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UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

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	)	Case No. 01-12266-SSM	COMMISSION CLERK
IN RE:	)		
	)	(As consolidated with 01-12267-SSM,	
PATHNET OPERATING, INC., et al.	)	01-12268 SSM, and 01-12269-SSM)	
	)		
Debtors.	)		

NOTICE OF MOTIONS

YOU ARE HEREBY NOTIFIED that Gordon P. Peyton, Trustee in Bankruptcy, has filed the attached motions:

A. Chapter 7 Trustee's Motion to Approve Sale Procedures and Memorandum in Support ("Sale Procedures Motion"); and

B. Chapter 7 Trustee's Motion for Authority to Sell Assets Free and Clear of Liens and Memorandum in Support ("Sale Motion/Auction Results").

1. The hearing on Item A above to Approve Sales Procedures will be held on November 4, 2003 at 10:00 a.m. If you object to the Sale Procedures Motion, you or your counsel must file a written objection with the Court and serve a copy on the undersigned counsel.

2. If the foregoing sales procedures are approved, you are hereby notified that the auction authorized thereby will be conducted on November 13, 2003 at 10:00 a.m. at 1775

Wichle Avenue, Suite 400, Reston, VA 20190.

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMF \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC \_\_\_\_\_
- MMS \_\_\_\_\_
- SEC \_\_\_\_\_
- OTH \_\_\_\_\_

H. Bradley Evans, Jr. (VSB #4733)  
 E. Andrew Burcher (VSB #41310)  
 REDMON, PEYTON & BRASWELL, LLP  
 510 King Street, Suite 301  
 Alexandria, VA 22314  
 (703) 684-2000  
 Counsel to Gordon P. Peyton, Trustee

DOCUMENT NUMBER-DATE  
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3. A hearing on Item B regarding the Sale Motion/Auction Results will be heard on November 18, 2003 at 10:00 a.m. If you object to this motion, you or your counsel must file a written objection with the Court and serve a copy on the undersigned counsel.

**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 motions, or if you want the Court to consider your views on the motions, then **five (5) business days before the respective Court hearing dates**, you or your attorney must:

- File with the Court (United States Bankruptcy Court for the Eastern District of Virginia (Alexandria Division), 200 South Washington Street, P.O. Box 19247, Alexandria, VA 22320-9247), 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 Court may deem any opposition waived, treat the motions 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 five (5) days before the dates stated above. You must also mail a copy to the persons listed below; and
- a) Attend the hearing to be held on **November 4, 2003 at 10:00 a.m.** regarding the Sale Procedures Motion; and
- b) Attend the hearing to be held on **November 18, 2003 at 10:00 a.m.** regarding the Sale Motion/Auction Results; and
- Send a copy of any written response to the following persons:
  - H. Bradley Evans, Jr.  
Redmon, Peyton & Braswell, LLP  
510 King Street, Suite 301  
Alexandria, VA 22314  
(703) 684-5109 (fax)

- United States Trustee, Region 4  
115 South Union Street, Suite 210  
Alexandria, VA 22314
- Tom W. Davidson, Esq.  
Akin Gump Strauss Hauer & Feld LLP  
1676 International Drive, Penthouse  
McLean, VA 22102-4832  
(703) 891-7719 (Fax)  
Counsel for FiberLink, Inc.
- Cecily Dumas, Esq.  
Friedman Dumas & Springwater LLP  
FriedOne Maritime Plaza, Ste. 2475  
San Francisco, CA 94111  
(415) 834-1044  
Counsel for Cisco Systems
- R. Timothy Bryan, Esq.  
Piper Rudnick LLP  
1775 Wiehle Avenue, Ste. 400  
Reston, VA 20190  
(703) 773-4000  
Counsel for Nortel Networks Inc.

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

Dated: October 20, 2003

GORDON P. PEYTON, TRUSTEE IN  
BANKRUPTCY

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

REDMON, PEYTON & BRASWELL, LLP

By: 

H. Bradley Evans, Jr., VSB No. 4733  
E. Andrew Burcher, VSB No. 41310  
510 King Street, Suite 301  
Alexandria, VA 22314  
(703) 684-2000  
Counsel to Gordon P. Peyton,  
Chapter 7 Trustee

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 20 day of October, 2003, mailed a true copy of the foregoing Notice of Motions to all parties listed on the attached service list.\*



\_\_\_\_\_  
R. Timothy Bryan

\*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.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

In re

PATHNET OPERATING, INC., et al.,

Debtor.

Case No. 01-12266-SSM

(As consolidated with 01-12267-SSM,  
01-12268 SSM, and 01-12269-SSM)

Chapter 7

**CHAPTER 7 TRUSTEE'S MOTION TO APPROVE SALE PROCEDURES  
AND MEMORANDUM IN SUPPORT**

Gordon P. Peyton ("Trustee"), the duly qualified and acting Chapter 7 Trustee of the above-named debtors (the "Debtors"), moves the court for an order establishing certain procedures for the sale of the Debtors' fiber optic assets located between Chicago, Illinois and Denver, Colorado (the "Assets") (the "Motion"). For a description of the proposed sale, please refer to the Sale Motion, served and filed herewith.

**I.**

**SUMMARY OF RELIEF REQUESTED**

1. The Trustee requests the Court to issue an order ("the "Sale Procedures Order") (a true and correct copy of the proposed "Order Approving Certain Procedures for Sale of Assets" is attached hereto as Exhibit A) approving sale procedures as follows (the "Sale Procedures"):

(a) Approving FiberLink, Inc., a Nebraska corporation ("FiberLink"), as the "Lead Bidder," pursuant to the Asset Purchase Agreement ("APA") dated as of

October 15, 2003, between the Trustee and FiberLink, a true and correct copy of which is attached to the accompanying Sale Motion.

(b) Authorizing the Trustee to conduct an auction out of court on or about November 13, 2003 (subject to rescheduling at the Trustee's discretion) at which only parties which are "Qualified Bidders" may participate. To be a Qualified Bidder, a party must prior to the action (i) establish to the Trustee's satisfaction the financial capability to complete and perform its obligations with respect to the proposed transaction if it is the Winning Bidder, (ii) make a cash deposit of not less than \$250,000 (an amount equal to the total deposit made by the Lead Bidder), which shall be nonrefundable and retained by the Trustee as liquidated damages if the party is the Lead Bidder but fails to consummate the transaction for any reason other than the failure of a condition to closing not caused by any action or omission of the Winning Bidder; and (iii) execute and deliver to the Trustee the APA, reflecting only modifications which are acceptable to the Trustee, binding such party if it is the Winning Bidder to consummate the transaction for the amount of the Winning Bidder's successful bid at the auction and otherwise in accordance with the terms of the APA as executed and delivered to the Trustee;

(c) Providing that the first overbid at the auction must exceed the purchase price offered by the Lead Bidder by at least \$300,000 and that any subsequent overbids must exceed the last bid amount by at least \$100,000;

(d) Authorizing the Trustee, in consultation with Cisco Systems Capital Corporation ("CSCC"), and Nortel Networks Inc. ("Nortel"), subject only to subsequent review by the Court at the Sale Hearing, to determine at and for purposes of the auction the value of the Lead Bidder's initial bid and any overbids, whether any overbid satisfies the overbid criteria set forth in subparagraph (b) immediate above and which bid represents the highest and

best bid for the Assets; to declare the maker of the highest and best bid as thus determined the Winning Bidder; and to resolve any issues or disputes which may arise during the auction;

(e) Providing that, if the Lead Bidder is not the Winning Bidder, the Lead Bidder shall be entitled to payment of a break-up fee (the "Break-Up Fee") in an amount equal to \$200,000 under and pursuant to the terms and conditions of the APA;

(f) Limiting the parties to whom objections to the Sale Motion shall be served to the Trustee, CSCC, Nortel, the Lead Bidder, the U.S. Trustee and any other party requesting notice thereof; and

(g) Limiting service of the Sale Procedures Order to the Trustee, CSCC, Nortel, the Lead Bidder, the U.S. Trustee, any party requesting notice thereof, and any prospective bidders identified by the Trustee.

#### **JURISDICTION**

2. This Court has jurisdiction over this matter pursuant to the provisions of 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to the provisions of 28 U.S.C. § 157(b)(2). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested in this Motion are §§ 105 and 363 of the Bankruptcy Code.

