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IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE:

Chapter 11

UPH HOLDINGS, INC., et al.,  
Debtors.

Case No.13-10570  
(Jointly Administered)

LOCAL TAX AUTHORITIES' OBJECTION TO DEBTORS' MOTION FOR ENTRY OF  
ORDER APPROVING AND AUTHORIZING THE SALE OF SUBSTANTIALLY ALL THE  
DEBTORS' ASSETS, THE PAYMENT OF NET SALES PROCEEDS TO HERCULES  
TECHNOLOGY II, L.P. AND OTHER RELATED RELIEF

TO THE HONORABLE COURT :

NOW COME Bexar County, Dallas County, and Harris County (jointly the "Local Texas Tax Authorities or "Tax Authorities"), and file their Objection to the Debtors' Motion for approval of the sale of substantially all of their assets and other related relief. In support of their Objection, the Local Texas Tax Authorities would show the Court as follows:

I.

The Local Texas Tax Authorities are political subdivisions of the State of Texas. They hold claims for ad valorem taxes assessed against the business personal property of the Debtors for the 2011 through 2013 tax years. Their claims for the pre-petition taxes total approximately \$150,000.

II.

As of January 1 of each year liability arises and a senior lien attaches to the property of the Debtors for the taxes of the Local Tax Authorities. The laws of the States of Texas (§§ 32.01 and 32.05(b) of the Texas Property Tax Code), give the liens securing these ad valorem taxes

superior claims over any other claim or lien against the property. This state priority for tax liens is retained in the Bankruptcy Code, giving this claim a superior position over all other claims against this property and the tax liens are unavoidable. 11 USC § 506; Stanford v. Butler, 826 F.2d 353 (5th Cir. 1987) ; Universal Seismic Associates, Inc., 288 F.3d 205 (5th Cir. 2002); In Re Winn's Stores, Inc.; 177 B.R. 253 (Bkcty W.D. Tex 1995). This lien priority has not been altered during this bankruptcy – the final cash collateral order only granted the pre-petition lender replacement liens and did not provide senior or priming liens. The final cash collateral order (docket #98, page 4, paragraph 6) recognizes that the liens of the pre-petition lender were subject to “prior liens” as described in or permitted by the Prepetition Loan Documents. Pursuant to applicable non-bankruptcy law, nothing in these documents could alter the priority of the tax liens, so both the pre-petition and adequate protection liens of the pre-petition lender are subordinate to the tax liens.

### III.

The Local Tax Authorities object to the relief requested in the Debtors’ Motion because it fails to provide for the liens and interests of the Tax Authorities to be adequately protected.

The proceeds from the sale of the collateral of the Local Tax Authorities constitute the cash collateral of these Tax Authorities, and they object to the use of their collateral or the proceeds of the sale of their collateral to pay any other creditors of this estate. Specifically, paragraph 52 on page 22 of the Sale Motion proposes that the proceeds from the sale shall be paid to another party, Hercules Technology II, L.P. Pursuant to 11 U.S.C. § 363(c)(4), absent consent by the Tax Authorities or an order of the Court permitting use of its cash collateral, the Debtors “shall segregate and account for any cash collateral” in their possession. The Debtors have not filed a motion seeking to use the cash collateral of these Tax Authorities, nor has there been notice or a

hearing on the use of these Tax Authorities' cash collateral. Accordingly, absent their consent, these taxes must either be paid prior to distribution of any proceeds of the sale of their collateral, or a segregated account must be established from sale proceeds to comply with the requirements of 11 USC § 363(c)(4).

