

# SECURITIES & EXCHANGE COMMISSION EDGAR FILING

**usell.com, Inc.**

**Form: 8-K**

**Date Filed: 2018-05-10**

Corporate Issuer CIK: 1271075

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 OR 15(d) of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): May 4, 2018

**uSell.com, Inc.**

(Exact name of registrant as specified in its charter)

**Delaware**

(State or other Jurisdiction of Incorporation)

**000-50494**

(Commission File Number)

**98-0412432**

(IRS Employer Identification No.)

**171 Madison Avenue, 17<sup>th</sup> Floor  
New York, New York**

(Address of principal executive offices)

**10016**

(Zip Code)

Registrant's telephone number, including area code: **(212) 213-6805**

Former Address: **N/A**

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

**Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

On May 4, 2018 (the "Effective Date"), uSell.com, Inc. (the "Company"), certain of the Company's subsidiaries and an institutional investor (the "Lender") entered into an amendment (the "Amendment") to that certain note purchase agreement (the "NPA") dated January 13, 2017. Pursuant to the Amendment, the Lender granted the Company a one-time forbearance of existing remedies of default, under one of the financial covenants of the NPA, until June 30, 2018. In addition, the Company amended the terms of the NPA related to the Company's debt coverage ratio and repaid \$3,304,068 under the NPA, including \$4,068 of accrued interest.

Further, on the Effective Date the Company entered into a second amended and restated secured term note (the "Second Note"), pursuant to which the NPA's interest rate was increased from 15.0% to 16.0% commencing June 1, 2018. The maturity date for the NPA remained as January 13, 2020.

The foregoing description of the Amendment is a summary only and is qualified in its entirety by the full text of the Amendment and the Second Note filed as Exhibits 10.1, and 10.2, respectively, to this Form 8-K and is incorporated herein by reference.

**Item 9.01 Financial Statements and Exhibits.**

(d) Exhibits.

[10.1 Form of Forbearance and Third Amendment Agreement dated May 4, 2018 \\*](#)

[10.2 Form of Second Amended and Restated Secured Term Note dated May 4, 2018\\*](#)

\*Certain schedules, appendices and exhibits to this agreement have been omitted in accordance with Item 601(b)(2) of Regulation S-K. A copy of any omitted schedule and/or exhibit will be furnished supplementally to the Securities and Exchange Commission staff upon request.

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## SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

**USELL.COM, INC.**

Date: May 10, 2018

By: /s/ Nikhil Raman  
Name: Nikhil Raman  
Title: Chief Executive Officer

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# FORBEARANCE AND THIRD AMENDMENT AGREEMENT

This Forbearance and Third Amendment Agreement (this "Amendment Agreement"), effective as of May 4, 2018, by and among uSell.com, Inc., a Delaware corporation ("USELL"), BST Distribution, Inc., a New York corporation ("BST"), We Sell Cellular LLC, a Delaware limited liability company ("WE SELL" together with uSell and BST, each a "Company" and collectively the "Companies"), the Purchaser party hereto (the "Purchaser") and \_\_\_\_\_, a Delaware limited liability company, as agent for the Purchaser and the other Purchasers from time to time party to the Note Purchase Agreement (as hereafter defined) (the "Agent" and together with such Purchasers, the "Creditor Parties").

WHEREAS, the Companies and Creditor Parties are parties to a Note Purchase Agreement dated as of January 13, 2017 (as amended from time to time, the "Purchase Agreement").

WHEREAS, an Event of Default (as defined in the Note) occurred on April 1, 2018 and is now existing based on Companies' failure to comply with the "Operating Margin" covenant set forth in Section 8.23(a) of the Purchase Agreement for the fiscal quarter period ending March 31, 2018 (the "Designated Default") by reason of which Creditor Parties have the full legal right to exercise their rights and remedies against Companies under the Purchase Agreement, the Related Agreements (as defined in the Purchase Agreement) and applicable law.

WHEREAS, Companies have requested that Creditor Parties (a) forbear for a period of time from exercising rights and remedies based on the occurrence of the Designated Default and (b) amend the Purchase Agreement and the Related Agreements on the terms and subject to the conditions set forth herein, and Creditor Parties are prepared to establish a period of forbearance and amend the Purchase Agreement, in each case, on the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the foregoing, and of other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1. Capitalized Terms. Capitalized terms not otherwise defined in this Amendment Agreement shall have the meaning ascribed to them in the Purchase Agreement.

## 2. Acknowledgment of Liabilities.

(a) Each Company hereby acknowledges that it is unconditionally liable to Creditor Parties under the Purchase Agreement and the Related Agreements to which it is a party for the payment of all Liabilities, and no Company has any defenses, counterclaims, deductions, credits, claims or rights of setoff or recoupment with respect to the Liabilities.

