§	**Case No. 20-32243 (MI)**
Debtors.[1]	§	**(Jointly Administered)**

ULTISAT'S TRIAL BRIEF IN SUPPORT OF PLAN CONFIRMATION

UltiSat, Inc. and its direct and indirect subsidiaries (collectively "UltiSat," or the "Government Business") submit this trial brief in support of confirmation of the Debtors' Plan,[2] showing the Court as follows:

Summary

1. Courts in the Fifth Circuit routinely utilize equitable theories such as estoppel and waiver to release obligations owed by non-debtors connected with a debtor. UltiSat's business includes execution on classified U.S. government contracts, and for that reason an independent proxy board is utilized to shield those contracts from UltiSat's ultimate, non-US parent and to mitigate potential foreign ownership control or influence ("FOCI"). As a result of UltiSat's unique status, all parties (including those objecting to confirmation) have refrained from advocating that UltiSat become a debtor. Though the Fifth Circuit generally disfavors using equitable powers to broadly release non-debtors, under the peculiar and unique situation here—the Government Business, the objectors' own actions, the structure of the Plan to transfer the economic value of

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/Speedcast. The Debtors' service address for the purposes of these chapter 11 cases is 4400 S. Sam Houston Parkway East, Houston, Texas 77048.

[2] Capitalized terms not otherwise defined herein shall have the meanings given them in the Debtors' Joint Chapter 11 Plan filed herein at ECF 992.

UltiSat—the Court should approve the Plan's release of UltiSat from the SFA[3] loan. Doing so gives effect to the economic realities of the Plan, putting substance above mere form. UltiSat takes no other positions about the Plan or objections to it.

Background

2. UltiSat and its subsidiaries are all directly or indirectly owned by the Debtors but are not themselves Debtors. Nonetheless they are substantial parties in interest. The Plan (at section 10.6(b)) proposes to include a Non-Debtor SFA Loan Party Release, which would terminate the liability of UltiSat as a guarantor of the SFA. UltiSat supports that provision in the Plan, indeed likely would support that provision in any plan proposed by the Debtors—or anyone else who was the successful Plan Sponsor.

3. The Debtors acquired UltiSat in November 2017. UltiSat conducts the Government Business, i.e., provision of services to the U.S. government, international governments, and intergovernmental organizations, some directly as a prime contractor and some indirectly as a subcontractor. UltiSat's government business lines include services to defense agencies, the intelligence community, and other government agencies handling highly classified information.

4. In order to perform certain government contracts, UltiSat holds a facility security clearance issued by the Department of Defense (the "DOD") in accordance with the DOD's National Industrial Security Program Operating Manual (the "NISPOM"). To maintain UltiSat's clearance, NISPOM regulations require that UltiSat mitigate its FOCI from Speedcast. *See* NISPOM 2-300(c). The form of UltiSat's FOCI mitigation is a "Proxy Agreement" between UltiSat, Speedcast, and the DOD.

[3] The prepetition Syndicated Facility Agreement (the "SFA").

5. The Proxy Agreement vests all operational control over UltiSat in DOD-approved U.S. citizen "Proxy Holders" and their subsequently appointed board of directors ("Proxy Board"). Among other things, UltiSat is required to "be organized, structured, and financed so as to be capable of operating as a viable business entity independent from the foreign owner." NISPOM 2-303(b)(2). In other words, UltiSat's viability must be protected in order for UltiSat to continue its work on classified contracts—an element important to both UltiSat's continued status as a profitable business and to U.S. national security.

6. The Proxy Board ensures that the Government Business operates independently from the Debtors. However, there is operational cooperation between the Government Business and the Debtors with both sides providing services to the other through the Master Services Agreement for Cooperative Commercial Arrangements, dated June 30, 2018 and as amended December 10, 2019, by and between UltiSat and Speedcast Communications, Inc. This Master Service Agreement is an arms-length agreement, approved by the Defense Counterintelligence and Security Agency ("DCSA") on behalf of the DOD, and is treated in the same manner as any other third-party vendor or supplier arrangement, providing commercial value to both parties.

