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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION

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COMMISSION
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In re:

COMMCO TECHNOLOGY, L.L.C. d/b/a
BROADCASTREAM COMMUNICATIONS
CORPORATION,

Debtor.

Chapter 11

Case No. 00-51488 (AHWS)

BARBARA H. KATZ, CHAPTER 11
TRUSTEE,

Plaintiff

Adv. Pro. No. 03-05111

v.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P. a/k/a Davenport, Evans,
Hurwitz & Smith,

Defendant.

April 9, 2004

**MOTION OF BARBARA H. KATZ, CHAPTER 11 TRUSTEE FOR
ENTRY OF AN ORDER PURSUANT TO FEDERAL RULE OF
BANKRUPTCY PROCEDURE 9019 COMPROMISING
AND SETTLING AVOIDANCE ACTION AGAINST
DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.**

Barbara H. Katz, Chapter 11 Trustee ("Trustee" or "Plaintiff"), by her attorneys, Pepe
& Hazard LLP, moves pursuant to Federal Rule of Bankruptcy Procedure 9019, for an order
authorizing its compromise and settlement of avoidance action against defendant, Davenport,

Evans, Hurwitz & Smith, L.L.P. a/k/a Davenport, Evans, Hurwitz & Smith ("Davenport" or
"Defendant") in Adversary Proceeding No. 03-05111. In support of this motion, the Trustee
states:

- AUS _____
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____
- OPC _____
- MMS _____
- SEC 1
- OTH _____

1. On November 12, 2003, the Trustee filed her complaint in Adversary Proceeding No. 03-05111 against Davenport seeking the recovery of \$67,708.11 in funds that the Trustee asserted were preferential pre-petition payments pursuant to Section 547 of the United States Bankruptcy Code ("Code").

2. In response to the complaint in the adversary proceeding, Davenport has raised several affirmative defenses. Counsel for the Trustee has analyzed the defenses as well as other information regarding the transfers and has determined that Davenport presents valid new value and ordinary course of business defenses with respect to two of the three transfers at issue.

3. The Trustee has concluded that it is in the best interest of the Debtor's estate to resolve the adversary proceeding against Davenport by accepting a \$35,000.00 payment in full satisfaction.

4. This settlement is in the best interest of this estate and is the most cost-effective resolution of the Trustee's claims against Davenport.

THE SETTLEMENT

5. The Trustee and Davenport have engaged in discussions and negotiations in an effort to reach a settlement of the adversary proceeding. During the course of these negotiations, the parties have had the opportunity to evaluate their positions, the relative strengths of their positions, and the cost and risk associated with prosecuting the adversary proceeding. The parties concluded that a viable settlement could be had which will result in payment by Davenport to the Trustee for the benefit of the estate.

6. In settlement of the Trustee's claims, Davenport shall pay to the Trustee the total amount of Thirty-five Thousand Dollars (\$35,000.00) ("Settlement Payment") to be paid within ten (10) business days from entry of the order approving this Motion ("Order").

7. In addition, Davenport has agreed to waive all claims against the Debtor and the Trustee, including its pre-petition unsecured claim in the amount of \$94,879.33 and any resulting claim pursuant to Code Section 502(h).

8. The precise terms of the settlement are contained in the Stipulation of Settlement, attached hereto and made a part hereof as Exhibit A.

THE SETTLEMENT AND COMPROMISE SHOULD BE APPROVED

9. This Court is charged with making an informed, independent determination as to whether the proposed settlement is fair, equitable and in the best interests of the estate's creditors. As addressed herein, controlling precedent identifies a number of factors for this Court to examine in reaching its conclusion. Review of the proposed settlement in light of these factors will reveal that the creditors stand to receive tangible and immediate benefits that far outweigh the vagaries of litigation. Under all of the pertinent factors, this settlement meets the relevant test of rising above the lowest point in the range of reasonableness. The proposed settlement is fair and equitable and will yield substantial benefits for the creditors of this estate. For these reasons, the Court should approve the settlement discussed herein.

