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6 Attorneys for Gayle Eskay Mills, Case Trustee

7 **IN THE UNITED STATES BANKRUPTCY COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 In re:

10 GEORGE W. KIMBLE and PATRICIA J.
11 ANDERSON KIMBLE,

12 Debtors.

(Chapter 7 Case)

No. 4:09-bk-33058-BMW

**STIPULATED MOTION TO AMEND
TRUSTEE'S MOTION TO AUTHORIZE
AND APPROVE SETTLEMENT AND
COMPROMISE OF CLAIMS AGAINST
SHAREHOLDER/CLAIMANT ALAN
BISHOP AS TO ALLOW SALE OF
ASSETS BY TRUSTEE AND DISMISSAL
OF ADVERSARY COMPLAINT**

**DE #238 (MOTION)
DE #253 (ORDER GRANTING MOTION)**

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19 Gayle Eskay Mills, Chapter 7 Trustee herein ("**Trustee**"), by and through undersigned
20 counsel, and Alan Bishop (collectively the "**Parties**") herein move to amend ("**Motion to Amend**")
21 the Order dated June 19, 2013 [DE #253] ("**Settlement Order**") approving and authorizing the
22 settlement and compromise of claims between the bankruptcy estate and Alan Bishop. In support of
23 this Motion to Amend, Trustee respectfully represents as follows:

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. FACTUAL BACKGROUND.**

26 1. This case was commenced by voluntary petition filed by the Debtors originally filed
27 under Chapter 11 on December 22, 2009 and converted to Chapter 7 on November 2, 2010.
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2 2. Gayle Eskay Mills is the duly appointed and acting Trustee of the Chapter 7 Estate.

3 3. Alan Bishop ("**Bishop**") is a co-owner of the Finger Lakes Radio Group, Inc., Geneva
4 Broadcasting, Inc., Lake Country Broadcasting, Inc., Auburn Broadcasting, Inc. and ROI
5 Broadcasting, Inc. (collectively "**FLRG Corporations**") as well the owner of Chadwick Bay
6 Broadcasting Corporation ("**CBB**").

7 4. Bishop filed a general, unsecured claim in the bankruptcy case, Proof of Claim No. 26
8 ("**POC 26**"), which was amended pursuant to the Settlement Order, for the amount of \$712,300.

9 5. Pursuant to the Trustee's Motion to Authorize and Approve Settlement and Compromise
10 of Claims Against Shareholder/Claimant Alan Bishop by Trustee and Dismissal of Adversary
11 Complaint ("**Bishop 9019**") [DE #238] and the Settlement Order approving the Bishop 9019,
12 Trustee and Bishop agreed to resolve Adversary No. 4:12-ap-01131 ("**Bishop Adversary**")
13 commenced by Bishop against the bankruptcy estate regarding the co-owned interests in the FLRG
14 Corporations and CBB. The terms of the settlement included that the Trustee was authorized to
15 liquidate the assets of the FLRG Corporations subject to Court approval, and upon the sale of the
16 FLRG Corporations, the Trustee was to transfer the bankruptcy estate's 50% interest in CBB to
17 Bishop.

18 6. In compliance with the Settlement Order, Trustee obtained an offer from Hoosier
19 AM/FM, LLC or assignee ("**Hoosier**") to purchase the interest in the FLRG Corporations for
20 \$3,375,000 ("**Purchase Price**"), which was approved by the Court by Order dated September 2,
21 2014, [DE #292], ("**Sale Order**") and the terms of which were incorporated in the Asset Purchase
22 Agreement ("**APA**"). Pursuant to Assignment and Assumption Agreement, and as authorized under
23 the Sale Order and the APA, Hoosier assigned its interests under the APA to Long Point
24 Communications, LLC ("**Buyer**") on September 22, 2014.

