

FILED

James C. Bastian, Jr. - Bar No. 175415
Mark Bradshaw - Bar No. 192540
MARSHACK SHULMAN HODGES & BASTIAN LLP
26632 Towne Centre, Suite 300
Foothill Ranch, California 92610
Telephone: (949) 340-3400
Facsimile: (949) 340-3000

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CLERK U.S. BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

BY _____ DEPUTY

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:

CASE NO.: **LA 00-44012 BR**

RELAY POINT, INC.,

Debtor(s).

NOTICE OF SALE OF ESTATE PROPERTY

Sale Date: **October 29, 2001**

Time: **2:00 P.M.**

Location: **U.S. Bankruptcy Court, 255 E. Temple St., Courtroom 1668, Los Angeles, CA 90012**

Type of Sale: Public

Private

Last date to file objections: **October 15, 2001**

Description of Property to be Sold: See the attached Notice of Hearing on Debtor's Motion for Order Approving Debtor's Sale of its Interest in Dial-Up Lines, et al. (the "Hearing Notice")

Terms and Conditions of Sale: See the attached Hearing Notice

Proposed Sale Price: See the attached Hearing Notice

Overbid Procedure (If Any): See the attached Hearing Notice

If property is to be sold free and clear of liens or other interests, list date, time and location of hearing:

October 29, 2001 at 2:00 P.M.

Contact Person for Potential Bidders (include name, address, telephone, fax and/or e:mail address):

James C. Bastian, Jr., Esq.

Marshack Shulman Hodges & Bastian LLP

26632 Towne Centre, Suite 300, Foothill Ranch, CA 92610

Telephone: (949) 340-3400

Facsimile: (949) 340-3000

Date: October 8, 2001

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION**

In re

RELAY POINT, INC.,

Debtor.

Tax I.D. No. 95-4606373

Case No. LA 00-44012 BR
Chapter 11

**NOTICE OF HEARING ON DEBTOR'S MOTION FOR
ORDER APPROVING DEBTOR'S SALE OF ITS INTEREST
IN DIAL-UP LINES AND RELATED OPERATING ASSETS,
FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS
PURSUANT TO 11 U.S.C. SECTION 363 AND
APPROVAL OF OVERBID PROCEDURES**

Date: October 29, 2001
Time: 2:00 P.M.
Place: Courtroom 1668
Edward R. Roybal Federal Bldg.
255 E. Temple Street
Los Angeles, CA 90012-3300

PLEASE TAKE NOTICE that a hearing on the Motion for Order Approving Debtor's Sale of its Interest in Dial-up Lines and Related Operating Assets, Free and Clear of Liens, Claims and Interests Pursuant to 11 U.S.C. Section 363 (the "Sale Motion") filed by Relay Point, Inc., a California corporation, the debtor and debtor in possession herein ("Debtor" or "Zyan") has been scheduled for **OCTOBER 29, 2001 at 2:00 P.M.**, in Courtroom 1668 of the above-entitled Court located at 255 East Temple Street, Los Angeles, California 90012.

A. Commencement of the Bankruptcy Case

The Debtor filed a petition under Chapter 11 of the Bankruptcy Code on December 7, 2000 (the "Petition Date"), and has continued in the possession of its property and the management of its affairs.

B. Description of the Debtor's Business

Prior to the Petition Date, the Debtor was a developer and Internet service provider ("ISP") supplying access, website hosting, and other related Internet services to individuals, professionals, and businesses principally throughout California as well as to a lesser extent throughout the United States. Through its wholesale partner and retail customer contracts for partner and end user Internet services the Debtor "owns" the partner or end user customer relationship by being the primary point of contact for ordering, provisioning, billing, technical support, customer care and all other aspects of the customer experience. Prior to the Petition Date, the Debtor provided Internet services through both digital subscriber lines ("DSL") and dial-up connections ("Dial-Up").

In connection with providing Internet services to its customers, the Debtor maintained a large operating network of equipment (the "ISP Network") which constituted one of the Debtor's largest monthly operating costs. ISP Network elements included the phone lines overs which the data is transmitted and the equipment that connects the customer's telephone lines to the Debtor's ISP Network.