7. Before the bankruptcy of the Debtors, the Debtors' principal creditor stakeholders (including those objecting to the Plan) deeply evaluated the potential of having UltiSat file chapter 11. All agreed with UltiSat's consistent messaging, that because of the sensitivity of the Government Business, UltiSat should not file and that doing so could have a deleterious effect on the value of the Government Business. At no time—even today—has any party claimed that an UltiSat bankruptcy would increase recoveries to the unsecured creditors, benefit the estate, or benefit any secured creditor.

UltiSat's Entire Economic Value is Distributed under the Plan

8. UltiSat holds a significant role in this case, but that role remains the same regardless of who owns UltiSat, regardless of who won the Plan Sponsor process, and regardless how creditors classes are divided. UltiSat is 100% owned by the Debtor. The economic value of UltiSat remains a crucial part of the Debtors' operations and their ability to propose a Plan:

A. UltiSat contributed approximately $151 million[4] of revenues and over $31 million[4] of EBITDA to the Debtors' consolidated P&L in 2019. With the deterioration in the Company's other businesses, such as Cruise and Energy, UltiSat has become proportionately more important to the Company's overall value.[5]

B. Due to these economic contributions, the value proposed to be distributed through the Plan includes 100% of the going concern value of UltiSat notwithstanding that it is not a Debtor. More specifically, a significant portion of Plan value represents UltiSat. If the SFA Guarantee liabilities are not terminated, the potential impact of UltiSat filing chapter 11 are grave. UltiSat's contribution to the overall profitability of the Debtors and its collective subsidiaries, and therefore the overall enterprise value, constitutes almost 50% of the combined total EBITDA.[5] This contribution would be put at significant risk if UltiSat were required to file chapter 11 solely to terminate the parent company's already released pre-petition debt.

C. UltiSat guaranteed the original DIP financing and the upsized DIP financing that the Court approved in August of this year, thus ultimately taking on up to $285 million of economic risk for the benefit of the Debtors and the Debtors' stakeholders, despite having no legal obligation to do so. Neither the original DIP nor the upsized DIP would have been possible but for such guarantees. At the time it guaranteed the original DIP, UltiSat looked forward to a consensual balance sheet restructuring of the Debtors and a prompt emergence.

D. UltiSat guaranteed the Debtors' prepetition SFA with its exposure being approximately $689 million as of the petition date. (Due to the roll up of some of the prepetition debt, that number is now approximately $633 million.)

[4] Amounts represent U.S. GAAP figures. In order to bridge to IFRS figures for comparability to select financials of the Debtors, certain adjustments will need to be made. Additionally, certain group adjustments are made when UltiSat financials are combined with group financials.

[5] Projections for 2020 EBITDA are provided in Proposed Disclosure Statement (ECF 899), Ex. D, at note (h) (UltiSat EBITDA) and Ex. E (consolidated EBITDA).

E. Under the Master Service Agreement between UltiSat and the Debtors (proposed to be assumed in the Plan) UltiSat and the Debtors sell services to each other, thus realizing economies that would otherwise not be available.

