

September 21, 2010

**Via Electronic Submission**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

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**Re: Notice of Ex Parte Communication**

**WT Docket No. 02-55; ET Docket Nos. 00-258, 95-18;  
New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for  
Transfer of Control of Earth Station Licenses and Authorizations, File  
Nos. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-  
0091211-00144.**

Dear Ms. Dortch:

Sprint Nextel Corporation (“Sprint Nextel”) hereby responds to the latest *ex parte* filing by ICO Global Communications (Holdings) Limited (“ICO Global”), the parent company of New DSBD Satellite Services G.P., Debtor-In-Possession (with its debtor-affiliates, “DBSD”).<sup>1</sup>

In that submission, ICO Global again tries to respond to its continued failure to support its earlier contention that the 2005 DBSD debt financing transaction (the “2005 Transaction”) was a transformative event that could somehow insulate ICO Global from direct liability for reimbursing Sprint Nextel for its *pro rata* share of Sprint Nextel’s costs incurred in clearing the 2 GHz spectrum for ICO Global’s MSS system. This time, ICO Global relies on new counsel, Mr. Joseph Weinstein of Davis Wright Tremaine LLP, to buttress its efforts to refute the analysis of Professor Thomas F. Cooney III of K&L Gates

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<sup>1</sup> See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 17, 2010) (“*ICO Global September 17 Notice of Ex Parte Presentation*”).

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LLP.<sup>2</sup> Mr. Weinstein's brief submission fails to even address, let alone support, the key proposition that ICO Global has claimed that the 2005 Transaction stands for: whether the 2005 Transaction established restrictions on ICO Global's control of or involvement in DBSD. Notwithstanding the various red herrings with which ICO Global again tries to distract the Commission, the silence of Mr. Weinstein on that key issue is deafening.

Attached as **Exhibit A**, Sprint Nextel offers Professor Cooney's analysis of Mr. Weinstein's September 17, 2010 rebuttal. In addition, for the convenience of the reader, we again submit, as **Exhibit B** hereto, a copy of Professor Cooney's analysis of the additional 2005 Transaction documents that ICO Global submitted on September 14, 2010,<sup>3</sup> which was originally included in Sprint Nextel's *ex parte* of September 17, 2010.<sup>4</sup>

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced dockets and electronic copies are being submitted to Commission staff listed below. If you have any questions, please feel free to contact me at (202) 778-9859.

Sincerely,

/s/ Marc S. Martin

Marc S. Martin

Counsel for Sprint Nextel Corporation

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<sup>2</sup> Professor Cooney is a corporate M&A and securities lawyer and an adjunct professor of business planning at George Washington University Law School for 22 years.

<sup>3</sup> ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 14, 2010) ("*ICO Global September 14 Notice of Ex Parte Presentation*").

<sup>4</sup> Sprint Nextel Notice of *Ex Parte* Communication, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (Sept. 17, 2010) ("*Sprint Nextel September 17 Notice of Ex Parte Communication*").

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cc: Austin Schlick  
Stewart Block  
David Horowitz  
Andrea Kearney  
Sally Stone  
Julie Veach  
Gardner Foster  
Karl Kensinger  
Geraldine Matise  
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Nick Oros  
Rick Kaplan  
Jennifer Flynn  
Robert Nelson  
Julius Knapp  
Bruce Romano  
Paul Murray  
John Leibovitz  
Mindel DeLaTorre  
Roderick Porter  
Charles Mathias  
John Giusti  
Louis Peraertz  
Angela Giancarlo  
Edward Lazarus

# EXHIBIT A

**Supplemental Analysis of  
ICO Global September 17 Notice of Ex Parte Presentation**

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By: Thomas F. Cooney, III  
K&L Gates LLP  
Adjunct Professor of Law  
George Washington University Law School

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I have had an opportunity to review the two letters comprising the Notice of *Ex Parte* Presentation filed by ICO Global Communications (Holdings) Limited (“ICO Global”) on September 17:<sup>1</sup> a letter prepared by Mr. Howard J. Symons (“Symons Letter”) and a limited support letter prepared by Mr. Joseph D. Weinstein (“Weinstein Letter”). As you are aware, I have previously submitted my analysis and conclusions<sup>2</sup> regarding the 2005 debt financing transaction involving DBSD North America, Inc. (with its debtor-affiliates, “DBSD”) (the “2005 Transaction”) in response to ICO Global’s September 3 and September 14 Notices of Ex Parte Presentation in which ICO Global claimed for the first time that the 2005 Transaction was a transformative event.<sup>3</sup>

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<sup>1</sup> ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 17, 2010) (“*ICO Global September 17 Notice of Ex Parte Presentation*”).

