

UNITED STATES BANKRUPTCY COURT
 DISTRICT OF MASSACHUSETTS
 EASTERN DIVISION

ORIGINAL

In re:)	
)	
ESSENTIAL.COM, INC.,)	Chapter 11
)	Case No. 15339-WCH
Debtor.)	
)	
ESSENTIAL.COM, INC.,)	
)	
Plaintiff,)	
)	Adversary Proceeding
v.)	No.: 01-1411-WCH
)	
UNITED SYSTEMS ACCESS, INC.,)	
)	
Defendant,)	
)	
and)	
)	
KENNEBUNK SAVINGS BANK)	
)	
Reach and Apply Defendant.)	
)	

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**MOTION TO APPROVE SETTLEMENT AGREEMENT
 AND RELEASE AND TO DISMISS ADVERSARY PROCEEDING**

To the Honorable William C. Hillman, Chief United States Bankruptcy Judge:

Pursuant to Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure (collectively, the "FRBP") and MLBR 2002-1 and 9019-1, Essential.Com, Inc. ("Essential" or "Debtor"), the debtor and debtor-in-possession, hereby moves this Court to approve the

Settlement Agreement and Release made and entered into between Essential and United Systems Access, Inc. ("USA"). A copy of the Settlement Agreement and Release ("Settlement Agreement") is attached as Exhibit A. This Motion is hereby filed in order to provide the Court

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and other parties in interest with more detailed information regarding the nature and basis for the Settlement Agreement. In further support hereof, Essential states as follows:

I. FACTUAL BACKGROUND

1. On June 29, 2001 (the "Petition Date"), Essential filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code ("Bankruptcy Code") in this Court.
2. Essential was in the business of reselling telecommunications services. As of the Petition Date, Essential had over 72,000 active subscribers in its customer base ("Customer Base") consisting predominately of households and small businesses.
3. On August 9, 2001, the Court approved the private sale ("Private Sale") of Essential's Customer Base, its trade names and URLs to USA for \$1,300,000. The Private Sale closed on August 10, 2001.
4. The conditions of the Private Sale were memorialized in an Asset Purchase Agreement ("APA") and Management Agreement ("Management Agreement") entered into between Essential and USA on August 10, 2001.
5. Pursuant to the APA, Essential's accounts receivable ("Essential Receivables") were not sold to USA and remained the property of Essential. At the time of the closing of the Private Sale, certain of the Essential Receivables had not been billed to customers. Essential estimated that the total amount of Essential Receivables as of the closing of the Private Sale exceeded \$1,500,000 of which approximately \$850,000 had been billed prior to the closing.
6. Pursuant to the APA, USA was obligated to collect for Essential's benefit the Essential Receivables in return for a ten percent (10%) commission. USA was required to use commercially reasonable efforts to collect the Essential Receivables. The APA also required that all amounts collected by USA from the Essential Receivables should be applied first to the oldest

of Essential's Receivables. Any amounts collected by USA were to be held in trust pending remittance to Essential.

7. By the middle of September, 2001, Essential had not received any payments from USA relating to the Essential Receivables. USA had also failed to provide Essential with documentation with respect to USA's efforts to issue invoices to customers for services relating to unbilled Essential Receivables. Essential also understood that USA had collected certain amounts from customers without crediting Essential as required by Essential's interpretation of the APA. In this regard, Essential notified USA with respect to USA's obligations under the APA and USA's defaults therein.

8. USA timely responded to Essential. USA asserted that Essential had collected over \$180,000 of the Essential Receivables directly thereby depriving USA of, among other things, its commission from such funds. Further, USA disputed Essential's interpretation of the APA with respect to the collection of receivables by USA. USA also asserted that problems with Essential's billing practices, files and accounting hindered USA's ability to timely or correctly issue invoices for the Essential Receivables. Additionally, USA alleged that certain acts and omissions by Essential, after the closing of the Private Sale, interfered with USA's operations including USA's ability to collect the Essential Receivables.

9. On October 1, 2001, after an exchange of certain demand letters, Essential commenced the above-captioned adversary proceeding (the "Adversary") against USA seeking to, among other things, enforce the provisions of the APA.

10. After commencement of the Adversary Proceeding, the parties engaged in informal discussions to resolve the Adversary Proceeding including the asserted defaults by USA under the APA. In this regard, the parties also exchanged certain financial and billing records.

In the context of these negotiations, USA paid \$151,275.00 to Essential in the first part of October, 2001

11. The parties' negotiations also included discussions with respect to services from telecommunication service providers that may have continued on and after the closing of the Private Sale.

