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ATTORNEYS FOR UNIPOINT HOLDINGS, INC.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:	§	CHAPTER 11
	§	
VARTEC TELECOM, INC., ET AL	§	CASE NO. 04-81694-SAF-11
DEBTOR	§	(JOINTLY ADMINISTERED)

**UNIPOINT HOLDINGS, INC.'S MOTION
TO MODIFY THE DECEMBER 2, 2004 ADEQUATE PROTECTION
STIPULATION AND CONSENT ORDER OR, ALTERNATIVELY, TO
COMPEL ASSUMPTION/REJECTION OF EXECUTORY CONTRACT**

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT EARLE CABELL BUILDING, U.S. COURTHOUSE, 1100 COMMERCE STREET, DALLAS, TX 75242, BEFORE THE CLOSE OF BUSINESS ON SEPTEMBER 6, 2005, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Unipoint Holdings, Inc. ("Unipoint") and files this its Motion to
Modify the December 2, 2004 Adequate Protection Stipulation and Consent Order, or,

Alternatively, to Compel Assumption/Rejection of Executory Contract, and would respectfully show the Court as follows:

I.
JURISDICTION, VENUE & BASIS FOR RELIEF

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). The relief requested herein is pursuant to 11 U.S.C. §§ 105, 361, 363 and 365.

II.
FACTUAL BACKGROUND

2. On November 1, 2004 (the “Petition Date”), the Debtors each filed a voluntary petition (the “Bankruptcy Cases”) for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors-in-possession pursuant to Bankruptcy Code §§ 1107(a) and 1108. The Bankruptcy Cases are jointly administered in Case No. 04-81694. A creditors’ committee has been appointed.

3. Unipoint is an enhanced service provider that provides services and network management to the Debtor pursuant to a master services agreement dated April 16, 2002 (as amended, including all schedules, the “MSA”). The Debtors utilize Unipoint’s enhanced technology platform. Unipoint is both a pre-petition and post-petition creditor of the Debtor.

4. During the first days of the Bankruptcy Cases, several entities, including Unipoint, filed Motions and/or joinders in Motions requesting adequate protection pursuant to 11 U.S.C. § 361. On December 2, 2005, the Court entered that one certain Stipulation and Consent Order By and Among Certain Carriers and the Debtors Regarding Adequate Assurance/Adequate Protection of Future Payments (the “Carrier Consent Order”). Unipoint became subject to the Carrier Consent

Order pursuant to the Debtors' First Notice filed with the Court on or about December 17, 2004. As set forth herein, as a result of (i) the Debtors' sale of substantially all of its assets to Comtel Telecom Assets, L.P. and (ii) entry into a proposed Stipulation with the SBC Telcos (described herein), the provisions of the Carrier Consent Order are no longer sufficient to adequately protect Unipoint. Accordingly, Unipoint seeks additional adequate protection from that provided in the Carrier Consent Order.

5. Since before the Petition Date, the Debtor and Unipoint have been defendants in litigation commenced by certain SBC Telcos as plaintiffs pending in the federal district court for the Eastern District of Missouri, Case No. 4:04CV1303CEJ (E.D. Mo.) (the "Missouri Litigation"). In the Missouri Litigation, the SBC Telcos have sued to recover certain access charges they claim are owed by the Debtors and Unipoint. In addition, prior to the Petition Date, the Debtors commenced an FCC action relating to the SBC Telcos styled *Petition for Declaratory Ruling that VarTec Telecom, Inc. is not Required to Pay Access Charges* (August 20, 2004) (the "FCC Action"). The FCC Action constituted an important protection to Unipoint because it (1) assured Unipoint that Vartec was taking appropriate and timely action to have the FCC determine the issue and (2) assured Unipoint that Vartec was taking appropriate and timely action to bear its part of the expense and effort to determine the issue.

6. On June 17, 2005, the Debtors filed their Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances and for Related Relief. On July 29, 2005, this Court entered its Order (A) Approving this Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets) (the "Sale Motion"), seeking approval

for the sale of substantially all of their assets to Leucadia National Corporation, the stalking horse bidder, or a higher bidder.

7. At an auction held on July 25, 2005, Comtel Investments, LLC (“Comtel”) was the winning bidder. On July 27, 2005, this Court considered the Sale Motion. On July 29, 2005, this Court entered its Order (A) Approving this Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors’ Remaining Assets). Therein, the Court approved the sale of substantially all of the Debtors’ remaining assets to Comtel. Comtel Telecom Assets, L.P. (“Comtel Telecom”) is the assignee of Comtel. Comtel Telecom has entered into an Asset Purchase Agreement (the “APA”) with the Debtors.