(b) Each Company hereby ratifies and confirms its obligations under the Purchase Agreement and the Related Agreements to which it is a party and hereby acknowledges and agrees that the Purchase Agreement and the Related Agreements to which it is a party remain in full force and effect.

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3. Forbearance.

(a) Each Company hereby acknowledges that the Designated Default has occurred on April 1, 2018 and is continuing which entitles the Creditor Parties to exercise their rights and remedies under the Purchase Agreement, the Related Agreements and applicable law. No Creditor Party has waived, presently does not intend to waive and may never waive such Designated Default and nothing contained herein or the transactions contemplated hereby shall be deemed to constitute in any manner whatsoever any such waiver. Each Company hereby acknowledges that Creditor Parties have the presently exercisable right to declare the Liabilities to be immediately due and payable under the terms of the Purchase Agreement and the Related Agreements.

(b) Subject to satisfaction of the conditions of effectiveness set forth in Section 8 of this Amendment Agreement, during the period (the "Forbearance Period") commencing on the date hereof and ending on the earlier to occur of (a) June 30, 2018 and (b) the occurrence of any Forbearance Default (as defined in Section 3(d) of this Amendment Agreement), Creditor Parties will forbear from exercising their rights and remedies under the Purchase Agreement, the Related Agreements and applicable law solely in respect of the Designated Default. Notwithstanding the foregoing, nothing contained herein shall impair in any manner whatsoever Creditor Parties' rights to administer the credit facility and/or to collect, receive and/or apply proceeds of each Company's accounts receivable and/or any other collateral to the Liabilities, in each case, in accordance with the terms of the Purchase Agreement and the Related Agreements. The Creditor Parties may consider extending the expiration date of the Forbearance Period, but any such extension will be determined by the Creditor Parties in their sole and absolute discretion and, if provided at all, shall only be made on terms and conditions satisfactory to the Creditor Parties in their sole and absolute discretion. Among other factors which the Creditor Parties may consider in determining whether to extend the expiration date of the Forbearance Period are the Companies' financial performance, the Companies' compliance with the June 30, 2018 "Operating Margin" financial covenant under Section 8.23(a), the occurrence of no Events of Default (other than the Designated Default) and the Creditor Parties' receipt of evidence satisfactory in all respects to the Creditor Parties demonstrating that satisfactory progress (as determined by the Creditor Parties in their sole and absolute discretion) has been made by the Companies in connection with their diligent and good faith efforts to refinance the Liabilities by June 30, 2018. No such extension, if provided at all, shall be effective unless in a writing executed by the Creditor Parties and the Companies, and acknowledged and agreed to by the Guarantors.

(c) Upon the termination of the Forbearance Period, the agreement of Creditor Parties to forbear with respect to the Designated Default shall automatically and without further action terminate and be of no further force and effect, it being expressly agreed that the effect of such termination will be to permit Creditor Parties to (i) exercise such rights and remedies immediately without any further notice, passage of time or forbearance of any kind and (ii) charge the Default Interest Rate (as defined in Section 1.7 of the Note) retroactively to April 1, 2018, which such Default Interest Rate charges shall be due and payable on the next Interest Payment Date (as defined in the Note).

(d) The occurrence of any Event of Default (other than the Designated Default) shall constitute a Forbearance Default. As of the date hereof, neither the Companies nor the Creditor Parties have any actual knowledge of any Events of Default other than the Designated Default.

(e) Subject only to Section 3(b) of this Amendment Agreement, Creditor Parties reserve the right, in their sole discretion, to exercise any or all of their rights and remedies under the Purchase Agreement, the Related Agreements and applicable law as a result of any Event of Default (other than the Designated Default), and no Creditor Party has waived any of such rights or remedies, and nothing in this Amendment Agreement, and no delay on their part in exercising any such rights or remedies, should be construed as a waiver of any such rights or remedies.

4. Amendments. Subject to satisfaction of the conditions of effectiveness set forth in Section 8 of this Amendment Agreement:

(a) The definition of "Applicable Net Debt" set forth in Section 8.23(b) of the Purchase Agreement is hereby amended and restated in its entirety to provide as follows:

"Applicable Net Debt" means, at the date of determination, the outstanding principal amount of the Notes less (Y) cash and cash equivalents on deposit in the Agent Controlled Account plus (Z) \$230,000."

(b) Notwithstanding anything contained in the Purchase Agreement or any Related Agreement to the contrary, so long as (a) no Event of Default (other than the Designated Default) shall occur and be continuing and (b) all Liabilities are paid in full in cash prior to the expiration of the Forbearance Period, the occurrence of the Designated Default shall not result in the imposition of the Default Interest Rate (as defined in the Note); provided that in the event all Liabilities are not paid in full prior to the expiration of the Forbearance Period and in the event (i) Companies fail to be in compliance with the "Operating Margin" covenant under Section 8.23(a) of the Purchase Agreement for the fiscal quarter ending June 30, 2018 or (ii) fail to provide Creditor Parties evidence satisfactory in all respects to the Creditor Parties demonstrating that satisfactory progress (as determined by the Creditor Parties in their sole and absolute discretion) has been made by the Companies in connection with their diligent and good faith efforts to refinance the Liabilities by June 30, 2018, then all Liabilities shall automatically bear interest at the Default Interest Rate (as defined in the Note) on a retroactive basis from the date of the first occurrence of the Designated Default.

