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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Hearing Date: December 16, 2008, at 9:30 a.m.
Objection Deadline: December 15, 2008

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In re : Chapter 11 Cases
360networks (USA) inc., et al., : Case No. 01-13721 (ALG)
Debtors. : (Jointly Administered)
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REORGANIZED DEBTORS' RESPONSE TO UNITED STATES TRUSTEE'S MOTION TO CONVERT CERTAIN OF THESE CONFIRMED CHAPTER 11 CASES TO CHAPTER 7 CASES

**TO: THE HONORABLE ALLAN L. GROPPER,
UNITED STATES BANKRUPTCY JUDGE**

The reorganized debtors in the above-captioned cases (collectively, the "Reorganized Debtors") hereby respond to the United States Trustee's motion for entry of an order under section 1112(b) of title 11 of the United States Code (the "Bankruptcy Code"), converting to chapter 7 the above-captioned chapter 11 case, Case No. 01-13721 (ALG) of 360networks (USA) inc. and only other remaining open related chapter 11 case, Case No. 01-13729 of 360fiber inc.¹ In support of this response, the Reorganized Debtors respectfully represent:

¹ Citations herein to the memorandum filed in support of the motion are to "UST Memo."

PRELIMINARY STATEMENT

It now appears the Debtors' general unsecured creditors, Committee, and the Reorganized Debtors are the victims of the misappropriation of substantial sums, representing the proceeds of preference actions, by Dreier LLP and people associated with that firm. Faced with the question of what to do now, all concerned seem to agree. The answer is to have an independent party investigate what happened and seek to recover the missing funds as quickly and economically as possible.

The United States Trustee ("UST"), apparently believing these tasks should be performed by a trustee, seeks conversion of the these cases to chapter 7 because appointment of a chapter 11 trustee is not possible after confirmation of a reorganization plan. Yet, conversion to chapter 7 and the resulting appointment of a trustee would cause extensive and unnecessary collateral damage to the victims of the misconduct here. Moreover, neither of the prerequisites for conversion under section 1112(b) of the Bankruptcy Code is present here because no "cause" to convert these cases exists and such conversion would not be in the best interests of the Debtors' creditors and estates.

Fortunately, this Court has the power under section 105 of the Bankruptcy Code and otherwise to fashion a remedy that would be far less harmful to the victims here while more effectively fulfilling the goals on which all agree. Whatever the label, this Court may appoint, empower, and authorize a postconfirmation estate representative to investigate and pursue the relevant claims. That relief, rather than the conversion to chapter 7 sought in the UST's motion, should be granted here.

GENERAL BACKGROUND

1. On June 28, 2001, 360networks (USA) inc., Telecom Central, L.P., 360networks holdings (USA) inc., 360fiber inc., 360fiber (USA 2) inc., 360fiber (USA 3) inc., 360networks (USA) of Virginia inc., 360networks LLC, 360networks Illinois LLC, 360networks Iowa LLC, 360networks Kentucky LLC, 360networks Louisiana LLC, 360networks Michigan LLC, 360networks Tennessee LLC, 360carrier management inc., TRES Management LLC, Meet Me Room LLC, Carrier Centers Georgia, inc, Carrier Center LA, inc., Texas Carrier Centers Inc., 360networks Mississippi LLC, 360pacific (USA) inc. and 360networks sub inc. (collectively, the “Debtors”) commenced voluntary cases under chapter 11 of the Bankruptcy Code in this Court. Prior to confirmation of the Plan (as defined below), the Debtors operated their businesses and managed their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. On June 29, 2001, this Court entered an order of joint administration pursuant to Bankruptcy Rule 1015(b), providing for the joint administration of the Debtors’ cases for procedural purposes only.

3. On or about July 12, 2001, the UST appointed an Official Committee of Unsecured Creditors (as reconstituted from time to time, the “Committee”) in these cases. No trustee or examiner was appointed in the Debtors’ cases.

4. These cases were coordinated with multiple reorganization cases of certain of the Debtors’ Canadian affiliates that were filed under the CCAA in Canada.