#### **BACKGROUND**

3. The APA requires, as a condition to FiberLink's obligation to proceed with the transaction, that the Court issue the Sale Procedures Order providing certain protections and benefits to FiberLink as the Lead Bidder. Specifically, the Sale Procedures Order must provide that, if FiberLink becomes the Lead Bidder and is thereafter overbid, it will receive a break-up fee in an amount equal to \$200,000 (the "Break-Up Fee"). The Trustee believes that

this provision is reasonable and appropriate and ultimately serves to preserve and enhance the value of the Debtors' estates.

4. Courts in this district have approved "break-up fees" similar to those proposed here on the justification that the initial offeror provides a valuable service by establishing a minimum price for the assets to be sold and in creating a market for the assets. In re Ryan, 261 B.R. 867, 870 (Bankr. E.D. Va. 2001) ("Bankruptcy courts allow break-up fees and related compensation for initial prospective purchasers in Chapter 11 cases. The basic justification for break-up fees is that the initial offeror provides a valuable service by establishing a minimum price for the assets to be sold and in creating a market for the assets.")

5. The Break-Up Fee satisfies the standards for allowing a break-up fee. The Trustee believes that the price to which FiberLink has committed in the APA represents a fair initial offer for the Assets, thus assuring a reasonable guaranteed minimum price for the Assets and an attractive floor for an auction. FiberLink was unwilling to make its proposal without the Break-Up Fee, and it is not committed to maintain its offer if the Break-Up Fee is not approved. The amount of the Break-Up Fee is reasonable in relation to the size of the transaction -- 4% of the estimated cash purchase price. The Break-Up Fee is based on FiberLink's actual out-of-pocket expenses.

6. In addition, the Trustee seeks court approval, via the Sale Procedures Order, of the other Sale Procedures outlined in paragraph 2 above. These include provisions regarding the conduct of an auction to be held shortly before the Sale Hearing, including the qualification of prospective overbidders. These provisions are tailored to the circumstances of this case, and are reasonably calculated to produce a competitive and orderly sale process resulting in the highest and best price reasonably obtainable for the Assets.



7. The Trustee submits that the Sale Procedures are reasonable and appropriate in the circumstances of these Chapter 7 cases, and requests that the Court approve them, including the Break-Up Fee.

II.

CONCLUSION

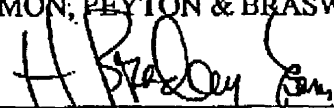
The Trustee proposes to sell the assets pursuant to a process designed to elicit the highest and best price reasonably obtainable. The Trustee submits that, for the reasons shown above, the sale process is a fair and reasonable one which is likely to both maximize the price for the benefit of the Debtors' unsecured creditors. Accordingly, the Trustee requests that the Court approve the Sale Procedures as set forth in the proposed Order.

GORDON P. PEYTON, TRUSTEE IN  
BANKRUPTCY  
By Counsel

Respectfully submitted,

REDMON, PEYTON & BRASWELL, LLP

By:

  
H. Bradley Evans, Jr., VSB No. 4733  
E. Andrew Burcher, VSB No. 41310  
510 King Street, Suite 301  
Alexandria, VA 22314  
(703) 684-2000  
Counsel to Gordon P. Peyton,  
Chapter 7 Trustee

CERTIFICATE OF SERVICE

I do hereby certify that I have this 20<sup>th</sup> day of October, 2003, mailed a true copy of the foregoing Motion to all parties listed on the service list attached to the Notice of Motions.\*

  
R. Timothy Bryan

\*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.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

In re

PATHNET OPERATING, INC., et al.,

Debtors.

Case No. 01-1266-SSM  
(As consolidated with 01-12267-SSM,  
01-12268 SSM, and 01-122269-SSM)

Chapter 7

**ORDER APPROVING CERTAIN PROCEDURES FOR SALE OF ASSETS**

The motion of Gordon P. Peyton, Chapter 7 trustee ("Trustee") to Approve Sale Procedures (Including Break-Up Fee to Lead Bidder) (the "Sale Procedures Motion"), with respect to debtors' proposed sale of certain assets came on for hearing on November 4, 2003, before the undersigned United States Bankruptcy Judge. The Trustee appeared by counsel, H. Bradley Evans of Redmon Peyton & Braswell; other appearances were as noted on the record. Notice appropriate under the applicable rules and this Court's order limiting notice having been given, and good cause appearing,

**IT IS HEREBY ORDERED that:**

1. The sale procedures (including cancellation fee to lead bidder) are approved as provided herein.
2. FiberLink, Inc., a Nebraska corporation ("FiberLink") is designated as the "Lead Bidder," on the condition that FiberLink and the Trustee shall have executed an Asset Purchase Agreement ("APA") in the form attached to the Trustee's Motion for Authority to Sell Assets Free and Clear of Liens (the "Sale Motion").
3. The Trustee is authorized to conduct an auction out of court (the "Auction") on or about November 13, 2003 at 10:00 a.m. at Piper Rudnick LLP, 1775 Wiehle

Avenue, Suite 400, Reston, VA 20190 (subject to rescheduling in the Trustee's discretion, after consultation with the Secured Lenders, at which only the Lead Bidder and parties which are "Qualified Bidders" may participate as bidders). To be a Qualified Bidder, a party must not later than two days prior to the Auction (or, in the Trustee's discretion, by a later time prior to the Auction, after notice and to and consultation with the Secured Lenders, (a) establish to the Trustee's satisfaction the financial capability to complete and perform its obligations with respect to the proposed transaction and its capability to complete and perform its obligations with respect to the proposed transaction if its bid is determined by the Trustee to be the highest and best bid ("Winning Bidder"), (b) make a cash deposit of not less than \$250,000 (*i.e.*, an amount equal to the total deposit made by the Lead Bidder), which shall be refundable only upon the terms and conditions set forth in the APA, and (c) execute and deliver to the Trustee the APA, reflecting only modifications which are acceptable to the Trustee and the Secured Lenders, binding such party if it is the Winning Bidder to consummate the transaction for the amount of the Winning Bidder's successful bid as the Auction and otherwise in accordance with the terms of the APA as executed and delivered to the Trustee, and contingent solely upon (i) being selected at the Auction as the bidder with the highest and best offer, and (ii) Court approval at the sale hearing, currently scheduled to be held on November 18, 2003.

4. The first overbid at the Auction must exceed the net purchase price of \$5,000,000 offered by the Lead Bidder by at least \$300,000, and any subsequent overbids must exceed the last bid amount by at least \$100,000.

5. The Trustee is authorized, after consultation with the Secured Lenders, and subject only to subsequent review by the Court at the sale hearing, to determine at and for purposes of the Auction the value of the Lead Bidder's initial bid and any overbids, whether any overbid satisfies the overbid criteria set forth in paragraph 3 above, and which bid represents the highest and best bid for the subject assets; to declare the maker of the highest and best bid as thus determined the Winning Bidder; and to resolve any issues or disputes which may arise during the Auction. In determining any of the foregoing, the Trustee shall consult with the Secured Lenders.

6. If the APA is terminated by the Lead Bidder pursuant to Section 8.4(a) or Section 8.4(c) thereof, without breach by the Lead Bidder of any material obligation under the APA, then the Trustee shall pay to the Lead Bidder a break-up fee (the "Break-Up Fee") in an amount equal to \$200,000, which Break-Up Fee shall be payable to the Lead Bidder in accordance with the terms of Section 8.5 of the APA. No bidder other than the Lead Bidder shall be entitled to a Break-Up Fee.

7. The hearing on the Trustee's proposed sale of the debtors' assets to the Winning Bidder shall be held on November 18, 2003 at 10:00 a.m. in the Courtroom of the Honorable Stephen S. Mitchell, 200 S. Washington Street, Alexandria, VA 22314, unless hereafter continued upon appropriate notice to relevant parties.

8. Any objection to the approval of the Sale Motion must be filed and served by first class mail on the Trustee, the Secured Creditors, the Lead Bidder, and the U.S. Trustee by no later than November 11, 2003.

9. Any objection of the Secured Lenders to approval of the Sale Motion to a Winning Bidder other than the Lead Bidder must be filed and served by facsimile transmission or other electronic means and by first class mail on the Trustee, the Winning Bidder, the Lead Bidder and the U.S. Trustee by no later than 4:00 p.m. on November 17, 2003.

10. The deposit of FiberLink shall be maintained by the Trustee or his counsel in a separate segregated account until further order of the Court.