(c) Notwithstanding anything contained in Section 1.4 of the Note to the contrary, (a) Companies shall, as a condition to effectiveness of this Amendment Agreement, redeem a portion of the outstanding principal balance of the Note in an aggregate amount equal to Three Million Three Hundred Thousand Dollars (\$3,300,000) (the "Specified Redemption") at a prepayment price equal to Three Million Three Hundred Thousand Dollars (\$3,300,000) plus the accrued but unpaid interest on such principal amount through and including the date of such prepayment (the "Specified Redemption Amount") and (b) solely in connection with Companies' election to make the Specified Redemption, Creditor Parties hereby waive the fifteen (15) day prior written redemption notice requirement and the prepayment premium under Section 1.4 of the Note. The Specified Redemption shall be made in accordance with the terms of Section 5 of this Amendment Agreement. Immediately after giving effect to the Specified Redemption, the outstanding principal balance of the Note shall be automatically reduced to Five Million Three Hundred Sixty Thousand Dollars (\$5,360,000) without further action on the part of Creditor Parties or any Company.

5. Specified Redemption. Companies hereby direct the Agent to (a) release Specified Redemption Amount from the Agent Controlled Account and (b) utilize the proceeds thereof to cause the Specified Redemption to be made.

6. Representations and Warranties. Each Company hereby represents and warrants to Purchasers and Agent that:

(a) The execution, delivery and performance of this Amendment Agreement (i) have been duly authorized by each Company, (ii) are not in contravention of the certificate of incorporation, bylaws, certificate of formation or operating agreement of any Company or of any indenture, agreement or undertaking to which any Company is a party or by which any Company is bound and (iii) are within each Company's powers.

(b) This Amendment Agreement is the legal, valid and binding obligation of each Company, enforceable in accordance with its terms, except as may be limited by applicable bankruptcy, insolvency, reorganization or similar laws relating to creditors' rights generally or by equitable principles.

(c) The representations and warranties of each Company contained in the Purchase Agreement and the Related Agreements are and will be true, correct and complete in all respects on and as of the date hereof to the same extent as though made on and as of such date, except to the extent that such representations and warranties specifically relate to an earlier date, in which case they were true, correct and complete as of such earlier date.

7. General Release. Each Company and each Guarantor (by its acknowledgment set forth below) hereby releases, waives and forever relinquishes all claims, demands, obligations, liabilities and causes of action of whatever kind or nature, whether known or unknown, which it has, may have, or might assert now or in the future against any Creditor Party and/or its, officers, directors, employees, agents, attorneys, accountants, consultants, successors and assigns, directly or indirectly, arising out of, based upon, or in any manner connected with any transaction, event, circumstance, action, failure to act or occurrence of any sort or type, whether known or unknown, which occurred, existed, or was taken or permitted prior to the date hereof. The inclusion of this paragraph in this Amendment Agreement, and the execution of this Amendment Agreement by Creditor Parties, does not constitute an acknowledgment or admission by any Creditor Party of liability for any matter, or a precedent upon which any liability may be asserted.



8. Conditions of Effectiveness. This Amendment Agreement shall become effective upon receipt by Agent (unless waived by Agent in writing) of the following, each in form and substance satisfactory to Agent in its sole discretion: (a) this Amendment Agreement executed by each Company and each Guarantor, (b) an original executed Second Amended and Restated Secured Term Note in the form attached hereto as Exhibit A, (c) corporate resolutions for each Company authorizing the transactions contemplated by this Amendment Agreement and (d) payment by Companies of all fees and expenses incurred by Agent (i) in connection with the transactions contemplated by this Amendment Agreement, including, without limitation, the fees of "-----", counsel to Agent and Purchasers and (ii) for matters described in Section 8.32 of the Purchase Agreement.

9. Effect on Note Purchase Agreement.

(a) Upon the effectiveness of this Amendment Agreement, each reference in the Purchase Agreement to "this Agreement," "hereunder," "hereof," "herein" or words of like import shall mean and be a reference to the Purchase Agreement as amended hereby.

(b) Except as specifically amended herein, the Agreement and all other documents, instruments and agreements executed and/or delivered in connection therewith, shall remain in full force and effect, and are hereby ratified and confirmed.

(c) The execution, delivery and effectiveness of this Amendment Agreement shall not operate as a waiver of any right, power or remedy of Agent, nor constitute a waiver of any provision of the Purchase Agreement, or any other documents, instruments or agreements executed and/or delivered under or in connection therewith.

