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FPSC - COMMISSION CLERK

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

IN RE:	§	
UPH HOLDINGS, INC.	§	CASE NO. 13-10570
PAC-WEST TELECOMM, INC.	§	CASE NO. 13-10571
TEX-LINK COMMUNICATIONS, INC.	§	CASE NO. 13-10572
UNIPOINT HOLDINGS, INC.	§	CASE NO. 13-10573
UNIPOINT ENHANCED SERVICES, INC.	§	CASE NO. 13-10574
	§	
UNIPOINT SERVICES, INC.	§	CASE NO. 13-10575
NWIRE, LLC	§	CASE NO. 13-10576
PEERING PARTNERS COMMUNICATIONS, LLC	§	CASE NO. 13-10577

**DEBTORS.**

EIN: 45-1144038; 68-0383568; 74-2729541; 20-3399903; 74-3023729; 38-3659257; 37-1441383; 27-2200110; 27-4254637

6500 RIVER PL. BLVD., BLDG. 2, # 200  
AUSTIN, TEXAS 78730

**CHAPTER 11**

**JOINTLY ADMINISTERED UNDER  
CASE NO. 13-10570**

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**MOTION FOR AN ORDER PURSUANT TO FED. R. BANKR. P. 9019 AUTHORIZING AND APPROVING HIGH-LOW ARBITRATION AND SETTLEMENT AGREEMENT BETWEEN TRUSTEE AND ITALK GLOBAL COMMUNICATIONS, INC. OF PENDING STATE COURT LAWSUIT**

**This pleading requests relief that may be adverse to your interests.**

**If no timely response is filed within twenty-one (21) days from the date of service, the relief requested herein may be granted without a hearing being held.**

**A timely filed response is necessary for a hearing to be held.**

TO THE HONORABLE U.S. BANKRUPTCY JUDGE TONY M. DAVIS:

COME NOW Lowell Feldman, Liquidating Trustee of the UPH Liquidating Trust (the "Trustee") and hereby moves this Court for entry of an order pursuant to FED. R. BANKR. PRO. 9019, authorizing the Trustee to enter into a High-Low Arbitration and Settlement Agreement

with iTalk Global Communications, Inc. (“iTalk”) and approving such settlement agreement as set forth in this motion (the “Motion”) for the resolution of issues between the Debtors and the Defendant at issue in the pending lawsuit styled *Lowell Feldman, as Liquidating Trustee of the UPH Liquidating Trust v. iTalk Global Communications, Inc.*, Cause No. D-1-GN-16-003884, in the 201st Judicial District Court of Travis County, Texas (the “State Court Lawsuit”). In support of the Motion, the Trustee respectfully represents as follows:

**I. BACKGROUND FACTS AND EVENTS**

1. On March 28, 2013, (the “Petition Date”), the Debtors filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (“Bankruptcy Code”).

2. On March 27, 2014, the Bankruptcy Court entered its Findings of Fact, Conclusions of Law, and Order Confirming Debtors’ Chapter 11 Plan of Reorganization (“Confirmation Order”) [Dckt. No. 842]. The Confirmation Order confirmed the Debtors’ Chapter 11 Plan, and among other things, approved the Debtors’ selection of Lowell Feldman as the Liquidating Trustee of the UPH Liquidating Trust, created under the Plan. *See* Confirmation Order, p. 22. Among other things, the Plan empowered the Trustee to object to proofs of claims filed in these bankruptcy cases. The Plan also empowered the Trustee to pursue all causes of action and to investigate any potential causes of action. *See* Plan, § 6.4.4.

3. Prior to the Petition Date, the Debtor UniPoint Enhanced Services, Inc. d/b/a Point One (“UES”) entered into a Master Services Agreement (“MSA”) with iTalk. The MSA set forth the terms on which iTalk agreed to purchase certain services from the Debtor UES on a wholesale basis, and on which the Debtor UES agreed to provide services to iTalk. The MSA provided that iTalk agreed to pay any applicable taxes and USF (Universal Service Fund) charges to be collected from iTalk’s retail customers. The MSA also provided that iTalk would indemnify the Debtor UES for any applicable taxes.