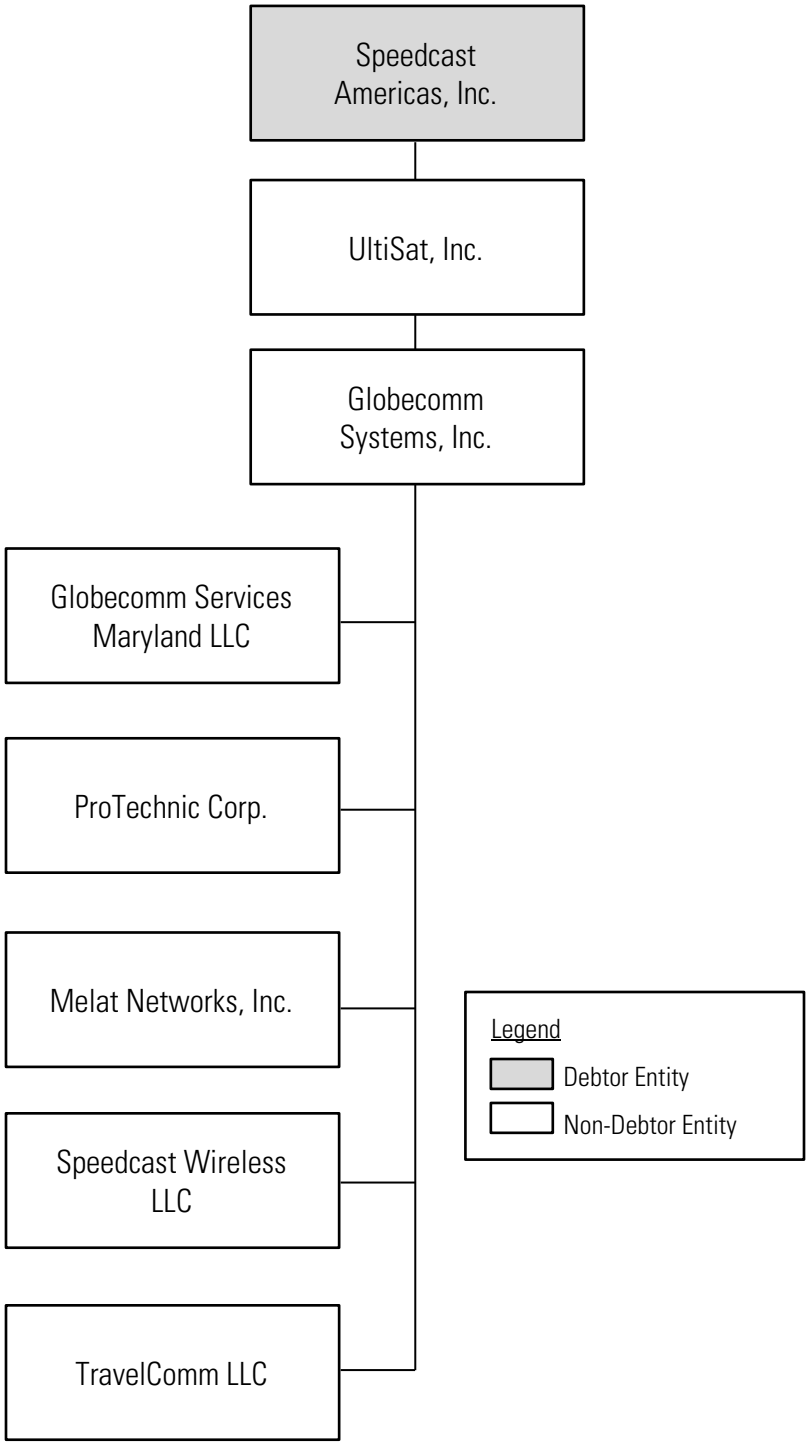
F. UltiSat is an enormous contingent creditor of the Debtors.[6] If it had to make good on its prepetition guaranty of the SFA, it would become subrogated to the SFA lenders' claims against the Debtors, i.e., potentially hundreds of millions of dollars.

9. The Plan proposes to distribute all of UltiSat's economic value to creditors, and the SFA lenders are only entitled to receive that value once—a single satisfaction. Viewed through the prism of their contractual rights under the SFA and UltiSat guarantees, the SFA lenders have only two routes to realize on that economic value—foreclose on the assets in the UltiSat entities, or realize on the equity pledge of the Debtor entity which owns UltiSat. As an economic matter, the two are mutually exclusive. If one seized the assets then the shares become worthless, and if one seized the shares, then as the 100% owner there is no need to foreclose on assets.

10. However, we are not in a state law proceeding but rather a bankruptcy proceeding where the goal is to maximize recoveries for the Debtors' stakeholders. We submit that the Plan does so by preserving the going concern value of UltiSat for the sole benefit of the Debtors and their creditors.