25 7. The Sale Order and the APA were amended four times by Orders dated as follows: (i)
26 Order dated June 22, 2015 [DE #388], (ii) Order dated October 9, 2015 [DE #437] and (iii) Order
27 dated December 17, 2015 [DE #454]; and (iv) Order dated March 29, 2016 [DE #476] (collectively
28 the "**Extension Orders**"). The Extension Orders approved the extension of close of escrow and in

1 consideration for the extensions of closing Buyer remitted additional earnest money deposits to
2 Trustee and Bishop.

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4 8. The Trustee believed the extensions of the close of escrow of the sale of the assets of the
5 FLRG Corporations was in the best interest of the bankruptcy estate because, as required in the Sale
6 Order and APA, the FCC had already approved of and consented to the assignment of the station
7 licenses to Buyer. A sale to a new buyer would result in a longer delay due to the requirement that
8 the FCC approve of and consent to the transfer to the new buyer.

9 9. After the fourth extension, Buyer failed to submit the Commitment Letter as agreed and
10 accordingly, the sale did not close escrow.

11 10. Due to the failure to close escrow, Trustee received from escrow and is currently
12 holding the sum of \$25,000, which had been deposited in escrow by Buyer pursuant to the third
13 Order extending the close of escrow, dated December 17, 2015 [D.E. #454] and which was
14 disbursed to the Trustee pursuant to the fourth Order extending the close of escrow dated March 29,
15 2016 [DE #476] ("**\$25,000 Earnest Money**"). The \$25,000 Earnest Money is to be divided
16 between the bankruptcy estate and Bishop pursuant to their respective, stipulated, ownership
17 interests in the FLRG Corporations; 67% to the bankruptcy estate and 33% to Bishop.

18 11. Accordingly, the Trustee hereby seeks authority to amend the Settlement Order to
19 authorize the Trustee to transfer the Estate's interest in the FLRG Corporations, which percentage
20 interest is disputed in the Bishop Adversary, to Bishop instead of an outright sale of the assets of the
21 FLRG Corporations to Bishop. The terms of the proposed amended settlement are detailed more
22 fully below.

23 **II. AGREEMENT BETWEEN THE PARTIES**

24 12. The Parties hereby stipulate and agree to amend the Bishop 9019 and the Settlement
25 Order, subject to Bankruptcy Court approval, pursuant to the following terms which are further set
26 forth in the Second Addendum to Agreement of Settlement Compromise ("**Second Addendum**")
27 and the Stock Purchase Agreement and Termination Agreement incorporated therein, which are
28 attached hereto as **Exhibit A and Exhibit B and Exhibit C**, respectively:

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- a. The FCC must approve the transfer of the stock to Bishop. Pursuant to the Second Addendum, Bishop, and the Trustee will apply for and file the applications with the FCC necessary to transfer the control of the FCC licenses within ten (10) days after execution of the Second Addendum.
 - b. Pursuant to the Stock Purchase Agreement, Bishop will remit the sum of \$1,217,355.00 ("**Settlement Amount**") to the Trustee in consideration for the transfer of the bankruptcy estate's shares of stock in the FLRG Corporations at a Closing (as defined in Section 13) to occur within twenty (20) days after the later to occur of: (i) the entry of a Bankruptcy Court Order approving the Second Addendum and the Motion to Amend or (ii) the date upon which the order of the FCC becomes final (i.e., no action, request for stay, petition for rehearing or reconsideration, or appeal is pending and the time for filing such request, petition, or appeal has expired), provided that allother conditions to Closing in the Stock Purchase Agreement have been met.
 - c. In consideration for payment of the Settlement Amount, at the Closing, the Trustee will transfer the bankruptcy estate's interest in the stock of the FLRG Corporations to Bishop pursuant to the terms of the Stock Purchase Agreement. The transfer of the stock will be on an as-is, where-is basis, except for the warranties and representations in the Stock Purchase Agreement. The Parties will execute the documents necessary to transfer the stock to Bishop.