12. The result of the parties' negotiations is the Settlement Agreement. Pursuant to the Settlement Agreement, the parties have agreed to settle the Adversary Proceeding and their disputes with respect to the APA as set forth in Section II below. The Settlement Agreement will also allow both parties to avoid the costs and risks of litigating the Adversary Proceeding.

II. THE SETTLEMENT AGREEMENT

13. Subject to the Court's approval, Essential and USA have agreed to resolve the Adversary as set forth in the Settlement Agreement. The major terms of the Settlement Agreement include the following:¹

- a. USA has agreed to make payments totaling \$350,000.00 to Essential in ten (10) weekly installments of \$35,000.00.
- b. USA previously placed an additional \$109,728.95 in escrow which shall be deemed released to Essential upon approval of the Settlement Agreement.
- c. Essential expressly releases any further claims it may have to the Essential Receivables and USA will have no further obligation to collect or remit to Essential any funds with respect to the Essential Receivables.
- d. Pursuant to the APA, USA assumed the rights, duties and obligations with respect to the Purchased Customers. Included in that obligation is USA's responsibility for payments to Incumbent Provider(s) for telecommunications services provided to the Purchased Customers following August 10, 2001. USA believes that it may have provided payments to Incumbent Provider(s) on account of customers not

¹ The summary set forth in this Motion is not intended to be a substitute for the Settlement Agreement, which contains additional terms and provisions. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Settlement Agreement.

part of the Customer Base on August 10, 2001. The Settlement Agreement requires the parties to meet in good faith in order to commence a reconciliation or “true-up” of any such amounts paid to Incumbent Provider(s) by USA on account of such customers. Essential shall reimburse USA for any payments made to incumbent carriers on account of customers not part of the Customer Base on August 10, 2001.

- e. To the extent either Party made payments to an Incumbent Provider(s) that exceed the actual amounts due any Incumbent Provider(s) for underlying telecommunications services provided during the respective periods, then such Party shall be entitled to a refund by the Incumbent Provider(s) or such Party may receive a credit against a future invoice. To the extent that any Incumbent Provider erroneously remits such refunds to Essential, or USA, then the Party receiving the refund in error shall, within five (5) business days of receipt, remit such amounts to Essential or USA, as the case may be. To the extent that any Incumbent Provider erroneously credits Essential or USA, then the Party receiving such credit(s) in error, shall, with five (5) business days of receipt of such credit(s), notify both the Incumbent Provider and the correct Party of same
- f. The Settlement Agreement also provides that except for the obligations arising under the Settlement Agreement or any obligations created by the Management Agreement between Essential and USA, each party, on its own behalf and on behalf of its assigns, successors, trustees, directors, officers, agents, attorneys, insurers, and employees, agrees not to sue the other and releases, absolves and discharges the other party from any and all claims which that party may have had against the other party, including but not limited to, any claim arising out of or connected to the APA.

Basis for Requested Relief

14. The United States Court of Appeals for the First Circuit has described the test to be used by Bankruptcy Courts called upon to approve or reject proposed compromises and settlements as follows:

A bankruptcy judge has the authority to approve a compromise of a claim pursuant to Bankruptcy Rule 9019(a). The ultimate issue on appeal is whether the bankruptcy court abused its discretion when it approved the compromise, which is a process requiring the bankruptcy court to “assess and balance the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.” *In re GHR Cos.*, 50 B.R. 925, 931 (Bankr. D. Mass. 1985) (quoting *In re Boston & Providence R.R.*, 673 F.2d. 11, 12 (1st Cir. 1982)). The specific factors which a bankruptcy court considers when making this determination include: (i) the probability of success in the litigation being

compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise. In re Anolik, 107 B.R. 426, 429 (D. Mass. 1989). Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995).

15. Essential believes that the value of the Settlement Agreement exceeds the lowest level of reasonably expectable litigation results and is fair and equitable and in the best interests of Essential and its creditors for the following reasons:

- a. The Settlement Agreement resolves the Adversary Proceeding without the risks, costs and delays inherent in any litigation. Moreover, as the party who did not prevail at trial would be likely to appeal any judgment, the substantial costs and delays of an appeal proceeding would be avoided.
- b. The Settlement Agreement results in Essential receiving nearly \$800,000 on account of the Essential Receivables through Essential's direct collections, payments by USA and release of funds held in escrow. This amount represents 50% of the total amount of Essential Receivables that were outstanding without reduction of uncollectable accounts. Further, pursuant to the APA, USA was entitled to a commission of ten percent (10%) from the Essential Receivables. USA has already paid to Essential all but one (1) of the weekly \$35,000 payments required under the Settlement Agreement.
- c. The total amount of the Essential Receivables included potentially uncollectable amounts. USA claimed that a substantial portion of the outstanding bills were in essence uncollectable as they were over ninety (90) days delinquent.
- d. The Settlement Agreement resolves any disputes between Essential and USA with respect to asserted acts or omissions by Essential post-closing of the Private Sale.
- e. USA asserted that approximately \$65,000 was due by Essential to certain customers for prior billing mistakes. The Settlement Agreement takes into account this billing dispute between the parties.
- f. The Settlement Agreement provides a mechanism for the parties to resolve the issues with respect to payments to incumbent carriers of telecommunications.