10. Miscellaneous. Section 13 of the Purchase Agreement is incorporated by reference into this Amendment Agreement without the necessity of fully repeating it.

IN WITNESS WHEREOF, the parties hereto have caused this Amendment Agreement to be duly executed and delivered by their duly authorized officers as of the date first set forth above.

COMPANIES:

USELL.COM, INC.

By: \_\_\_\_\_  
Name: Nikhil Raman  
Title: Chief Executive Officer

BST DISTRIBUTION, INC.

By: \_\_\_\_\_  
Name: Brian Tepfer  
Title: Chief Executive Officer

WE SELL CELLULAR LLC

By: \_\_\_\_\_  
Name: Nikhil Raman  
Title: Manager

SIGNATURE PAGE TO  
FORBEARANCE AND THIRD  
AMENDMENT AGREEMENT

\_\_\_\_\_

PURCHASER:

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

AGENT:

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

SIGNATURE PAGE TO  
FORBEARANCE AND THIRD  
AMENDMENT AGREEMENT

\_\_\_\_\_

GUARANTOR ACKNOWLEDGEMENT AND AGREEMENT:

\_\_\_\_\_  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

SIGNATURE PAGE TO  
FORBEARANCE AND THIRD  
AMENDMENT AGREEMENT

\_\_\_\_\_

THIS NOTE IS ISSUED WITH ORIGINAL ISSUE DISCOUNT. BEGINNING NO LATER THAN 10 DAYS AFTER THE ISSUE DATE OF THIS NOTE, USELL.COM, INC., A DELAWARE CORPORATION, LOCATED AT 171 MADISON AVENUE, 17<sup>TH</sup> FLOOR, NEW YORK, NEW YORK 10016, SHALL PROMPTLY MAKE AVAILABLE TO THE HOLDER OR HOLDERS OF THIS NOTE UPON REQUEST THE INFORMATION DESCRIBED IN TREASURY REGULATION SECTION 1.1275-3(b)(1)(i).

THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS. THIS NOTE MAY NOT BE OFFERED FOR SALE, SOLD, TRANSFERRED OR ASSIGNED (I) IN THE ABSENCE OF (A) AN EFFECTIVE REGISTRATION STATEMENT FOR THE SECURITIES UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPLICABLE STATE SECURITIES LAWS OR (B) AN OPINION OF COUNSEL, IN A GENERALLY ACCEPTABLE FORM, THAT REGISTRATION IS NOT REQUIRED UNDER SAID ACT OR APPLICABLE STATE SECURITIES LAWS OR (II) UNLESS SOLD PURSUANT TO RULE 144 UNDER SAID ACT.

THIS NOTE IS REGISTERED WITH THE AGENT PURSUANT TO SECTION 13.5(b) OF THE PURCHASE AGREEMENT (AS DEFINED BELOW). TRANSFER OF ALL OR ANY PORTION OF THIS NOTE IS PERMITTED SUBJECT TO THE PROVISIONS SET FORTH IN SUCH SECTION 13.5 WHICH REQUIRE, AMONG OTHER THINGS, THAT NO TRANSFER IS EFFECTIVE UNTIL THE TRANSFEREE IS REFLECTED AS SUCH ON THE REGISTRY MAINTAINED WITH THE AGENT PURSUANT TO SUCH SECTION 13.5(b).

#### **SECOND AMENDED AND RESTATED SECURED TERM NOTE**

FOR VALUE RECEIVED, each of USELL.COM, INC., a Delaware corporation ("USELL"), BST DISTRIBUTION, INC., a New York corporation ("BST"), WE SELL CELLULAR LLC, a Delaware limited liability company ("WE SELL"); together with USELL and BST, the "Companies" and each a "Company"), hereby promises to pay to \_\_\_\_\_, a Delaware limited liability company (the "Holder") or its registered assigns or successors in interest, the sum of EIGHT MILLION SIX HUNDRED SIXTY THOUSAND DOLLARS (\$8,660,000), together with any accrued and unpaid interest hereon subject to the terms and conditions set forth herein.

Capitalized terms used herein without definition shall have the meanings ascribed to such terms in that certain Note Purchase Agreement, dated as January 13, 2017 (as amended, restated, modified and/or supplemented from time to time, the "Purchase Agreement") among Companies, the Holder, each other Purchaser and \_\_\_\_\_, as agent for the Purchasers (the "Agent" and together with the Purchasers (including the Holder), collectively, the "Creditor Parties"), pursuant to which this Second Amended and Restated Secured Term Note was issued.

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The following term shall apply to this Second Amended and Restated Secured Term Note (this "Note"):

"Maturity Date" shall mean January 13, 2020.

