

ORIGINAL

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
(Eastern Division)

020000

\_\_\_\_\_)  
In re )  
 )  
ESSENTIAL.COM, INC., )  
 )  
Debtor. )  
\_\_\_\_\_)

Chapter 11  
Case No. 01-15339-WCH

**MOTION TO APPROVE SETTLEMENT STIPULATION REGARDING  
ADMINISTRATIVE CLAIM OF BASIL A. PALLONE  
PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 9019**

The Plan Trustee of Essential.com, Inc. (the "Debtor"), hereby moves the Court, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure, for an Order approving the compromise of an existing controversy with Basil A. Pallone. As set forth in greater detail below, the parties have entered into a stipulation resolving all claims and counterclaims, under circumstances where extensive uncertainty and potential expense connected to litigating Mr. Pallone's administrative expense claim request are eliminated and valuable assets of the estate are preserved for the benefit of all unsecured creditors. As further set forth below, the proposed compromise with Mr. Pallone represents a fair and reasonable disposition of the pending dispute and should, therefore, be approved by the Court. In further support of this Motion, the Plan Trustee respectfully sets forth and represents as follows:

**Jurisdiction and Venue**

1. The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. sections 157 and 1334.

AUS \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
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OPC \_\_\_\_\_  
MMS \_\_\_\_\_  
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Nonnye

Done 2/05/02

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2. This is a “core” proceeding as that term is defined in 28 U.S.C. section 157(b)(2)(A), (b)(2)(F) and (b)(2)(O).

3. Venue in this Court is proper pursuant to 28 U.S.C. sections 1408 and 1409.

### **Background**

4. On June 29, 2001 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”).

5. On July 18, 2001, the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”) consisting of three of the Debtor’s unsecured creditors.

6. On November 27, 2000, the Debtor entered into a written Retention Agreement with Mr. Pallone (the “Agreement”).

7. The Agreement provided certain incentive bonuses to Mr. Pallone as follows:

- a. Upon the earlier of : (i) the expiration of twelve months of continuous employment with the Debtor following the effective date; or (ii) the consummation of a sale of all or substantially all of [the Debtor’s] assets, Mr. Pallone was entitled to a cash payment of \$150,000 (the “Retention Bonus”).
- b. Upon liquidation or dissolution of the company, Mr. Pallone was entitled to payment equal to three (3) months of compensation at his ordinary salary level (the “Severance Bonus”).

8. The Court approved the sale of all or substantially all of the assets of the Debtor on August 9, 2001.

9. Prior to the Petition Date Mr. Pallone was paid \$50,000 on account of his Retention Bonus and \$100,000 remains outstanding.

10. As of the Petition Date Mr. Pallone’s salary equaled to \$13,750 per month.

11. Mr. Pallone has filed a request for the allowance and payment, as an administrative priority expense, the Retention Bonus in the amount of \$100,000 and the Severance Bonus in the sum of \$41,250 pursuant to his Agreement with the Debtor.

12. Prior to confirmation of a Joint Plan of Liquidation for the Debtor the Creditors' Committee objected to Mr. Pallone's request.

13. On December 21, 2001, the Court entered an Order confirming the Plan of Liquidation proposed by the Committee and the Debtor on November 2, 2001. Pursuant to the Plan, Charles A. Dale III was appointed to serve as Plan Trustee.

14. On December 21, 2001, the Court entered a scheduling order on Mr. Pallone's administrative claim request, setting discovery and other procedural deadlines. After extensive settlement discussions, the parties have negotiated a resolution of the claim as embodied in a written settlement stipulation (the "Stipulation") attached hereto as Exhibit A.