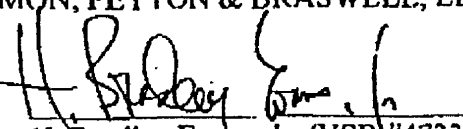
Dated:

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

I ASK FOR THIS:

REDMON, PEYTON & BRASWELL, LLP

By:

  
H. Bradley Evans, Jr. (VSB #4733)

510 King Street, Suite 301

Alexandria, VA 22314

(703) 684-2000

(703) 684-5109 (Fax)

Counsel for Gordon P. Peyton, Trustee

Copies to:

H. Bradley Evans, Jr., Esquire  
REDMON, PEYTON & BRASWELL, LLP  
510 King Street, Suite 301  
Alexandria, VA 22314

Tom W. Davidson, Esquire  
AIKEN GUMP STRAUSS HAUER & FELD, LLP  
1676 International Drive, Penthouse  
McLean, VA 22102

Cecily A. Dumas, Esquire  
Friedman Dumas & Springwater, LLP  
One Maritime Plaza, Suite 2475  
San Francisco, CA 94111

John G. McJunkin, Esquire  
R. Timothy Bryan, Esquire  
PIPER RUDNICK, LLP  
1775 Wiehle Avenue  
Reston, VA 20190

Jack Frankel, Esquire  
U.S. Trustee's Office  
115 South Union Street  
Alexandria, VA 22314

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

In re:	)	
	)	
PATHNET OPERATING, INC. et al.,	)	Chapter 7
	)	
	)	Case Nos. 01-12266-SSM
Debtors	)	
	)	

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DECLARATION OF SHAWN O'DONNELL

I, Shawn O'Donnell, declare under penalty of perjury as follows:

1. I am the former Executive Vice President of Pathnet, Inc. ("PNI"). Because Pathnet Operating, Inc. ("POI"), had no employees and was provided services by PNI, I performed a similar function on behalf of POI.
2. As of March 31, 1999, PNI entered into an agreement with Pacific Fiberlink, LLC, predecessor in interest to 360networks (USA) inc. ("360") (the "Joint Build Agreement"), by which 360 agreed to construct a fiber optic telecommunications system between Chicago, Illinois and Denver, Colorado (the "Project"). I understand that PNI later assigned this agreement to POI.
3. The Joint Build Agreement:
  - (a) Provides that POI shall have the right to use fifty percent (50%) of each regeneration site (paragraph 2 A);
  - (b) Grants POI the same right of access and entry to regeneration facilities sites as 360 and the right to use an equal amount of collocation space as 360, or a minimum of 120 square feet (paragraph 19); and
  - (c) Required the regeneration facilities to be designed for joint use and to have "meet me" vaults that allow for the connection of POI's IRU fibers to other fibers outside of the network, or, in other words, to allow POI to sell access to its fibers to customers by providing for the ability for customers to connect to the fibers owned by POI (Joint Build Agreement, Exhibit F).

EXHIBIT C -

4. 360 failed to provide POI sufficient space for its use in the regeneration sites at Chicago, Illinois, Des Moines, Iowa, and Omaha, Nebraska to connect its fibers to those of its customers, as required by the Joint Build Agreement. As a result, POI was forced to construct separate facilities in Chicago, Illinois, Des Moines, Iowa, and Omaha, Nebraska, at a cost of \$4,928,000.00 in order to be able to provide its customers with access to its fiber.
5. The Joint Build Agreement also required 360 to calculate the amount of fiber necessary to manufacture the amount of fiber optic cable required by the Project, and to manufacture and install the fiber optic cable. 360 failed to properly manage the manufacture of the fiber optic which resulted in a short fall of 120 miles of fiber optic cable. During the manufacturing process 22%-23% of the fiber was wasted while, the industry average of fiber waste associated with manufacturing fiber optic cable is 5%-7%. As a result POI incurred additional costs to it of \$1,538,793.00.

Dated this 17th day of October 2003.

  
Shawn O'Donnell

**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

**Alexandria Division**

**In re:**

**PATHNET OPERATING, INC. et al.,**

**Debtors**

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**Chapter 7**

**Case Nos. 01-12266-SSM**

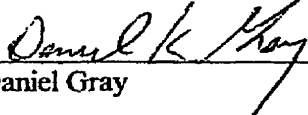
**DECLARATION OF DANIEL GRAY**



I, Daniel Gray, declare under penalty of perjury as follows:

1. I am the former Controller of Pathnet, Inc. ("PNI") and Pathnet Operating, Inc. ("POI"). I am familiar with the books and records of PNI and POI as they were recorded and maintained in the ordinary course of business.
2. As of March 31, 1999, PNI entered into an agreement (the "Joint Build Agreement") with Pacific Fiberlink, LLC, and the predecessor in interest to 360networks (USA) inc. ("360"), by which 360 agreed to construct a fiber optic telecommunications system between Chicago, Illinois and Denver, Colorado (the "Project"). The Joint Build Agreement subsequently was assigned by PNI to POI.
3. Pursuant to the Joint Build Agreement, 360 agreed to design, engineer, construct, install, and maintain a three (3) conduit fiber optic telecommunications system between Denver, Colorado, and Chicago, Illinois (the "Project"), and to sell to POI: (a) one (1) conduit and fifty percent (50%) of the total number of fibers pulled through the Primary Conduit and associated improvements; (b) the right to utilize collocation space in the regeneration sites, in an amount that is the greater of 120 square feet or the amount used by 360 (Joint Build Agreement, paragraph 19.1.2); (c) the right to use fifty percent (50%) of each regeneration site (Joint Build Agreement, Exhibit A, paragraph 2 A); and (d) a "meet me" vault in each regeneration site that allows PNI to connect with its IRU fibers to other fibers outside the network (Joint Build Agreement, Exhibit F, 3(d)). In consideration of the foregoing, POI agreed to pay fifty percent (50%) of the costs of constructing the Project;
4. POI has paid to 360 a total of \$48,242,253. POI also held back \$6,373,823, which together equal fifty (50%) of the costs of constructing the Project;
5. POI is entitled to a credit of \$1,136,987.00 from 360 based upon POI's payment of 360's Invoice numbered 20-00-1111 in the amount of \$1,136,987.00 from proceeds of a loan to POI by Cisco Systems Capital Corporation for which 360 never recognized as paid;
6. In January of 2001, I spoke to by telephone with Carment Drollinger of 360, who was the controller at 360. Ms. Drollinger informed me that 360 had sold fibers and/or conduits to Williams and MCI for a total consideration of \$6,199,575 of which POI is entitled to \$2,066,525 pursuant to the terms of the Joint Build Agreement and the Joint Marketing Agreement between the parties.

Dated this 16<sup>th</sup> day of October 2003.

  
Daniel Gray

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

IN RE:

PATHNET OPERATING, INC.

Debtor

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Case No. 01-12266-SSM

Chapter 7

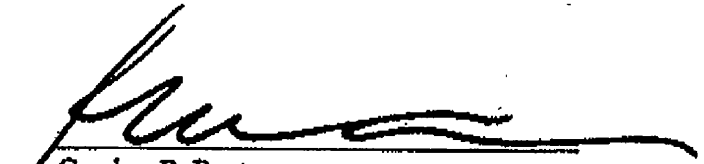
AFFIDAVIT IN SUPPORT OF SALE

I, Gordon P. Peyton, Trustee in Bankruptcy, hereby swear and depose as follows:


1. I am the Chapter 7 Trustee in Bankruptcy for Pathnet Operating, Inc., ("POI") and Pathnet Real Estate, LLC ("PRE").
2. As part of my duties as Trustee I have sold a significant amount of assets in cooperation with the secured lenders. At the present time there is approximately \$1.2 million earmarked for non-priority unsecured creditors.
3. For an extended period of time I have been attempting to sell the Debtor's one-half interest in a fiber optic system between Chicago, Illinois and Denver, Colorado.
4. In those efforts, I have been assisted by Telecom Asset Management ("TAM"). I am advised and therefore believe that TAM has extensive experience in selling assets such as these as a result of the telecom industries' economic problems.
5. The property has been marketed for a long time.
6. FiberLink, LLC ("Fiberlink") has offered \$5 million for the aforementioned route. They have signed or soon will sign an Asset Purchase Agreement ("APA") in that regard.
7. FiberLink was and is represented by the law firm of Aiken Gump in connection with the APA, the Letter of Intent which initiated it and related documentation. This is an arms length transaction proposed and negotiated in good faith.