16. Since the proposed compromise fairly balances “the value of the claims being compromised against the value to the estate of the acceptance of the compromise proposal,” it is well within the bounds of this Court's discretion to approve the proposed settlement. Jeffrey v. Desmond, 70 F.3d at 185.

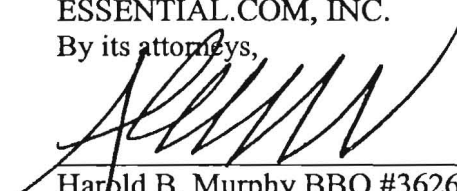
WHEREFORE, Essential.Com, Inc. respectfully requests that this Court enter an Order

- (i) approving this Motion and the Settlement Agreement; and
- (ii) providing such other relief as is just and proper.

Respectfully submitted,

ESSENTIAL.COM, INC.

By its attorneys,



Harold B. Murphy BBO #362610
Alex M. Rodolakis BBO# 567781
Hanify & King
Professional Corporation
One Federal Street
Boston, MA 02110
(617) 423-0400
Telefax: (617) 556-8985

Dated: December 14, 2001

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EXHIBIT A

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE ("**Agreement**") is made and entered into by and between United Systems Access, Inc. ("**USA**") and Essential.com, Inc. ("**Essential.com**") (each a "**Party**" and collectively, the "**Parties**"). Capitalized terms used but not defined herein shall be as defined in the asset purchase agreement entered into between the Parties on August 10, 2001 (the "**Asset Purchase Agreement**").

RECITALS

WHEREAS, USA acquired the Purchased Property from Essential.com pursuant to the Asset Purchase Agreement; and

WHEREAS, USA has remitted to Essential.com an additional \$151,275.00 in Accounts Receivable; and

WHEREAS, Essential.com has directly collected an additional \$186,802.15 in Accounts Receivable; and

WHEREAS, a dispute has arisen between the Parties concerning the billing, collection and payment obligations arising under the Asset Purchase Agreement, including the billing, collection, and payment of Accounts Receivable; and

WHEREAS, subject to the terms of this Agreement, Essential expressly releases any further claims it may have to any Accounts Receivable, other than those sent to collection by Essential prior to August 10, 2001, as USA will have exclusive rights, title, and interest to all Accounts Receivable upon execution of this Agreement; and

WHEREAS, the Parties wish to resolve any and all known or unknown disputes, claims, complaints, grievances, charges, actions, petitions and demands between them as defined herein, under the Asset Purchase Agreement; and

WHEREAS, the Parties expressly acknowledge and agree that nothing in this Agreement shall be construed to affect or limit either Party's continuing rights, duties, or obligations under the Management Agreement.

NOW, THEREFORE, in consideration of the recitals, covenants, conditions and promises contained herein, and other good and valuable consideration the adequacy and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

1. **Payment.** USA will pay Essential.com as follows:

A. \$350,000 to be paid in ten (10) weekly installments of \$35,000, commencing on Wednesday October 17, 2001. USA will cause these amounts to be wire transferred to the counsel of record of Essential.com no later than the close of business on Friday of each of the successive nine (9) weeks.

B. \$109,728.95 ("Escrowed Funds"), from the release of amounts already paid by USA, and held in escrow by the counsel of record of Essential.com. The Escrowed Funds shall be deemed released to Essential.com upon approval of this Settlement Agreement by the United States Bankruptcy Court for the District of Massachusetts (the "Court").

C. Default. In the event that USA fails to make any payment when due hereunder under Section 1, Essential.com shall notify USA of such failure to pay in writing. If USA does not cure such default within five (5) business days, Essential.com may institute an enforcement proceeding before the Court, and is expressly entitled to recover, in addition to any outstanding payments under Section 1 to the installment payments due, \$50,000 in punitive damages.

2. Transfer Of Software. Upon execution of this Agreement, Essential.com does hereby irrevocably and unconditionally sell, assign, convey, transfer and deliver to USA all of Essential.com's right, title and interest in and to the software it owns or licenses.