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13. Effective upon Trustee's receipt of payment in full of the Settlement Amount, and the transfer of stock in the FLRG Corporations to Bishop pursuant to the terms and conditions of the Stock Purchase Agreement (the "**Closing**"), each of Bishop, individually and on behalf of the FLRG Corporations, and the Trustee, on behalf of the bankruptcy estate (the "**Releasing Parties**"), agree to mutually release and forever discharge each other, from any and all claims, demands, causes of action, actions, damages, losses, costs, expenses, compensation and all other

1 damages and liabilities of any kind or nature whatsoever, direct or indirect, known or unknown,
2 for any matter, cause or thing whatsoever from the beginning of the world to the effective date of
3 the Closing, except with respect to Bishop's Claim POC 26, which shall be subordinated
4 effective as of the Closing to all claims of the Estate in accordance with Section 15. This release
5 shall not affect the Parties' rights to enforce the terms of this settlement.

6 14. Effective upon Closing, Bishop releases any and all interest in the \$25,000 Earnest
7 Money currently in the Trustee's possession. No disbursement shall be made to Bishop from the
8 \$25,000 Earnest Money.

9 15. Bishop further stipulates and agrees to, effective upon Closing, subordinate his claim,
10 POC 26, to all claims of the Estate.

11 16. The transfer of stock to Bishop and payment of the Settlement Amount is in
12 resolution of the disputed ownership interests and of the claims asserted against the bankruptcy
13 estate by Bishop in the Bishop Adversary and of all claims asserted against Bishop and the
14 FLRG Corporations by the Trustee. Accordingly, this is a settlement pursuant to Rule 9019 and
15 is not subject to higher and better bids.

16 17. Trustee believes the amended settlement is appropriate after consideration of all of the
17 circumstances. As detailed below, the transfer of stock to Bishop in settlement of the disputed
18 interests and claims related to the FLRG Corporations will net the same amount, if not more, to the
19 Estate as the sale of the assets of the FLRG Corporations to Bishop as the back-up bidder. The
20 outright sale of the assets to Bishop was anticipated to net the Estate \$1,184,022, while Bishop will
21 pay the Estate in an amount of \$1,217,355 to settle the dispute over the stock interest in the FLRG
22 Corporations.

23 **III. LEGAL ARGUMENT**

24 18. The requested relief is authorized by Rule 9019(a) of the Federal Rules of Bankruptcy
25 Procedure which provides as follows:

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27 On motion by the trustee and after notice and a hearing, the court may approve a
28 compromise or settlement. Notice shall be given to creditors, the United States Trustee,

1 the debtor, the indenture trustee as provided in Rule 2002 and to any other entity as the
2 court may direct.

3 19. The Trustee, in the exercise of her best business judgment and in consideration of the
4 requirements of *A & C Properties*, 784 F.2d 1377 (9th Cir. 1986), *In re Woodson*, 839, F.2d 610
5 (9th Cir. 1988), and *In re Schmitt*, 215 B.R. 417 (9th Cir. BAP 1997), believes that the proposed
6 compromise and settlement is an appropriate resolution of this matter.

7 20. Bankruptcy courts have broad discretion in approving compromise agreements. *In re*
8 *Woodson* 839 F.2d at 620. The Court may approve a compromise if it is fair and equitable. *Id.* In
9 determining the fairness and adequacy of a proposed compromise agreement, the Court should
10 consider the following four factors: (1) the probability of success in litigation; (2) the difficulties, if
11 any, to be encountered in collection; (3) the complexity of the litigation involved as well as the
12 expense, inconvenience and delay necessarily attendant to the litigation; and (4) the paramount
13 interest of creditors and a proper deference to their reasonable views.

14 21. Consideration of these factors does not require the Court to decide questions of law or
15 fact raised in the controversies sought to be settled, or determine that the compromise presented is
16 the best possible outcome. Rather, the Court need only canvass the issues to determine whether the
17 settlement falls "below the lowest point in the zone of reasonableness". *Newman v. Stein*, 464 F.2d
18 689, 698 (2nd Cir. 1972). cert. denied. 409 U.S. 1039 (1972); see also *In re Pennsylvania Truck*
19 *Lines, Inc.*, 150 B.R. 595, 598 (Bankr. E.D. Pa. 1992) (holding that a bankruptcy court must
20 consider these factors to see whether the settlement falls below the lowest point in the range of
21 reasonableness.) Accordingly, if the court finds the compromise does not fall below the threshold
22 of reasonableness, the compromise should be approved. *In re Planned Protective Services, Inc.*,
23 130 B.R. 94, 99 n.7 (Bankr. C.D. Cal. 1991).

