

# ORIGINAL

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

030000-P4

In re:	)
	)
PATHNET OPERATING, INC.,	)
	)
DEBTOR.	)
	)
GORDON P. PEYTON, CHAPTER 7 TRUSTEE FOR	)
PATHNET OPERATING, INC.	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF DURANGO, CO	)
	)
Defendant.	)

Case No. 01-12266-SSM

Chapter 7

Adversary Proceeding  
No. 03-1150

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 COMMISSION  
 CLERK

## NOTICE OF MOTION

Gordon P. Peyton, Chapter 7 Trustee of the bankruptcy estate of Pathnet Operating, Inc. ("POI"), has filed a Motion to Approve Settlement Agreement in the above-entitled proceeding.

**Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)**

If you do not wish the court to grant the relief sought in the motion, or if you want the court to consider your views on the motion, then on or before June 26, 2003 or your attorney must:

- Send to the parties listed below at least 15 days written notice of a hearing, which may be set on any regularly-scheduled motion day of the judge assigned to the case. If necessary, you may obtain a list of such dates by telephone from the clerk's office. The original and one copy of the notice must be filed with the clerk, accompanied by a motion day cover sheet, a copy of which may be obtained from the clerk. If you are not represented by an attorney, you may instead file with the clerk a written request for hearing. If you mail your request for hearing to the court for filing, you must mail it early enough so the court will receive it on or before the date stated above. The address of the clerk's office is as follows:

Clerk of Court  
 United States Bankruptcy Court  
 P.O. Box 19247  
 Alexandria, Virginia 22320

You will be notified by the clerk of the hearing date and will be responsible for sending notice of hearing to the parties listed below.

- File with the court, at the address shown above, a written response with supporting memorandum as required by Local Bankruptcy Rule 9013-1(H). **Unless a written response and supporting memorandum are filed and served by the date specified, the**

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FPSC-COMMISSION CLERK

**Court may deem any opposition waived, treat the motion as conceded, and issue an order granting the requested relief without further notice or hearing. If you mail your response to the court for filing, you must mail it early enough so the court will receive it on or before the date stated above. You must also mail a copy to the persons listed below.**

- Attend the hearing scheduled to be held on **July 1, 2003 at 9:30 a.m.** in Courtroom 1, United States Bankruptcy Court, 200 South Washington Street, Alexandria, Virginia 22314. **If no timely response has been filed opposing the relief requested, the court may grant the relief without holding a hearing.**
- A copy of any written response must be faxed and mailed to the following persons:

- John G. McJunkin  
J. David Folds  
Piper Rudnick LLP  
1775 Wiehle Avenue, Ste. 400  
Reston, VA 20190  
Facsimile: (703) 773-5035

- United States Trustee, Region 4  
115 South Union Street, Suite 210  
Alexandria, VA 22314  
Facsimile: (703) 557-7279

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: June 11, 2003

Signature, name, address and telephone number of person giving notice:

/s/ J. David Folds  
John G. McJunkin VSB #31011  
J. David Folds VSB #44068  
1775 Wiehle Avenue, Ste. 400  
Reston, VA 20190  
Telephone: (703) 773-4155  
Facsimile: (703) 773-5035

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Motion was served electronically as available, and mailed, postage prepaid, on June 11, 2003 to the Office of the U.S. Trustee, Counsel representing the opposing party and via first class mail to the creditors in this case and to entities who have requested notice pursuant to Bankruptcy Rule 2002 as set forth on the attached service list.\*

/s/ J. David Folds  
J. David Folds

\*Pursuant to Local Rule 5005-1(C) (8), the attached service lists are not being served on each of the parties, but are attached to the original Certificate of Service filed with the Court.



2. The case was subsequently converted to Chapter 7 and the Trustee was appointed Chapter 7 Trustee.

### **The Adversary Proceeding**

3. In the 90 days prior to the Petition Date, the Debtor made transfers to the City of Durango, CO (the “Defendant”) in the amount of \$33,448.65 (the “Alleged Preferential Transfers”).

4. On March 31, 2003, the Trustee initiated the Adversary Proceeding against the Defendant seeking to avoid and recover the Alleged Preferential Transfers.

### **The Settlement Agreement**

5. After engaging in settlement discussions, the Trustee and the Defendant entered into a stipulation of settlement (the “Settlement Agreement”), a copy of which is attached hereto as Exhibit A. The Trustee and the Defendant entered into the Settlement Agreement, subject to this Court’s approval, to resolve the amount owed to the Trustee by the Defendant as a result of the Alleged Preferential Transfers.