11. The following chart shows UltiSat within the Debtor's corporate structure, starting with the Debtor—Speedcast Americas, Inc.— which owns UltiSat:

[6] The bar date order (at para. 8(i)) exempted affiliates such as UltiSat from the bar date (ECF 463) so as of yet UltiSat has not yet filed a proof of claim.


Speedcast Americas, Inc.
UltiSat, Inc.
Globecomm Systems, Inc.
Globecomm Services Maryland LLC
ProTechnic Corp.
Melat Networks, Inc.
Speedcast Wireless LLC
TravelComm LLC
Legend
Debtor Entity
Non-Debtor Entity

12. Speedcast Americas, Inc. guaranteed the obligations owed to the SFA lenders, secured by 100% of the shares of UltiSat. There is no funded debt at UltiSat, and relatively limited trade debt and other ordinary course operating obligations. Accordingly, the equity pledge that Debtor Speedcast Americas, Inc. gave to secure the SFA captures the value in UltiSat. Surely Speedcast Americas, Inc.—a Debtor in this case—can distribute in the Plan the full value of its ownership interest in UltiSat. Such ownership interest of course has no value if the prepetition secured guarantees remain in place, since the amount of the guarantee of the SFA exceeds the entire value of UltiSat. In other words, to enable Speedcast Americas, Inc. to convey the economic value of all the UltiSat shares, it must remove the liens on the subsidiaries' assets. Doing so harms no one, and it benefits the Debtors' estate.

13. Thus, as an incident to its jurisdiction over Debtor Speedcast Americas, Inc., the Court has the power to take practical steps to enable that Debtor to distribute maximum value to its stakeholders. And if a party alleges that the Plan undervalues Speedcast Americas, Inc.'s ownership in UltiSat (no party does), or that higher value would be obtained by the Debtors' estate by direct rather than indirect access to the value of UltiSat (which nobody has claimed), then the Court can address those objections like all Plan valuation issues. At most, the Plan Sponsor and Plan proponent would adjust Plan distributions to capture the accurate value.

14. The Plan limits the SFA lenders to a single satisfaction of their secured claims against Speedcast Americas, Inc. and UltiSat. The Debtors cannot, in reality, distribute that economic value twice. The Debtors have concluded, and the Plan provides, for realization on Speedcast Americas, Inc. by cashing out the SFA lenders in the indubitable equivalent of the full collateral value of that entity and its subsidiaries. Leaving the UltiSat SFA guarantees in place destroys the value of Debtor Speedcast Americas, Inc.

Court has Discretion to Release the Guarantees in this Very Unique Circumstance

15. The Fifth Circuit has long held that 11 U.S.C. §524(e) does not prevent the equitable doctrines of waiver, estoppel, or *res judicata* from releasing the claims against a non-debtor affiliated with a Debtor when there was no timely objection.[7] Here, the objections to releasing UltiSat have nothing to do with the economic reality of the proposal, provide no benefit to the estate, would probably harm the objecting party's collateral, and elevate form over substance.

16. Bankruptcy courts permit nonconsensual releases of third-parties whose contributions were substantial and crucial to success of plan. *See e.g.*, *SEC v. Drexel Burnham Lambert Grp., Inc.* (*In re Drexel Burnham Lambert Grp., Inc.)*, 960 F.2d 285, 293 (2d Cir. 1992) (permitting releases of non-debtors whose contributions were essential to the success of plan and retention of employees); *In re Metromedia Fiber Network Inc*., 416 F.3d 136, 141-42 (2d Cir. 2005) (releases appropriate in the rare cases where the estate has received a substantial contribution from the third-party).