4. iTalk defaulted under the MSA and failed to pay the Debtor UES certain amounts for sales taxes in Texas that constitute Additional Charges under the MSA. Consequently, prior to the Petition Date, the Debtor UES filed suit in Travis County, Texas, against iTalk, thus initiating Cause No. D-1-GN-12-001909, *Unipoint Enhanced Services, Inc. d/b/a PointOne v. iTalk Global Communications, Inc.*, in the 261st Judicial District, Travis County, Texas. As of the Petition Date, that lawsuit was still pending, was eventually stayed, but as of the Effective Date of the Plan, had been dismissed without prejudice.

5. In their bankruptcy case, the Debtors scheduled the Comptroller as holding a claim in the amount of \$295,308.00. The Comptroller filed certain claims that totaled \$572,503.63, including a claim against UniPoint Holdings, Inc., in the amount of \$448,752.42, as a priority and secured claim, Claim No. 4 in Case No. 13-10573 (the "Comptroller Claim").

6. On October 29, 2015, the Trustee filed his Objections to Claims Filed by the Texas Comptroller of Public Accounts ("Objection to Comptroller Claims"). On November 19, 2015, the Comptroller filed its Response to the Trustee's Objection [Dckt. No. 1256]. In the Response, the Comptroller asserted that the Comptroller Claim arose from sales and use tax that the Debtor Unipoint Holdings, Inc. incurred, and was based upon an audit of its books and records. *See* Response, ¶ 7. In addition, the Comptroller also stated that Debtor Unipoint Holdings signed a payment agreement with the Comptroller in August 2012, in which it agreed that it owed a liability of \$482,885.67 as of August 21, 2012, (the "Tax Settlement Agreement"). *See* Response, ¶ 7.

7. Pursuant to the Tax Settlement Agreement, the Debtor Unipoint Holdings agreed that it owed a liability of \$482,885.67 to the Comptroller. Importantly, in conjunction with the Tax Settlement Agreement, the Comptroller was aware that the Debtor Unipoint Holdings had

sued iTalk to enforce iTalk's liability under the MSA for the same unpaid sales taxes that arose from the transactions contained in the audit the subject of the Tax Settlement Agreement. Indeed, the Comptroller agreed that if it recovered any of the taxes in issue against iTalk, it would apply those recoveries against amounts that Unipoint Holdings owed under the Tax Settlement Agreement. Indeed, the Tax Settlement Agreement explicitly included such condition as a provision thereof, providing that "[s]hould the [Comptroller] recover from iTalk any of the taxes due related to this audit period such amounts would be credited to [Debtor Unipoint Holdings]." *See Ex. B, p. 3.*

8. Based upon the foregoing, and the Trustee's investigation, the Trustee sued iTalk in this Court, thus initiating Adversary Proceeding No. 16-01024. iTalk filed its Motion to Dismiss Adversary Complaint Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) [Adv. Dckt. No. 3], which the Court granted based upon its finding of a lack of jurisdiction stemming from the prevalence of state law claims, and the status of administration of these cases.

9. Following this Court's dismissal, on August 19, 2016, the Trustee filed his Original Petition, thus initiating the State Court Lawsuit in Travis County district court (the "State Court") for breach of contract and for indemnity. In the State Court Lawsuit, the parties agreed on a form scheduling order and propounded several rounds of written discovery; iTalk also made a jury demand.

10. On February 16, 2017, iTalk filed its Motion for Summary Judgment (the "MSJ"), arguing that the statute of limitations barred all of the Trustee's claims. The Trustee opposed the MSJ. The State Court conducted a hearing on the MSJ and on May 24, 2017, the Court denied the MSJ.