## ARTICLE I

### CONTRACT RATE AND AMORTIZATION

1.1 Contract Rate. Subject to Sections 1.7 and 2.9, interest payable on the outstanding principal amount of this Note (the "Principal Amount") shall accrue at a rate per annum equal to sixteen percent (16%). Interest shall be (i) calculated on the basis of a 365 day year and the actual number of days elapsed, and (ii) payable monthly, in arrears, commencing on June 1, 2018, and on the first business day of each consecutive calendar month thereafter through and including the Maturity Date, and on the Maturity Date, whether by acceleration or otherwise (each, an "Interest Payment Date").

1.2 Contract Rate Payments. The Contract Rate shall be paid on each Interest Payment Date with respect to the number of days from, but excluding, the prior Interest Payment Date (or the issuance date with respect to the first Interest Payment Date) through and including the applicable Interest Payment Date. Interest shall also be paid in cash on the date of any payment or prepayment of this Note with respect to the Principal Amount being paid at such time.

1.3 Principal Payments. The outstanding Principal Amount together with any accrued and unpaid interest and any and all other unpaid amounts which are then owing by Companies to the Holder under this Note, the Purchase Agreement and/or any other Related Agreement shall be due and payable on the Maturity Date, whether by acceleration or otherwise.

1.4 Optional Prepayment. Companies may redeem the outstanding principal balance of this Note in whole, but not in part, at any time after July 13, 2018, upon at least fifteen (15) days' prior written notice delivered to Agent and the Holder, at the prepayment price of 103% of the outstanding Principal Amount of this Note so redeemed plus all accrued but unpaid interest hereunder.

To exercise its right to prepay this Note as provided in this Section 1.4, Companies must deliver written notice of such election to the Agent and each Purchaser at least fifteen (15) days prior to the repayment date, as set forth in such notice, and Companies must take the same action with respect to all of the holders of any other Notes.

1.5 Mandatory Prepayment Events. Unless waived in writing by the Agent, Companies shall prepay the Notes (a) from the net proceeds of any incurrence of Indebtedness or other capital raising or financing transaction (other than net proceeds of any Indebtedness incurred as permitted by clause (e)(i) of Section 8.24 of the Purchase Agreement), (b) from the net proceeds of any insurance claims relating to any of the Collateral (unless (i) no Event of Default has occurred and is continuing, (ii) such proceeds are not greater than \$1,000,000 and (iii) such proceeds are not used to replace, restore or repair such Collateral), (c) from the net proceeds of any sale of Collateral (other than as permitted by clause (e)(vi) of Section 8.24 of the

Purchase Agreement) and/or (d) in the event USELL elects to dissolve the SPE under Section 9.1(c) of the LLC Agreement, each a "Mandatory Prepayment Event." Notwithstanding the foregoing, in the event Companies raise capital solely through the issuance of equity or receives cash proceeds from the exercise of outstanding warrants ("Equity Raise"), such Equity Raise shall not subject Companies to a Mandatory Prepayment Event, provided that no Event of Default exists at the time of the Equity Raise or would have occurred but for the passage of time or the giving of notice, or both, in which case the Equity Raise would create a Mandatory Prepayment Event. Any prepayments made by Companies pursuant to a Mandatory Prepayment Event shall be applied to the outstanding principal balance of all of the Notes then outstanding on a pro rata basis (based upon the respective outstanding principal amounts thereof). All Principal Amounts required to be prepaid due to a Mandatory Prepayment Event are required to be prepaid at a prepayment price of 103% of the outstanding Principal Amount of this Note so redeemed plus accrued but unpaid interest hereunder.

1.6 Events of Default. The occurrence of any of the following events set forth in this Section 1.6 shall constitute an event of default ("Event of Default") hereunder:

(a) Failure to Pay. Any Company fails to pay when due any installment of principal, interest or other fees hereon in accordance herewith, or any Company fails to pay any of the other Liabilities (under and as defined in the Security Agreement) within three (3) business days of when due;

(b) Breach of Covenant. Any Company or any of its Subsidiaries breaches any covenant or any other term or condition of this Note, the Purchase Agreement or any Related Agreement in any material respect and such breach, if subject to cure, continues for a period of fifteen (15) days after the occurrence thereof;

(c) Breach of Representations and Warranties. Any representation, warranty or statement made or furnished by any Company or any of its Subsidiaries in this Note, the Purchase Agreement or any other Related Agreement shall at any time be false or misleading in any material respect on the date as of which made or deemed made;

(d) Default Under Other Agreements. The occurrence of any default (or similar term) or other event relating to any Indebtedness or Contingent Obligation of any Company or any of such Company's Subsidiaries beyond the period of grace (if any), (i) the effect of which default or other event is to cause, or permit the holder or holders of such indebtedness or beneficiary or beneficiaries of such Contingent Obligation to cause, such Indebtedness to become due prior to its stated maturity or any such Contingent Obligation to become payable and (ii) (x) the aggregate amount of any such Indebtedness to become due prior to its stated maturity and any such Contingent Obligations to become payable is in excess of \$100,000, or (y) such default or other event is reasonably likely to result in a Material Adverse Effect;