5. On August 19, 2002, the Debtors and 360networks (holdings) ltd. filed the First Amended Joint Plan of Reorganization (Docket No. [1175]). That plan was modified (as

modified, the “Plan”) and then confirmed by this Court on October 1, 2002 (Docket No. [1337]). The Plan became effective on November 12, 2002 (the “Effective Date”).

6. Contemporaneously, an interdependent reorganization plan was approved for the Debtors’ Canadian affiliates by the Canadian CCAA Court.

7. On April 13, 2005, the Debtors filed a Motion for Final Decree Closing Cases of Certain Reorganized Debtors (Docket No. [1701]). That motion, which covered each of the Debtors’ cases except the two cases now remaining open and the case of 360networks sub inc., was granted by this Court by order, dated, May 3, 2005 (Docket No. [1705]).²

OTHER RELEVANT FACTS

8. Until now, these cases have been remarkably successful. Prepetition, the Debtors were part of a large global telecommunications group that was growing rapidly until it “hit a wall” when the telecommunications industry virtually collapsed in 2001. Thus, without the benefit of prepetition work-out negotiations and with little time even to prepare, the Debtors filed for chapter 11 protection. Nevertheless, just over fifteen months later the Debtors confirmed a consensual plan of reorganization that provided both for substantial recoveries to all creditor constituencies and for the reorganization of the Debtors’ revitalized North American operations.

Substantial Consummation of the Plan in 2002

9. Under the Plan, on or shortly after its 2002 Effective Date, the following classes of claims were paid in full: (a) Class 1 Administrative Claims (\$15 million); (b) Class 2 Priority

² The 360fiber inc. case was excluded from the order only because of a then pending adversary proceeding, which subsequently was resolved. The 360networks sub inc. case was voluntarily dismissed by order, dated March 26, 2003.

Tax Claims (\$9 million); Class 3 Other Priority Claims (\$50,000); Class 5 Nonconsensual Lien Claims (\$22 million); and Class 6 Other Secured Claims (\$0).³

10. In addition, holders of Class 4 Prepetition Lender Claims received: (x) \$135 million in cash; (y) \$215 million in principal amount of senior secured notes; and (z) 80.5% of the stock (“New Parent Stock”) of the Reorganized Debtors’ new parent (which 80.5% of the stock had value then estimated at \$120 million).

11. As to Class 7 General Unsecured Claims, the Plan provided for holders of Allowed Class 7 Claims to receive a combination of: (a) 10% of the New Parent Stock or a lump sum cash distributions in lieu of such stock (then estimated to have an aggregate value of \$10 to \$15 million); (b) 85% of the first \$30 million of net preference recoveries from the preference claims the Committee was to pursue under the Plan (the “Committee Claims”); and (c) 80% of net recoveries above \$30 million from Committee Claims.⁴ On or shortly after the Effective Date, more than half of such New Parent Stock or cash distributions in lieu of such stock was distributed to Class 7 creditors then holding allowed claims.

12. In total, therefore, under the Plan, cash, notes, and stock together worth well over \$500 million was distributed to the Debtors’ creditors on or shortly after the Plan’s 2002 Effective Date. Additionally, on the Effective Date, the Debtors effectively transferred the Committee Claims to the Committee because the Committee then had the “exclusive” right to prosecute such claims. Plan § 4.3(c)(2). Moreover, all of the Debtors’ other assets revested in

³ All aggregate claims and other amounts are approximations based on the Debtors’ Disclosure Statement [Docket No. 1100].

⁴ The remainder of the net preference recoveries were payable to the Reorganized Debtors. Consistent with the Plan, the Reorganized Debtors already received certain of those amounts. Plan § 4.3(c).

the applicable Reorganized Debtors. Plan § 7.2. Meanwhile, the Debtors' Canadian affiliates emerged from their CCAA cases in tandem with the Reorganized Debtors' emergence.

13. Since the Effective Date, the Reorganized Debtors have entered into numerous substantial transactions, including asset sales and purchases as well as various contracts and leases, with numerous third parties. Additionally, the Reorganized Debtors made payments on the notes issued under the Plan.