EXHIBIT F

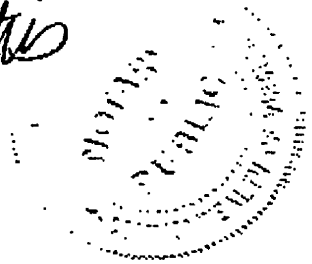
8. FiberLink is not an insider.
9. There have been no action ties prohibited by 11 USC §363 (N) to my knowledge.
10. I believe this is in the best interest of creditors and in my judgment, is an advantageous step for these estates to take.

  
Gordon P. Peyton  
Trustee in Bankruptcy

Subscribed and sworn to before me this 14 day of October, 2003.

  
Meredith R. Mathis  
Notary Public

My Commission Expires: 9/30/07



UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

In re

PATHNET OPERATING, INC., et al.,

Debtor.

Case No. 01-12266-SSM

(As consolidated with 01-12267-SSM,  
01-12268 SSM, and 01-12269-SSM)

Chapter 7

**CHAPTER 7 TRUSTEE'S MOTION FOR AUTHORITY TO SELL ASSETS FREE AND  
CLEAR OF LIENS AND MEMORANDUM IN SUPPORT**

Gordon P. Peyton ("Trustee"), the duly qualified and acting Chapter 7 Trustee of the above-named debtors (the "Debtors"), moves the Court for authority to sell Debtors' fiber optic assets located between Chicago, Illinois, and Denver, Colorado (the "Assets"), and for other relief (the "Sale Motion"), all as more fully described in paragraph 1 below.

**I.**

**RELIEF REQUESTED**

1. At the Sale Hearing, the Trustee will seek an order (the "Sale Order") (a true and correct copy of the proposed Order Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of all Liens, Claims, Encumbrances, and Other Interests is attached hereto as Exhibit A):

(a) Granting authority to sell the Assets, free and clear of liens and interests to the maximum extent allowed by Bankruptcy Code § 363(f), and in particular any interests asserted by 360 Networks (U.S.A.), Inc. ("360"), and the liens and interests of all other

parties (the “Other Lienholders”), to FiberLink, Inc., a Nebraska corporation (“FiberLink”) or to a successful overbidder (“Overbidder”) at an auction to be held pursuant to the Sale Procedures described below (such Overbidder or FiberLink, as the case may be, is hereafter referred to as the “Winning Bidder”) and ordering that all liens and interests shall be transferred to the proceeds of sale;

(b) Finding that 360 has no interest in the Assets by virtue of the Trustee’s entitlement to a conveyance of title to the Assets;

(c) Approving the definitive Asset Purchase Agreement (the “APA”), a true and correct copy is attached hereto as Exhibit B, between the Winning Bidder and the Trustee;

(d) Waiving the ten day stay applicable to sales of assets pursuant to Rule 6004(g) of the Federal Rules of Bankruptcy Procedure;

(e) Finding that the Winning Bidder is a third-party, arm’s length acquirer of the Assets and will acquire the Assets in good faith within the meaning of Bankruptcy Code § 363(m); and

(f) Making findings and granting other relief consistent with and in furtherance of the foregoing.

### **JURISDICTION**

2. This Court has jurisdiction over this matter pursuant to the provisions of 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to the provisions of 28 U.S.C. § 157(b)(2). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested in this Motion are §§ 105 and 363 of the Bankruptcy Code.

## BACKGROUND

3. These cases were commenced by voluntary petitions under Chapter 11 filed by debtors Pathnet Telecommunications, Inc. (“PTP”), Pathnet, Inc. (“PNP”), Pathnet Operating, Inc. (“POI”), Pathnet Real Estate, LLC (“PRE”), Pathnet Fiber Equipment, LLC (“PFE”), and Pathnet Operating of Virginia (“POV”) on April 2, 2001.

4. POI, PRE, PFE, and POV continued as debtors in possession until July 19, 2001, when the Court issued an order converting the cases of POI, PRE, PFE and POV to Chapter 7 (hereinafter, the “Converted Debtors”). The Trustee was appointed Chapter 7 Trustee for the Converted Debtors on or about July 20, 2001.

5. POI was in the business of providing telecommunication services through its fiber optic networks. POI’s interest in the Assets is derived from its rights in a joint development with Pacific Fiberlink, LLC, predecessor in interest to 360, of a fiber optic telecommunications system between Denver, Colorado and Chicago, Illinois under an Agreement dated as of March 31, 1999 (the “Joint Build Agreement”) pursuant to an assignment of the Joint Build Agreement from its affiliate, Pathnet, Inc. Pursuant to the Joint Build Agreement, in exchange for payment of 50% of the costs associated with constructing the telecommunications system and other miscellaneous expenses, POI (defined as “Purchaser”) was entitled to acquire certain interests in real and personal property including one conduit and 50% of the total number of fibers pulled through the Primary Conduit (as defined therein) and other assets related to the system from 360 (defined as “Developer”). See Joint Build Agreement, referred to in the Memorandum Opinion of Court entered on the Court’s docket on January 28, 2003.

6. As evidenced by the Joint Build Agreement, the intent of the parties was that POI would acquire ownership of specific assets associated with the telecommunications system to be developed under the agreement. First, in the agreement, the parties specifically

define the term "Purchaser System" as the assets and related rights that POI is intended to acquire. Second, the agreement not only contemplates the conveyance of title to the "Purchaser System" by a bill of sale, the form of which is attached as an exhibit to the Joint Build Agreement, it also contemplates automatic transfer of title to POI.

7. Transfer of title to the Assets was required to be effected upon payment by POI of the purchase price for the costs associated with completion of each segment of the telecommunications system. Section 10.2 of the Joint Build Agreement provides in part:

Upon Substantial Completion and full payment of the Purchase Price for each Segment of the Purchaser System to DEVELOPER [360], title to each Segment of the Purchaser System shall be fully vested in, transferred, and conveyed to Purchaser [POI] by a bill of sale, substantially in the form set forth in Exhibit I, or without further action upon an event of bankruptcy. (Emphasis supplied.)

Joint Build Agreement, Section 10.2.

The Trustee contends that the automatic transfer of title contemplated by this provision has been triggered. 360 currently is operating as a reorganized debtor, having commenced a Chapter 11 case on June 28, 2001 in the United States Bankruptcy Court for the Southern District of New York, Case No. 01-13721-ALG. Accordingly, at the time of 360's filing, title automatically transferred to POI. At no time has 360 terminated the Joint Build Agreement. Further, 360 has not rejected the Joint Build Agreement in its own bankruptcy proceedings. (The Trustee will request that the Court take judicial notice of the above facts prior to or at the hearing on the Sale Motion.)

8. In addition, Section 10.2 further provides for transfer of title to certain assets related to the system automatically upon payment for such items: "Notwithstanding the foregoing, title to all work in progress and all materials that DEVELOPER purchases or furnishes for the Purchaser System as part of the Purchaser System, including but not limited to, Cable, Conduit and facilities shall pass to Purchaser when such items have been paid for by Purchaser as provided in Exhibit B."

9. POI paid 360 in full for its 50% share of the costs associated with construction of the system, and/or is entitled to credits under the Joint Build Agreement exceeding any amounts remaining owing. (See Declarations of Shawn O'Donnell, Daniel Gray, and William Smedberg attached hereto as Exhibits C, D and E respectively.) Despite POI's payment in full of the purchase price for each segment, 360 has failed and refused to deliver a bill of sale to POI for title to any segment of the system. The Trustee has been required to commence an adversary proceeding in this Court against 360 as a consequence of 360's failure to deliver documents of title to the Assets. Accordingly, as discussed more fully in Section B below, the Trustee makes this motion under Bankruptcy Code § 363(f)(4), seeking a determination that 360's claimed interest in the Assets is disputed, and authorizing POI to sell the Assets free and clear of the claimed interest of 360.

10. In the alternative, the Trustee is entitled to sell the Assets free and clear of the interests of 360 under Bankruptcy Code § 363(f)(5), as discussed in Section B below. Should the Court determine that POI did not pay the purchase price in full, the Trustee is prepared to tender to 360 the balance of the purchase price as determined by the Court, in connection with approval of the Sale Motion, to the extent the balance does not exceed the net proceeds from the Sale to the Winning Bidder.