(e) Bankruptcy. Any Company or any of its Subsidiaries shall (i) apply for, consent to or suffer to exist the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property, (ii) make a general assignment for the benefit of creditors, (iii) commence a voluntary case under the federal bankruptcy laws (as now or hereafter in effect), (iv) be adjudicated a bankrupt or insolvent, (v) file a petition seeking to take advantage of any other law providing for the relief of debtors, (vi) acquiesce to, without challenge within fifteen (15) days of the filing thereof, or failure to have dismissed, within forty-five (45) days, any petition filed against it in any involuntary case under such bankruptcy laws, or (vii) take any action for the purpose of effecting any of the foregoing;

(f) Judgments. Attachments or levies are made upon any Company's or any of its Subsidiary's assets or a judgment is rendered against any Company or any of its Subsidiaries or any of its or their property involving a liability which is in excess of \$100,000 in the aggregate with any other such liability (other than liability covered under available insurance) or could reasonably be expected to have a Material Adverse Effect and which shall not have been vacated, discharged, stayed or bonded within thirty (30) days from the entry thereof;

(g) Insolvency. Any Company or any of its Subsidiaries shall admit in writing its inability, or be generally unable, to pay its debts as they become due or cease operations of its present business;

(h) Change of Control. A Change of Control (as defined below) shall occur with respect to any Company or any Guarantor, unless the Agent shall have expressly consented to such Change of Control in writing. A "Change of Control" shall mean (i) any event or circumstance as a result of which any "Person" or "group" (as such terms are defined in Sections 13(d) and 14(d) of the Exchange Act, as in effect on the date hereof), other than a Holder of a Note, is or becomes the "beneficial owner" (as defined in Rules 13(d)-3 and 13(d)-5 under the Exchange Act), directly or indirectly, of 20% or more on a fully diluted basis of the then outstanding voting equity interests of any Company or any Guarantor (other than a "Person" or "group" that beneficially owns 20% or more of such outstanding voting equity interests of any Company or any Guarantor as of the Closing Date), (ii) any event or circumstance as a result of which USELL shall at any time own less than 100% of all issued and outstanding equity interests of any of the following entities: HD Capital Holdings LLC, Upstream Phone Company USA, Inc., BST Distribution, Inc. and/or Upstream Holdings, Inc., (iii) any event or circumstance as a result of which BST Distribution, Inc. shall at any time own less than 100% of all issued and outstanding equity interests of We Sell Cellular, LLC, (iv) any change in the composition of the Board of Directors of any Company or any Guarantor (the "Board") such that the Continuing Directors (as defined below) cease for any reason to constitute at least a majority of the Board (as used herein, "Continuing Directors" means those individuals who as of the Closing Date constituted the Board and each other director that was elected by at least 66 2/3% of the Continuing Directors, or as applicable, such director's nomination for election to the Board is recommended by 66 2/3% of the Continuing Directors), (v) any Company or any of the Guarantors merges or consolidates with, or sells all or substantially all of its assets to, any other Person, or (vi) the consummation of a purchase, tender or exchange offer made to, and accepted by, the holders of more than a majority of the outstanding shares of common stock of any Company or any Guarantor. Notwithstanding the foregoing or anything contained herein to the contrary, clause (i) of this Section 1.6(h) shall not apply to those Persons or "groups" listed on Schedule 1.6(h) hereto, provided that such Persons or "groups" do not beneficially own 50% or more on a fully diluted basis of the then outstanding voting equity interests of any Company or any Guarantor;



(i) Failure of Liens. The Agent's lien on any Collateral deemed material by Agent shall fail or cease to be a first priority validly perfected security interest; or

(ii) Breach of Covenant. The Company or any of its Subsidiaries breaches any covenant set forth in Section 5 or 8 of the Purchase Agreement.

1.7 Default Interest. Following the occurrence and during the continuance of any Event of Default, Companies shall pay additional interest on the outstanding Principal Amount of this Note, at a rate per annum which is determined by adding five percent (5.0%) per annum to the Contract Rate ("Default Interest Rate"), and all outstanding obligations under this Note, the Purchase Agreement and each other Related Agreement, including unpaid interest, shall continue to accrue interest at the Default Interest Rate from the date of such Event of Default until the date such Event of Default is cured or waived in writing by the Agent.

1.8 Acceleration. If any Event of Default shall have occurred and be continuing, (a) if such event is an Event of Default specified in Section 1.6(e), all of the Notes at the time outstanding shall automatically become immediately due and payable together with interest accrued thereon, without any requirement of presentment, demand, protest or notice of any kind, all of which are hereby waived, and (b) if such event is not an Event of Default specified in Section 1.6(e) (as a result of which the Notes have already been accelerated), the Agent or the holders of a majority of the outstanding principal amount of the Notes may at their option, by notice in writing to Companies, declare all of the Notes to be, and all of the Notes shall thereupon be and become, immediately due and payable together with interest accrued thereon, without any requirement of further presentment, demand, protest or other notice of any kind, all of which are hereby waived and with the consent of the Creditor Parties, the Agent shall exercise on behalf of the Creditor Parties (including the holders of all of the Notes) all rights and remedies available to them under the Security Agreement and any other Related Agreement.