Paragraph 3.2(b) on page 12 of the Asset Purchase Agreement attempts to rectify this shortcoming. However the relief it provides is insufficient. This paragraph provides that the tax claims will be paid only when "resolved by final order of the Bankruptcy Court." The majority of the taxes are for delinquent tax years – the amounts are not subject to interpretation or dispute. Further the Tax Authorities are entitled to statutory interest at the rate of 12% per annum from the petition date on these amounts. 11 U.S.C. § § 506(b) and 511. Delaying the payment of the taxes until the Debtors decide to seek an order (which is not necessary as claims are deemed allowed, so such an order may never be entered, thus there is no certainty as to when claims may be paid), unduly delays payment and the accrual of interest will result in less money available for junior and unsecured creditors. Further, this paragraph states that the "tax reserve" shall be an amount as set forth in "Schedule 3.2(b)". A review of the APA included in the Amended Notice of Stalking Horse Bidder fails to set forth any amounts to be reserved for the claims of the Local Texas Tax Authorities, thus leaving them without any security or adequate protection. The tax reserve amount must include sufficient amounts to pay the claims in full, including all interest which may accrue thereon.

Further, as set forth in the APA, the "tax reserve" amount would essentially act as a determination of the claim amounts rather than merely proving an adequate protection reserve. The Debtors, purchaser and any other party should not be permitted to bypass the claim objection process through unilateral determination of claim amounts hidden in an unfiled exhibit to a

document. The claim reserve amount should be set by agreement between the Debtors and the tax claimants or should be an amount sufficient to pay all claims in full as filed plus a year's worth of interest, and such amounts should be fully disclosed and subject to objection by the Tax Authorities.

Finally, paragraph 8.4 on page 27 of the APA provides that the 2013 taxes shall be pro-rated between the Buyer and Sellers. To the extent the purchaser assumes the liability to actually make the payment of the 2013 taxes (which may be for the full amount of the taxes if the taxes are pro-rated through an adjustment of the purchase price), the property should be sold subject to the tax liens. If there is no lien on the property, there is no guarantee the purchaser will pay - it will not have personal liability under Texas law because it was not the January 1 owner, and should the purchaser fail to pay the Tax authorities would be without recourse. This presents an even greater problem if the tax reserve is insufficient to pay the full amount of the tax claims and interest.

#### IV.

Although a credit bid does not appear to be contemplated at this time, in the event of a credit bid on any of the assets to be sold, the proposed procedures fail to take into account that any credit bid will be of a junior lien and the purchaser should either tender sufficient cash to pay the tax claims, or the credit bid purchaser should take the property subject to the tax liens and under the terms of the final asset purchase agreement agree to pay the taxes.

#### V.

WHEREFORE, the Local Texas Tax Authorities pray that the Court order the Debtors to either pay the Tax Authorities claims at closing of the proposed sale or to place sufficient proceeds from the sale of the collateral of these Tax Authorities into a segregated account to

which their liens attach with the priority they otherwise hold pursuant to non-bankruptcy law, that distribution of such proceeds be authorized without the entry of a court order specifically providing therefore if no timely objection to the tax claims are filed or if the parties reach agreement on the tax claim amounts and that there be no distribution of sale proceeds from the Texas collateral to any other party, and further request other and such relief as is just and proper.

Respectfully submitted,

/s/ Elizabeth Weller

Elizabeth Weller  
Tex. Bar No. 00785514  
LINEBARGER GOGGAN  
BLAIR & SAMPSON, LLP  
2323 Bryan St. #1600  
Dallas, TX 75201  
(469)221-5075 phone  
(469)221-5002 fax  
BethW@publicans.com

Attorneys for Bexar County, et al, jointly the Local Texas Tax Authorities

/s/Diane W. Sanders

DIANE W. SANDERS  
Texas Bar No. 16415500  
LINEBARGER GOGGAN  
BLAIR & SAMPSON, LLP  
P.O. Box 17428  
Austin, Texas 78760  
(512) 447-6675 (Telephone)  
(512) 443-5114 (Facsimile)  
diane.sanders@lgbs.com

**CERTIFICATE OF SERVICE**

I hereby certify that this 15<sup>th</sup> day of July, 2013, a true and exact copy of the foregoing to be served via the Court's CM/ECF electronic notification system on all parties requesting same, and via US first class mail, postage prepaid, to the parties listed below, and on the attached service list.