<sup>2</sup> See Sprint Nextel Notice of *Ex Parte* Communication, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (Sept. 10, 2010) (“*Sprint Nextel September 10 Notice of Ex Parte Communication*”); Sprint Nextel Notice of *Ex Parte* Communication, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (Sept. 17, 2010) (“*Sprint Nextel September 17 Notice of Ex Parte Communication*”).

<sup>3</sup> ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 3, 2010) (“*ICO Global September 3 Notice of Ex Parte Presentation*”); ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control

In my prior submissions, I concluded that as a legal and factual matter ICO Global controlled DBSD both before and after the 2005 Transaction, and that as a result, the 2005 Transaction could not have been transformative and did nothing to restrict ICO Global from its continued direct involvement in DBSD and the MSS system enterprise. Nothing in the Symons Letter or the Weinstein Letter directly challenges that conclusion. Rather, there are a number of tangential assertions in the two letters that again attempt to misdirect the discussion and thereby obscure the conclusion regarding ICO Global's continuing control of DBSD. Mr. Symons asserts: "[t]he implication of Sprint's filings is that ICO Global controlled the business decisions of DBSD after 2005, but in fact ICO Global has not, at any time since then, sought to influence or compelled any of DBSD's directors to approve or disapprove decisions with respect to the U.S. MSS business;" and further, "from and after the 2005 DBSD financing, ICO Global has maintained an arms-length relationship with DBSD, and has completely refrained from directing or otherwise participating in DBSD's business decisions."<sup>4</sup>

Factually, Mr. Symons cannot be correct. After the 2005 Transaction, all of the directors of DBSD, save one who was appointed by DBSD's noteholders but who had no veto authority, were also directors of ICO Global. Control is a factual test. It is generally deemed met when one party has the right and exercises such right to appoint a majority of the Board of Directors of another party. ICO Global had that right and used it to appoint the same people who were ICO Global directors to be DBSD directors. There is nothing in the Symons Letter, the Weinstein Letter or otherwise in the record that is inconsistent with that fact.<sup>5</sup>

As a legal matter, the Symons Letter asserts that ". . . the DBSD directors' fiduciary obligations limit ICO Global's ability to exercise control over such business decisions." Again, Mr. Symons is incorrect. First, there is not a single provision in the 2005 Transaction documents that *per se* limits or changes the fiduciary duties of the DBSD directors as a legal matter. Second, as Messrs. Symons and Weinstein are surely aware, it is a well settled proposition of law that the DBSD directors owe no fiduciary duties to the noteholders unless or until they convert their debt to equity. Third, the fiduciary duties of the DBSD Board of Directors, under law, are to serve the best interests of the DBSD shareholders. That would be ICO Global.<sup>6</sup> Accordingly, as a legal matter, unchanged by the 2005 Transaction documents, the DBSD directors had a

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of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 14, 2010) ("*ICO Global September 14 Notice of Ex Parte Presentation*").

<sup>4</sup> Symons Letter, at 3.

<sup>5</sup> The DBSD directors are nearly all both ICO Global's appointees and ICO Global directors. This situation is reminiscent of a scene from the play "The Ruling Class" wherein the lead character is asked when he first started to believe he was God, and responds with words to the effect "every time I started to pray I would wind up talking to myself." Here, the same people, the DBSD directors and the ICO Global directors are talking to themselves.

<sup>6</sup> As DBSD stated in its transfer of control applications, ICO Global owns 99.84% of DBSD. *New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations*, Nos. SES-T/C-20091211-01575, SES-T/C-20091211-1576, SAT-T/C-0091211-00144, Exhibit E, at 1.

fiduciary duty to act in the best interests of ICO Global. Specific instructions from ICO Global were not necessary to create or form that duty.