The Committee's Preference Actions

14. Contrary to the assertion of the UST that "the Plan does not specify the exact division of labor between the Reorganized Debtors and the Post-confirmation Committee with respect to the prosecution of preference actions," UST Memo ¶ 6, the Plan is clear that after the Effective Date, the Committee had "the exclusive right to prosecute all Committee Claims". Further, the Plan required the Committee to "deposit all proceeds from the prosecution or settlement of Committee Claims into the Preference Account", which is "an escrow or trust account maintained by and under the exclusive control of the Committee". Plan §§ 4.3(c)(2); 1.63.

15. Also, the Plan specifies two responsibilities of the Reorganized Debtors related to Committee Claims. First, the Reorganized Debtors were to (and repeatedly did) "use their reasonable best efforts to timely cooperate with the Committee in its analysis, investigation, and pursuit of Committee Claims." Plan § 4.3(g).⁵ Second, the Reorganized Debtors were to act as a

⁵ The substantial time and effort involved in the Reorganized Debtors' cooperation obligation was one reason they shared in the Net Preference Recoveries, particularly in light of the number and magnitude of the Committee's preference litigations. Other reasons for the sharing arrangement included, *inter alia*, that under the Plan, the Class 4 secured creditors did not share directly in the preference recoveries despite such

distribution agent to make the final distribution of Net Preference Recoveries to Class 7 Creditors if and when the Committee transferred the funds to the Reorganized Debtors. Plan § 5.1(c).⁶

16. While Class 7 creditors were projected to receive a recovery from their share of the net proceeds from Committee Claims, there was no assurance of that result. See, e.g., Debtors' Disclosure Statement pp. 5, 18 ("Such assumptions [including the projected amount of Net Preference Recoveries for Class 7 Claims] are not predictions and are subject to many unforeseeable circumstances." "[T]here can be no assurance of any minimum recovery level on such claims).

17. After the Plan's Effective Date, the Reorganized Debtors promptly fulfilled virtually all of their Plan responsibilities. Meanwhile the Committee's preference actions, which had become the only significant open matters in these cases, progressed slowly. In April 2006, due to the Reorganized Debtors' remaining interests in these cases having become parallel with the Committee's pursuit of preference claims and with the hope of facilitating resolution of such actions because the Reorganized Debtors had, inter alia, relevant fact knowledge to contribute, the Reorganized Debtors requested to join the Committee. Committee counsel rejected that request. Nonetheless, Committee counsel agreed to have one of the Reorganized Debtors become an ex officio member of the Committee with the ability to participate in certain

creditors' over \$700 million of unsecured deficiency claims and instead were to indirectly share in such recoveries through their ownership of 80.5% of the New Parent Stock.

⁶ The UST implies the Reorganized Debtors had another obligation based on their right to receive certain information regarding the Preference Account. See UST Memo ¶ 5. Yet, that provision was merely a right for the Reorganized Debtors' benefit because of their entitlement to a substantial share of Net Preference Recoveries.

Committee deliberations concerning the Committee's pursuit and/or settlement of preference actions, conditioned on the Reorganized Debtors' having: (a) no vote; and (b) no ability to have their outside counsel participate in Committee communications or deliberations.

18. After the Reorganized Debtors' involvement in the Committee's preference litigation deliberations and mediations, the key remaining Committee Claims began to get resolved. Further, while until then the recoveries on Committee Claims had barely kept pace with the Committee's professional fees and costs, in July 2007 the Committee received its first large preference recovery from the Nortel action. Some other substantial preference action settlements followed.

19. When all of the Committee's remaining litigations had been resolved, the Reorganized Debtors prepared to make the final Plan distributions to Class 7 creditors and the Reorganized Debtors, subject to their receiving the remaining Net Preference Proceeds by a wire transfer from Dreier LLP of approximately \$38.6 million.

20. Late on December 4, 2008, however, the Reorganized Debtors first learned that substantial funds were missing from the 360networks Committee escrow account at Dreier LLP. The Reorganized Debtors gathered what information they could that evening. The next morning, counsel for the Reorganized Debtors advised this Court's chambers and the UST's office that preference proceeds were missing.

21. Meanwhile, the Reorganized Debtors were (and have continued to be) cooperating with the efforts of the SEC Receiver for Dreier LLP and of law enforcement authorities to track down money missing from the Dreier LLP escrow and trust accounts.