11. By agreement, the parties participated in a mediation with Bert Pluymen on July 11, 2017. Following the mediation, the parties agreed to enter into a High-Low Arbitration and Settlement Agreement (the “Agreement”).<sup>1</sup>

## **II. RELIEF REQUESTED**

12. By this Motion, the Debtors seek an order of this Court authorizing the Trustee to enter into the Agreement, and approving such Agreement for the resolution of the issues between the Trustee and iTalk in the State Court Lawsuit.

## **III. THE SETTLEMENT**

13. The Agreement represents a resolution of the State Court Lawsuit, and significantly limits potential litigation costs. Under the Agreement, the Parties agree to irrevocably submit to a binding arbitration hearing (the “Arbitration”), and the Agreement sets forth the parameters of both the award (the “Arbitration Award”) and the scope of the evidentiary record. Under the Agreement, the Parties have agreed that the arbitrator shall only issue an award that provides for either a “HIGH” figure of \$450,000.00, or a “LOW” figure of \$150,000.00. *See* Agreement, ¶ 3. The Agreement further delineates that the only issue for decision in Arbitration is whether the applicable state of limitations bars the Trustee’s claims in the State Court Lawsuit. To this end, the Agreement provides that if the arbitrator finds that the applicable statute of limitations bars the Trustee’s claims either in full or in part, the arbitrator shall issue a written arbitration award in the “low” amount, but if the arbitrator finds that the applicable statute of limitations does not bar the Trustee’s claims, the arbitrator shall issue a written arbitration award in the “high” amount.

14. The Agreement provides that the Parties will to file an Agreed Dismissal after this Court’s approval of the Agreement. *See* Ex. 1, ¶ 5. In addition, the Agreement establishes a

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<sup>1</sup> The Agreement contains a confidentiality provision, and thus is not attached to this Motion.

mandatory Payment Schedule, pursuant to which the Defendant is to pay the Arbitration Award. Ex. 1, ¶ 6. The Payment Schedule requires the Defendant to pay half (50%) of the Arbitration Award within ten (10) business days of issuance of the Arbitration Award, and requires the Defendant to pay the balance no later than January 15, 2018, or ninety (90) days from the Arbitration Award, whichever is later. Ex. 1, ¶ 6.

15. Upon the Defendant's default, the Agreement endows the Trustee with the unencumbered right to file and seek entry of one of two agreed judgments, either in the amount of \$300,000, (representing twice the amount of the "LOW" amount), or in the amount of \$900,000, (representing twice the amount of the "HIGH" amount) (each, an "Agreed Judgment"). See Ex.1, ¶ 8. In addition, the Agreement provides that service of all petitions, citations, summons, and other process in any lawsuit, action, or proceeding against Defendant for breach of the Agreement and/or entry of an Agreed Judgment may be upon Defendant's counsel of record in the State Court Lawsuit. See Ex. 1, ¶ 9.

16. Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") grants the Court authority to approve the settlement of claims and controversies after notice and a hearing. Specifically, Rule 9019 provides in pertinent part that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The Third Circuit has emphasized that "to minimize litigation and expedite the administration of a bankruptcy estate, '[c]ompromises are favored in bankruptcy.'" *In re Martin*, 91 F. 3d 389, 393 (3d Cir. 1996) (citations omitted). In addition, courts agree that the approval of a proposed compromise and settlement is committed to the sound discretion of the bankruptcy court. See *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Rivercity v. Herpel (In re Jackson Brewing Co.)* 624 F.2d 599, 602-03 (5th Cir. 1980) (decided under

Bankruptcy Act). Settlements are considered a “normal part of the process of reorganization” and a “desirable and wise method of bringing to a close proceedings otherwise lengthy, complicated and costly.” *Jackson Brewing*, 624 F.2d at 602 (citations omitted).