## ARTICLE II

### MISCELLANEOUS

2.1 Cumulative Remedies. The remedies under this Note shall be cumulative.

2.2 Failure or Indulgence Not Waiver. No failure or delay on the part of the Holder (or the Agent on behalf of the Holder) hereof in the exercise of any power, right or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such power, right or privilege preclude other or further exercise thereof or of any other right, power or privilege. All rights and remedies existing hereunder are cumulative to, and not exclusive of, any rights or remedies otherwise available.

2.3 Notices. Any notice herein required or permitted to be given shall be given in writing in accordance with the terms of the Purchase Agreement.

2.4 Amendment Provision. The term "Note" and all references thereto, as used throughout this instrument, shall mean this instrument as originally executed, or if later amended or supplemented, then as so amended or supplemented, and any successor instrument as such successor instrument may be amended or supplemented.

2.5 Assignability. This Note shall be binding upon each Company and its successors and assigns, and shall inure to the benefit of the Holder and its successors and assigns, and may be assigned by the Holder in accordance with the requirements of the Purchase Agreement. No Company may assign any of its obligations under this Note without the prior written consent of the Holder, any such purported assignment without such consent being null and void.

2.6 Cost of Collection. In case of the occurrence of an Event of Default under this Note, Companies shall pay the Holder (and the Agent on behalf of the Holder) the Holder's (and the Agent's) costs of collection, including reasonable fees associated with the hiring of experts and reasonable attorneys' fees.

2.7 Governing Law, Jurisdiction and Waiver of Jury Trial.

(a) THIS NOTE SHALL BE GOVERNED BY AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW.

(b) EACH COMPANY HEREBY CONSENTS AND AGREES THAT THE STATE AND/OR FEDERAL COURTS LOCATED IN THE COUNTY OF NEW YORK, STATE OF NEW YORK SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIMS OR DISPUTES BETWEEN ANY COMPANY, ON THE ONE HAND, AND THE HOLDER AND/OR ANY OTHER CREDITOR PARTY, ON THE OTHER HAND, PERTAINING TO THIS NOTE OR ANY OF THE OTHER RELATED AGREEMENTS OR TO ANY MATTER ARISING OUT OF OR RELATED TO THIS NOTE OR ANY OF THE RELATED AGREEMENTS; PROVIDED, THAT EACH COMPANY ACKNOWLEDGES THAT ANY APPEALS FROM THOSE COURTS MAY HAVE TO BE HEARD BY A COURT LOCATED OUTSIDE OF THE COUNTY OF NEW YORK, STATE OF NEW YORK; AND FURTHER PROVIDED, THAT NOTHING IN THIS NOTE SHALL BE DEEMED OR OPERATE TO PRECLUDE THE HOLDER AND/OR ANY OTHER CREDITOR PARTY FROM BRINGING SUIT OR TAKING OTHER LEGAL ACTION IN ANY OTHER JURISDICTION WHERE ANY OF THE COLLATERAL IS LOCATED TO COLLECT THE LIABILITIES (AS DEFINED IN THE SECURITY AGREEMENT), TO REALIZE ON THE COLLATERAL (AS DEFINED IN THE SECURITY AGREEMENT) OR ANY OTHER SECURITY FOR THE OBLIGATIONS, OR TO ENFORCE A JUDGMENT OR OTHER COURT ORDER IN FAVOR OF THE HOLDER AND/OR ANY OTHER CREDITOR PARTY. EACH COMPANY EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR SUIT COMMENCED IN ANY SUCH COURT, AND EACH COMPANY HEREBY WAIVES ANY OBJECTION WHICH IT MAY HAVE BASED UPON LACK OF PERSONAL JURISDICTION, IMPROPER VENUE OR FORUM NON CONVENIENS. EACH COMPANY HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS, COMPLAINT AND OTHER PROCESS ISSUED IN ANY SUCH ACTION OR SUIT AND AGREES THAT SERVICE OF SUCH SUMMONS, COMPLAINT AND OTHER PROCESS MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO SUCH COMPANY AT THE ADDRESS SET FORTH IN THE PURCHASE AGREEMENT AND THAT SERVICE SO MADE SHALL BE DEEMED COMPLETED UPON THE EARLIER OF SUCH COMPANY'S ACTUAL RECEIPT THEREOF OR FIVE (5) DAYS AFTER DEPOSIT IN THE U.S. MAIL, PROPER POSTAGE PREPAID.