15. The essential terms of the Stipulation provide:

- a. Mr. Pallone's claim against the Debtor shall be Allowed in the sum of \$141,250 and shall be satisfied in the following manner:
  - i. The sum of \$50,000 shall be Allowed as a chapter 11 administrative priority expense under section 503(b) of the Bankruptcy Code, and such amount shall be paid forthwith upon entry of a final order by the Bankruptcy Court approving this Stipulation. For purposes of this Stipulation, the term "final order" shall be defined as an order of the Bankruptcy Court in this proceeding which has not been vacated, reversed, stayed, modified, or amended and which is no longer subject to appeal and of which no appeal is pending;
  - ii. The balance of Mr. Pallone's claim, namely \$91,250, shall be Allowed and treated as a general unsecured claim under the Plan;

- iii. Mr. Pallone shall receive an interim distribution on account of his unsecured claim in the amount of \$50,000 upon entry of a final order by the Bankruptcy Court approving this Stipulation;
  - iv. In the event that the distributions made under the Plan to the Debtor's other general unsecured creditors exceeds 54%, Mr. Pallone shall receive additional distributions equal to the amount by which the distribution to all unsecured claims exceeds 54%; and
  - v. In the event that the distribution on unsecured claims does not equal or exceed 54%, the Plan Trustee shall be deemed to have waived any right to seek disgorgement of any portion of the interim distribution already paid to Mr. Pallone.
- b. Excepting only the rights which arise under the express terms of this Stipulation, Mr. Pallone shall release and forever discharge the Debtor, its bankruptcy estate and their respective officers, directors, agents, employees, successors and assigns of an from any and all other claims, debts, demands, rights, causes of action and liabilities of any nature and description, known or unknown, both in law and equity which Mr. Pallone now has or ever had from the beginning of the world to the date upon which the Bankruptcy Court's Order approving the Stipulation becomes final and is no longer subject to appeal.
  - c. The Plan Trustee for himself, the Debtor and its bankruptcy estate shall release and forever discharge Mr. Pallone, his successors and assigns, of and from any and all claims, debts, demands, rights, causes of action and liabilities of any nature and description, known or unknown, both in law and equity which the Plan Trustee now has or had from the beginning of the world to the date upon which the Bankruptcy Court's Order approving the Stipulation becomes final and is no longer subject to appeal.

16. For the reasons set forth below, the Plan Trustee requests that the Court enter an Order approving the Stipulation.

**The Settlement Is In The Best Interest Of The Debtor's Estates**

17. Rule 9019 of the Federal Rules of Bankruptcy Procedure provides that

On motion by the [debtor-in-possession] and after notice and a hearing, the court may approve a compromise or settlement. Notice

shall be given to creditors, the United States trustee, the debtor, and indentured trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a). The primary purpose of a compromise or settlement is to avoid the necessity of determining sharply contested and dubious issues. See, e.g., Wil-Rud Corp. v. Lynch (In re California Associated Prods. Co.), 183 F.2d 946, 949 (9th Cir. 1950). The policy of the law generally is to encourage settlement. See Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960).

18. Courts traditionally defer to the trustee or debtor-in-possession when examining the reasonableness of a settlement. See, e.g., Newman v. Stein, 464 F.2d 689, 693 (2d Cir.1972) (“The responsibility of the bankruptcy judge ... is not to decide the numerous questions of law and fact raised ... but rather to canvass the issues and see whether the settlement ‘fall[s] below the lowest point in the range of reasonableness.’”); In re Media Cent., Inc., 190 B.R. 316 (E.D. Tenn. 1994) (court presumed trustee had subjected settlement to his independent review and analysis where trustee recommended approval of proposed compromise and settlement); see also 9 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 9019.03[1] (15th ed.1993) (to minimize litigation and expedite administration of bankruptcy estate, “[c]ompromises are favored in bankruptcy”).