C. Status of the Debtor's Business Operations

Growth in the public's awareness of the potential and uses of the Internet, relatively low barriers to entry, and lack for the most part of brand loyalty have created a highly fragmented market for DSL ISPs. A substantial reason that brand loyalty has been so hard to build among ISPs is the fact that essentially almost every ISP offers the identical product at virtually the same price; to wit access to the Internet. As such, to a large extent ISPs in the eyes of the majority of customers have become fungible, or easily and seamlessly replaceable. These conditions have created an ISP marketplace populated by in excess of 7,000 independent ISPs. The

ISPs are experiencing very high rates of customer turnover, or in industry parlance "customer churn rates". This high annual churn rate, coupled with the relatively high cost of acquisition for a customer, has resulted in substantial downward pressure on earnings, as the recovery periods for acquiring the customer are seemingly too short in most cases to allow for a return on customer acquisition investments.

As a result of the overall condition of the ISP industry, the Debtor has determined that its only reorganization option is the orderly sale of its operating assets.

The Debtor has already sought and obtained Court approval for the sale of the Debtor's DSL supplied lines and in some instances, as part of a settlement and compromise with wholesale suppliers, the return of DSL lines to the supplier.

D. Summary of Debtor's Secured Obligations

The following chart lists the secured claims listed in the Debtor's Bankruptcy Schedule D along with a description of how their respective claims affect the assets that are the subject of the Sale Motion:

| Creditor | Description of Collateral | Approximate Amount | <u>Relation to the Assets that Are the Subject of the Sale Motion</u> |
|--|--|--------------------|---|
| Covad (All Amounts Are Disputed) | Retail DSL customers Account No. C10758 | \$1,121,757.63 | None - the collateral has already been sold pursuant to prior Court order |
| | Retail DSL customers Account No. C10368 | \$64,525.61 | None - the collateral has already been sold pursuant to prior Court order |
| | Retail DSL customers Account No. C11214 | \$7,860.28 | None - the collateral has already been sold pursuant to prior Court order |
| | Retail DSL customers Account No. C11257 | \$30,923.12 | None - the collateral has already been sold pursuant to prior Court order |
| First Sierra Financial Old Kent Leasing | Computer Equipment | \$31,791.45 | None - the collateral is not a part of the sale transaction. |
| Paul Gamberg (Disputed) | Computer Equipment | \$100,000.00 | None - the collateral is not a part of the sale transaction. |

E. The Dial-Up Lines and Related Operating Assets Purchase Offer

The Debtor has received an offer for the purchase and sale of its Dial-Up Internet service customer lines and all related tangible and intangible assets necessary to operate the Dial-Up Lines (collectively the "Dial-Up Lines" or the "Dial-Up Assets") from Ralph Howard and Martin Bronstein, and/or their assignees (the "Proposed Buyer").

Attached as **Exhibit "A"** to the Declaration of Douglas DeStafeno (the "DeStafeno Declaration") attached to the Sale Motion is a list of the related tangible and intangible assets necessary to operate the Dial-Up Lines that will be included in the sale transaction. Such assets can be generally described as miscellaneous office furniture and equipment, including web and mail servers, domain names, software licenses, customer contracts and vendor contracts (such as backbone provider contracts), outstanding accounts receivable due from the customers and telephone numbers.

Attached as **Exhibit "B"** to the DeStafeno Declaration attached to the Sale Motion is a true and correct copy of the proposed Agreement of Purchase and Sale (the "Sale Agreement"), in substantially final form. (Once finalized, the Sale Agreement will be filed with the Court.) A summary of the terms of proposed transaction is as follows:¹

a. Transfer of Dial-Up Lines. As of the Closing, Debtor will sell, assign and convey to the Proposed Buyer, and the Proposed Buyer will purchase, acquire and accept from the Debtor, the Dial-Up Lines, free and clear of any liens, charges, security interests, encumbrances, liabilities or obligations of any nature or kind whatsoever, including successor liabilities pursuant to Section 363 of the Bankruptcy Code (collectively, "Liens or Encumbrances").