APPROVAL OF THE SETTLEMENT IS IN THE BEST INTERESTS OF THE CREDITORS OF THIS ESTATE

10. The Settlement proposed herein represents a fair, equitable and reasonable compromise of the causes of action maintained by the Trustee against Davenport. The

settlement recognizes that the potential recovery does not justify the cost of continuing the adversary proceeding and the further delay in obtaining the potential recovery.

11. The alternative to approval of the settlement is costly and time-consuming litigation. The Trustee submits, as the fiduciary for the estate and its creditors, that viewed in this light, continued litigation with Davenport is not a prudent course of action.

12. Bankruptcy Rule 9019(a) permits this Court, following notice and a hearing as provided by Bankruptcy Rule 2002, to approve a compromise or settlement of claims. The Rule provides:

(a) *Compromise.* On motion by the trustee 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 indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Neither Bankruptcy Rule 9019 nor any section of the Code explicitly sets forth the standards by which a court is to evaluate a proposed settlement for approval, but those standards are well-established and focus upon whether the proposed settlement is reasonable and in the best interests of creditors. In Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414 (1968), *reh'g denied*, 391 U.S. 909 (1968), the United States Supreme Court concluded that the trial court must make an informed, independent judgment as to whether a settlement is fair and equitable, and explained as follows:

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the

terms of the compromise with the likely rewards of litigation.
Anderson, 309 U.S. at 424. (citations omitted).

13. The United States Court of Appeals for the Second Circuit has instructed that the responsibility of the judge "is not to decide the numerous questions of law and fact raised by appellants, but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied sub nom.*, Cosoff v. Rodman, 464 U.S. 822 (1983). See In re Purofied Down Products Corp., 150 B.R. 519, 522-23 (S.D.N.Y. 1993); In re Crowthers McCall Pattern, Inc., 120 B.R. 279, 287 (Bankr. S.D.N.Y. 1990); In re Carla Leather, Inc., 44 B.R. 457, 470 (Bankr. S.D.N.Y. 1984), *aff'd*, 50 B.R. 764 (S.D.N.Y. 1984). The assessment of a settlement only requires identification of the issues in controversy "so that the bounds of reasonableness can be seen with some clarity." Carla Leather, 44 B.R. at 470.

14. In considering a proposed settlement, the Court is guided by a lenient standard consistent with the theory that "little would be saved by the settlement process if [in order to approve a settlement] bankruptcy courts [were required to conduct] . . . an exhaustive investigation and determination of the underlying claims." Purofied Down Products, 150 B.R. 522-23. The Bankruptcy Court in Carla Leather explained the policy underlying the abridged review of settlements in bankruptcy as follows:

The very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise . . . This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty.

Carla Leather, 44 B.R. at 470, *see also* Purofied Down Products, 150 B.R. at 522-23. Thus, in evaluating the propriety of a settlement, the Court need not conduct a trial, "mini-trial," or "rehearsal of the trial" on the merits to actually resolve the existing factual and legal issues, but

must simply consider whether against the background of those issues, the settlement is reasonable. Newman v. Stein, 464 F.2d 689, 692 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972). *See also* In re Drexel Burnham Lambert Group, 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991) ("Drexel I"); In re International Distribution Centers, Inc., 103 B.R. 420, 423 (S.D.N.Y. 1989).

15. In deciding whether a proposed compromise is fair and equitable, reasonable and in the best interests of creditors, courts in the Second Circuit follow the analysis first articulated by the Supreme Court in Anderson. Courts judge a proposed settlement based upon a consideration of some or all of the following factors:

- (a) the relative benefits to be received by creditors under the proposed settlement;
- (b) the likelihood of success in the litigation compared to the present and future benefits offered by the proposed settlement;
- (c) the prospect of complex and protracted litigation if settlement is not approved;
- (d) the attendant expense, inconvenience and delay of litigation;
- (e) the probable difficulties of collecting on any judgment that might be obtained;
- (f) the competency and experience of counsel who support the proposed settlement;
- (g) the extent to which the settlement is the product of arm's-length bargaining, and not the product of fraud or collusion;
- (h) the nature and breadth of any releases to be issued as a result of the proposed settlement; and
- (i) the paramount interest of the creditors and proper deference to their reasonable views.

See Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1975); In re Ionosphere Clubs, Inc., 156 B.R. 414, 427 (S.D.N.Y. 1993); Purofied Down Products, 150 B.R. at 522; In re Fugazy, 150 B.R. 103, 106 (Bankr. S.D.N.Y. 1993); Drexel I, 134 B.R. at 497; In re Drexel Burnham Lambert Group, Inc., 134 B.R. 499, 506 (Bankr. S.D.N.Y. 1991); Crowthers McCall, 120 B.R. at 287; International Distribution Centers, 103 B.R. at 422; In re Texaco, Inc., 84 B.R. 893, 901; In re Lion Capital Group, 49 B.R. 163, 175 (Bankr. S.D.N.Y. 1985); Carla Leather, 44 B.R. at 466.

16. The Trustee submits that, absent settlement, the costs and expenses associated with prosecuting the adversary proceeding against Davenport will be significant as will the loss of the time value of the settlement amount. Even if the Court is confident that the Trustee would prevail, it can still approve the settlement if it is above the lowest point in the range of reasonableness. The Trustee submits that the proposed settlement meets this test.

17. The Trustee further submits that this settlement is the product of completely arms'-length negotiations. Settlement discussions proceeded in earnest over the course of several months. Each of the parties' positions was analyzed and evaluated. The final agreement reflects the efforts of both parties to resolve this matter, particularly the Trustee's effort to maximize the recovery for the estate.

18. As discussed above, this Court can and should give great weight to the informed judgment of the Trustee that the settlement is fair and equitable. On balance, the settlement benefits all parties. Settlement, at far lower cost and with funds in hand, provides the creditors of this estate with a direct and substantial benefit.

19. Relevant case law holds that it is also appropriate for this Court to consider the opinions of the counsel who support the settlement in reaching its conclusion. Counsel for

the Trustee are accomplished practitioners. The Trustee submits that counsel has carefully considered and balanced the merits of settlement versus continued litigation, and have concluded that this settlement is fundamentally fair and equitable in light of the totality of the circumstances present.

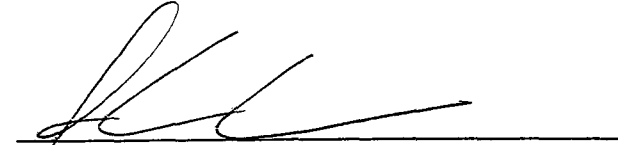
CONCLUSION

20. The settlement represents a fair and balanced compromise and resolution of the estate's claim against Davenport. As demonstrated herein, all of the criteria for approval of the proffered settlement have been met. Consideration of all relevant factors shows that there is no benefit to be gained from continuing the litigation. The creditors of this estate will realize immediate and tangible benefits through settlement, and their paramount interests will thus be best served. The Trustee proffers compelling and sound reasons for accepting this settlement as being in the best interests of the creditors of this estate. For all of the reasons discussed herein, the Trustee strongly recommends that the Court approve the settlement, and that the Court enter an order, substantially in the form annexed hereto.

WHEREFORE, the Trustee respectfully requests that this Court enter an order approving the compromise and settlement of Adversary Proceeding No. 03-05111, together with such other, further, and different relief as this Court deems just, proper, and equitable under the circumstances.

BARBARA H. KATZ, CHAPTER 11 TRUSTEE

By



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EXHIBIT A

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION**

<hr/>	:	
In re:	:	Chapter 11
	:	
COMMCO TECHNOLOGY, L.L.C. d/b/a BROADCASTREAM COMMUNICATIONS CORPORATION,	:	Case No. 00-51488 (AHWS)
	:	
Debtor.	:	
<hr/>	:	
	:	
BARBARA H. KATZ, CHAPTER 11 TRUSTEE,	:	Adv. Pro. No. 03-05111
	:	
Plaintiff	:	
	:	
v.	:	
	:	
DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P. a/k/a Davenport, Evans, :	:	
Hurwitz & Smith,	:	
Defendant.	:	
<hr/>	:	