19. The First Circuit has recognized various criteria that a bankruptcy court should consider in striking the balance between “the value of the claim that is being compromised against the value to the estate of the acceptance of the compromise proposal.” Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995) (citing Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)). The First Circuit identified three such factors: (1) the probability of success were the claim to be

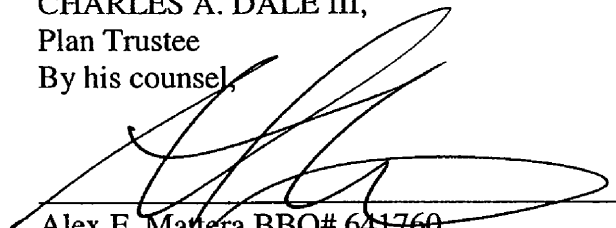
litigated measured against the concrete and immediate benefits of settlement; (2) the reasonable accommodation of creditors' views regarding the settlement; and (3) the experience and competence of the fiduciary proposing the settlement. See Hicks, Muse & Co., Inc. v. Brandt (In re Healthco Int'l, Inc.), 136 F.3d 45, 50 (1st Cir. 1998).

20. Here, consideration of these three factors clearly supports approval of the Stipulation. Through resolution of Mr. Pallone's claim, the estate would avoid the significant expense of conducting discovery, identifying, locating and deposing witnesses, and litigating the matter to a conclusion. The Stipulation caps Mr. Pallone's claim without subjecting the estate to the uncertainty and substantial expense of litigation. The Plan Committee, composed of the former Creditors' Committee members, has agreed to the relief requested herein. The Plan Trustee therefore believes that the Stipulation is in the best interest of the estate and unsecured creditors.

WHEREFORE, for all of the foregoing reasons, the Debtors respectfully request that this Court enter an Order in the form attached hereto approving the Agreement.

Respectfully submitted,

CHARLES A. DALE III,  
Plan Trustee  
By his counsel,



Alex F. Mattera BBO# 641760  
Gadsby Hannah LLP  
225 Franklin Street  
Boston MA 02110  
Telephone: (617) 345-7000  
Facsimile: (617) 204-8025  
[amattera@ghlaw.com](mailto:amattera@ghlaw.com)

Date: January 30, 2002

**EXHIBIT A**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
(Eastern Division)

In re	)	
	)	
ESSENTIAL.COM, INC.,	)	Chapter 11
	)	Case No. 01-15339-WCH
Debtor.	)	
	)	

**STIPULATION REGARDING  
ADMINISTRATIVE CLAIM OF BASIL G. PALLONE**

This Stipulation (the “Stipulation”) is entered into this 28<sup>th</sup> day of January, 2002, by and among Basil G. Pallone (“Mr. Pallone”), and Charles A. Dale, in his capacity as the Plan Trustee (the “Plan Trustee”) of Essential.com, Inc. (the “Debtor”).

WHEREAS on June 29, 2001 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”); and

WHEREAS on November 27, 2000, the Debtor entered into a written Retention Agreement with Mr. Pallone (the “Agreement”); and

WHEREAS the Agreement provided certain incentive bonuses to Mr. Pallone as follows:

- a. Upon the earlier of: (i) the expiration of twelve months of continuous employment with the Debtor following the effective date; or (ii) the consummation of a sale of all or substantially all of [the Debtor’s] assets, Mr. Pallone was entitled to a cash payment of \$150,000 (the “Retention Bonus”).
- b. Upon liquidation or dissolution of the company, Mr. Pallone was entitled to payment equal to three (3) months of compensation at his ordinary salary level (the “Severance Bonus”); and



WHEREAS the Court approved the sale of all or substantially all of the assets of the Debtor on August 9, 2001; and

WHEREAS prior to the Petition Date Mr. Pallone was paid \$50,000 on account of his Retention Bonus and \$100,000 remains outstanding; and

WHEREAS as of the Petition Date Mr. Pallone's salary equaled to \$13,750 per month; and

WHEREAS Mr. Pallone has filed a request for the allowance and payment, as an administrative priority expense, the Retention Bonus in the amount of \$100,000 and the Severance Bonus in the sum of \$41,250 pursuant to his Agreement with the Debtor; and

WHEREAS prior to confirmation of a Joint Plan of Liquidation for the Debtor the Creditors' Committee objected to Mr. Pallone's request; and

WHEREAS on December 21, 2001, the Court entered an Order confirming the Plan of Liquidation proposed by the Committee and the Debtor on November 2, 2001. Pursuant to the Plan, Charles A. Dale III was appointed to serve as Plan Trustee; and

WHEREAS the parties desire to resolve this issue without the time and expense of additional litigation.