(c) EACH COMPANY DESIRES THAT ITS DISPUTES BE RESOLVED BY A JUDGE APPLYING SUCH APPLICABLE LAWS. THEREFORE, TO ACHIEVE THE BEST COMBINATION OF THE BENEFITS OF THE JUDICIAL SYSTEM AND/OR OF ARBITRATION, EACH COMPANY HERETO WAIVES ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, SUIT, OR PROCEEDING BROUGHT TO RESOLVE ANY DISPUTE, WHETHER ARISING IN CONTRACT, TORT, OR OTHERWISE BETWEEN THE HOLDER AND/OR ANY OTHER CREDITOR PARTY, ON THE ONE HAND, AND EACH COMPANY, ON THE OTHER HAND, ARISING OUT OF, CONNECTED WITH, RELATED OR INCIDENTAL TO THE RELATIONSHIP ESTABLISHED BETWEEN THEM IN CONNECTION WITH THIS NOTE, ANY OTHER RELATED AGREEMENT OR THE TRANSACTIONS RELATED HERETO OR THERE TO.

2.8 Severability. In the event that any provision of this Note is invalid or unenforceable under any applicable statute or rule of law, then such provision shall be deemed inoperative to the extent that it may conflict therewith and shall be deemed modified to conform with such statute or rule of law. Any such provision which may prove invalid or unenforceable under any law shall not affect the validity or enforceability of any other provision of this Note.

2.9 Maximum Payments. Nothing contained herein shall be deemed to establish or require the payment of a rate of interest or other charges in excess of the maximum permitted by applicable law. In the event that the rate of interest required to be paid or other charges hereunder exceed the maximum rate permitted by such law, any payments in excess of such maximum rate shall be credited against amounts owed by Companies to the Holder and thus refunded to Companies.

2.10 Security Interest. The Agent, for the ratable benefit of the Creditor Parties, has been granted a security interest in certain assets of Companies and the Guarantors as more fully described in the Security Agreement and the other Related Agreements.

2.11 Construction; Counterparts. Each party acknowledges that its legal counsel participated in the preparation of this Note and, therefore, stipulates that the rule of construction that ambiguities are to be resolved against the drafting party shall not be applied in the interpretation of this Note to favor any party against the other. Unless the context otherwise requires, (i) words in the singular or plural include the singular and plural and pronouns stated in either the masculine, the feminine or neuter gender shall include the masculine, feminine and neuter, (ii) the words "hereof," "herein" and words to similar effect refer to this Note in its entirety, and (iii) the use of the word "including" in this Note shall be by way of example rather than limitation. This Note may be executed by the parties hereto in one or more counterparts, each of which shall be deemed an original and all of which when taken together shall constitute one and the same instrument. Any signature delivered by a party by facsimile or electronic transmission shall be deemed to be an original signature hereto.

2.12 Registered Obligation. This Note shall be registered (and such registration shall thereafter be maintained) as set forth in Section 13.5(b) of the Purchase Agreement. Notwithstanding any document, instrument or agreement relating to this Note to the contrary, transfer of this Note (or the right to any payments of principal or stated interest thereunder) may only be effected by (i) surrender of this Note and either the reissuance by Companies of this Note to the new holder or the issuance by Companies of a new instrument to the new holder or (ii) registration of such holder as an assignee in accordance with Section 13.5 of the Purchase Agreement.

2.13 Amendment and Restatement. This Note amends and restates in its entirety the Amended and Restated Secured Term Note made by Companies in favor of Holder, as of November 2, 2017, in the original principal amount of \$8,660,000 (the "Prior Note"). This Note does not constitute a novation of the Prior Note and all amounts outstanding as of the date hereof under the Prior Note shall remain outstanding under this Note.

[Balance of page intentionally left blank; signature page follows]

IN WITNESS WHEREOF, each Company has caused this Amended and Restated Secured Term Note to be signed in its name effective as of this 4<sup>th</sup> day of May, 2018.

USELL.COM, INC.

By: \_\_\_\_\_  
Name: Nikhil Raman  
Title: Chief Executive Officer

BST DISTRIBUTION, INC.

By: \_\_\_\_\_  
Name: Brian Tepfer  
Title: Chief Executive Officer

WE SELL CELLULAR LLC

By: \_\_\_\_\_  
Name: Nikhil Raman  
Title: Manager

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IN WITNESS WHEREOF, each Company has caused this Amended and Restated Secured Term Note to be signed in its name effective as of this 4<sup>th</sup> day of May, 2018.

**USELL.COM, INC.**

By: \_\_\_\_\_  
Name: Nikhil Raman  
Title: Chief Executive Officer

**BST DISTRIBUTION, INC.**

By: \_\_\_\_\_  
Name: Brian Tepfer  
Title: Chief Executive Officer

**WE SELL CELLULAR LLC**

By: \_\_\_\_\_  
Name: Nikhil Raman  
Title: Manager

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