STIPULATION OF SETTLEMENT

WHEREAS, on December 18, 2000, Commco Technology, L.L.C. d/b/a Broadstream Communications Corporation filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"); and

WHEREAS, the United States Bankruptcy Court for the District of Connecticut authorized the appointment of Barbara H. Katz as Chapter 11 Trustee (the "Trustee") on November 20, 2002; and

WHEREAS, Commco had a business relationship with Davenport, Evans, Hurwitz & Smith, L.L.P. ("Davenport") whereby Davenport provided legal services to Commco; and

WHEREAS, Davenport filed a proof of claim on April 25, 2001 asserting a general unsecured claim against the Debtor in the amount of \$94,879.33 (Claim No. 32); and

WHEREAS, the Trustee commenced an adversary proceeding against Davenport to recover alleged preferential transfers in the amount of \$67,708.11; and

WHEREAS, the Trustee and Davenport have agreed to settle this matter to avoid the costs and risk associated with litigating the issues set forth in the adversary proceeding.

NOW, THEREFORE, in consideration of the foregoing and the covenants hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Trustee and Davenport agree to resolve the claims set forth in the adversary proceeding as follows:

1. Davenport agrees to pay and remit to the Trustee the sum of \$35,000.00 (the "Settlement Amount"), payable on or before ten (10) days from the date the Court approves this Stipulation pursuant to Bankruptcy Rule 9019. The payment should be made payable to Barbara H. Katz, Chapter 11 Trustee and should be sent to Joshua W. Cohen, Pepe & Hazard LLP, 30 Jelliff Lane, Southport, Connecticut 06890-1436.

2. In connection with this Settlement, Davenport waives, relinquishes and withdraws, without the need for further action on behalf of the parties, all claims against the Debtor and the Trustee, including, but not limited to, those for (i) the amount paid pursuant to this Stipulation which might otherwise be allowable pursuant to Bankruptcy Code Section 502(h), and (ii) any and all other claims it has or could have asserted in this

bankruptcy case, including, but not limited to, its general unsecured claim in the amount of \$94,879.33.

3. Except as otherwise provided herein, the Trustee and the Debtor's estate hereby waive and relinquish any and all claims against Davenport.

4. The Stipulation and the documents referred to herein constitute the entire agreement among the parties with regard to the subject matter hereof. This Stipulation may not be modified or amended except in writing, signed by all signatories hereto, or their successors in interest.

5. This Stipulation shall be interpreted and construed in accordance with the provisions of the Bankruptcy Code and, where not inconsistent, the laws of the State of Connecticut.

6. Any dispute, action or proceeding arising out of or relating to this Stipulation shall be within the exclusive jurisdiction of the Bankruptcy Court.

7. This Stipulation may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same document.

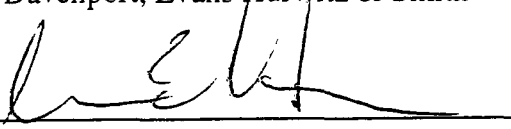
8. The undersigned represent and warrant that they have full authority to execute this Stipulation on behalf of their respective parties, and that the respective parties have full knowledge of and have consented to this Stipulation.

9. Upon clearance of payment for the Settlement Amount, the Trustee shall file with the Court a Notice of Dismissal and shall provide a copy to Davenport.

DAVENPORT, EVANS, HURWITZ & SMITH,
L.L.P. a/k/a Davenport, Evans Hurwitz & Smith

Dated: 3/22/04

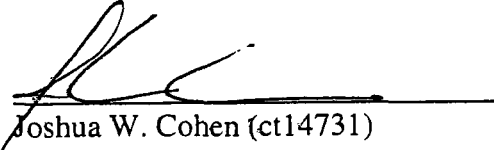
By: _____


Robert E. Hayes, Esq.
Davenport, Evans, Hurwitz & Smith, L.L.P.
206 West 14th Street
P.O. Box 1030
Sioux Falls, SD 57101-1030