b. No Assumption of Liabilities. Except to the extent expressly set forth in this Agreement, or in the order or orders of the Bankruptcy Court, the Proposed Buyer shall not assume and shall have no responsibility with respect to, all liabilities or obligations of the Debtor, known or unknown, absolute or contingent, accrued or unaccrued, whether due or to become due (collectively, "Liabilities").

c. Purchase Price. The purchase price shall be \$75,000 and shall include any other assets deemed necessary to the continued delivery of Internet service to the current subscribers of the Debtor as determined in the Diligence Period defined below.

d. Assistance in the Transfer of the Lines. The Company shall, and shall cause its officers, directors and employees to provide the Proposed Buyer with commercially reasonable technical and customer assistance to allow the Dial-Up Lines to be successfully transferred.

e. Due Diligence Period. For a period of 21 days from the execution of the Sale Agreement, ("the Diligence Period"), the Proposed Buyer shall have the right to inspect all assets that are the subject of the transaction and the financial accounting records relating to such assets to determine if the assets are consistent with the Proposed Buyer's planned business operations. If the Proposed Buyer determines for any reason, in its sole and absolute discretion, that the assets are not consistent with its planned business operations, then the Proposed Buyer may terminate the contract and will have no further obligations to the Debtor. The Due Diligence Period will be completed prior to the hearing on the Sale Motion.

f. Closing. The Closing ("Closing") shall occur on or before November 15, 2001 (the "Closing Date"). In the event Court approval of the transaction is not received by the Closing Date, the transaction shall be completed within 15 (fifteen) days of Court approval; however, if Court approval is not received by December 1, 2001, then the Sale Agreement shall terminate and neither the Proposed Buyer nor the Debtor shall have any further obligations to each other.

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¹ A summary of the material terms of the Sale Agreement is discussed in this Notice of and the Sale Motion, but the summary and the discussion is not meant to be a complete review of every provision of the agreement between the parties. The Sale Agreement itself is the legally binding document the Debtor seeks approval of and, in the event of any inconsistency between the terms, provisions or effect of the Sale Agreement and the description of it in these pleadings, the Sale Agreement alone shall govern alone and not these pleadings or the descriptions herein.

g. Overbid. Minimum overbids to be at least \$10,000 and a topping fee of \$5,000 (the "Topping Fee").² In case of overbid, the new buyer will have to meet all the standard criteria of qualification.

h. Post Closing Cooperation. In case at any time after the Closing any further action is necessary or desirable to carry out the purposes of the Sale Agreement, each of the parties will take such further action (including the execution and delivery of such further instruments and documents) as the other may reasonably request, all at the sole cost and expense of the requesting party.

i. Conduct of Business. From the date of Sale Agreement and until the Dial-Up Lines have been successfully transferred or termination of the Sale Agreement, whichever first occurs, the Debtor shall use commercially reasonable best efforts to preserve and maintain the Dial-Up Lines, ordinary wear and tear excepted.

j. Deliveries. At the Closing, the Debtor shall deliver the following to the Proposed Buyer:

i. A Bill of Sale in a form reasonably acceptable to the Proposed Buyer, such other instruments of conveyance and transfer, and such powers of attorney, as shall be effective to vest in the Proposed Buyer title to or other interest in, and the right to full custody and control of, the assets, free and clear of all Liens or Encumbrances whatsoever;

ii. Evidence that any and all sales or use taxes assessed or assessable in connection with the transaction - including sales taxes assessable against the amounts that have been invoiced by the Debtor for services but will be paid to the Proposed Buyer - have been paid by the Debtor, or in the alternative, the Debtor will remit taxes (for all billings) collected or due from any Debtor transactions or provide evidence that the taxes have been paid to taxing authorities as they were due.