22. At the Court's request, during the afternoon of December 5, 2008, the Court had a telephonic conference with counsel for the Reorganized Debtors and the UST. Counsel for the Reorganized Debtors provided an update regarding what then was known about the Dreier LLP situation. Near the end of the conference call, counsel for the Reorganized Debtors noted that he expected to return to the Court in the near term to discuss the designation of some person or entity with the authority to investigate what had happened and pursue relevant claims. The Court responded that it had in mind an examiner type person to fill that role.

23. During the following days, counsel for the Reorganized Debtors responded to fact inquiries from and discussed next steps with the UST's office. Counsel for the Reorganized Debtors noted that: (a) more facts were becoming known and new developments were occurring on a daily basis; and (b) in other bankruptcy cases involving criminal conduct, it was important not to interfere with the prosecutors and in any event, access to critical information would not be available during the early stages of the criminal investigation and prosecution process. Counsel to the Reorganized Debtors and the UST's office then agreed to consult with each other on how and when to next proceed.

24. Without the anticipated further consultation, the UST then filed the chapter 7 conversion motion. In signing an Order to Show Cause setting a hearing on the UST's motion, the Court inserted language stating that at the scheduled hearing, "the Court may consider alternative relief to protect the estate." While the Reorganized Debtors support (and indeed initially suggested), the central relief sought by the UST, the independent investigation of what happened to the preference recoveries and the pursuit of relevant claims, the Reorganized Debtors submit that "alternative relief" consistent with the Court's suggestion of an examiner type person or entity would be appropriate here.

RELIEF REQUESTED

I. **THERE IS NO BASIS FOR CONVERSION OF THESE CHAPTER 11 CASES UNDER SECTION 1112(b)**

25. Under the former section 1112(b), which governs these cases, conversion of a chapter 11 case to chapter 7 requires “cause” and that the requested conversion be in the best interests of creditors and the estate. See 11 U.S.C. § 1112(b). As demonstrated below, neither of such elements exists here. Further, even were all those factors to be satisfied (which clearly is not true here), the Court still retains discretion to fashion an appropriate remedy.

A. Cause For Conversion Is Not Present Here

The UST asserts two specific “causes” for conversion under former section 1112(b), “unreasonable delay by the debtor that is prejudicial to creditors” and “inability to effectuate substantial consummation of a confirmed plan”. UST Memo p. 8 (citing 11 U.S.C. § 1112(b)(3), (7)). Additionally, the UST asserts that a breach of fiduciary duty might constitute “cause” for conversion under section 1112(b). Id. p. 9. None of these alleged causes for conversion exist here.

1. There Has Been No Unreasonable Delay by the Reorganized Debtors

Not only has there been no unreasonable delay here by the Debtors or Reorganized Debtors, there has been no delay by them at all. As described above regarding substantial consummation of the Plan, the Debtors and Reorganized Debtors moved promptly to achieve and promptly did achieve each step towards consummation of the Plan. Further, as acknowledged by the UST, the decision to defer distribution under the Plan of Net Preference Recoveries to Class 7 creditors until all Committee Claims had been resolved was made, based upon advice of

counsel, by the Committee, which had “exclusive” control over those claims and proceeds. See UST Memo p. 11.

Unable to assert any responsibility of the Reorganized Debtors for delay, the UST simply ignores the fact that any delay here was caused by Dreier LLP and related parties, and not by the Reorganized Debtors as required by section 1112(b)(3). See UST Memo p. 8. Correspondingly, the only case cited by the UST on section 1112(b)(3) involved unreasonable delay by a “liquidating corporation” that took “title to all of the assets of the Debtors” under a plan and then was to liquidate those assets, resolve all outstanding claims against the Debtors, and distribute the asset proceeds to the holders of allowed claims against the debtors. See In re Consolidated Pioneer Mortgage Entities, 264 F.3d 803, 804-05 (9th Cir. 2001) (emphasis added). In contrast, here the Debtors were reorganized, not liquidated, the distributions at issue represent less than 10% of the total distributions under the Plan, and the Debtors’ successors were not responsible for the delay at issue. Indeed, there has been no default under the Plan by the Reorganized Debtors.

