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**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)

**LIMITED OBJECTION TO MOTION FOR INTERIM AND FINAL ORDERS (I)
AUTHORIZING THE DEBTORS TO USE CASH COLLATERAL, (II) AUTHORIZING THE
DEBTORS TO INCUR POST-PETITION FINANCING ON AN INTERIM AND FINAL BASIS
WITH SUPERPRIORITY OVER ADMINISTRATIVE EXPENSES AND SECURED BY
SENIOR PRIMING LIENS, (III) SCHEDULING A FINAL HEARING AND ESTABLISHING
NOTICE REQUIREMENTS, AND (IV) GRANTING RELATED RELIEF [DOCKET #32]**

COMES NOW Unipoint Holdings, Inc. (“Unipoint”), a creditor of the above-named Debtor, and hereby files this its Limited Objection to the above-captioned debtors’ (the “Debtors”) Motion for Interim and Final Orders (i) Authorizing the Debtors to Use Cash Collateral, (ii) Authorizing the Debtors to Incur Post-Petition Financing on an Interim and Final Basis with Superpriority Over Administrative Expenses and Secured by Senior Priming Liens, (iii) Scheduling a Final Hearing and Establishing Notice Requirements, and (iv) Granted Related Relief [Docket # 34] (the “DIP Loan Motion”). In support thereof, Unipoint respectfully states as follows:

Summary

1. Unipoint is a provider of enhanced telecommunications services under the name of PointOne. Unipoint is both a pre-petition and post-petition creditor and anticipates that the Debtors will continue to use its services.

2. According to the terms of the DIP Loan Motion, the Debtors propose to grant to Rural Telephone Finance Corporation (“RTFC”), as security for the DIP financing described therein, the following: (a) a lien and security interest in all of the Obligors’ Pre-Petition Collateral subject only to any existing, valid, enforceable offset rights and liens prior to the Lender on the Pre-Petition Collateral; and (b) a lien and security interest in all of the Obligors’ Collateral. The DIP Loan Motion further provides that the priority of the liens and security interests proposed to be granted under the Financing Order will be: (a) under Bankruptcy Code § 364(c)(2), a first priority lien in assets no otherwise encumbered by a valid perfected lien; (b) under Bankruptcy Code § 364(d)(1), a “first priority, senior, perfected priming lien upon all of the Obligors’ right, title, and interest in, to, and under the Pre-Petition Collateral; and (c) under Bankruptcy Code § 364(c)(3), a second priority junior lien upon all of the Obligors right, title and interest under all Collateral. Further, the DIP Loan Motion purports to cause the bankruptcy estates to waive surcharge rights under 11 U.S.C. § 506(c).

Argument

A. Waiver of 506(c) Surcharge Rights by the Estates is not Appropriate

3. The Section 506(c) surcharge wavier provision should not be granted. All related provisions should be stricken from any order granting the DIP Loan Motion. Neither the Debtors nor RTFC cite any authority in the DIP Loan Motion supporting a waiver of Section 506(c) surcharge rights. Allowing such a waiver would have the likely result of preventing the Debtors’

(or a subsequent trustee's) ability to properly administer the estate. Moreover, the waiver could allow the lender an enhanced recovery by allowing it to improperly benefit from non-debtor parties' goods and services.

4. In this District, the "Attorney Checklist Concerning Motions and Orders Pertaining to Use of Cash Collateral and Post-Petition Financing" notes at section (3)(f) that section 506(c) waivers are "generally not favored by Bankruptcy Courts in this District."

5. Other courts have disfavored attempted section 506(c) waivers. For example, in *In re Willingham Investments, Inc.*, 203 B.R. 75, 79 (Bankr. M.D.Tenn. 1996), the court refused to read a cash collateral order to "prohibit the payment of § 506(c) expenses" noting that such a reading was "nonsensical and disingenuous in light of [the creditor's] consent to the payment of post petition operating expenses to keep the [debtor's] doors open for business and the payment of Trustee's fees and expenses." In *In re Brown Brothers, Inc.*, 136 B.R. 470, 474 (W.D. Mich. 1991), the cash collateral order provided in part that "[t]he security interest of [the secured creditor] in the Debtor's assets shall not be subject to (a) surcharge under § 506(c) of the Bankruptcy Code" The court explained that the aim of this provision was to "immunize [the secured creditor] from surcharge payment obligations under 11 U.S.C. § 506(c) [and that] [s]uch a provision is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal."

6. In *In re Ridgeline Structures, Inc.*, 154 B.R. 831, 832 (Bankr. D.N.H. 1993), the court had for consideration, a motion for use of cash collateral. The court held that a stipulation, related to the motion, between the FDIC, which was a secured creditor of the debtor, and the debtor that provided that "no expense of administration [would] be charged against the secured party under § 506(c) no matter what action, inaction, or acquiescence by FDIC might occur ... is

against public policy and unenforceable per se.” The court went on to add that it was “not authorized to and never would insulate a party from the consequences of their conduct no matter how egregious.” *Id.*

B. The Proposed DIP Loan Violates Tex. Bus. & Comm. Code § 9-404 & 11 U.S.C. § 364(d)(1)(B)

7. Additionally, although the DIP Loan Motion appears to provide an exception for the exercise of offset rights as to pre-petition collateral, no similar provision exists as to other collateral. The absence of an exception for offset with respect to all collateral directly impacts Unipoint’s rights under its agreements with the Debtors. This has a direct impact upon Unipoint’s ability to provide post-petition services to the Debtors.

8. To the extent the liens and other protections proposed to be granted to RTFC would be superior to Unipoint’s rights under its contractual agreements with the Debtors, Unipoint would not be adequately protected. Specifically, if any of the liens and other protections proposed to be granted to RTFC in the Financing Motion would have an adverse effect upon Unipoint’s rights under its agreements with the Debtors, including its right to deduct, retain, setoff or recoup amounts due to Unipoint from amounts that might otherwise be payable by Unipoint, such provisions would be contrary to Tex. Bus. & Comm. Code § 9-404 and would violate Bankruptcy Code § 364(d)(1)(B).

9. Based upon each of the foregoing, Unipoint objects to the entry of a Final DIP Order unless the described defects are remedied.

WHEREFORE, Unipoint respectfully requests that the DIP Loan Motion be denied as set forth herein.

Dated: Austin, Texas
November 17, 2004

Respectfully submitted,

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By: /s/ Patricia B. Tomasco

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ATTORNEYS FOR UNIPOINT
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent, via United States first-class mail, to all parties listed on the Service List, on this 17th day of November, 2004.

/s/ Patricia B. Tomasco