6. Under the terms of the Settlement Agreement, the Defendant and the Trustee agreed that the Defendant shall pay the Trustee the sum of Ten Thousand Dollar and Zero Cents (\$10,000.00) (the “Settlement Amount”) in full settlement of any and all claims that could have been asserted by the Trustee against the Defendant related to the Alleged Preferential Transfers.

### **Relief Requested**

7. By this Motion, the Trustee requests that the Court approve the Settlement Agreement pursuant to Bankruptcy Rule 9019(a) and Section 105 of the Bankruptcy Code.

8. The standard for approving a settlement, whether it is in the best interest of the estate, entails an examination of the settlement's terms with the litigation's probable cost and benefits. In re Bond, 16 F.3d 408 (4th Cir. 1994).

9. The Settlement Agreement meets this test. The Defendant received payments in the 90 days before the Petition Date totaling \$33,448.65. After reviewing the facts and circumstances of the transaction, and evaluating the defenses raised by the Defendant, the Trustee has concluded that compromising the claim for a payment of \$10,000.00 is a fair compromise of the claim. The Trustee submits that the proposed settlement is in the best interests of the creditors in this case as it will result in an immediate payment of \$10,000.00 without incurring the expenses and inherent risk of litigation. The settlement, which requires a complete payment upon final Court approval, will also eliminate any issue as to difficulty in collection following litigation, if successful.

#### **Notice**

10. Notice of this Motion has been provided to the United States Trustee, counsel for the Defendant, the creditors in this case and each of the parties requesting notice pursuant to Bankruptcy Rule 2002

#### **Conclusion**

WHEREFORE, the Trustee respectfully requests the entry of an order (a) approving the Settlement Agreement by and between the Trustee and the City of Durango, CO attached hereto as Exhibit A and (b) granting such other relief as the Court considers just and proper.

Reston, Virginia  
June 11, 2003

Respectfully submitted,

**Gordon P. Peyton, Chapter 7  
Trustee for Pathnet Operating, Inc.**

By: /s/ J. David Folds  
J. David Folds

**Counsel to Gordon P. Peyton,  
Chapter 7 Trustee for Pathnet Operating, Inc.**

John G. McJunkin, VSB # 31011  
J. David Folds, VSB # 44068  
Piper Rudnick LLP  
1775 Wiehle Avenue, Suite 400  
Reston, Virginia 20190  
(703) 773-4155 – Telephone  
(703) 773-5035 – Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Approve Settlement and proposed Order were served electronically as available, and mailed, postage prepaid, on June 11, 2003 to the following:

David P. Smith, Esquire  
Office of City Attorney  
City of Durango  
P.O. Box 3150  
Durango, Colorado 81302

Office of the U.S. Trustee  
115 S. Union Street  
Alexandria, Virginia 22314

and via first class mail on June 11, 2003 to entities who have requested notice pursuant to Bankruptcy Rule 2002 as set forth on the attached service list.\*

/s/ J. David Folds  
J. David Folds

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

IN RE: )

PATHNET OPERATING, INC., )

Debtor. )

Case No. 01-12266-SSM

Chapter 7

\_\_\_\_\_  
GORDON P. PEYTON, CHAPTER 7 )  
TRUSTEE FOR PATHNET OPERATING, )  
INC., )

Plaintiff, )

Adv. Pro. No. 03-1150

v. )

CITY OF DURANGO, CO, )

Defendant. )

ORDER

Having considered the Motion to Approve Settlement (the "Motion") filed by Gordon P. Peyton, Chapter 7 Trustee (the "Trustee") for Pathnet Operating, Inc. (the "Debtor") and any opposition to the Motion, and finding that there is cause to grant the relief requested, it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion is granted.

It is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
Stephen S. Mitchell  
United States Bankruptcy Judge

EXHIBIT A

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

IN RE:	)	
	)	
PATHNET OPERATING, INC.,	)	Case No. 01-12266-SSM
	)	
Debtor.	)	Chapter 7
_____	)	
	)	
GORDON P. PEYTON, CHAPTER 7	)	
TRUSTEE FOR PATHNET OPERATING,	)	
INC.,	)	
	)	Adv. Proc. No. 03-1150
Plaintiff,	)	
	)	
v.	)	
	)	
CITY OF DURANGO, COLORADO	)	
	)	
Defendant.	)	
_____	)	

STIPULATION BY AND BETWEEN  
GORDON P. PEYTON, CHAPTER 7 TRUSTEE FOR PATHNET  
OPERATING, INC., AND CITY OF DURANGO, COLORADO