NOW, THEREFORE, in consideration of the mutual agreements and undertakings contained herein, the parties hereby stipulate and agree as follows:

1. Mr. Pallone's claim against the Debtor shall be Allowed in the sum of \$141,250 and shall be satisfied in the following manner:
  - a. The sum of \$50,000 shall be Allowed as a chapter 11 administrative priority expense under section 503(b) of the Bankruptcy Code, and such amount shall be paid forthwith upon entry of a final order by the Bankruptcy Court approving this Stipulation. For purposes of this Stipulation, the term "final order" shall be defined as an order of the Bankruptcy Court in this proceeding which has not been vacated,

reversed, stayed, modified, or amended and which is no longer subject to appeal and of which no appeal is pending;

- b. The balance of Mr. Pallone's claim, namely \$91,250, shall be Allowed and treated as a general unsecured claim under the Plan;
- c. Mr. Pallone shall receive an interim distribution on account of his unsecured claim in the amount of \$50,000 upon entry of a final order by the Bankruptcy Court approving this Stipulation;
- d. In the event that the distributions made under the Plan to the Debtor's other general unsecured creditors exceeds 54%, Mr. Pallone shall be entitled to receive additional distributions equal to the amount by which the distribution to all unsecured claims exceeds 54%; and
- e. In the event that the distribution on unsecured claims does not equal or exceed 54%, the Plan Trustee shall be deemed to have waived any right to seek disgorgement of any portion of the interim distribution already paid to Mr. Pallone.

2. Excepting only the rights which arise under the express terms of this Stipulation, Mr. Pallone hereby releases and forever discharges the Debtor, its bankruptcy estate and their respective officers, directors, agents, employees, successors and assigns of and from any and all other claims, debts, demands, rights, causes of action and liabilities of any nature and description, known or unknown, both in law and equity which Mr. Pallone now has or ever had from the beginning of the world to the date upon which the Bankruptcy Court's Order approving this Stipulation becomes final and is no longer subject to appeal. Notwithstanding the foregoing sentence, nothing herein shall serve to waive any Mr. Pallone's rights to payment for consulting services provided to the debtor or the Plan Trustee.

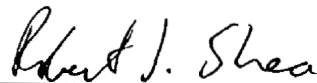
3. The Plan Trustee for himself, the Debtor and its bankruptcy estate hereby releases and forever discharges Mr. Pallone, his successors and assigns, of and from any and all claims, debts, demands, rights, causes of action and liabilities of any nature and

description, known or unknown, both in law and equity which the Plan Trustee now has or had from the beginning of the world to the date upon which the Bankruptcy Court's Order approving this Stipulation becomes final and is no longer subject to appeal.

4. This Stipulation shall become binding and effective in accordance with its terms on the first business day following the date upon which the Bankruptcy Court's Order Approving this Stipulation becomes final and is no longer subject to appeal.

Respectfully submitted,

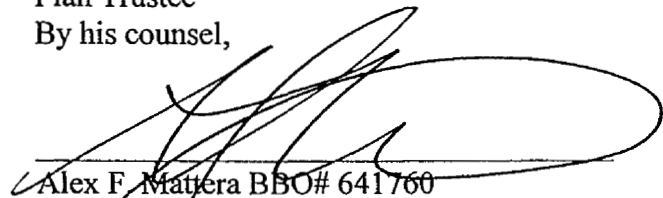
BASIL A. PALLONE,  
By his counsel,



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Robert Shea BBO# 546795  
Tarlow, Breed, Hart, Murphy & Rodgers, P.C.  
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Boston, MA 02110  
(617) 218-2048  
[rshea@tbhmr.com](mailto:rshea@tbhmr.com)