3. Payments to Service Providers.

a. Pursuant to the Asset Purchase Agreement, USA assumed the rights, duties, and obligations with respect to the Purchased Customers (as defined in the Asset Purchase Agreement) as of August 10, 2001. The Parties acknowledge that USA is responsible for payments to incumbent local exchange carriers or interexchange carriers (collectively, the "Incumbent Providers") for underlying telecommunications services provided to the Purchased Customers on or after August 10, 2001. The Parties further acknowledge that Essential is responsible for payment to the Incumbent Providers for underlying telecommunications services provided to the Purchased Customers on or before August 9, 2001, and to Essential customers other than the Purchased Customers at all times.

(i) To the extent that USA has, on or before the date of this Agreement, compensated any Incumbent Provider for underlying telecommunications services provided to any Essential customers other than Purchased Customers, the Parties shall meet in good faith within fifteen (15) days after the execution of this Agreement, or such other times as may be agreed to by the Parties, in order to commence a reconciliation or true-up of any such amounts paid to Incumbent Providers by USA. Essential will reimburse USA for any such amounts within five (5) business days. If such reconciliation or true-up reveals that Incumbent Providers continue to provide service to any Essential customers other than Purchased Customers, USA, at the expense of Essential, will send such customers notices within five (5) business days after execution of this Agreement, notifying such customers that their service will be disconnected on thirty (30) days' notice. Essential's obligation to reimburse USA for payments made to Incumbent Providers for underlying telecommunications services provided to any Essential customers other than Purchased Customers shall expire on the date of termination specified in the disconnection notices.

b. The Parties further acknowledge that (i) USA has made payments, on or after August 10, 2001, to Incumbent Providers for underlying telecommunications services provided on and after August 10, 2001; and, (ii) Essential has made payments, on or before August 9, 2001, to the Incumbent Providers for underlying telecommunications services provided on or before August 9, 2001.

(i) To the extent such payments made by either Party exceed the actual amounts due any Incumbent Provider(s) for underlying telecommunications services provided during the respective periods, then such Party shall be entitled to a refund by the Incumbent Provider(s) or such Party may receive a credit against a future invoice. To the extent that any Incumbent Provider erroneously remits such refunds to Essential.com, or USA, then the Party receiving the refund in error shall, within five (5)

business days of receipt, remit such amounts to Essential.com or USA, as the case may be. To the extent that any Incumbent Provider erroneously credits Essential.com or USA, then the Party receiving such credit(s) in error, shall, with five (5) business days of receipt of such credit(s), notify both the Incumbent Provider and the correct Party of same.

(ii) In no event shall any payments made by USA be credited towards any amounts due Incumbent Providers for underlying telecommunications services provided prior to August 10, 2001, as Essential.com remains solely liable for any payments due Incumbent Providers for services provided to Essential.com for the period prior to August 10, 2001.

(iii) To the extent that either Party disputes whether such refund or credit was, or was not, received in error, then the Parties shall promptly meet to resolve such dispute. Each Party shall have the right to inspect the books and records of the other Party and to inspect the invoices of the Incumbent Providers and all relevant documentation. While any refund or credit is in dispute, the Party receiving such disputed refund or credit shall segregate such amount from other assets of the Party and hold such amount in trust.

4. **Customer Complaints.** Essential.com acknowledges and agrees that it will, during the term of the Management Agreement, establish a representative to: 1) address any complaints, disputes, grievances or other claims made by any customer other than Purchased Customers; and 2) respond to and resolve any complaint, suit, show cause order, data request or any other information request or proceeding submitted to or commenced against Essential.com by any customer or state or federal court or regulatory agency, with respect to events, claims, liabilities, or causes of action arising prior to August 10, 2001, including refunding customers any amounts due prior to August 10, 2001. With the exception of customer refunds other than relating to Purchased Customers, which Essential shall promptly pay if a customer demonstrates that a refund is due, the response from Essential, unless otherwise required by law, to any of the foregoing shall be limited to the facts and circumstances surrounding its bankruptcy filing, current status of its bankruptcy proceedings and such other information as Essential.com may be able to provide in light of its liquidation and dissolution.