11. 360 may be compelled, in a legal or equitable proceeding, to accept a money satisfaction of its interest under any outcome. In the Joint Build Agreement, 360 contracted to sell certain real and personal property assets to POI upon payment of the purchase price. As noted above, the Trustee first contends that POI has paid the purchase price and is entitled to sell its Assets. If POI has not paid the purchase price in full, then two alternatives exist: (1) the Trustee may obtain specific performance of the contract to purchase the property by tendering the balance of the purchase price, as determined by the Court; or (2) 360 is entitled



to money damages for POI's breach of contract to purchase the property. Either way, 360 may be compelled to accept a money satisfaction of its interest.

12. The Trustee, after consultation with Cisco Systems Capital Corporation ("CSCC"), and Nortel Networks Inc. ("Nortel"), sought and obtained court authority to retain Telecom Asset Management Group ("TAM") to assist the Trustee in his efforts to sell the Assets, culminating in the Trustee's entering into the APA with FiberLink. (See Affidavit in Support of Sale of Gordon P. Peyton ("Peyton Declaration") attached hereto as Exhibit F.)

13. Under the APA, the Assets to be sold are the following:

Buyer shall purchase all of the Assets as-is, where-is, used or useful to the operations of the Business, including but not limited to, all tangible assets, real property, inventories, machinery and equipment, and all intangible property rights, such as contracts, easement rights, customer lists, designs, maps, or any other intellectual property solely related to the Assets other than license agreements with Nortel Networks and Cisco Systems.

14. The purchase price under the APA is \$5,000,000, payable in cash at closing. FiberLink has deposited \$250,000, or 5% of the purchase price, with TAM. The APA also contemplates that FiberLink will be entitled to a break-up fee of \$200,000 under certain circumstances set forth in the APA if the sale to FiberLink is not consummated.

15. The Trustee believes that the purchase price which FiberLink offers to pay for the Assets is reasonable. Importantly, FiberLink's offer is subject to overbids at an auction to be held shortly before the Sale Hearing. As a result, the ultimate sale price will be established by a market transaction. This, the Trustee believes, offers the best prospect of realizing maximum value for the Assets.

16. The APA requires that the sale be free and clear of liabilities, obligations, mortgages, liens, taxes, and encumbrances of any kind, including any liabilities arising from any existing lawsuits, including 360. As stated above, this Motion contemplates that all liens and disputed interests will be transferred to the proceeds of sale.

## II.

### MEMORANDUM OF POINTS AND AUTHORITIES

#### A. Sale of Assets under Section 363(b)

17. Section 363(b) of the Bankruptcy Code permits a debtor-in-possession to sell property of the estate other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b). Further, section 105(a) of the Bankruptcy Code allows a bankruptcy court to “issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

18. A bankruptcy court’s power to authorize a sale under section 363(b) is to be exercised at the court’s discretion. In re WPRV-TV, 143 B.R. 315 (D. Puerto Rico 1991) (1st Cir. 1993); New Haven Radio, Inc. v. Meister (In re Martin Trigona), 760 F.2d 1334, 1346 (2d Cir. 1985); Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063 (2d Cir. 1983).

19. Courts have considered a number of factors in determining whether to approve a sale of assets under section 363(b) of the Bankruptcy Code including (i) whether a sound business reason exists for the proposed transaction; (ii) whether fair and reasonable consideration is being provided; (iii) whether the transaction has been proposed and negotiated in good faith; and (iv) whether adequate and reasonable notice has been provided. See e.g., In re Ewell, 958 F.2d 275 (9th Cir. 1992) (declining to set aside or modify a sale pursuant to 11 U.S.C. § 363 because the price was fair and reasonable and the buyer was a good faith purchaser pursuant to section 363(m) of the Bankruptcy Code).

20. In In re Delaware & Hudson Ry. Co., 124 B.R. 169 (D. Del. 1991), the District Court noted that evidence supporting the proposed purchase price as being fair and reasonable included extensive solicitation of bids by the trustee, negotiations with several prospective purchasers, and the trustee’s testimony that the accepted offer was the best offer received for the debtor’s assets.

21. The Trustee believes that the proposed sale is the best way to maximize the value of the Assets for the benefit of unsecured creditors in these Chapter 7 cases. The Trustee's sale process has included widespread solicitation of interest from prospective purchasers, negotiation of the APA with FiberLink as Lead Bidder, and an open and competitive auction which the Trustee proposes to conduct under the Sale Procedures Order. As a result, the Trustee submits that the sale to the Winning Bidder will be the product of good faith, arm's-length negotiations between the Trustee and the Winning Bidder and will reflect the highest and best price obtainable for the Assets in light of all relevant factors.

**B. Sale Free and Clear of Liens and Interests - Section 363(f)**

As stated above, the Trustee requests that the sale and transfer of the Assets be made free and clear of all liens, claims and interests of 360 and the Other Lienholders, under the provisions of section 363(f) of the Bankruptcy Code.

22. Section 363(f) provides that a trustee may sell property free and clear of any interest in such property of an entity other than the estate if any of the following circumstances are present:

- (a) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (b) such entity consents;
- (c) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
- (d) such interest is in bona fide dispute; or
- (e) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

23. The Trustee seeks to sell the Assets free and clear of the interests, if any, of the 360 in such Assets. 360 contends that the Converted Debtors do not own the assets, and

thus, the Trustee does not have authority to sell the Assets. The threshold issue is whether the Assets are property of the estate. In re Continental Air Lines, Inc., 780 F.2d 1223, 1226 (5<sup>th</sup> Cir. 1986) (section 363(b) sale of assets outside the ordinary course of business is limited to assets of the estate); Cross Electric Co, Inc. v. United States, 664 F.2d 1218, 1220 (4<sup>th</sup> Cir. 1981) (estate includes whatever property interest the debtor had at the commencement of the case); Matter of Jones, 768 F.2d 923,927 (7<sup>th</sup> Cir. 1985) (estate's rights in debtor's property limited to those rights held by debtor).

24. Pursuant to section§ 541(a) of the Bankruptcy Code, property of the estate consists of all legal and equitable interests in property of the debtor as of the commencement of the case wherever located and by whomever held. The Court has preliminary jurisdiction to determine whether the Converted Debtors' interests in the Assets constitute property of the estate, notwithstanding the assertion of competing claims against the property. State of Missouri v. U.S. Bankruptcy Court for the E. D. of Arkansas, 647 F.2d 768, 773 (8th Cir. 1981) (In light of broad definition of property of section 541 of the Bankruptcy Code, debtors' possessory interest and a minute ownership interest in grain sufficient to trigger preliminary jurisdiction over the property in the bankruptcy court); In re BHB Enterprises, LLC, 1997 WL 33344250 (Bankr. D. S.C.) (where a third party claimed ownership interest in certain personal property assets being sold by trustee, bankruptcy court must first determine whether the assets are property of the estate).

25. POI is entitled to conveyance of title to the Assets upon payment of the purchase price for each segment of the system. As demonstrated by the O'Donnell Declaration, POI has paid its share in full. 360's wrongful refusal to deliver a bill of sale does not deprive POI of title to the Assets. Indeed, the Joint Build Agreement provides that title passes "without further action upon an event of bankruptcy." Joint Build Agreement, Section 10.2. Under the provisions of the Joint Build Agreement, title passed to POI no later than June 28, 2001, the

commencement date of 360's Chapter 11 case. This is a sufficient interest for the Court to find that the Assets constitute property of the estate within the meaning of section 541(a).

26. Moreover, Section 363(f)(4) authorizes the Court to grant a motion to sell assets where the interest of the third party is in bona fide dispute. The standard is whether there is an objective basis for either a factual or legal dispute as to the validity of the interest. See, e.g., In re Collins, 180 B.R. 447, 452 (Bankr. E.D. Va. 1995). This standard does not require the Court to resolve the underlying dispute, just to determine its existence. Collins, 180 B.R. at 452, citing In re Octagon Roofing, 123 B.R. 583, 590 (Bankr. N.D. Ill. 1991).

27. Section 363(f)(4) contemplates that assets may be sold by the trustee prior to resolution of the underlying dispute.

The purpose of §363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate's assets need not be delayed while such disputes are being litigated. See, generally, 3 Lawrence P. King, Collier on Bankruptcy ¶363.06 (15<sup>th</sup> ed. Rev. 1998). Typically, the proceeds of sale are held subject to the disputed interest and then distributed as dictated by the resolution of the dispute; such procedure preserves all parties' rights by simply transferring interests from property to dollars that represent its value.

Moldo v. Clark (In re Clark), 266 B.R. 163, 171 (9<sup>th</sup> Cir. BAP 2001).