24 22. The Trustee believes that amending the Settlement Order, after the failed sale of the
25 assets of the FLRG Corporations to Buyer, is in the best interest of the Estate. Bishop had the
26 option to proceed with the sale as a back-up bidder for the gross sale price of \$3,300,000, which,
27 had that sale closed escrow, would have resulted in net sale proceeds to the Estate of approximately
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1 \$1,184,022. The net sale proceeds to the Estate on the asset sale to Bishop is calculated after
2 payment of the following: (a) the gross sale proceeds would be paid to the FLRG Corporations; (b)
3 the FLRG Corporations' liabilities would be paid from the gross sale proceeds; (c) the payment of
4 any taxes due on the asset sale would then be paid from the sale proceeds; and (d) the net sale
5 proceeds would then be divided between the Estate and Bishop pursuant to the stipulated percentage
6 ownership interests of 67% to the Estate and 33% to Bishop.
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8 23. This amended settlement provides for an expeditious resolution of the Estate's interest in
9 the FLRG Corporations and provides funds to the Estate for the benefit of creditors of the Estate.
10 The settlement will resolve the dispute regarding the percentage ownership interests in the FLRG
11 Corporations and claims set forth in the Bishop Adversary, and will provide funds to the Estate
12 more expeditiously than re-noticing the sale of the assets of the FLRG Corporations. Moreover, the
13 transfer of the stock interest to Bishop on the terms set forth herein, provides substantially the same
14 amount in net proceeds, if not more, to the Estate as the asset sale of the FLRG Corporations to
15 Bishop as the back-up bidder, as detailed above. The anticipated net to the Estate from the transfer
16 of the Estate's interest in the stock of the FLRG Corporations will be \$1,217,355.

17 24. Furthermore, after the sale failed to close escrow, the Trustee inquired with the potential
18 buyers who had previously expressed interest in purchasing the FLRG Corporations' assets to see if
19 they were still interested in purchasing the assets. None of the previously interested buyers made an
20 offer or expressed an interest in purchasing the FLRG Corporations' assets.

21 25. Accordingly, the Trustee believes the proposed amended settlement of the disputed
22 ownership interests in the FLRG Corporations by transfer of the Estate's stock in the entities to
23 Bishop is in the best interest of the creditors and parties-in-interest of this Estate.

24 26. Trustee seeks authority to execute all documents necessary to resolve this matter, to
25 transfer the shares and to effectuate the Closing.

26 WHEREFORE, the Trustee respectfully requests this Court enter an Order amending the
27 Bishop 9019 and the Settlement Order to allow for the transfer of the bankruptcy estate's interest in
28 the FLRG Corporations to Bishop instead of a sale of the assets of the FLRG Corporations on the

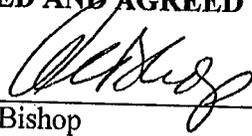
1 terms set forth herein and authorizing the Trustee to executed the documents necessary to resolve
2 this matter, transfer the shares and effectuate the Closing, , and for such further and other relief as
3 the Court deems necessary.
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6 RESPECTFULLY SUBMITTED THIS 2nd day of June, 2016.

7 **LANE & NACH, P.C.**

8
9 By /s/ Allison M. Lauritson – 022185
10 Adam B. Nach
11 Allison M. Lauritson
12 Attorneys for Chapter 7 Trustee

13 **STIPULATED AND AGREED TO:**

14 By 
15 Alan Bishop

16 COPY of the foregoing delivered via first class mail
17 or electronic notification on June 2016, to:

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27 By /s/ _____
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