Thus, as I have previously demonstrated, ICO Global controlled DBSD as a factual and legal matter before and after the 2005 Transaction. No revisionist manipulation of words or phrases changes that reality. ICO Global has also consistently and pervasively involved itself in the affairs of DBSD. Further, ICO Global has held itself out as the owner and operator of the 2 GHz MSS system in its own right both prior to and following the 2005 Transaction. These facts demonstrate ICO Global's control of the MSS system enterprise that gives rise to its regulatory responsibility in this case.<sup>7</sup>

With respect to the allegedly transformative nature of the 2005 Transaction, the balance of the Symons Letter and all of the Weinstein Letter speak to whether the 2005 Transaction documents were "routine" or "standard." First, the fundamental issue is whether there is anything in the 2005 Transaction documents, whether or not standard or routine, that precluded ICO Global from factually and legally controlling DBSD, or from continuing in its central role with respect to the MSS system. I have shown that there is not, both here and in my previous analyses referenced above, and there is nothing in either the Symons Letter or the Weinstein Letter that contradicts this view.

Second, with respect to whether the covenants in the 2005 Transaction were "routine" or "standard," my observation was obviously intended to address a situation involving similar borrowings by similarly situated borrowers. In contrast, the Symons Letter and the Weinstein Letter compare debt financings of borrowers that are clearly *not* similarly situated: the 2005 Transaction to an unrelated 2005 Sprint Nextel Corporation ("Sprint Nextel") credit facility. In 2005, Sprint Nextel was an NYSE-listed Fortune 100 company with tens of thousands of employees, tens of millions of subscribers and billions of dollars in revenue. By contrast, in 2005, DBSD was a private start-up company, with a handful of employees, no customers, only one valuable asset, and an unproven business plan. The comparison between the two situations is not even apples and oranges; it is pumpkins and peas. It is therefore not at all surprising that Sprint Nextel would borrow on a different basis than DBSD. Nor is it surprising that a lender to Sprint Nextel would not seek constraints on the purposes to which funds borrowed by Sprint Nextel could be used, in contrast to very different lender constraints on the use of funds by a start-up venture.

Furthermore, not only were the borrowers not similarly situated in the comparison suggested by the Symons Letter and the Weinstein Letter, but the Sprint Nextel credit facility was straight debt, rather than a convertible financing. Again, it is not surprising that the 2005 Transaction, which was convertible into equity, would have covenant features that seek to protect the value of the noteholders' conversion rights that would not be present in the Sprint Nextel credit facility. The Weinstein Letter, which principally addresses these issues, concedes that, ". . . the DBSD Indenture contained a number of common debt type provisions . . ."<sup>8</sup> and

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<sup>7</sup> See, e.g., Sprint Nextel September 17 Notice of Ex Parte Communication, at 3, 6.

<sup>8</sup> Weinstein Letter, at 2. These include certain limitations on the borrower DBSD's business practices, such as requirements that affiliate transactions take place on an "arms length"

that “. . . any one of these may be seen as merely addressing the protecting the [sic] ability of the debtor to repay the loan on its terms . . . .”<sup>9</sup> In fact, **every** one of these “non-standard or routine” covenants identified by Mr. Weinstein either relates to the noteholders’ concern to assure repayment of the loan or seeks to protect the exercisability and value of the conversion rights, and would be more or less standard and routine for any start-up borrower in these circumstances.

Notably, these covenants do not restrain or constrain ICO Global’s control over DBSD or its direct activities with respect to the MSS system enterprise. After all, the terms of the 2005 Transaction were approved by the Board of Directors of DBSD, who were all appointed by ICO Global and were all directors of ICO Global. ICO Global naturally ceded to the lenders’ demands for certain mitigations of risk concerning the subsidiary’s use of the proceeds, but plainly did not cede control over DBSD. The noteholders could have acquired control of DBSD in 2005, as they propose to do now, by electing all of the directors but for one to be appointed by ICO Global. They did not. As subsequent events and the Commission’s record shows, ICO Global continued to remain deeply and actively involved in the MSS system enterprise with DBSD regardless of the 2005 Transaction.<sup>10</sup>

In short, nothing in the Symons Letter or the Weinstein Letter effectively addresses the otherwise clear conclusion that the 2005 Transaction was not a transformative event.

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basis, and that DBSD not engage in businesses other than those permitted by the 2005 Transaction documents.

<sup>9</sup> Weinstein Letter, at 3.

<sup>10</sup> See, e.g., Sprint Nextel September 17 Notice of Ex Parte Communication, at 3-4, 6-7.