BARBARA H. KATZ,
CHAPTER 11 TRUSTEE, PLAINTIFF

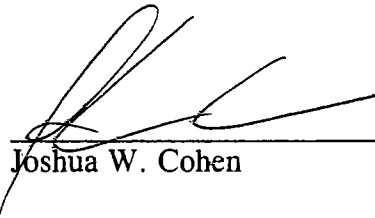
Dated: 3/30/04

By: _____


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CERTIFICATE OF SERVICE

I, Joshua W. Cohen, hereby certify that copies of the foregoing Motion of Barbara H. Katz, Chapter 11 Trustee for Entry of an Order Pursuant to Federal Rule of Bankruptcy Procedure 9019 Compromising and Settling Avoidance Action Against Davenport, Evans, Hurwitz & Smith, L.L.P. with exhibits and proposed order were served by first-class U.S. mail, postage pre-paid, on April 9, 2004 upon the parties shown below and also listed on the attached Service List.



Joshua W. Cohen

Office of the U.S. Trustee
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Florida Public Service Commission
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Form 499
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Whippany NJ 07981

Franchise Tax Board
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
BRIDGEPORT DIVISION

In re:	:	
	:	Chapter 11
	:	
COMMCO TECHNOLOGY, L.L.C. d/b/a	:	Case No. 00-51488 (AHWS)
BROADCASTREAM COMMUNICATIONS	:	
CORPORATION,	:	
Debtor.	:	
	:	
BARBARA H. KATZ, CHAPTER 11	:	Adv. Pro. No. 03-05111
TRUSTEE,	:	
	:	
Plaintiff	:	
	:	
vi.	:	
	:	
DAVENPORT, EVANS, HURWITZ &	:	
SMITH, L.L.P. a/k/a Davenport, Evans,	:	
Hurwitz & Smith,	:	April 9, 2004
Defendant.	:	
	:	

**ORDER PURSUANT TO FED.R.BANKR.P. 9019
APPROVING THE SETTLEMENT AND
COMPROMISE OF AVOIDANCE ACTION AGAINST
DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.**

Upon the motion of Barbara H. Katz, Chapter 11 Trustee (the "Trustee"), by her attorneys Pepe & Hazard LLP, for approval of a settlement pursuant to Fed.R.Bankr.P. 9019(a); the motion having been served upon those parties required to be served; the Trustee having commenced an adversary proceeding by filing a complaint against Davenport, Evans, Hurwitz & Smith, L.L.P. a/k/a Davenport, Evans, Hurwitz & Smith ("Davenport"), which sought, *inter alia*, to recover preferential payments totaling \$67,708.11 to Davenport; the parties having negotiated a settlement of their dispute whereby, in exchange for the payment

by Davenport to the Trustee of the sum of \$35,000.00 to be paid in a single installment within ten (10) days of entry of an order authorizing the settlement and compromise of the adversary proceeding along with the waiver of various claims by Davenport, the Trustee will dismiss said adversary proceeding in accordance with the Stipulation of Settlement attached to the motion as Exhibit A; the Trustee having represented to the Court that both the Trustee and Davenport carefully have considered and balanced the merits of settlement as against the costs and vagaries of litigation and have concluded that the proposed settlement is fair and equitable in light of the circumstances present, and having further represented to the Court that the settlement is above the lowest point in the range of reasonableness and in the best interests of the creditors of this estate and all other parties in interest; the Court having determined based upon the motion and the representations made therein and during the hearing that the settlement is fair, equitable and in the best interests of the Debtor's unsecured creditors and that the settlement rises above the lowest point in the range of reasonableness; no objections having been filed or interposed; no adverse interest having been represented; and good and sufficient cause appearing therefor; it is

ORDERED, that pursuant to Bankruptcy Rule 9019(a), the motion of the Trustee be, and it hereby is, granted in its entirety; and it is further

ORDERED, that pursuant to Bankruptcy Rule 9019(a), the settlement as described above and in the motion be, and it hereby is, approved, with the terms of the settlement incorporated in full into this Order; and it is further

ORDERED, that the Trustee and Davenport be, and they hereby are, authorized and empowered to take any and all actions necessary to effectuate the terms of the settlement.

Dated: Bridgeport, Connecticut
April _____, 2004

The Honorable Alan H.W. Shiff
United States Bankruptcy Judge