5. **Release.** Except for those obligations created by or arising out of this Agreement or the Management Agreement, each Party (the "Releasing Party"), on its own behalf and on behalf of its assigns, successors, trustees, directors, officers, agents, attorneys, insurers, and employees, past and present, does hereby covenant not to sue and acknowledges complete satisfaction of and hereby releases, absolves and discharges the other Party and its successors and assigns, their trustees, directors, officers, agents, attorneys, insurers, and employees, past and present, and each of them (hereinafter collectively referred to as "Releasees"), with respect to and from any and all claims, demands, liens, agreements, contracts, covenants, actions, suits, causes of action, obligations, debts, expenses, attorneys' fees, damages, judgments, orders and liabilities of whatever kind or nature in law, equity or otherwise, whether now known or unknown, suspected or unsuspected, and whether or not concealed or hidden, which the Releasing Party now owns or holds or has at any time heretofore owned or held as against said Releasees, or any one of them, including specifically, but not exclusively, and without limiting the generality of the foregoing, any and all claims, demands, agreements, obligations and causes of action, known or unknown, suspected or unsuspected by such Releasing Party arising out of or in any way connected with the Asset Purchase Agreement, including but not limited to any payment obligations arising under the Asset Purchase Agreement.

6. **Waiver.** It is a further condition of the consideration hereof and is the intention of Essential.com and USA in executing this instrument that, with the exception of the Parties' continuing obligations under the Management Agreement, the same shall be effective as a bar as to each and every claim, demand and cause of action hereinabove specified and, in furtherance of this intention, each Party hereby expressly

waives any and all rights or benefits conferred by the provisions of any state civil code and expressly consents that this Agreement shall be given full force and effect according to each and all of its express terms and conditions, including those relating to unknown and unsuspected claims, demands and causes of actions, if any, as well as those relating to any other claims, demands and causes of actions herein above specified. Each Party acknowledges that it may hereafter discover claims or facts in addition to or different from those which they now know or believe to exist with respect to the subject matter of this Agreement and which, if known or suspected at the time of executing this Agreement, may have materially affected this settlement. Nevertheless, each Party hereby waives any right, claim or cause of action that might arise as a result of such different or additional claims or facts.

7. **No Admission.** It is understood that the execution of this Agreement is not an admission of any existing claim, demand, action, cause of action, suit, controversy, agreement, promise, representation or damage between the Parties hereto. Each of the Parties acknowledges that it has been represented by counsel.

8. **Entire Agreement.** The Parties hereto acknowledge that this written document contains the entire agreement among the Parties, and it cannot be modified except by a written amendment executed by both Parties. No representations (other than those set forth in the declaration described above), promises, conditions or agreements with reference to the execution of this document have been made or entered into between the Parties hereto other than as herein expressly provided.

9. **Successors And Assigns.** This Agreement shall bind and inure to the benefit of the legal representatives, heirs, successors and assigns of the Parties and the Releasees hereto.

10. **Representations And Warranties Of Essential.com.** Essential.com represents and warrants that its undersigned representative has the authority to act on behalf of Essential.com and to bind Essential.com and all who may claim through it to bind them to the terms and conditions of this Agreement. Essential.com further represents and warrants that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein.

11. **Representations And Warranties Of USA.** USA represents and warrants that the undersigned has the capacity to act on its own behalf and on behalf of all who may claim through it to bind them to the terms and conditions of this Agreement. USA further represents and warrants that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein.

12. **Governing Law.** This Agreement shall be deemed to have been executed and delivered within the Commonwealth of Massachusetts, and the rights and obligations of the Parties hereunder shall be construed and enforced in accordance with, and governed by, the laws of the State of Massachusetts without regard to principles of conflict of laws. Each Party acknowledges and agrees that this Agreement is subject to Court approval, and that the Court retains exclusive jurisdiction over the subject matter of this Agreement.

13. **Counterparts.** This Agreement may be executed in counterparts, and each counterpart shall have the same force and effect as an original and shall constitute an effective, binding agreement on the part of each of the undersigned.

14. **Construction.** Whenever appropriate from the context of this Agreement, the use of any gender shall include any and all genders and the singular number shall include the plural and plural number shall include the singular.

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IN WITNESS WHEREOF, the Parties hereto have executed this Agreement the day and year indicated below.

DATED: _____, 2001

United Systems Access, Inc.

By:


[Signature]

[Printed Name and Title]

DATED: _____, 2001

Essential.com, Inc.

By:

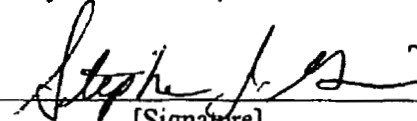

[Signature]

Basil G. Pallone, +4 Authorized Representative
[Printed Name and Title]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement the day and year indicated below.

DATED: 12/07/01, 2001

United Systems Access, Inc.

By: 
[Signature]

STEPHEN J. GILBERT, PRESIDENT
[Printed Name and Title]

DATED: _____, 2001

Essential.com, Inc.

By: _____
[Signature]

[Printed Name and Title]