## **EXHIBIT B**

## MEMORANDUM OF LAW

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WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18  
New DBSD Satellite Services G.P., Applications for Transfer of Control  
File Nos. SAT-T/C-20091211-00144, *et al.*

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### **Supplemental Analysis of Additional Materials Related to the 2005 DBSD Debt Financing Transaction**

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By: Thomas F. Cooney, III  
K&L Gates LLP  
Adjunct Professor of Law  
George Washington University Law School

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#### **I. INTRODUCTION**

On September 3, 2010, ICO Global Communications (Holdings) Inc. (“ICO Global”) submitted an extensive, but incomplete, set of documents related to a 2005 debt financing transaction (the “2005 Transaction”) involving DBSD North America, Inc. (with its debtor-affiliates, “DBSD”).<sup>1</sup> As recounted during subsequent meetings with Commission staff and legal advisors to the Chairman and several Commissioners, I reviewed those initial materials and concluded that the 2005 Transaction was not, as a factual or legal matter, a transformative event that affected or restricted ICO Global’s controlling role with or involvement in DBSD.<sup>2</sup> To the contrary, the 2005 Transaction documents expressly recognized that ICO Global’s control of and direct involvement in DBSD after the transaction would continue.<sup>3</sup> I further determined that unless and until the conversion rights held by the lenders are actually exercised, the lenders have no equity or equity-like rights, and therefore no reason to look at the impact of the 2005 Transaction on a fully-diluted basis; and that even on a fully diluted basis, ICO Global would

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<sup>1</sup> See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 3, 2010) (“*ICO Global September 3 Notice of Ex Parte Presentation*”).

<sup>2</sup> See, e.g., Sprint Nextel Notice of *Ex Parte* Communication, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SES-T/C-20091211-01575, SES-T/C-20091222-1576, SAT-T/C-0091211-00144 (Sept. 10, 2010) (“*Sprint Nextel September 10 Notice of Ex Parte Communication*”).

<sup>3</sup> See Sprint Nextel September 10 Notice of *Ex Parte* Communication, at 2.

still be in control of DBSD by virtue of its ability to elect a majority of the Board of Directors of DBSD.<sup>4</sup>

Subsequently, in response to a request by Commission staff, on September 14, 2010 ICO Global provided additional documents related to the 2005 Transaction that were not included in its original submission.<sup>5</sup> This Memorandum of Law discusses my further analysis of those supplemental materials, and my conclusions as to the implications those materials carry with respect to the 2005 Transaction. As further discussed below, I have determined that those supplemental materials likewise do not support ICO Global's claims that the 2005 Transaction was a transformative event. To the contrary, those supplemental materials actually provide additional support for my earlier conclusion that the 2005 Transaction did not cause or require a fundamental change in the pre-existing relationship between ICO Global and DBSD.

## II. DISCUSSION

In its September 3 Notice of *Ex Parte* Presentation, ICO Global contended that the 2005 Transaction fundamentally changed the control relationship between ICO Global and DBSD and their operation of a common enterprise, which ICO Global has acknowledged was the case prior to the 2005 Transaction.<sup>6</sup> Notably, in its September 14 Notice of *Ex Parte* Presentation ICO Global does not assert that the supplemental materials are supportive of its earlier position that the 2005 Transaction was transformative. Rather, ICO Global now asserts that the supplemental materials support three tangential (but misdirected) propositions: (1) that ICO Global and DBSD are legally separate entities; (2) that the supplemental materials show that ICO Global and DBSD did not have a commonality or unity of interest after the 2005 Transaction; and (3) that as a result of the 2005 Transaction DBSD was financially self sufficient with no need to rely on the resources of ICO Global.<sup>7</sup>

Each of these assertions is flawed or irrelevant. With respect to any legal separations between ICO Global and DBSD, Sprint Nextel Corporation ("Sprint Nextel") has never argued that DBSD is not a separate entity as a legal matter, but rather has argued consistently that the existence of legally separate entities is irrelevant to imposing enterprise wide liability for reimbursement of spectrum clearing expenses. Indeed, with respect to the second assertion, the supplemental materials were all part of the same 2005 Transaction that occurred for the *sole purpose* of funding ICO Global's ambitions to construct, launch, and operate the MSS business through its substantially wholly owned subsidiary DBSD. Finally, Sprint Nextel has never argued that DBSD did not have additional resources available to it as a result of the 2005 Transaction because, of course, that was the purpose of the financing; rather, Sprint Nextel has

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<sup>4</sup> *Id.*

<sup>5</sup> See ICO Global Notice of *Ex Parte* Presentation, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18; New DBSD Satellite Services G.P., Debtor-in-Possession, Applications for Transfer of Control of Earth Station Licenses and Authorizations, File Nos. SAT-T/C-0091211-00144, *et al.* (filed Sept. 14, 2010) ("*ICO Global September 14 Notice of Ex Parte Presentation*").