CHARLES A. DALE III,  
Plan Trustee  
By his counsel,



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Alex F. Mattera BBO# 641760  
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Facsimile: (617) 204-8025  
[amattera@ghlaw.com](mailto:amattera@ghlaw.com)

Date: January 28, 2002

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
(Eastern Division)

_____	)	
In re	)	
	)	
ESSENTIAL.COM, INC.,	)	Chapter 11
	)	Case No. 01-15339-WCH
Debtor.	)	
_____	)	

**PLAN TRUSTEE'S OPPOSITION TO MOTION OF TYCO CAPITAL FOR LEAVE TO FILE ADMINISTRATIVE CLAIM AFTER THE BAR DATE**

Charles A. Dale, in his capacity as the Plan Trustee (the "Plan Trustee") of Essential.com, Inc. (the "Debtor"), hereby objects to the motion of Tyco Capital ("Tyco") for leave to file administrative claim after the bar date. In further support of this Opposition, the Plan Trustee respectfully submits as follows:

1. On June 29, 2001 (the "Petition Date"), the Debtor filed its voluntary petition for relief under chapter 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Massachusetts.
2. On July 18, 2001, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") consisting of three of the Debtor's unsecured creditors. The Committee's application to employ Gadsby Hannah LLP as counsel was allowed on August 16, 2001.
3. On August 9, 2001, the Court allowed the Debtor's motion to sell all or substantially all of its assets.
4. On November 2, 2001, the Committee and the Debtor filed a Joint Plan of Liquidation and Disclosure Statement in this case. The Disclosure Statement was approved

on November 28, 2001 by an order of the Court entered on that date. The Court's order also required all administrative claims against the estate to be asserted on or before December 17, 2001 (the "Bar Date Notice"). A copy of the Bar Date Notice was served on December 1, 2001. According to the Debtor's Certificate of Service dated December 4, 2001, Tyco received a copy of the Bar Date Notice, providing it actual notice of the deadline for asserting administrative claims.

5. On December 21, 2001, the Court entered an order confirming the Plan of Liquidation proposed by the Committee and the Debtor on November 2, 2001. Pursuant to the Plan, Charles A. Dale III was appointed Plan Trustee.

6. The Effective Date under the Plan occurred on January 1, 2002.

7. On January 14, 2001, Tyco filed its motion for leave to file administrative claim after the bar date, citing excusable neglect as the reason for failing to timely assert its administrative claim. Tyco has not alleged that it failed to receive the Bar Date Notice, but merely that an individual with Tyco failed to personally view the order and deadline until after the deadline had passed. Accordingly, Tyco has failed to demonstrate any excusable neglect in support of its request that this Court excuse its filing of an administrative claim more than one month after the deadline for filing administrative claims, after confirmation of the Plan of Liquidation in this case, and approximately two weeks after the Effective Date pursuant to the Plan. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 392, 395-98 (1993) (mere "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"); Mirpuri v. ACT Mfg., Inc., 212 F.3d 624, 630-31 (1st Cir. 2000) (same); In re Petroleum Prod. Mgt., Inc., 240 B.R.

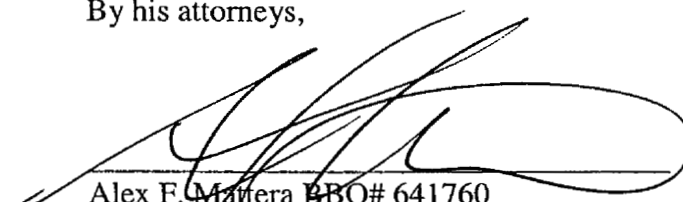
407, 416 (Bankr. D. Kan. 1999) (barring creditor who could not manage its mail properly from asserting claim late).

8. In the event that Tyco is allowed to have its late-filed claim treated as though timely filed, the Plan Trustee reserves the right to object to the underlying claim.

WHEREFORE the Plan Trustee respectfully requests that this Court enter an order denying Tyco's motion for leave to file administrative claim after the bar date, and such other and further relief as is just and equitable.