8. Pursuant to a proposed stipulation (the “Stipulation”) between the Debtors, the SBC Telcos, Comtel Telecom and Rural Telephone Finance Cooperative (“RTFC”), the secured creditor, on the final closing date of the APA, mutual releases between and among the SBC Telcos and the Debtors shall become effective and, *inter alia*, the Debtors shall be dismissed with prejudice from the Missouri Litigation, leaving Unipoint as the sole solvent defendant therein. In addition, pursuant to the Stipulation, the FCC Action shall be withdrawn and the Debtors and Comtel have agreed that neither the Debtors nor Comtel Telecom shall re-assert the FCC Action.

9. The APA contemplates that Comtel Telecom shall provide management services to the Debtors for the supervision and management of the Debtors’ businesses through the Final Closing Date. To date, Unipoint has not heard directly from Comtel Telecom with respect to its anticipated use of Unipoint’s enhanced technology platform and the potential impact that such use may or will have on the Missouri Litigation. Moreover, the Debtors’ and Comtel’s agreement with SBC to dismiss the FCC Action and to not re-assert it has the effect of eliminating the Debtors’

defense to the Missouri litigation. Once the Debtors agree to delay or forego the FCC Action, it places additional delay and risk on Unipoint that the FCC will not finally pronounce the obvious the ultimate issue of whether local access charges are due for traffic transmitted across an ESP so that SBC will be precluded from using the AT&T decision as an anti-competitive wedge.

10. The primary beneficiary of the Sale Motion is, of course, RTFC. As of the Petition Date, the total alleged outstanding obligations to RTFC consisted of (i) a term loan of approximately \$154,000,000.00 and (ii) a revolving line of credit with a total commitment of \$70,000,000.00. Comtel's winning bid of \$82,100,000.00 obviously does not provide for payment in full of RTFC's alleged secured claims. Moreover, the various budgets negotiated by the Debtors and approved by the Bankruptcy Court relating to use of cash collateral and the obtaining of post-petition financing do not include amounts to indemnify and/or otherwise provide protection to Unipoint. Given the sale of substantially all assets, it may reasonably be anticipated that the Debtors' estates shall be administratively insolvent and that no administrative expense not specifically budgeted or carved-out will be payable. Thus, RTFC and Comtel shall benefit from the Debtors' use of Unipoint's enhanced services platform, leaving Unipoint to bear the risks of such continued use.

III. **ARGUMENT AND AUTHORITIES**

A. Request for Additional Adequate Protection

11. Pursuant to 11 U.S.C. §§ 105, 361, 363 and 365, Unipoint requests that the Court provide additional adequate protection with respect claims and charges related to the Debtors' use of Unipoint's enhanced technology platform as provided under the MSA. *Cf. In re Tudor Motor Lodge Assocs, L.P.*, 102 B.R. 936, 953-54 (Bankr. D. N.J. 1989) (recognizing the elasticity of adequate protection, "susceptible to differing applications over a wide range of factual situations,"

including non-debtor parties to executory contracts). As noted above, the Court has approved the APA which allows the Debtors to delay assumption or rejection of executory contracts pending the Final Closing. During that time period, Comtel Telecom shall manage and operate the Debtors assets. Pursuant to the proposed Stipulation, the Debtors are to be dismissed with prejudice from the Missouri Litigation. However, the claims asserted against Unipoint by the SBC Telcos in the Missouri Litigation are not resolved via the Stipulation, including claims which arise and relate to the Debtors' use of Unipoint's enhanced technology platform. Accordingly, although certain of the claims asserted in the Missouri Litigation against Unipoint are directly related to the Debtors' use of Unipoint's enhanced technology platform, Unipoint should not have to bear the risks and burdens of such use without the Debtors escrowing funds in an amount to be determined by the Court after notice and hearing, on a monthly basis, for indemnification of Unipoint as required under the MSA. Prior to the Debtors' entry into the APA, Unipoint provided certain services relating to Unipoint's enhanced technology platform. Based upon Comtel Telecom's management services under the APA, Unipoint will have little input or knowledge regarding the Debtors' traffic.

12. To provide Unipoint with adequate protection during the period of time prior to assumption or rejection of the MSA, the Debtors should be required to escrow funds, on a monthly basis in an amount to be determined by the Court after notice and hearing, to indemnify Unipoint for any and all claims, damages, charges and/or fees which Unipoint may incur as a result of the Debtors' use of Unipoint's enhanced technology platform and any litigation brought or continued by the SBC Telcos and/or any other person or entity resulting from that use until the MSA is either assumed or rejected. Such escrowed funds should be in an amount sufficient to provide indemnification of, but not be limited to, any damages or charges imposed in the Missouri Litigation and attorneys' fees going forward.