UPH Holdings, Inc.  
Pac-West Telecomm, Inc.  
Tex-Link Communications, Inc.  
UniPoint Holdings, Inc.  
UniPoint Enhanced Services, Inc.  
nWire, LLC  
Peering Partners Communications, Inc.  
6500 River Place Blvd., Bldg. @, Suite 200  
Austin, TX 78730

Patricia Baron Tomasco  
Jennifer Francine Wertz  
Jackson Walker LLP  
100 Congress Ave., Ste. 1100  
Austin, TX 78701

Valerie Wenger  
Office of US Trustee  
903 San Jacinto, Room 230  
Austin, TX 78701

Stuart Komrower  
Ilana Volkov  
COLE, SCHOTZ, MEISEL,  
FORMAN & LEONARD, P.A.  
25 Main Street  
Hackensack, NJ 07601

/s/ Diane W. Sanders  
Diane W. Sanders

Steve Hubbard / RBC  
202 US Route One, Suite 206  
Falmouth, ME 04105

One Communications/Earthlink  
5 Wall Street  
Burlington, MA 01803

America OnLine  
22000 AOL Way  
Dulles, VA 20166

Telesense  
Cabs Department  
P.O. Box 364300  
Las Vegas, NV 89133-6430

Cox Communications  
1550 W. Deer Valley Rd.  
Phoenix AZ 85027

CenturyLink  
P.O. Box 2961  
Phoenix, AZ 85062-2961

Frontier  
P.O. Box 92713  
Rochester, NY 14692-0000

Cogent Communications  
P.O. Box 791087  
Baltimore, MD 21279-1087

Genband, Inc.  
ATTN: Eric Hinton  
2801 Network Blvd  
Suite 300  
Frisco, TX 75034

Samsara  
1250 S Capital of Texas Highway  
Bldg 2-235  
West Lake Hills, TX 78746

La Arcata Development Limited  
ATTN: ACCOUNTS RECEIVABLE  
c/o NAI Reco Partners  
1826 N. Loop 1604 W, #250  
San Antonio, TX 78248

Grande Communications Network  
Dept 1204  
P.O. Box 121204  
Dallas, TX 75312-1204

Telus Corporation  
215 Slater Street  
Ottawa, Ontario, K1P 5N5  
CANADA

Alpheus Communication  
Attn: SVP – Contract  
Administration  
1301 Fannin, 20<sup>th</sup> Floor  
Houston, TX 77002

Hines REIT One Wilshire, LP  
Attn: Kevin McInerny  
624 S. Grand Avenue  
Suite 2435  
Los Angeles, CA 90017

Bandwidth.Com, Inc.  
75 Remittance Drive, Suite 6647  
Chicago, IL 60675

Pac Bell  
P.O. Box 166490  
Atlanta, GA 30321-0649

Arent Fox LLP  
1050 Connecticut Ave. N.W.  
Washington, DC 20036-5339

FPL FiberNet LLC  
TJ412-01-0-R  
ATTN: FISCAL SERVICES  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Pilot Communications  
P.O. Box 77766  
Stockton, CA 95267-1066

Arthur A. Stewart  
William A. Frazell  
Assistant Attorneys General  
Bankruptcy & Collections Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Stephen W. Lemmon  
Sam Chang  
Brown McCarroll, LLP  
111 Congress Avenue, Suite 1400  
Austin, Texas 78701

BOXER F2, LP  
c/o Tracy Fink  
720 N Post Oak Blvd., Suite 500  
Houston, Texas 77024

Internal Revenue Service  
P. O. Box 7346  
Philadelphia, PA 19101-7346

United States Attorney  
816 Congress Avenue, Suite 1000  
Austin, TX 78701

United States Attorney General  
Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Texas Comptroller of Public Accounts  
Revenue Accounting Division –  
Bankruptcy Section  
P.O. Box 13528  
Austin, TX 78711

Texas Workforce Commission  
TEC Building – Bankruptcy  
101 East 15th Street  
Austin, TX 78778

James Ruiz  
Andrew J. Schumaker  
Winstead P.C.  
401 Congress Avenue, Suite 2100  
Austin, Texas 78701

Charles E. Richardson, III, Esq.  
Vice President and General Counsel  
Momentum Telecom  
2700 Corporate Drive, Suite 200  
Birmingham, AL 35242