F. Further Overbid Procedures with Regards to the Dial-Up Assets

The Debtor requests that the following procedures for the submission of overbids be approved:

a. The Sale Agreement provides that the overbids must be at least \$10,000 and a Topping Fee of \$5,000. Thus, the initial overbid shall be at least \$90,000. Minimum bid increments thereafter shall be in increments of \$10,000.

b. The Topping Fee is only payable in the event that the Proposed Buyer is not the successful overbidder for the Dial-Up Assets.

c. Overbids must be in writing and be received by Debtor's counsel, Marshack Shulman Hodges & Bastian LLP to the attention of James C. Bastian, Jr. no later than ten (10) days prior to the hearing on the Sale Motion.

d. Overbids must be accompanied by certified funds in an amount equal to twenty percent (20%) of the overbid purchase price.

e. All Overbidders shall prequalify, in the sole discretion of the Debtor no later than five (5) days prior to the hearing on the Sale Motion, by providing to Debtor with evidence, satisfactory to Debtor, of such overbidders' ability to qualify as a purchaser of the Dial-Up Assets. In connection therewith, the Debtor may require all potential overbidders to provide the overbidder's audited financial statements and federal tax returns for the prior three calendar/fiscal years and such other documentation relevant to an overbidder's ability to qualify as the purchaser of the Dial-Up Assets and to provide proof of its ability to close the sale and

² The topping fee shall constitute reimbursement of all of the Proposed Buyer's actual costs and expenses, including, without limitation, attorneys fees' and reasonable expenses in connection with the sale of the Dial-Up Lines.

immediately and unconditionally pay the purchase price as increased by overbid at Closing.

f. All Overbidders must seek to acquire the Dial-Up Assets on terms and conditions not less favorable to the Debtor than the terms and conditions to which the Proposed Buyer has agreed to purchase the Dial-Up Assets as set forth herein, including, without limitation to, the provisions that competing bids must be obligated to perform within the same time that the Proposed Buyer would be obligated to perform.

g. If overbids are received, the final bidding round shall be held at the hearing on the Sale Motion.

h. Any overbidder must offer to acquire the Dial-Up Assets on terms not materially more burdensome or conditional to the Debtor than the terms of the Sale Agreement and must offer to acquire the Dial-Up Assets without any condition on the outcome of unperformed due diligence beyond the deadline for conducting due diligence as set forth in the Sale Agreement.

G. Assumption and Assignment of Executory Contracts and/or Leases Relating to Dial-Up Assets

To the extent one exists, the Proposed Buyer of the Dial-Up Assets must have legal authority to enforce performance under any leases or executory contracts that relate to the Dial-Up Assets to be sold. Likewise, the other parties to the leases and contracts must have a basis for seeking the buyer's performance thereunder. Accordingly, the Debtor requests that the Court approve the assumption and assignment of any and all executory contracts and unexpired leases pertaining to any of the Dial-Up Assets that are ultimately included in the sale.³ To the extent necessary, the Debtor shall cure all payment defaults of any executory contracts and unexpired leases pertaining to the Dial-Up Assets that are ultimately included in the sale so that such executory contracts and unexpired leases may be assumed and assigned to the Proposed Buyer.

H. Good Cause Exists to Approve the Sale Motion

The negotiation of the proposed sale was an arms-length transaction. The negotiations with the Proposed Buyer have resulted in an offer to sell that will have substantial benefit. As set forth in the Notice of the Sale Motion, the creditors will have been provided with sufficient notice of the sale. Accordingly, the sale is in good faith and should be approved. The Debtor shall request such a finding pursuant to Bankruptcy Code Section 363(m) at the hearing on this Sale Motion.

The Debtor believes that the sale pursuant to the foregoing terms will be at a fair market value. The Debtor believes that the offer from the Proposed Buyer is the best that it will be able to generate due to the state of the Internet service provider market. The Debtor has contacted several ISPs to determine if they have interest in acquiring the Dial-Up Assets. As of the date of this Sale Motion, no other parties have expressed an interest in acquiring these assets at a better price. Further, the Debtor believes that the proposed overbid procedures sale will provide the maximum possible value for the Dial-Up Assets.

The Debtor has made a business decision that it is in the best interest of the creditors of this estate that this Sale Motion be approved. As a result of developments since the Petition Date, the Debtor believes the only option available is the orderly sale of its operating assets. The Debtor has undertaken extensive efforts to consolidate operations, and to reduce overhead and operating costs to a minimum level necessary to maintain and preserve the value of assets until they can be sold. In order to continue to consolidate and wind down its operations in the most cost effective manner, the Debtor seeks an order from the Court authorizing the sale proposed herein.