28. Court have authorized sales free and clear under Section 363(f)(4) under circumstances analogous to the Trustee's proposed sale. In Gulino v. Wakelin (In re The Inn at Goose Rocks Ltd. Part.), 1990 WL 19988 (D. Me.), prior to the filing of an involuntary petition, insiders had transferred legal title to two apartments from the debtor partnership to a third party. The trustee filed a motion to sell all real and personal property of the debtor free and clear of liens, including the apartments for which debtor did not hold title. The court, in authorizing the sale, found that the attempted conveyance a fraudulent transfer, and thus recoverable for the benefit of the estate. In State of Missouri, 647 F.2d 768, the trustee sought authority to sell grain located in partnership warehouses free and clear of all liens, arguing that the grain should be sold

to preserve the financial benefits of the proceeds pending eventual distribution. The trustee alleged a genuine dispute between the estate and other parties concerning ownership of the grain. The court noted that the sale should be allowed to proceed, only upon meeting the requirements of 363(f) and the duty under the Bankruptcy Code to protect the property interest of third parties by providing adequate protection of such interests. Id., 647 F.2d at 778.

29. 360 has contended on numerous occasions before this Court that POI has not paid its 50% of the construction costs in full, and that POI still owes 360 additional money. The Trustee anticipates that 360 will oppose the sale, and in support of such opposition, will present evidence that it contends contradicts the evidence submitted by the Trustee. If 360 is permitted to block the sale merely by presently evidence that contradicts the Trustee's claim of title, the sale may be lost and the estate deprived of realizing upon assets having a value of at least \$5 million. In order to facilitate the sale while a purchaser is at hand, the Trustee respectfully requests that the Court take evidence, if needed, at the hearing on the Sale Motion and to determine whether 360 has already been paid in full, or if POI has not paid the purchase price in full, to determine the remaining balance of the purchase price and order that the assets may be sold upon payment of the purchase price. By conducting a mini-trial in conjunction with the Sale Hearing, the Court can prevent 360 from effectively blocking an asset sale until the adversary proceeding is resolved. This procedure is consistent with the Bankruptcy Code, and is in the best interests of the estates and their creditors.

30. 360's interest may be reduced to money. Whether this Court treats the Trustee's request as a demand for specific performance of sale or an action for damages, the result is the same. Section 365(f)(5) refers to those interests in property that can, by operation of law, be reduced to dollars. In re Beker Indus. Corp., 63 B. R. 474, 478 (Bankr. S.D.N.Y. 1986). If the holder of an interest may be compelled to accept a money award instead of equitable relief, a sale can proceed under Section 363(f)(5). In WBQ Partnership v. Commonwealth of Virginia

(In re WBQ Partnership), 189 B.R. 97 (Bankr. E.D. Va. 1995), the Court confirmed a sale of a nursing home by the trustee free and clear of a right of recapture held by the Virginia Department of Medical Assistance Services, holding that the Department's right of recapture may be reduced to a claim for money, and thus is subject to a hypothetical money satisfaction under Section 363(f)(5). 189 B.R. at 107. The WBQ case is consistent with cases which hold that the Court may approve a sale free and clear even though the creditors receive less than full satisfaction of their interests. See, e.g., In re Wing, 63 B.R. 83 (Bankr. M.D. Fla. 1986) and In re Hunt Energy Co., Inc., 48 B.R. 472 (Bankr. N.D. Ohio 1985). The Trustee proposes to pay the balance of the purchase price, if any, as determined by the Court, to the extent the balance does not exceed the net proceeds from the Sale to the Winning Bidder.

**C. Good Faith Determination Under Section 363(m)**

31. FiberLink has advised that it will require in the APA, as a condition to effectiveness, a determination that the proposed transaction has been made and negotiated in good faith, and that FiberLink is entitled to the protections section 363(m) of the Bankruptcy Code as a result. Section 363(m) provides as follows:

The reversal or modification on appeal of an authorization under subsection (b) and (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

32. Although the Bankruptcy Code does not define the term "good faith," courts have consistently held that the phrase encompasses one who purchases in "good faith" and for "value". In re Abbotts Dairies of Pennsylvania, Inc., 788 F.2d 143, 147 (3d Cir. 1986) ("The requirement that a purchaser act in good faith. . . speaks to the integrity of his conduct in the course of the sale proceedings. Typically, the misconduct that would destroy a purchaser's good

faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." (citing In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)).

33. As set forth above, and as evidenced by the statements contained in the Peyton Declaration, the terms of the FiberLink APA were negotiated at arm's length and in good faith and without collusion or fraud pursuant to a sale process intended to elicit the best offers available. The Trustee believes that the FiberLink terms are fair and reasonable; they will in any event be subject to overbids at the auction so that the final sale price will in reality represent the market value of the Assets. As such, the Winning Bidder should be determined to be a good faith purchaser within the meaning of section 363(m) and should be accorded the protections provided by section 363(m).

### III.


#### CONCLUSION

For the reasons set forth above, the Trustee requests that the Court approve the sale and enter the Sale Order.

GORDON P. PEYTON, TRUSTEE IN  
BANKRUPTCY  
By Counsel

Respectfully submitted,

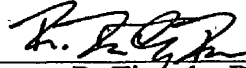
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**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 20<sup>th</sup> day of October, 2003, mailed a true copy of the foregoing Motion to all parties listed on the service list attached to the Notice of Motions.\*



\_\_\_\_\_  
R. Timothy Bryan

\*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.

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

In re  
PATHNET OPERATING, INC., et al.,  
Debtors.

Case No. 01-1266-SSM  
(As consolidated with 01-12267-SSM,  
01-12268 SSM, and 01-122269-SSM)

Chapter 7

**ORDER AUTHORIZING THE SALE OF CERTAIN OF  
THE DEBTORS' ASSETS FREE AND CLEAR OF ALL LIENS,  
CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS**

Upon the motion dated October 17, 2003 (the "Motion"), of Gordon P. Peyton, Chapter 7 Trustee (the "Trustee") for authorization pursuant to sections 105 and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") and Rules 2002, 6004, and 9008 of the Federal Rule of Bankruptcy Procedure (the "Bankruptcy Rules") to sell certain of the assets of the assets located between Chicago, Illinois and Denver, Colorado (the "Assets") owned by Pathnet Operating, Inc., and Pathnet Real Estate, LLP (collectively, the "Debtors") free and clear of all liens, claims, encumbrances, and other interests to FiberLink, Inc. (the "Purchaser") pursuant to that certain Asset Purchase Agreement dated as of October 15, 2003, by and between the Trustee and the Purchaser, a copy of which is annexed hereto (including all amendments, schedules, exhibits, and agreements ancillary thereto, the "Asset Purchase Agreement"); and the Court having considered the Motion and the Asset Purchase Agreement; and, in accordance with Bankruptcy Rules 6004 and 9008, requisite notice of the Motion having

been provided; and the Court having entered an order on November 4, 2003 (the "Procedures Order"), pursuant to which the Court, inter alia, (i) established the date and time for the hearing on the Motion (the "Sale Hearing"), (ii) approved the bidding procedures specified therein (the "Bidding Procedures"), (iii) approved the form and manner of notice for the sale of the Assets pursuant to the terms and conditions of the Asset Purchase Agreement (collectively, the "Sale"); and the Sale Hearing having been held before this court on November 18, 2003, at which time all parties in interest were afforded an opportunity to be heard; and the Court having heard testimony and received evidence in support of the Sale; and upon all of the pleadings filed with the Court and the record of the Sale Hearing made by the Trustee before the Court; and the objections, if any, to the relief requested in the Motion having been withdrawn, resolved, or overruled by the Court; and it appearing to the Court that the relief requested by the Motion is in the best interests of the Debtors and their respective estates; and after due deliberation and consideration and good and sufficient cause appearing therefor,

IT IS HEREBY FOUND AND CONCLUDED, that:

A. On April 1, 2001 (the "Petition Date"), each of the Debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code commencing their respective cases (collectively, the "Chapter 11 Cases"). On July 19, 2001, the Court entered an order converting the Chapter 11 Cases to cases under Chapter 7 of the Bankruptcy Code (the "Chapter 7 Cases") and thereafter the Trustee was appointed.

B. This Court has jurisdiction to hear and determine the Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Determination of the Motion is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (M), (N), and (O). The statutory predicates for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 9006, and 9008.