A. Kenneth Hennesay  
**ALLEN MATKINS**  
1900 Main Street, 5th Floor  
Irvine, CA 92614-7321

Mitchell W. Katz  
1801 California Street, 9th Floor  
Denver, CO 80202

Timothy Bortz  
Commonwealth of Pennsylvania  
Dept. of Labor and Industry  
Reading Bankruptcy & Compliance Unit  
625 Cherry Street, Room 203  
Reading, PA 19602-1152

John Dillman  
Attorney in Charge for Taxing Authority  
Linebarger Goggan Blair & Sampson, LLP  
PO Box 3064  
Houston, Texas 77253-3064

Joseph R. Dunn  
Mintz Levin Cohn Ferris Glovsky and  
Popeo, PC  
3580 Carmel Mountain Rd., Suite 300  
San Diego, CA 92130

Dun & Bradstreet  
c/o Ronald Rowland  
307 International Circle, Ste 270  
Hunt Valley, MD 21030

Laura Garfinkel  
CABS Billing Division  
GSAssociates  
5400 Laurel Springs Parkway, Suite 404  
Suwanee, GA 30024

Susan L. Lissant  
Special Assistant Attorney General  
Missouri Department of Revenue  
General Counsel's Office  
301 W. High Street, Room 670  
P O Box 475  
Jefferson City MO 65105-0475

Hercules Technology II, LP  
31 St. James Avenue, Ste 790  
Boston, MA 02116

Kelly M. Crawford, Esq.  
Peter C. Lewis, Esq.  
Scheef & Stone, L.L.P.  
500 N. Akard, 27th floor  
Dallas, Texas 75201

Melissa A. Haselden  
HOOVER SLOVACEK LLP  
5847 San Felipe, Suite 2200  
Houston, Texas 77057

David F. Brown  
Ewell, Bickham, & Brown LLP  
111 Congress Avenue, Suite 400  
Austin, Texas 78701

Philip G. Eisenberg  
W. Steven Bryant  
Locke Lord LLP  
600 Travis Street, Suite 2800  
Houston, Texas 77702

IBM Corporation  
Bankruptcy Coordinator  
Roger Lavolette  
275 Viger East, Suite 400  
Montreal, QC H2X 3R7  
Canada

Kate P. Foley  
Christine E. Devine  
Mirick O'Connell, DeMallie & Lougee  
1800 West Park Drive, Suite 400  
Westborough, MA 01581

Courtney Harris  
Aldine ISD  
14910 Aldine-Westfield Rd.  
Houston, Texas 77032

Leslie E. Trout  
Director of Finance and Administration  
ATER WYNNE LLP  
1331 NW Lovejoy Street, Suite 900  
Portland, OR 97209

James V. Hoeffner  
GRAVES, DOUGHERTY, HEARON  
MOODY, P.C.  
401 Congress Avenue, Suite 2200  
Austin, Texas 78701

Hercules Technology Growth  
Capital, Inc.,  
31 St. James Avenue, Suite 790  
Boston, MA 02116

Jason S. Brookner  
**LOOPER REED & MCGRAW  
P.C.**  
1601 Elm Street, Suite 4600  
Dallas, TX 75201

Kurt F. Gwynne  
Reed Smith  
1201 N Market Street, Suite 1500  
Wilmington, DE 19801

Linda Boyle, Esq.  
tw telecom inc.  
10475 Park Meadows Drive, # 400  
Littleton, CO 80124

Craig A. Wolfe, Esq.  
Kelley Drye & Warren LLP  
101 Park Avenue  
New York, New York 10178

Richard E. Mikels  
Mintz Levin Cohn Ferris Glovsky  
and Popeo, PC  
One Financial Center  
Boston, MA 02111

Kay D. Brock  
Travis County Attorney's Office  
PO Box 1748  
Austin, Texas 78767-1748

David Aelvoet  
Linebarger Goggan Blair &  
Sampson  
711 Navarro Street, Suite 300  
San Antonio, Texas 78205