17. Before approving a settlement under Rule 9019, a court must determine whether “the compromise is fair, reasonable, and in the interests of the estate.” *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) (quoting *In re Louise's*, 211 B.R. 798, 801(D. Del. 1997)). To so determine court must assess the value of the claim that is being settled and balance it against the value to the estate of the approval of the settlement. *Martin*, 91 F.3d at 393. In striking this balance, the court should consider the following factors:

- a. The probability of success in the litigation;
- b. The complexity, expense, and likely duration of the litigation;
- c. The possibilities of collecting on any judgment that might be obtained;
- d. All other factors relevant to making a full and fair assessment of the wisdom of the proposed compromise; and
- e. Whether the proposed compromise is fair and equitable to the Debtors, their creditors, and other parties in interest.

*See Protective Comm. For Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968); *See also Martin*, 91 F.3d at 393.

18. Basic to the process of evaluating proposed settlements is “the need to compare the terms of the compromise with the likely rewards of litigation.” *TMT Trailer Ferry*, 390 U.S. at 425. Generally, the role of the bankruptcy court in evaluating a proposed settlement is not to decide the issues in dispute, but rather, to determine whether the settlement is fair and equitable as a whole. *Id.* at 424; *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). In addition, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. *See Connecticut Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage*

*Corp.*), 68 F.3d 914, 917 (5th Cir. 1995). First, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Id.* Second, the court should consider “the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Id.* at 918 (citations omitted).

19. The Trustee believes that the Agreement meets the standards for approval of a compromise and settlement pursuant to Rule 9019, and is reasonable, fair, and equitable. Consistent with the Trustee’s fiduciary duty, the Agreement is in the best interest of the Debtors’ creditors and their estates. In deciding whether to enter into the Agreement, the Trustee has weighed the cost of further litigation, including the cost of depositions and additional discovery. The Trustee has also considered the costs of a jury trial, and the likelihood of ultimate recovery on any judgment in the State Court Lawsuit.

20. Additionally, the Trustee has considered the fact that he has largely concluded the administration of these cases, and resolution of the State Court Lawsuit should enable him to proceed to finalize administration of the estates. Moreover, the Agreement is the product of arms-length negotiations between the Trustee and the Defendant, resulting from a day-long mediation. Thus, the Trustee believes that approval of the Settlement Agreement is in the best interest of the Debtors’ estates and their creditors.

WHEREFORE, PREMISES CONSIDERED the Trustee respectfully requests that this Court grant the relief requested herein; that the Court permit the Trustee to enter into the Agreement; and grant such other and further relief to the Trustee as is just and proper.

Dated: August 18, 2017.

Respectfully submitted,

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By: /s/ Jennifer F. Wertz

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of August 2017, a true and correct copy of the foregoing has been served electronically via the Court's CM/ECF electronic notification system, and via United States mail, postage prepaid upon the following attached service list.

*/s/ Jennifer F. Wertz,* \_\_\_\_\_

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IN THE UNITED STATES BANKRUPTCY COURT  
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DEBTORS. § CHAPTER 11

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**ORDER AUTHORIZING AND APPROVING HIGH-LOW ARBITRATION AND SETTLEMENT AGREEMENT BETWEEN TRUSTEE AND ITALK GLOBAL COMMUNICATION, INC. PURSUANT TO FED. R. BANKR. PRO. 9019**

CAME ON FOR CONSIDERATION the Motion for an Order Pursuant to Fed. R. Bankr. Pro. 9019 Authorizing and Approving High-Low Arbitration and Settlement Agreement Between Trustee and iTalk Global Communications, Inc. of Pending State Court Lawsuit (“Motion”) that Lowell Feldman, Liquidating Trustee of the UPH Liquidating Trust (the “Trustee”) filed; and the Court having reviewed the Motion and considered the main elements of the Agreement (as defined in the Motion) finds good cause for the relief granted herein. It is therefore

ORDERED that the Motion is hereby granted in its entirety;

ORDERED that the Trustee is authorized to enter into the Agreement with iTalk Global Communications, Inc. (the “Defendant”); and

ORDERED that, pursuant to FED. R. BANKR. PRO. 9019, the Agreement is hereby approved.

###

**SUBMITTED BY:**

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By: /s/ Jennifer F. Wertz

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