This stipulation (the "Stipulation") is made by and between the plaintiff, Gordon P. Peyton, Chapter 7 Trustee (the "Trustee") for Pathnet Operating, Inc. (the "Debtor") and City of Durango, Colorado (the "Defendant");

WHEREAS, on April 2, 2001 (the "Petition Date"), the Debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code"); and

WHEREAS, the case was subsequently converted to Chapter 7 and the Trustee was appointed Chapter 7 Trustee; and

WHEREAS, on or about March 31, 2003, the Trustee filed a Complaint against Defendant, styled *Gordon P. Peyton, Chapter 7 Trustee for Pathnet Operating, Inc. v. City of Durango, Colorado*, Adv. Pro. No. 03-1150, Case No. 01-12266 (the “Adversary Proceeding”), in the United States Bankruptcy Court for the Eastern District of Virginia (the “Bankruptcy Court”) in which the Trustee seeks to avoid and recover transfers made by Debtor to the Defendant in the amount of \$33,448.65 (the “Preferential Payments”), within ninety days of the Petition Date; and

WHEREAS, the parties have engaged in settlement negotiations and have agreed to the terms of this Stipulation taking into consideration the costs, risks and delay which would otherwise be attendant to litigation of the Adversary Proceeding; and

WHEREAS, the Trustee has evaluated the terms of the Stipulation and believes its acceptance is in the best interests of the Debtor’s estate.

NOW, THEREFORE, based upon the foregoing, the Trustee and the Defendant, subject to the approval of the Bankruptcy Court, intending to be legally bound, hereby stipulate and agree as follows:

1. The Defendant shall pay the amount of \$10,000.00 (the “Settlement Amount”) by check made payable to “Gordon P. Peyton, Chapter 7 Trustee for Pathnet Operating, Inc.” and deliver the Settlement Amount to David Folds, Piper Rudnick LLP, 1775 Wiehle Avenue, Suite 400, Reston, Virginia, 20190 upon execution of this Stipulation. The Trustee shall hold the Settlement Amount in escrow until the Bankruptcy Court approves the Stipulation.

2. Effective upon Bankruptcy Court approval of this Stipulation, the Trustee, on one hand, and the Defendant, on the other, hereby release and discharge each other, their successors and assigns, their agents, and attorneys from all claims, known or unknown, which each party may have against the other. This general release includes without limitation (i) any and all claims from or relating to the transaction(s) related to the Adversary Proceeding and (ii) any and all claims from or relating to any other transaction(s) between the Debtor and the Defendant; provided, however, nothing herein set forth shall relieve the assignee of the Debtor's rights under the Letter Agreement dated July 5, 2000, between the Debtor and the City of Durango, from the future maintenance and relocation obligations set forth within said Letter Agreement.

3. The parties expressly acknowledge that the waivers and agreements herein shall become effective upon the entry of an Order by the Bankruptcy Court approving this Stipulation and may not thereafter be rescinded or revoked.

4. Each party shall bear its own costs and expenses in connection with this matter, including legal fees and expenses.

5. The Bankruptcy Court shall retain jurisdiction to hear and determine any matters or disputes arising from or relating to this Stipulation.

6. This Stipulation shall be governed and interpreted in accordance with the law of the Commonwealth of Virginia, without consideration of the principles of conflict of law.

7. This Stipulation shall be binding upon the parties hereto and their respective executors, heirs, successors and assigns.

8. This Stipulation may be executed in counterparts, and when all counterparts have been executed, each executed counterpart will have the force and effect of the original.

9. Nothing herein shall be construed to waive any proof of claim that the Defendant has filed against the Debtor's estate, or the Trustee's right to challenge or object to any such proof of claim.

10. This Stipulation constitutes the entire agreement between the Trustee and the Defendant regarding the matters stated herein. This Stipulation may not be amended, modified, or extended with respect to any party to this Stipulation except by a written instrument executed by both parties hereto.

11. In the event the foregoing Stipulation is not approved by the Bankruptcy Court, the Trustee shall return the sum of \$10,000.00 to the City of Durango, Colorado within five (5) business days from the date such approval is denied by the Court and the City of Durango shall have a period of twenty (20) days from the date of such determination by the Court within which to answer or otherwise respond to the Complaint in the above-referenced Adversary Proceeding.

12. The undersigned certify that they are duly authorized to execute this Stipulation on behalf of the parties thereto.

City of Durango, Colorado

By: Robert F. Ledger, Jr.  
Robert F. Ledger, Jr., City Manager

Date: May 21, 2003

Gordon P. Peyton, Chapter 7  
Trustee for Pathnet Operating, Inc.

By: J. David Folds  
J. David Folds

Date: 6/10/03