13. The MSA expressly provide for such indemnification and termination. Section 8.3

provides, in relevant part:

[Debtor] shall indemnify and hold harmless [Unipoint] and any third party or affiliated provider, operator or maintenance/repair contractor of facilities employed in connection with the provision of Services or Ancillary Service (all of which shall be referred to as “Providers”) against and from any court, administrative or agency action, suit or similar proceeding, whether civil or criminal, private or public, brought against Providers arising out of or related to the contents transmitted hereunder (over [Unipoint]’s network or otherwise) including, but not limited to claims, actual or alleged, relating to any violation of copyright law, export control laws, failure to procure Consents, failure to meet governmental or other technical broadcast standards, or that such transmission contents are libelous, slanderous, and invasion of privacy, or otherwise unauthorized or illegal. **[Unipoint] may terminate or restrict any transmissions over the network if, in its reasonable judgment, (a) such actions are reasonably appropriate to avoid violation of applicable law; or (b) there is a reasonable risk that criminal, civil, or administrative proceedings or investigations based upon the transmissions contents shall be instituted against Providers. [Debtors] agrees not to use Services or Ancillary Service for any unlawful purpose, including without limitation any use, which constitutes or may constitute a violation of any local, state or federal obscenity law.**

MSA § 8.3 (emphasis added). Section 8.4 of the MSA provides additional grounds for such indemnity. It states:

Each party shall indemnify, defend and hold harmless the other party, its members, shareholders, affiliates, directors, officers, employees, agents, successors, and assigns (collectively, “Assigns”), from any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any kind, including, without limitation, reasonable attorneys’ fees and other disbursements (collectively, “Damages”), arising out of or sustained in any claim, suit, proceeding or action commenced by any third party based upon the indemnifying Party’s, or its Assigns’, gross negligence or willful misconduct in connection with the performance of its obligations and duties under this Agreement. The indemnified Party shall promptly notify the other Party in writing of any such claim, suit, proceeding or action. This Section 8.4 shall survive termination of this Agreement.

MSA § 8.4.

14. Based upon the foregoing, Unipoint requests, as adequate protection, that the Debtors be required to escrow funds in an amount sufficient to provide payment of Unipoint's indemnity claims which, in addition, should be granted an administrative priority under 11 U.S.C. § 503(b) and included in any operating budget under the .

15. “A debtor-in-possession which elects to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract’ must, nevertheless, pay for the reasonable value of those services.” *In re Travelot Co.*, 286 B.R. 462, 466 (Bankr. S.D. Ga. 2002) (quoting *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188, (1984). That value, “depending on the circumstances of a particular contract, may be what is specified in the contract.” *Bildisco*, 465 U.S. at 531, 104 S. Ct. at 1199; *see also Goldin v. Putnam Lovell, Inc. (In re Monarch Capital Corp.)*, 163 B.R. 899, 907-908 (Bankr. D. Mass. 1994) (non-debtor party to pre-petition contract was entitled to reasonable value of services actually conferred on debtor during post-petition, pre-assumption/rejection period).

16. Likewise, in the case of *In re StarNet, Inc.*, 355 F.3d 634 (7th Cir. 2004), the 7th Circuit recently stated

[n]either § 365(a) nor anything else in bankruptcy law entitles debtors to more or different services, at lower prices, than their contracts provide. Section 365(a) gives debtors a right to walk away before the contract’s end (with the creditor’s entitlement converted to a claim for damages), not a right to obtain extra benefits without paying for them. In the main, and here, bankruptcy law follows non-bankruptcy entitlements.

Id. at 637 (citing *Bildisco*, 465 U.S. 513, 79 L. Ed. 2d 482, 104 S. Ct. 1188; *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 20, 147 L. Ed. 2d 13, 120 S. Ct. 1951 (2000); *Butner v. United States*, 440 U.S. 48, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979)). The 10th Circuit has expressed similar views in *Country World Casinos, Inc. v. Tommyknocker Casino Corp. (In re Country World Casinos, Inc.)*, 181 F.3d 1146 (10th Cir. 1999), in upholding “the principle that a party to a contract cannot claim

its benefits where he is the first to violate its terms.’” *Id.* at 1150 (quoting *Western Plains Serv. Corp. v. Ponderosa Dev. Corp.*, 769 F.2d 654, 657 (10th Cir. 1985)). *See also*, *Cajun Elec. Members Comm. v. Mabey (In re Cajun Elec. Power Coop., Inc.)*, 230 B.R. 693, (Bankr. M.D. La. 1999), (assumption not permitted where structure of ongoing performance is breach of agreement).