D. Proper, timely, adequate and sufficient notice of the Motion, the Bidding Procedures, the Sale Hearing, and the proposed Sale have been provided in accordance with the terms of the Procedure Order and such notice constitutes due and proper notice for purposes of sections 102(l), 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 9006, and 9008, and the Procedures Order, and no other or further notice of the Motion, the Sale Hearing, or of the entry of this order is required.

E. The Bidding Procedures afforded a full, fair, and reasonable opportunity for any entity to make a higher and better offer to purchase the Assets and no higher or better offer has been made. The Trustee has complied with the procedures set forth in the Procedures Order concerning the evaluation of competing bids, the conduct of the auction, and the communication with the stakeholders to the extent required thereby. The sale and auction process conducted by the Trustee was non-collusive, fair and reasonable, and conducted in good faith.

F. A reasonable opportunity to object or be heard regarding the relief requested in the Motion has been afforded to all interested persons and entities, including: (a) all parties, if any, who are known to claim a property interest in or a Lien (as defined in the Bankruptcy Code) upon any Asset; (b) all governmental taxing authorities who have, or as a result of the Sale of the Assets may have, a Claim (as defined in the Bankruptcy Code),

contingent or otherwise, against the Debtors; (c) all creditors and other parties who have filed a Notice of Appearance in these cases; and (d) the United States Trustee for the Eastern District of Virginia.

G. The Trustee has full power and authority to execute, deliver and perform the Asset Purchase Agreement and all other documents contemplated thereby and to consummate the transactions contemplated thereby; the execution, delivery and performance by the Trustee of the Asset Purchase Agreement and all other documents contemplated thereby and the consummation of the transactions contemplated thereby have been duly authorized by the Trustee; and no consents or approvals, other than those expressly provided for in the Asset Purchase Agreement, are required to consummate the Sale.

H. The Sale is in the best interests of the Debtors and their estates. The Trustee has demonstrated and proven to the satisfaction of this Court good, sufficient, and sound business purpose and justification for the Sale and the transactions contemplated by the Asset Purchase Agreement and this Order. The entry of this Order and the approval of the Asset Purchase Agreement are necessary and appropriate to maximize the value of the Debtors' estates. Without an expeditious sale of the Assets, there will be substantial diminution in the value of the Assets to the detriment of the Debtors, their estates, the Debtors' creditors, and the Debtors' post-petition creditors. Such business justification includes, but is not limited to, the following factors: (i) there is a risk of immediate and irreparable deterioration in the value of the Assets if the Sale is not consummated immediately; (ii) the Asset Purchase Agreement constitutes the highest and best bid for the Assets; and (iii) the consummation of the Asset Purchase Agreement presents the best opportunity to realize the value of the Assets and avoid further decline and

devaluation thereof. After consideration of the circumstances described in the Motion, the Court has determined that the Bidding Procedures presented the best opportunity for the Trustee to realize the highest distribution possible to creditors.

I. The Purchase Price (as defined in the Asset Purchase Agreement) constitutes fair and reasonable consideration and reasonably equivalent value for the Assets.

J. The Debtors have good title to the Assets and, accordingly, the transfer of the Assets to the Purchaser pursuant to the Asset Purchase Agreement will be a legal, valid and effective transfer of the Assets.

K. As a condition to the Sale, the Purchaser requires that the Assets be sold to it free and clear of all Liens, Claims, encumbrances, interests, contractual commitments, obligations and Liabilities (as defined in the Asset Purchase Agreement) of any kind, type, description, or nature whatsoever, including, without limitation, any theory of successor liability, de facto merger, or substantial continuity, whether based in law or equity, and employee benefit obligations, collective bargaining agreements, environmental liabilities, any security interest, mortgage, charge against or interest in property, adverse claim, claim of possession, licensee or restriction of any kind, including, but not limited to, any restriction on the use, receipt or income or other exercise of any attributes or ownership or any option to purchase, option, charge or retention agreement which is intended as security or other matters of any person or entity that encumber or relate to, or purport to encumber or relate to, the Assets (collectively, "Interests"), and that the Purchaser shall have no liability or obligation for any Excluded Liabilities. The Purchaser would not enter into the Asset Purchase Agreement or consummate the Sale, thus adversely affecting the Debtors' and impeding the Trustee's efforts to maximize distributions to

creditors, if the Sale were not free and clear of all Interests or if the Purchaser were or would be liable for any Excluded Liabilities.

L. An injunction against the creditors and third parties pursuing Interests is necessary to induce the Purchaser to close under the Asset Purchase Agreement. The issuance of such injunction is necessary to avoid irreparable harm to the Debtors, the Debtors' estates, and the Debtors' creditors.

M. Each entity with an Interest in the Assets (including any Liens) has consented to the Sale, is deemed to have consented to the Sale, or could be compelled in a legal or equitable proceeding to accept a money satisfaction of such Interest, or the Sale otherwise satisfies the requirements of section 363(f) of the Bankruptcy Code.

N. All of the actions taken by the Purchaser, the Trustee, and their respective officers, directors, employees, counsel, financial advisors and other professionals in connection with the Asset Purchase Agreement, the Motion, and this Order have been taken in good faith, and the Purchaser is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code because, among other reasons,:

- (a) The Purchaser is not an "insider" of the Debtors, as the term is defined in the Bankruptcy Code;
- (b) The Purchaser is unrelated to the Debtors or the Trustee;
- (c) The Asset Purchase Agreement was negotiated, proposed, and entered into by the Trustee and the Purchaser without collusion, in good faith, and from arm's-length bargaining positions;

- (d) The Purchase Price was not controlled by an agreement between potential or actual bidders within the meaning of section 363(n) of the Bankruptcy Code;
- (e) Neither the Purchaser nor the Trustee has engaged in any conduct that would cause the transactions contemplated by the Asset Purchase Agreement to be avoided as contemplated in Section 363(n) of the Bankruptcy Code; and
- (f) In the absence of a stay pending appeal, the Purchaser will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the Sale as contemplated by the Asset Purchase Agreement at any time after the entry of this Order and, accordingly, such closing in the face of an appeal will not deprive the Purchaser of its status as a good faith purchaser.

O. Neither the Purchaser nor any of its successors or assigns is assuming any of the Debtors' or the Trustee's obligations or liabilities which are accrued for, applicable to, or arising from any period (or portion thereof) ending on or prior to the Closing Date (as defined in the Asset Purchase Agreement).

P. There is no common identity among the Purchaser and the Debtors' incorporators, officers, directors or material stockholders.

Q. No bulk sales law or any similar law apply in any way to the transfer of the Assets under the Asset Purchase Agreement.



R. The transfers of the Assets (a) are or will be legal, valid, and effective transfers of property of the Debtors' estates to the Purchaser and (b) vest or will vest in the Purchaser all right, title, and interest of the Debtors in and to all of the Assets free and clear of all Interests under sections 363(f) and 105 of the Bankruptcy Code.

S. All amounts that may be payable by any Debtor or the Trustee pursuant to the Asset Purchase Agreement constitute first priority administrative expenses under sections 503(b) and 507(a)(1) of the Bankruptcy Code.

T. The transfer to the Purchaser of the Assets does not and will not subject the Purchaser or any of its successors or assigns to any liability for Claims against the Debtors by reason of such transfer under the laws of the United States, any state, territory or possession thereof or the District of Columbia applicable to such transaction.

U. Time is of the essence in closing the transaction under the Asset Purchase Agreement and the Purchaser intends to close the Sale and perform all of the transactions necessary under the Asset Purchase Agreement as soon as possible. Therefore, any party objecting to this Order must exercise due diligence in filing an appeal and pursuing a stay or risk their appeal being foreclosed as moot.

V. All of the provisions of this Order are nonseverable and mutually dependent.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The findings of fact set forth above and conclusions of law stated herein shall constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy

Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any finding of fact later shall be determined to be a conclusion of law, it shall be so deemed, and to the extent any conclusion of law later shall be determined to be a finding of fact, it shall be so deemed.

2. The Motion is granted in all respects.

3. All objections to the Motion or the relief requested therein that have not been withdrawn, waived or settled, and all reservations of rights included therein, are overruled on the merits.

4. All of the terms and conditions of the Asset Purchase Agreement hereby are approved in all respects, and the sale of the Assets pursuant to the Asset Purchase Agreement is hereby authorized under sections 363(b) and (f) of the Bankruptcy Code. The omission in this Order of specific reference to any provision of the Asset Purchase Agreement shall not impair or diminish the efficacy, propriety, or approval of such provision.