2. Substantial Consummation of the Debtors’ Plan Occurred Years Ago

Equally unfounded is the UST’s assertion that “the Reorganized Debtors have demonstrated ‘an inability to effectuate substantial consummation of a plan.’” UST Memo p. 9. Substantial consummation is deemed to occur upon the following:

- (A) transfer of all or substantially all of the property proposed by the by the plan to be transferred;
- (B) assumption by the debtor or by the successor to the debtor under the plan of the business or the management of all or substantially all of the property dealt with by the plan; and
- (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2).

Here, there is no question that the Plan was substantially consummated years ago within the meaning of section 1101(2). Specifically, six years ago: (a) the Confirmation Order became final and nonappealable; (b) all of the Debtors' property proposed to be transferred under the Plan was transferred, including the Committee Claims themselves -- which were effectively transferred to the Committee's "exclusive" control; (c) the Reorganized Debtors assumed the business or management of their respective property under the Plan; and (d) well over \$500 million (representing over 90%) of the projected distributions under the Plan to the Debtors' creditors were completed, with only the funds held by Dreier LLP (which were derived from the Committee Claims for which the Debtors previously had transferred responsibility to the Committee) still to be distributed.⁷ Moreover, any recoveries on the Committee Claims were contingent and speculative so that the fact that such distributions have not been made yet could not signify that the Plan was not substantially consummated. Consequently, the Reorganized Debtors not only have demonstrated an ability to substantially consummate the Plan, such substantial consummation unquestionably occurred years ago.

3. There Has Been No Breach of a Fiduciary Duty that Justifies Conversion Here

The UST's argument that "cause" for conversion exists here due to "breach of fiduciary duty by a responsible person in a case" also is belied by the UST's own submissions. UST

⁷ Further, all of the Debtors' other cases have been closed or dismissed and all contested matters and adversary proceedings in all of the 360networks cases have been or are about to be resolved and/or closed. There are currently four adversary proceedings still technically open on the docket. Those proceedings have been inactive for several years and concern matters that have been resolved. The Reorganized Debtors, together with the Committee, where appropriate, were seeking official resolution of such proceedings and fully expect they will be closed soon.

Memo p. 9. Nowhere does the UST assert or provide a basis for concluding there was a breach of any duty, let alone a fiduciary duty, by the Reorganized Debtors. Instead, the UST suggests – without basis as to any participant here beyond Dreier LLP and its personnel – that a “chapter 7 trustee is needed to determine if there were any breaches of fiduciary duties” Id. (emphasis added). Hence, the cases cited by the UST are irrelevant here because they involve conclusive findings of serious misconduct by the debtor or debtor in possession, not unfounded speculation regarding the need “to determine” whether such misconduct might have occurred.

B. Even If There Were “Cause” To Convert The Debtors’ Open Chapter 11 Cases To Chapter 7 Cases, Such Conversion Would Not Be Appropriate Under Section 1112(b)

The “court may decline to convert or dismiss a case under § 1112(b) even in the presence of cause. The court has wide discretion to make an appropriate disposition of the case.” In re Pete Gallegos Paving, Inc., 2008 WL 1751971 at *1 (Bankr. S.D. Tex. Apr. 14, 2008). Here, conversion of these cases to chapter 7 is not warranted because chapter 7 requires debtors to be liquidated, while the Debtors already have reorganized. See id. (“Conversion is thus a transmutation from an attempt to reorganize to a liquidation.”).

Also, in making the determination of the best interests of the creditors and estate under section 1112(b), “the court must consider the interests of all of the creditors.” In re Superior Siding and Window, Inc., 14 F.3d 240, 243 (4th Cir. 1994). See In re E.C. Garcia and Company, Inc., 78 F.3d 592 (9th Cir. 1996) (unpublished decision). Thus, the potential harm to other creditor classes that relied on the Debtors’ reorganization Plan and received over \$500 million of cash, notes, and stock under the Plan, should govern here. See In re E.C. Garcia, 78 F.3d at 592 (material default as to one of many plan classes not enough to warrant conversion). Similarly, conversion is not warranted here due to its adverse impact on those parties who have dealt with

and relied upon the Reorganized Debtors over the past six years as well as on the Debtors' Canadian affiliates who emerged from their CCAA cases under a plan linked to the Debtors' Plan.