17. Similarly, as the Sixth Circuit noted in *City of Detroit*, sometimes bankruptcy courts must enjoin pursuing non-debtors to give effect to the plan, even when the claims of the dissenting creditors are not paid in full. *In re City of Detroit*, 524 B.R. 147, 172 (Bankr. E.D. Mich. 2014) ("not inconsistent with the Code for a bankruptcy court to enjoin a non-consenting creditor's claim against a non-debtor") (internal quotation marks omitted). As a court of equity, there is no magic

[7] *See, e.g.*, *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Hernandez v. Larry Miller Roofing, Inc.*, 628 F. App'x 281, 285-86 (5th Cir. 2016), as revised (Jan. 6, 2016); *In re Chesnut*, 356 F. App'x 732, 740 (5th Cir. 2009) (secured lender with notice of plan resolution of non-debtor spouse claim has released lien as to non-debtor spouse); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051-54 (5th Cir. 1987) (plan included a specific release of a non-debtor guarantor).

formula that sets forth which unusual circumstances would justify enjoining the SFA lender— this one this fills the bill.

18. UltiSat recognizes, as it must, that some courts have ruled, on the facts before the courts in those cases, that a release of claims as between non-debtors is not appropriate, and we further recognize that in some contexts the Fifth Circuit has spoken forcefully on this subject. However, in the course of addressing this subject, the Fifth Circuit has articulated guidance as to the circumstances in which discharge of a non-debtor would be appropriate. The Plan here comports with such guidance.

19. When the Court examines the precedents carefully, one sees that the authorities support what the Debtors seek to accomplish in the Plan—giving effect to substance over form. The Plan hands over the entire economic value of UltiSat to the Debtors' creditors, including through the $150 million cash payment proposed in the Plan. Thus, the claims that the SFA lenders might otherwise have against UltiSat are not being blocked, rather they are being channeled to the recovery out of the value of UltiSat's immediate parent, Debtor Speedcast Americas, Inc. If one compares this situation to *In re Zale Corp*., 62 F.3d 746 (5th Cir. 1995), one finds that in *Zale* (i) the beneficiary of the proposed release was not a subsidiary or affiliate, and (ii) the "victims" of the release were left without recompense. The *Zale* court specifically noted that, unlike in cases such as *Drexel*, *supra*, the economic rights lost by the victims of the release were not replaced. *Id.* at 760-61. Here, in contrast, the full economic rights are being preserved in the form of the secured claim against UltiSat's immediate parent, which is a Debtor.

20. Similarly, in *In re Pacific Lumber Co*. 584 F. 3d 229 (5th Cir. 2009), the court, in denying the release sought, carefully distinguished the facts of that case (where the released party was not a debtor affiliate) from hypotheticals that are remarkably similar to the situation here:

"There are no allegations in this record that [the proposed released parties] were jointly liable for an of [debtor] Palco's or Scopac's prepetition debt. They are not guarantors, or sureties, nor are they insurers." *Id*. at 252.

21. Finally, we address *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031 (5th Cir. 2012) ("*Vitro*"), which simultaneously had the strongest worded dicta and the most off point facts compared with the present situation. *Vitro* was not a chapter 11 case at all but rather was a chapter 15 linked to a Mexican *concurso* proceeding. The *concurso* order, for which the debtor sought recognition and additional relief, would have benefitted insiders in a plan that insiders voted on to preserve their equity while heavily impairing creditors. And those releases were general discharges—not a specific release of a specific debt. As the Court noted in the *Vitro*, "We have distinguished other cases for including general, as opposed to *specific*, releases." *Id*. at 1068 (emphasis added). Here, a specific release of a specific claim is being sought, not the general relief.

22. Indeed, in *Vitro* the bankruptcy court properly refused to approve discharges of non-debtor subsidiary guarantors when the equity was being left in place. In *Vitro*, the prepetition equity hijacked the value of the guarantor subsidiaries—the opposite of what is happening here where creditors receive the entire economic value of UltiSat. *Vitro*'s blanket statements about discharges of non-debtors being unavailable ("our court has firmly pronounced its opposition to such releases," *id*. at 1062) relied on generic statements in *Pacific Lumber* and *Zale* for generic releases. As discussed above, however, neither of those cases established a black and white rule.