5. By the issuance of this Order, the Trustee (including, but not limited to the Trustee's employees, agents, and counsel) is authorized and directed to execute and deliver, and empowered to fully perform under, consummate and implement, the Asset Purchase Agreement and all additional amendments, instruments, and documents that may be reasonably necessary or desirable to implement the Asset Purchase Agreement and to take all further actions as may reasonably be requested by the Purchaser for the purpose of assigning, transferring, granting, conveying, and conferring to the Purchaser, or reducing to the Purchaser's possession, any or all of the Assets.

6. The Trustee's obligations under the Asset Purchase Agreement shall constitute first priority administrative expenses of the Debtors' Chapter 7 estates under sections 503(b) and 507(a)(1) of the Bankruptcy Code with priority over any and all other administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims under sections 105, 326, 328, 506(c), 507(a) or 726 of the Bankruptcy Code, and the Trustee is hereby authorized to pay all amounts payable thereunder immediately if and when any Seller's obligations arise thereunder, without further order of the Court.

7. Pursuant to sections 363(f) and 105(a) of the Bankruptcy Code, title to all of the Assets shall be transferred to the Purchaser at the Closing in accordance with the terms and conditions of the Asset Purchase Agreement (or thereafter as provided therein), free and clear of all Interests (including, without limitation all postpetition obligations and liabilities of the Debtors, whether or not incurred in the Chapter 11 Cases or the Chapter 7 Cases), with all such Interests released, terminated and discharged as to the Purchaser (and its successors and assigns) and as to the Assets. All Interests will attach to the proceeds from the Sale, in the order of their priority, with the same validity, force, and effect that they had against the Assets immediately prior to the Sale.

8. All persons and entities holding Interests of any kind and nature with respect to the Assets or the Debtors hereby are barred from asserting such Interests against the Purchaser, its successors and assigns, or against the Assets.

9. If any person or entity that has filed any mortgages, deeds of trust, financing statements, or other documents or agreements evidencing Interests on any Asset shall

not have delivered to the Trustee prior to the Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, or releases of all Interests which the person or entity has with respect to any Assets, then the Purchaser hereby is authorized to execute and file statements, instruments, releases, and other documents on behalf of the person or entity with respect to such Asset. The foregoing notwithstanding, the provisions of this Order authorizing the sale and assignment of the Assets free and clear of Interests shall be self-executing, and notwithstanding the failure of the Trustee, the Purchaser, or any other party to execute, file or obtain releases, termination statements, assignments, consents, or other instruments to effectuate, consummate, and/or implement the provisions hereof or the Asset Purchase Agreement with respect to the sale and assignment of the Assets, all Interests on the Assets shall be deemed divested, void and unenforceable. All persons or entities that are presently, or at any time hereafter prior to the transfer to the Purchaser, in possession of any of the Assets are hereby directed to surrender possession of any of the Assets to the Purchaser at the Closing.

10. This Order shall be binding upon the Trustee, its successors and assigns and any other trustee that may be appointed in these Chapter 7 Cases or in any case under Chapter 11 of the Bankruptcy Code to which any such case may be converted, and any affected third parties, including without limitation, all persons and entities asserting any Interests in the Debtors' estates or any of the Assets and all other persons and entities, including without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials, and all other persons or entities who may be

required by operation of law or by the duties of their office or contract to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report to or insure title or state of title in or to any of the Assets. Each and every federal, state, and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Asset Purchase Agreement, including without limitation, documents and instruments for recording in any governmental agency or department required to transfer the Assets to the Purchaser and all licenses under the Debtors' ownership necessary for the operation of any Assets, and the county and state offices wherein termination statements under the Uniform Commercial Code are authorized to be filed.

11. None of the Purchaser, its successors and assigns, or any affiliate of such entity shall have any liability, duty or responsibility for any Interests, administrative expenses, or other liabilities against the Debtors or any of the Debtors' predecessors or affiliates of any kind or character, whether known or unknown as of the Closing, now existing or hereafter arising, whether fixed or contingent, under the laws of the United States, any state, territory, or possession of the United States or the District of Columbia, based on any theory of law, including, without limitation, any theory of successor, vicarious, or transferee liability and under no circumstances will the Purchaser be deemed a successor to or alter ego of the Debtors, or any of them, for any liability or obligation (whether direct or indirect, liquidated or unliquidated, choate or inchoate, or contingent or fixed) whatsoever.

12. From and after entry of this Order, none of the Trustee or any employee, agent, or counsel of the Trustee, or any of the Debtors' respective creditors or other parties in

interest shall take or cause to be taken any action that would interfere with the transfer of the Assets to the Purchaser in accordance with the terms of this Order and the Asset Purchase Agreement.

13. The Purchaser is a purchaser in good faith of the Assets and is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

14. In the absence of a stay pending appeal, the Purchaser will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the Sale as contemplated by the Asset Purchase Agreement at any time after the entry of this Order and, accordingly, such closing in the face of an appeal will not deprive the Purchaser of its status as a good faith purchaser. If the parties to the Sale consummate the transactions contemplated thereby while an appeal of this Order is pending, the Purchaser shall be entitled to rely upon the protections of section 363(m) of the Bankruptcy Code, absent any stay pending appeal granted by a court of competent jurisdiction prior to such consummation.

15. The Purchase Price for the Assets is fair and reasonable and the Sale shall not be avoided under section 363(n) of the Bankruptcy Code.

16. All persons are hereby enjoined from asserting, prosecuting or otherwise pursuing any Interest against the Purchaser, any of its successors or assigns, or any of its affiliates, agents, officers, directors, members, partners, counsel, or advisors, and from recovering any Claim such person had, has or may have against the Purchaser, or any of its affiliates, agents, officers, directors, members, partners, counsel, or advisors in connection with the negotiation of, or any agreements contained in, the Asset Purchase Agreement or the transactions contemplated by the Asset Purchase Agreement or this Order.

17. From and after entry of this Order, each Debtor, the Trustee, each party in interest in these cases, and each other party that was provided with notice of the Sale Motion (and each of their respective successors and assigns) hereby fully and forever releases, relieves, waives, relinquishes, and discharges each of the Purchaser and its present, former and future directors, officers, employees, agents, counsel, advisors, shareholders, subsidiaries, affiliates, successors and assigns from, against and with respect to any and all actual or potential demands, Claims, actions, causes of action (including derivative causes of action), suits, assessments, liabilities, losses, costs, damages, penalties, charges, expenses, and all other forms of liability whatsoever, in law or equity, whether asserted or unasserted, known or unknown, foreseen or unforeseen, now existing or hereafter arising that any such person ever had, now has or hereafter may have relating in any way to any Seller or their respective predecessors or estates based in whole or in part upon any act, omission, or other occurrence taking place on or prior to the Closing Date, but expressly excluding any rights or obligations expressly set forth in the Asset Purchase Agreement.

18. As of the time and date of the Closing, all agreements of any kind whatsoever and all orders of this Court entered prior to the date hereof shall be deemed amended and/or modified to the extent required to permit the consummation of the Sale and the other transactions contemplated by the Asset Purchase Agreement.

19. This Court retains jurisdiction to (i) enforce and implement the terms and provisions of the Asset Purchase Agreement, all amendments thereto and any waivers and consents thereunder, (ii) compel delivery of the Assets to the Purchaser, (iii) resolve any disputes

arising under or related to the Asset Purchase Agreement, except as otherwise provided therein, and (iv) interpret, implement and enforce the provisions of this Order.

20. The Asset Purchase Agreement and any related agreements, documents, or other instruments may be waived, modified, amended or supplemented by the parties thereto in accordance with the terms thereof without further order of the Court.

21. No bulk sales law, or similar law of any state or other jurisdiction shall apply in any way to the transactions contemplated by the Asset Purchase Agreement or this Order.

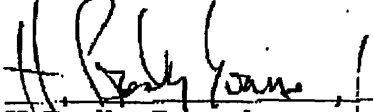
22. As provided by Bankruptcy Rules 6004(g), this Order shall be effective and enforceable immediately upon entry. No automatic stay applies following entry of this Order.

Dated: November \_\_, 2003

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HONORABLE STEPHEN S. MITCHELL  
UNITED STATES BANKRUPTCY JUDGE

We ask for this:



H. Bradley Evans, Jr.

Counsel for Gordon P. Peyton, Trustee in Bankruptcy