Moreover, Class 7 creditors also would not be better off from conversion of these cases and the appointment of a chapter 7 trustee with an undefined role that is unlimited in scope. As discussed below, there is an alternative for obtaining an independent investigation that should produce quicker recoveries at less cost for the Class 7 creditors whose Plan recoveries would bear the expense of any investigation and recovery effort. Further, under the Plan, Class 7 creditors receive 10% of the New Parent Stock, whose value likely would be adversely impacted by any association of the Reorganized Debtors with chapter 7, even if that impact could be limited as suggested — without authority — by the UST. See UST Memo p. 10. Indeed, not a single Class 7 unsecured creditor in these cases supports the UST's conversion request, while the Reorganized Debtors understand that Class 7 creditors holding substantial claims support the relief proposed by the Reorganized Debtors herein.

Additionally, the lack of certainty regarding the legal implications of conversion of these cases to chapter 7 is troubling. The UST states the following regarding that impact:

As the property of the estates re-vested in the Reorganized Debtors under the Plan, see Plan at § 7.2, there does not appear to be a need to operate or administer the Reorganized Debtors. The [proposed] trustee's role will be to administer the Plan assets and to make distributions to creditors.

UST Memo p. 10. Yet, administering “the Plan assets” makes little sense here as there are no such assets except any claims of the Debtors' estates. The key claims here, those of the Committee, to whom responsibility for the Committee Claims were assigned, as well as the claims of general unsecured creditors and the Reorganized Debtors, as the beneficiaries of the

Committee Claims, are not necessarily part of the Debtors' estates. Moreover, the basis for the UST's presumption that conversion of these cases and appointment of a chapter 7 trustee would have no impact on the Reorganized Debtors or their operations is unstated.

Consequently, conversion of these cases is neither legally justified nor practical, particularly when there is a far preferable alternative available to conduct an investigation and pursue related claims.

II. **A POSTCONFIRMATION REPRESENTATIVE WOULD FULFILL THE UST'S OBJECTIVES WHILE MINIMIZING UNINTENDED ADVERSE CONSEQUENCES TO CREDITORS AND THE REORGANIZED DEBTORS**

There is precedent for the Court to appoint a special postconfirmation functionary to investigate the missing funds and pursue appropriate claims. See, e.g., In re Record and Tape Place, Inc., 1983 Bankr. Lexis 6461 at *2-3 (Bankr. D. Mass. Apr. 7, 1983) (Court "authorized appointment of a functionary to investigate and monitor [the debtor's] post-confirmation operations"). Specifically, pursuant to section 105 of the Bankruptcy Code, the Court appointed a "supervisor" who "did not displace the confirmed Debtor's management but rather his duties were a hybrid of the duties of a trustee and examiner" Id. at *13. While the scope of the alleged facts and the duties of the proposed functionary differ here, the Record and Tape Court was similarly concerned, inter alia, with the costs of a trustee and the impact of conversion on creditor distributions and, therefore, provides useful precedent for this Court to tailor the relief granted to the relevant needs and constraints. Id. at *10. See Equal Employment Opportunity Commission v. Local 638, 81 F.3d 1162, 1181 (2nd Cir. 1996) (Second Circuit states that a federal court has inherent power to appoint a special master to implement a district court's order

“so long as the master’s powers are ‘tailored to the cure the . . . violation’” that the court’s order was intended to address) (citation omitted) (emphasis added).⁸

Notably, as the appointment of a functionary in Record and Tape was not under section 1104 of the Bankruptcy Code, “the United States Trustee was powerless regarding the appointment of a functionary.” Id. at *14-15. Instead, the Bankruptcy Court made the appointment. The same flexible approach is warranted here and is incorporated into the annexed order proposed by the Reorganized Debtors.

⁸ Although the Reorganized Debtors fully support having a prompt investigation here, all parties should recognize that any such investigation might be unable to determine the relevant facts quickly. With criminal charges against Marc Dreier pending and unresolved, the U.S. Attorney is likely to object to comprehensive civil examinations of persons who may be witnesses in the criminal case, and witnesses in any event may be reluctant to testify while a criminal investigation that may result in additional charges is being pursued. Similarly, the SEC Receiver and, if Dreier LLP becomes a debtor under the Bankruptcy Code, the trustee in any such case, is likely to view the role of any investigator appointed in these cases as being subordinate to theirs. Meanwhile, however, it appears adequate steps now have been taken by the U.S. Attorney and the SEC to preserve both assets and evidence. For these reasons, this Court should recognize that there is time to identify and craft a mandate for an investigator here that would complement, rather than impede, the efforts already being undertaken by the U.S. Attorney and the SEC.