<sup>6</sup> ICO Global September 3 Notice of *Ex Parte* Presentation, at 2.

<sup>7</sup> ICO Global September 14 Notice of *Ex Parte* Presentation, at 1.

argued that the fact that DBSD had additional resources available to it as a result of the 2005 Transaction in no way changed the relationship between ICO Global and DBSD.

In short, the supplemental materials do nothing to disturb my earlier conclusion that the interdependent relationship between ICO Global and DBSD continued after the 2005 Transaction. Below I analyze in more detail the matters raised by ICO Global in its September 14 Notice of *Ex Parte* Presentation.

**A. The Supplemental Materials Further Demonstrate that ICO Global Retained the Ability to Control DBSD, and Expressly Limited Circumstances In Which Such Control Could Be Changed**

As I explained above, the question of the legal separation of ICO Global and DBSD is a red herring that is irrelevant to the issue of ICO Global's direct liability for its own actions as part of the MSS operator and common enterprise. For the purposes of this Memorandum, the central question is whether the supplemental materials add to our understanding of whether the 2005 Transaction was a transformative event. As you will see below, those materials merely confirm my prior conclusion and advice that the 2005 Transaction did not change the control relationship between ICO Global and DBSD.

With respect to what the supplemental materials add, the two principal operative documents included therein are the Collateral Trust Agreement<sup>8</sup> and the Pledge Agreement.<sup>9</sup> Pursuant to the Collateral Trust Agreement, the Bank of New York, as the trustee under the Indenture, agreed to act as agent for the note holders for purposes of administering and enforcing all of the documents in the 2005 Transaction that created security interests in the stock of DBSD and that other collateral that secures repayment of the notes.<sup>10</sup> Pursuant to the Pledge Agreement, the Bank of New York in its capacity as collateral agent agreed to act on behalf of the note holders in holding the collateral, creating the related security interests and dealing with the collateral in the event of a default.<sup>11</sup>

In *no respect*, however, did either of these documents, or any related document, change or otherwise restrict the ability of ICO Global to control DBSD. In fact, the opposite is true. Section 6 of the Pledge Agreement makes it clear that unless there is a default, ICO Global retained the right to receive all cash dividends and distributions paid by DBSD with respect to the pledged stock and to exercise all voting rights with respect to the pledged stock.<sup>12</sup> Thus, the 2005 Transaction not only did not work to change the control of DBSD, but it also expressly limited the circumstances in which the collateral agent could cause a change of control. Indeed, pursuant to Section 7(c) of the Pledge Agreement, the collateral agent is affirmatively precluded from taking "any action hereunder that would constitute or result in any transfer of control or

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<sup>8</sup> ICO Global September 14 Notice of *Ex Parte* Presentation, Attachment 1A.

<sup>9</sup> *Id.*, Attachment 1B.

<sup>10</sup> *See* ICO Global September 3 Notice of *Ex Parte* Presentation, Attachment B5.

<sup>11</sup> *See* ICO Global September 14 Notice of *Ex Parte* Presentation, Attachment 1B, at 1-4.

<sup>12</sup> *Id.* at 4.

assignment of the Pledgor or any [Commission] licenses held or controlled by the Pledgor without obtaining all necessary [Commission] and other governmental authority approvals.”<sup>13</sup>

In its September 14 Notice of *Ex Parte* Presentation, ICO Global mistakenly refers to the pledge of ICO Global stock as reflecting the investor’s priority “ownership” in DBSD.<sup>14</sup> In fact there was no priority ownership created pursuant to the supplemental materials. Rather, the supplemental materials only created a priority “lien” on the stock that could be converted into actual ownership of the stock only upon a default. No other document included among the supplemental materials contains any provision which is otherwise inconsistent with ICO Global’s continuing control of DBSD or which broadens the powers of the collateral agent to cause a change of control. I also note that the fact that the Pledge Agreement was non-recourse to ICO Global has no relevance to ICO Global’s continuing control of DBSD; rather it relates only to the sufficiency of the collateral that the note holders acquired to secure the indebtedness. Additionally, the fact that ICO Global did not guarantee DBSD’s credit facilities is also not relevant to determining whether ICO Global continued to control DBSD after the 2005 Transaction; but again is only relevant to the adequacy of the collateral that the note holders received.