Respectfully submitted,

CHARLES A. DALE III,  
Plan Trustee  
By his attorneys,



Alex F. Mattera BBO# 641760  
Gadsby Hannah LLP  
225 Franklin Street  
Boston MA 02110  
Telephone: (617) 345-7000  
Facsimile: (617) 204-8025  
[amattera@ghlaw.com](mailto:amattera@ghlaw.com)

Date: January 30, 2002

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS  
(Eastern Division)

_____	)	
In re	)	
	)	
ESSENTIAL.COM, INC.,	)	Chapter 11
	)	Case No. 01-15339-WCH
Debtor.	)	
_____	)	

**PLAN TRUSTEE'S MOTION TO EXTEND THE INITIAL DISTRIBUTION DATE**

Charles A. Dale, in his capacity as the Plan Trustee (the "Plan Trustee") of Essential.com, Inc. (the "Debtor"), hereby requests that this Court enter an Order extending the Initial Distribution Date<sup>1</sup> under the Joint Plan of Liquidation. In support of this Motion, the Plan Trustee respectfully submits as follows:

1. On June 29, 2001 (the "Petition Date"), the Debtor filed with this Court its voluntary petition for relief under Chapter 11, Title 11 of the United States Code (the "Bankruptcy Code").
2. On July 18, 2001, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") consisting of three of the Debtor's unsecured creditors.
3. On August 9, 2001, the Court allowed the Debtor's motion to sell substantially all of its assets to United Systems Access, Inc. ("USA").

<sup>1</sup> All capitalized terms not defined herein shall have the meaning ascribed to them in the Debtors recently confirmed Plan.

4. On December 21, 2001, the Court entered an Order confirming the Plan of Liquidation proposed by the Committee and the Debtor on November 2, 2001. Pursuant to the Plan, Charles A. Dale III was appointed to serve as Plan Trustee.

5. The Effective Date under the Plan occurred on January 1, 2002.

6. The Plan requires that the Plan Trustee make an Initial Distribution either; (i) forty-five (45) days after the Effective Date; or (ii) other such date as may be selected by the Plan Trustee subject to the approval of the Bankruptcy Court. The Initial Distribution Amount shall be made from available funds after payment of Unclassified Claims and Priority Claims, and reservation of sufficient amounts to pay all Disputed Claims.

7. Contemporaneously herewith, the Plan Trustee has filed objections to claims totaling more than \$5.5 million. Furthermore, the Plan Trustee continues to work closely with the various banking institutions at which the Debtor maintained accounts, letters of credit and other deposits to consolidate the Debtor's assets and to free up restricted cash in order to increase the funds available for the Initial Distribution. Finally, the Plan Trustee is attempting to resolve a disputed Administrative Claim asserted by USA in the sum of over \$500,000.

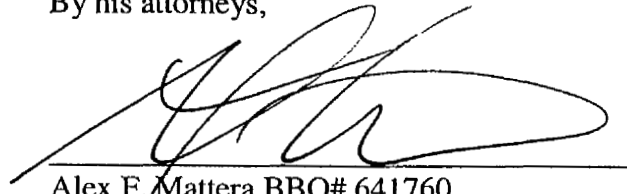
8. The Plan Trustee anticipates the resolution of the majority of the claims objections and the recovery and consolidation of substantially all of the Debtor's funds from various banking institutions within approximately ninety (90) days. Until major claims objections are resolved, however, it would be inefficient to make an Initial Distribution to unsecured creditors.



WHEREFORE, the Plan Trustee respectfully requests that this Court enter an Order extending the Initial Distribution Date by sixty (60) days, through and including April 15, 2002.

Respectfully submitted,

CHARLES A. DALE III,  
Plan Trustee  
By his attorneys,

A handwritten signature in black ink, appearing to be 'A. Mattera', written over a horizontal line.

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Facsimile: (617) 204-8025  
[amattera@ghlaw.com](mailto:amattera@ghlaw.com)

Date: January 30, 2002