³ Due to the due diligence period, the Proposed Buyer may ultimately not include certain executory contracts or unexpired leases in the sale. The Debtor will not assume or assign any executory contracts or unexpired leases that are ultimately not included in the sale.

Finally, if the Sale Motion is not approved, the Debtor may be unable to find another buyer for the Dial-Up Lines and may be forced to cease operation of the Dial-Up Lines in order stop the accrual of the administrative expenses associated with their operation. If the Dial-Up Lines are allowed to "go dark", the result would be a sudden and complete loss of Internet access by the Debtor's customers. To the Debtor's business customers relying on today's Internet communications technology, this loss of Internet access could be severely damaging and may cause the estate to incur additional administrative claims that could not be paid. Moreover, if the Dial-Up Lines go dark, any sale of such lines will be forever lost.

In essence, based on good business reasons, including the economics of the Debtor's situation, the Sale Motion should be approved.

For further information please see the **DEBTOR'S MOTION FOR ORDER APPROVING DEBTOR'S SALE OF ITS INTEREST IN DIAL-UP LINES AND RELATED OPERATING ASSETS, FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS PURSUANT TO 11 U.S.C. SECTION 363 AND APPROVAL OF OVERBID PROCEDURES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DOUGLAS DESTAFENO IN SUPPORT THEREOF** on file with the Clerk of the above-entitled Court which may be reviewed on Monday through Friday from 9:00 A.M. to 4:00 P.M. A copy of the Sale Motion may also be obtained by written request to the Debtor's counsel at the address indicated below.

PLEASE TAKE FURTHER NOTICE, that objections to the Sale Motion, if any, shall be filed with the Clerk of the above Court located at 300 North Los Angeles Street, Los Angeles, California 90012, with a filed-stamp courtesy copy delivered to the chambers of the Honorable Barry Russell, United States Bankruptcy Judge, and a copy served upon Marshack Shulman Hodges & Bastian LLP to the attention of James C. Bastian, Jr., 26632 Towne Centre, Suite 300, Foothill Ranch, California 92610 and the Office of the United States Trustee, 221 North Figueroa, Suite 800, Los Angeles, California 90012, no later than fourteen (14) days prior to the scheduled hearing. Failure to file a timely response may be deemed as consent to the relief requested in the Motion. **SEE, LOCAL BANKRUPTCY RULE 9013-1(a)(7).**

Dated: September 20, 2001

James C. Bastian, Jr. - Bar No. 175415
Mark Bradshaw - Bar No. 192540
MARSHACK SHULMAN HODGES & BASTIAN LLP
26632 Towne Centre, Suite 300
Foothill Ranch, California 92610-2808
Telephone: (949) 340-3400
Facsimile: (949) 340-3000



James C. Bastian, Jr.
Mark Bradshaw
Attorneys for the Relay Point, Inc.,
Debtor and Debtor in Possession

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the City of Foothill Ranch, County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is 26632 Towne Centre, Suite 300, Foothill Ranch, California 92610.

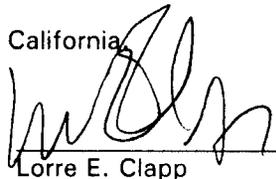
On **September 21**, 2001, I served the documents named below on the parties in this Action as follows:

DOCUMENT(S) SERVED: **NOTICE OF HEARING ON DEBTOR'S MOTION FOR ORDER APPROVING DEBTOR'S SALE OF ITS INTEREST IN DIAL-UP LINES AND RELATED OPERATING ASSETS, FREE AND CLEAR OF LIENS, CLAIMS AND INTERESTS PURSUANT TO 11 U.S.C. SECTION 363 AND APPROVAL OF OVERBID PROCEDURES**

SERVED UPON: **SEE THE ATTACHED SERVICE LIST**

- (BY MAIL)** I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Foothill Ranch, California. I am readily familiar with the practice of Marshack Shulman Hodges & Bastian LLP for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- (FEDERAL)** I declare that I am employed in the office of a member of the bar of this court, at whose direction this service was made.

Executed on **September 21**, 2001, at Foothill Ranch, California.



Lorre E. Clapp