**B. The Supplemental Materials Establish Only That DBSD Could Finally Repay ICO Global For ICO Global’s Services, Not That The Relationship Between the Two Entities Changed**

ICO Global’s September 14 Notice of *Ex Parte* Presentation focuses in large part on documents related to DBSD’s financial difficulties and ICO Global’s services and expenses.<sup>15</sup> The items ICO Global highlights in fact establish only that after the 2005 Transaction DBSD was able to pay for services that ICO Global continued to provide, and not that the nature of the relationship between the parties changed. In fact, that information actually demonstrates the continuing interconnectedness of DBSD and ICO Global from and after the time of the 2005 Transaction, during which ICO Global was actually reimbursed for its services, and continuing through the bankruptcy proceeding wherein ICO Global agreed to provide transition services pursuant to the Support Agreement of the nature and kind ICO Global had all along provided to DBSD in exchange now for recognition of its continuing equity interest in DBSD. These materials make clear that interconnectedness included providing office space, insurance policy coverage, payroll costs and services, personnel, and professional and consulting services, among other matters.

In short, the disclosures that ICO Global highlights make it clear that the services provided by ICO Global post the 2005 Transaction were of the same nature and scope as provided prior to the 2005 Transaction, with the only difference being that until the commencement of the bankruptcy proceeding DBSD could actually reimburse ICO Global for the costs. ICO Global makes the point that it was convenient and cost efficient for it to provide these services to DBSD.<sup>16</sup> Again, Sprint Nextel does not contend that it did not make good

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<sup>13</sup> *Id.* at 5.

<sup>14</sup> ICO Global September 14 Notice of *Ex Parte* Presentation, at 1.

<sup>15</sup> *Id.*, at 2-4.

<sup>16</sup> ICO Global September 14 Notice of *Ex Parte* Presentation, at 3.

business sense for the note holders to encourage the parent to provide a wide range of services to its controlled subsidiary. But the use of commonly accepted business practices between a parent and a controlled affiliate, which was not precluded by the 2005 Transaction, cannot be somehow twisted for the proposition that as a result the two companies were not a part of the same business enterprise. Most importantly, the improved financial position of DBSD did not in any respect change the control relationship between the parties. In fact, the supplemental materials make it clear that the directors and key executive officers of the parent and DBSD continued to have substantial overlap after the 2005 Transaction, and at all times after the 2005 Transaction ICO Global was in a position to nominate all members of the Board of Directors of DBSD, other than the one member who could be appointed by the note holders but who had no veto authority over Board decisions.

**C. Consolidated Tax Filing Further Undermines ICO Global's Contention That The Impact of The 2005 Transaction Should Be Viewed On A Fully Diluted Basis**

ICO Global disingenuously suggests that its continuing to file consolidated tax returns after the 2005 Transaction was the result of a decision to file consolidated returns made prior to the 2005 Transaction, an election that it asserts remained binding after the 2005 Transaction.<sup>17</sup> I am advised that if the 2005 Transaction resulted in ICO Global owning less than an 80% equity interest in DBSD, DBSD could not have been included in ICO Global's consolidated federal income tax return following the 2005 Transaction despite ICO Global's earlier election to file a consolidated federal income tax return. *See* IRC §§ 1501 and 1504(a); *see also* Treasury Regulation § 1.1502-75. This is consistent with my prior observation that although the note holders had the right to convert the notes and dilute ICO Global's ownership interest in DBSD, they never did so and therefore ICO Global's ownership interest never decreased.<sup>18</sup>

**III. CONCLUSION**

In summary, the supplemental materials and commentary provided by ICO Global in its September 14 Notice of *Ex Parte* Presentation continue to be employed to mischaracterize legal facts and circumstances, and misdirect attention from the real issues in this matter. Nothing in the September 14 Notice of *Ex Parte* Presentation supports a contention that the 2005 Transaction was a transformative event. Rather, when carefully considered and in context the supplemental materials actually provide additional support for my earlier conclusion that the 2005 Transaction did not cause or require a fundamental change in the relationship between ICO Global and DBSD.

TFC:rlc

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<sup>17</sup> *Id.*, at 4.

<sup>18</sup> *See, e.g.*, Sprint Nextel September 10 Notice of *Ex Parte* Communication, at 2.