23. *Vitro*'s statements about broad prohibitions on non-debtor releases were not integral to the holding, and not consistent with the teachings of *Pacific Lumber* and *Zale*. And *Vitro* itself, in the course of discussing cases from other circuits and relief that might be available

under chapter 15, noted all of the peculiar facts that make *Vitro* an unreliable precedent beyond its facts, including: bona fide creditors were grouped with insiders in a single voting class, and the equity retained $500 million of value while creditors took an enormous haircut. *Vitro* (*id*. at 1061-62) cited and described at length the *Metromedia*[8] factors, which have been satisfied here:

A. **Release terms important to the success of the plan** – It is indisputable that the plan proponent here is not going to put up hundreds of millions of dollars to own an enterprise as to which the principal prepetition funded debt remains outstanding.

B. **Estate received substantial consideration** – UltiSat has guaranteed all of the DIP financings, that alone is enormous consideration. Aside from and in addition to that obligation, the ability to deliver UltiSat as a viable going concern, a wholly owned subsidiary of Debtor Speedcast Americas, Inc., is of immense value to the estates of the Debtors.

C. **Enjoined claims channeled to a fund rather than being extinguished** – The SFA lenders' claims are being directed to the $150 million fund created under the Plan which the Debtors expect to show (indeed must show) is the indubitable equivalent of all of UltiSat's value.

D. **Enjoined claims would indirectly impact the Debtors' reorganization by way of indemnity or contribution** – Leaving the UltiSat guarantees outstanding just assures that the Debtors could become subject to claims for indemnification to the extent the UltiSat guarantee is called.

E. **Unique circumstances** – UltiSat is not just an ordinary government contractor. It handles highly classified information, indeed the national security implications of UltiSat are so compelling that upon its acquisition by an Australian company it was required to vest voting control in the Proxy Board, described above.

24. *Metromedia*, like most of the cases on non-debtor releases and discharges, involved unaffiliated third-parties, not a wholly owned subsidiary where the share value is being conveyed in the plan. *Metromedia* also involved, like most of the "discharge" cases, a request for discharge of claims that would be good against the world. Here the only target of the contractual release is

[8] *In re Metromedia*, 416 F. 2d at 142-43.

the SFA lenders, and the purpose of the termination of the guaranty is to facilitate distribution in the Plan of all of the value of Debtor Speedcast Americas, Inc.

25. Bankruptcy courts are historically courts of equity/chancery. Because equity looks to the intent and will regard substance rather than form, bankruptcy courts consider the reality of a transaction, not its form. Whether under substantive consolidation, recharacterization, equitable subordination, vote designation, determining insider status, determining an involuntary petition, or ruling on fraudulent transfers—almost never will a bankruptcy court put form over substance. In this case the substance of the Debtors' Plan is to convey to its creditors all of the value in UltiSat. If UltiSat were a debtor, nothing would change in the Plan, and nothing would change for creditors save for the expenses and loss of value that would follow. The Court should consider the reality of the objection and the reality of the Plan. Why not give effect to the Plan and, because of the unique case with unusual circumstances, release UltiSat on the guarantees for the benefit of all creditors?

Conclusion

26. Rather than to delay the Plan and injure creditors by focusing on the form of UltiSat's release, the better practice, which is in the interest of justice, is to examine the substance and the effect of the Plan. Weighing the relative benefits, and lack of real economic prejudice to any party, and considering the reality of the Plan, the Court should do equity and forbid the SFA lenders from collecting from UltiSat since they are receiving the entire economic value of the UltiSat shares and indirectly, therefore, UltiSat as a business inclusive of its assets, in the Plan.

Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: */s/Hugh M. Ray, III.*

Hugh M. Ray, III
State Bar No. 24004246
Two Houston Center
909 Fannin, Suite 2000
Houston, TX 77010-1028
Tel: (713) 276-7600
Fax: (713) 276-7673
hugh.ray@pillsburylaw.com

--and--

Leo T. Crowley (*pro hac vice*)
New York Bar No. 1728005
31 West 52nd Street
New York, NY 10019-6131
Tel: 212-858-1740
Fax: 212-858-1500
leo.crowley@pillsburylaw.com

Counsel for UltiSat, Inc.