17. Here, several things will happen that upend the rationale and plain language of the Master Services Agreement. First, the Debtors are required not to put traffic onto Unipoint’s enhanced platform that would subject Unipoint to liability or attorneys’ fees defending even specious claims. Second, Vartec is required to indemnify Unipoint for any liability or attorneys’ fees occasioned by such conduct. Prior to the approval of Comtel as the purchaser and the entry by the Debtors and Comtel into the Stipulation, Unipoint was one of three defendants. Unipoint will be the only remaining solvent defendants subject to its ability to plead in Comtel and/or Vartec as third party defendants going forward. Indeed, absent bankruptcy, the MSA gives Unipoint the choice of requesting indemnification or terminating its services if it was in doubt of the Debtors’ ability to indemnify it. Because the Debtors are released from liability, they have no further incentive to cooperate with Unipoint in avoiding local access charges prior to the Final Closing under the APA. Unipoint’s contract requires that Unipoint be indemnified for any such charges. The Debtors and the RTFC cannot profit from Unipoint’s services without shouldering the corresponding burden of indemnification as an administrative expense, in other words, if the estate is to benefit from the MSA, it must comply with all of its terms, not just some of them.

18. The Carrier Consent Order was negotiated and entered in the early days of the case and, given the sale of substantially all of the Debtors’ assets, no longer provides sufficient protection to Unipoint. By its terms, the Carrier Consent Order merely provides a invoicing and “true-up” mechanism for the Debtors and their carriers or service providers for post-petition service

charges. The Carrier Consent Order does not contemplate a sale of all assets by the Debtors, or the type of litigation claims which may now be incurred by Unipoint as a result of the sale and the proposed Stipulation. Unipoint requests that the Carrier Consent Order be supplemented to provide Unipoint with the additional adequate protection set forth herein.

B. Motion to Compel Assumption or Rejection

19. In the alternative to Unipoint being provided adequate protection in the form of escrowing funds sufficient to fund any administrative claim for indemnification, Unipoint requests that the Debtors be required to assume or reject the MSA. Under the standards of determining what constitutes a reasonable time to assume or reject under section 365(d)(2), the court should consider: (i) the damage the non-debtor will suffer beyond the compensation available under the Bankruptcy Code; (ii) the importance of the contract to the debtor's business and reorganization; (iii) whether the debtor has had sufficient time to appraise its financial situation and the potential value of its assets in formulating a plan; and (iv) whether exclusivity has terminated. *Theater Holding Corp. v. Mauro*, 681 F.2d 102, 105-06 (2d. Cir. 1982); *In re Hernandez*, 287 B.R. 795, 806 (Bankr. D. Ariz. 2002). Under these factors, given the Debtors' likely administrative insolvency and the sale of substantially all of its assets to Comtel, and given the undue risks which are being placed upon Unipoint as described herein, requiring assumption or rejection at this time is entirely appropriate. *See, e.g., In re Templeton*, 154 B.R. 930, 933 (Bankr. W.D. Tex. 1993) (creditor suffering an economic loss warranted assumption or rejection); *accord In re Texas Import Co.*, 360 F.2d 582, 584 (5th Cir. 1966) (creditor may ask court to compel assumption or rejection).

20. Under the terms of the APA, 5.11(c), risk of administrative claims for assumed contracts shifts to the Buyer. Under these terms, at any time prior to Final Closing, the Buyer may designate contracts to be assumed, and, upon assumption, the Buyer takes full responsibility for any

cure costs and liability. In addition, the terms of the MSA are relatively low-risk term permitting termination of services on relatively short notice. As such, assumption would not pose an undue risk on the estate compared to the risk being borne by Unipoint.

WHEREFORE, PREMISES CONSIDERED, Unipoint Holdings, Inc. respectfully requests that after notice and hearing, the Carrier Consent Order be supplemented to provide additional adequate protection to Unipoint as described herein pursuant to 11 U.S.C. §§ 105, 361, 363 and 365, or, in the alternative, to require the Debtors to assume or reject the MSA, and for any such other and further relief to which Unipoint may be justly entitled.

Respectfully submitted,

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By: /s/ Kell C. Mercer

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ATTORNEYS FOR UNIPOINT
HOLDINGS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent, via ECF (as indicated) or United States first-class mail, to all parties listed on the attached Service List, on this 17th day of August, 2005.

/s/ Kell C. Mercer
Kell C. Mercer