CONCLUSION

WHEREFORE, the Reorganized Debtors respectfully request that the Court: (a) enter an order consistent with this response that is substantially in the form annexed hereto as Exhibit A; and (b) grant the Reorganized Debtors such other and further relief as the Court deems just and proper.

Dated: December 15, 2008

WILLKIE FARR & GALLAGHER LLP

Of Counsel: Elizabeth K. Horowitz

/s/ Alan J. Lipkin

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11 Cases
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360networks (USA) inc., et al., : Case No. 01-13721 (ALG)
:
Debtors. : Jointly Administered
-----X

**ORDER APPOINTING A POSTCONFIRMATION
REPRESENTATIVE OF THE DEBTORS' ESTATES**

Upon the United States Trustee's motion (the "Motion") for entry of an order under section 1112(b) of title 11 of the United States Code (the "Bankruptcy Code") converting to chapter 7 the chapter 11 case, Case No. 01-13721 (ALG) of 360networks (USA) inc. and the only other remaining open related chapter 11 case, Case No. 01-13729 of 360fiber inc.; and an order to show cause (the "Order to Show Cause") having been entered by the Court scheduling a hearing (the "Hearing") to consider the Motion as well as to consider alternative relief based on the concerns raised by the Motion; and upon consideration of the Reorganized Debtors' response to the Motion and all other responses to the Motion; and it appearing that the Court has jurisdiction over this matter and the relief requested in the Motion and referenced in the Order to Show Cause pursuant to 28 U.S.C. §§ 157 and 1334; and due and sufficient notice of the Motion and Order to Show Cause having been given under the circumstances; therefore, upon the Motion and all the proceedings before the Court and after due deliberation and sufficient cause appearing therefore; it is hereby:

ORDERED that the Motion shall be resolved by the appointment of a Postconfirmation Representative of the Debtors' Estates (the "Representative") solely to investigate and, if authorized by this Court, solely to initiate, pursue, settle and collect any claims

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(“Claims”) of the “Debtors’ estates, holders of “Class 7 Claims,” and the “Committee” based upon the investment, disbursement, misappropriation, defalcation or other use or application of proceeds from “Committee Claims” and the “Preference Account,” each such term as defined in the First Amended Joint Plan of Reorganization Proposed by Debtors and 360networks (holdings) Ltd., dated August 14, 2002, as amended; and it is further

ORDERED that the Representative shall be appointed by this Court after consideration of candidates submitted in writing by the Reorganized Debtors, the Committee or its current members, and the United States Trustee within ___ days of the date hereof; and it is further

ORDERED that the Representative may, in his or her discretion and to the extent it is feasible to do so, provide a draft of any report on his investigation on a confidential basis to the Reorganized Debtors and counsel for current members of Committee for their review and comment, which comments, if any, the Representative may accept or reject in whole or in part; and it is further

ORDERED that the Representative’s initiation of any litigation to recover on or agreement to settle any Claims first must be authorized by this Court based upon a motion filed and served on not less than ten business days notice, with service by hand or overnight mail on the Reorganized Debtors, each current member of the Committee, and the United States Trustee; provided, however, that without Court authorization, the Representative may commence litigation or file any proof of claim, notice, or similar document solely to the extent necessary to preserve a claim that might otherwise expire due to a statute of limitations, bar date, or other time bar; and it is further

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ORDERED that, pending further order of this Court, the Representative shall hold any recoveries on the Claims in accordance with requirements for holding cash applicable to a trustee appointed under the Bankruptcy Code in this District; and it is further

ORDERED that the Court reserves decision on any issue related to the confidentiality of any material provided to the Representative, provided that any materials separately obtained under the Federal Rules of Bankruptcy Procedure may be used by any party; and it is further

ORDERED that this Court shall retain jurisdiction over any matters related to or arising from the implementation of this Order.

Dated: New York, New York
December __, 2008

HON. ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE