

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re	:	Case No. 01-13721 (ALG)
	:	
360 networks (USA) inc., <u>et al.</u> ,	:	(Chapter 11)
	:	
Reorganized Debtors.	:	
	:	
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**MEMORANDUM OF LAW OF THE UNITED STATES TRUSTEE  
IN SUPPORT OF MOTION TO CONVERT THESE CONFIRMED  
CHAPTER 11 CASES TO CHAPTER 7 CASES**

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

Diana G. Adams, the United States Trustee for Region 2 (the “United States Trustee”), in furtherance of the duties and responsibilities set forth in 28 U.S.C. § 586(a)(3) and (5), does hereby file this memorandum of law in support of her motion (the “Motion”) to this Court for an order converting the Chapter 11 cases of 360networks (USA) inc. (Case No. 01-13721) and 360fiber inc. (Case No. 01-13729) (collectively, the “Reorganized Debtors”) to Chapter 7 cases, pursuant to 11 U.S.C. § 1112(b). In support thereof, the United States Trustee represents and alleges as follows:

**INTRODUCTION**

The Reorganized Debtors expected to make a final distribution to unsecured creditors and to close their cases on December 15, 2008. In order to make the final distribution, the Reorganized Debtors were anticipating a wire transfer of approximately \$40 million being held in a bank account maintained by Dreier LLP (the “Dreier Firm”), the attorneys for the unsecured creditors’ committee. The wire transfer was never made and in view of the recently filed criminal and securities charges against Marc Dreier, the apparent equity owner of the Dreier Firm, it appears that significant funds – including some or all of the funds being held for final distributions in these cases – may be missing from the bank account maintained by the Dreier Firm. Accordingly, the Court should convert the remaining Chapter 11 cases to Chapter 7 cases in light of the inability to substantially consummate the plan of reorganization, the immediate need for an independent fiduciary to examine the breath of

the financial impact upon the creditors in these cases, and the attendant delay and prejudice to creditors.

The appointment of a Chapter 7 trustee will ensure that a disinterested third party immediately takes steps to review the disposition of the funds and to determine the appropriate course of action should it be determined that some or all of the funds have been misappropriated. To the extent some or all of the funds are recovered, the Chapter 7 Trustee will expedite the distributions to the unsecured creditors.

### FACTS

#### *A. Background*

1. On June 28, 2001, 360networks (USA) inc., Telecom Central, L.P., 360networks holdings (USA) inc., 360fiber inc., 360 fiber (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., 36n0networks Mississippi LLC, 360pacific (USA) inc. and 360networks sub inc. (collectively, the “Debtors”)<sup>1</sup> 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 properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

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

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<sup>1</sup>As explained below, final decrees were entered in all of the Debtors’ cases except for those of the Reorganized Debtors.

3. On or about July 12, 2001, the United States Trustee appointed the official committee of unsecured creditors in these cases. No trustee or examiner has been appointed in the Debtors' cases.

4. On August 19, 2002, the Debtors and 360networks (holdings) ltd. filed the First Amended Joint Plan of Reorganization (Docket No. 1175) (as modified, the "Plan") and the First Amended Disclosure Statement with respect to the Plan (Docket No. 1176) (the "Disclosure Statement"). The Plan was confirmed by this Court by order entered on October 1, 2002 (Docket No. 1337) (the "Confirmation Order"). Under the confirmed plan, the unsecured creditors' committee remained in existence in order to supervise certain preference and other causes of actions pursued by the Committee (the "Post Confirmation Committee"). The Dreier Firm represents the Post Confirmation Committee.

*B. Relevant Plan Provisions*

5. The Plan provides for the establishment of an account described as "an escrow or trust account maintained by and under the sole and exclusive control of the Committee" to hold funds advanced by the Debtors or Reorganized Debtors for preference actions after the effective date of the Plan, and also to hold proceeds obtained from the prosecution of the preference actions (the "Preference Account"). See Zipes Decl. Ex. A (Plan) at ¶ 1.63. With respect to the Preference Account, "[t]he Committee promptly shall provide the Reorganized Debtors with copies of the monthly statements for the Preference Account together with a schedule of all deposits into and withdrawals from the Preference Account. The Reorganized Debtors shall have the right to audit the Preference Account, at the Reorganized Debtors' expense, upon reasonable notice." Id. at ¶ 4.3(c). Under the Plan, unsecured creditors would receive 80 percent and the Reorganized Debtors would receive 20 percent of the net preference recoveries described in the Plan. Id. at ¶ 3.7.

6. While 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 the preference actions, it did require that "[t]he Debtors and Reorganized Debtors shall use their reasonable best

efforts to timely cooperate with the Committee in its analysis, investigation, and pursuit of Committee Claims.” *Id.* at ¶ 4.3(g).

*C. Post-Confirmation Developments Generally*

7. Under the Post-Confirmation Order and Notice dated January 16, 2003 (the “Post-Confirmation Order”), the Debtors are required to file post-confirmation status reports “every January 15th, April 15th, July 15th, and October 15th until a final decree has been entered.” *See* Post-Confirmation Order at ¶ 1. The Debtors filed their last post-confirmation status report on April 16, 2004 (Docket No. 1641), and have failed to file any further post-confirmation status reports with the Court.

8. On April 13, 2005, the Debtors and 360 networks (holdings) ltd. filed a Motion for Final Decree Closing Cases of Certain Reorganized Debtors (Docket No. 1701) (the “First Case Closing Motion”). The First Case Closing Motion, which covered each of the Debtors’ cases except the cases of the Reorganized Debtors and the case of 360networks sub inc., was granted by this Court by order entered on May 3, 2005 (Docket No. 1705). The 360fiber inc. case was excluded from the order only because of a then pending adversary proceeding and was closed when the adversary proceeding was resolved. On December 2, 2008, the Reorganized Debtors filed a Motion for Final Decree Closing Cases of Certain Reorganized Debtors (the “Final Decree Motion”) (Docket No. 1988) (seeking to close the open cases). The Final Decree Motion was scheduled to be heard on December 15, 2008.

*D. Post-Confirmation Developments Involving The Preference Account*

9. By letter dated November 7, 2007 (the “November Letter”) (Doc. No. 1833), the Post Confirmation Committee provided a report to unsecured creditors regarding the timing and projected amounts of distributions to unsecured creditors. The Post Confirmation Committee projected that the total of unsecured claims is approximately \$275 million “and is not expected to change significantly.” Based upon the recoveries to date, the Post Confirmation Committee projected recoveries of no less than 15 percent of the face amount of unsecured claims. The Post Confirmation Committee further

estimated that the distribution would take place in the late second quarter or early third quarter of 2008. A copy of the November Letter is attached as Exhibit B.

10. Over the past year, the Court has repeatedly inquired as to the status of the distribution to unsecured creditors. For example, during the April 2, 2008 hearing, the following dialogue ensued:

NORMAN KINEL: . . . . But, we are – we have completed – resolved every last preference action, and unfortunately for Your Honor, U.S. Relo is the only outstanding one.

THE COURT: Well, it's too bad because, as I understand it, you're holding up a distribution to creditors because of this.

MR. KINEL: Well, Your Honor, I wouldn't characterize it that way. There are some issues on the distribution that will be worked on and there will be a very significant distribution made in a matter of months. And in the meantime, the money is earning a kind of nice interest rate. So, no one is upset and it really --

THE COURT: Well, you have a committee and I have to presume that they know what they're doing. All right.

Transcript of Hearing of April 2, 2008 (“Apr. 2 Tr.”) (Doc. No. 1887) at 6-7. See Zipes Decl. Ex. C (excerpts from the Apr. 2 Hearing Tr.).

11. Subsequently, on July 24, 2008, the Court expressed skepticism about the Post Confirmation Committee's decision to maintain a large Preference Account without making a distribution to creditors:

THE COURT: I always assumed that [the decision to wait to make one distribution by the Committee to unsecured creditors] was a decision, right or wrong, of the committee. They wanted to hold enormous sums of money in their accounts as these preference cases wound their way to termination.

MR. KINEL: Your Honor, that wouldn't be entirely accurate for the following reasons. As you may recall, the bulk of the money, the net preference recoveries that we have today [in escrow], came from three actions. Nortel, Pirelli --

THE COURT: I know that, but Nortel is a while ago.

MR. KINEL: – and Sycamore. Nortel is the oldest. Nortel is almost a year old, I think. Sycamore and Pirelli resolved only this year. And the decision to – as a matter of fact, there was discussion after the Nortel money came in about making a distribution at that time. And in consultation with 360, who is the body – the entity who, under the plan, physically is going to cut the checks, the decision was made --

THE COURT: That's what I thought, the committee decided in its business judgment that it would prefer to make one distribution and hold the funds until this all got resolved. I thought that's what happened.

MR. KINEL: That's correct.

Transcript of Hearing of July 24, 2008 (“July 24 Tr.”) (Doc. No. 1947) at 22-23. See Zipes Decl. Ex. D (excerpts from the July 24 Tr.).

12. On or about December 8, 2008, Marc S. Dreier, Esq., the Dreier Firm's sole equity partner, was charged by federal prosecutors with securities fraud and wire fraud charges and over attempts to sell certain allegedly bogus notes to various investors. See David Glovin & Bob Van Voris, *Lawyer Dreier Charged by U.S. With \$100 Million Fraud*, BLOOMBERG NEWS, Dec. 8, 2008, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=abUudD8Pp5NA&refer=home>). Mr. Dreier has also been sued by the Securities & Exchange Commission on securities fraud allegations stemming from the same transactions. See id.

13. According to press accounts, “\$20 million or more in escrow funds are missing at the firm.” See Liz Moyer, *Dreier Charged With \$113 Million Financial Fraud*, Forbes.com, Dec. 8, 2008, at [http://www.forbes.com/2008/12/08/marc-dreier-fraud-biz-wall-cx\\_lm\\_1208dreier\\_print.html](http://www.forbes.com/2008/12/08/marc-dreier-fraud-biz-wall-cx_lm_1208dreier_print.html)).

14. The United States District Court for the Southern District of New York has appointed Mark Pomerantz of the law firm of Paul Weiss Rifkind Wharton & Garrison as the equity receiver in the civil action that the Securities and Exchange Commission has commenced against Marc S. Drier.

*See Zach Lowe & Daniel Wise, Dreier Arraigned on Two Charges; Receiver Named to Guard Firm Assets*, N.Y.L.J, Dec. 9, 2008, at 1.

*E. The Notification of the United States Trustee and Court on December 5, 2008 of the Missing Funds*

15. On December 5, 2008, Alan Lipkin of Willkie Farr & Gallagher, counsel to the Reorganized Debtors, contacted the United States Trustee's Office and the Court, separately, regarding information he had obtained relating inter alia to the monies being held in the Preference Account that were never wire-transferred to the Reorganized Debtors. See Zipes Decl. at ¶ 5. As a result of that call, the Court held a telephone conference later that day with Mr. Lipkin and representatives of the United States Trustee's Office. Post Confirmation Committee counsel, although advised of the conference, did not have a representative on the telephone. During that call, the Court was advised that approximately \$40 million of estate funds had never been wire transferred by the Dreier Firm and that there was a possibility that some or all of those funds had been misappropriated from the escrow accounts. Id. at ¶ 6.

## ARGUMENT

### CAUSE FOR CONVERSION OF THESE CHAPTER 11 CASES UNDER SECTION 1112(b) EXISTS HEREIN

The Court has sufficient cause to convert these cases to Chapter 7 under Section 1112(b). Section 1112(b) of the Bankruptcy Code prior to the 2005 amendments<sup>2</sup> describes a variety of factors which may constitute “cause” for the conversion of a Chapter 11 case to a Chapter 7 case or for the dismissal of a Chapter 11 case in its entirety. See 11 U.S.C. § 1112(b). Under this provision, the Court may find cause in the following circumstances, among others:

- (1) unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C § 1112(b)(3)); and
- (2) inability to effectuate substantial consummation of a confirmed plan (11 U.S.C § 1112(b)(7)).

11 U.S.C. § 1112(b).

Here, the Court should convert or dismiss these cases based on the statutory grounds enumerated in 11 U.S.C. 1112(b)(3) and (7), separate and apart from the clear breach of fiduciary duty. The breach by the Dreier Firm has caused “unreasonable delay . . . that is prejudicial to creditors.” 11 U.S.C. §1112(b)(3); see Pioneer Liquidating Corp. v. United States Trustee (In re Consol. Pioneer Mortg. Entities), 264 F.3d 803, 809 (9th Cir. 2001) (affirming conversion of a case from chapter 11 to chapter 7 under 1112(b)(3) for prejudicial delay where the debtor made no distributions for five years following the confirmation of a plan of liquidation). Clearly, the Dreier Firm’s failure to make the final distribution in these cases is prejudicial to creditors.

Likewise, the Reorganized Debtors have demonstrated “an inability to effectuate substantial consummation of a plan.” 11 U.S.C. § 1112(b)(7). The Second Circuit has explained that a plan is substantially consummated upon, among other things, “the transfer of substantially all of the property proposed by the plan to be transferred; . . . and the commencement of distribution under the plan.”

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<sup>2</sup>These cases were filed in 2001.

Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 144 (2d Cir. 2005). The Reorganized Debtors are unable to effectuate the substantial consummation of the Plan. The statement in the Final Decree Motion that “distributions under the Plan to the Reorganized Debtors’ creditors will have been completed as of the date upon which this motion is heard” is not accurate. See Final Decree Motion at ¶ 12. Thus, this Court should convert these cases based on 11 U.S.C. § 1112(b)(7).

Moreover, the listed factors under 11 U.S.C. § 1112(b) for conversion of a case are not exclusive and a court may “use its equitable powers to reach an appropriate result in individual cases.” Carolin Corp. v. Miller, 886 F.2d 693, 699 (4<sup>th</sup> Cir. 1989). For example, this Court may properly convert the case for a breach of fiduciary duty by a responsible person in a case. In In re Hampton Hotel Investors, L.P., 270 B.R. 346 (Bankr. S.D.N.Y. 2001), the court was troubled by the general partner’s borrowing without court approval. Id. at 353. The general partner also made a payment on a pre-petition claim. Id. Further, the debtor failed to collect receivables from an affiliate. Id. Most seriously, the court noted that the general partner took an undisclosed interest in assets sold by the debtor at an auction. Id. at 355.

The Hampton Hotel court converted the case after finding that: (a) the debtor had violated basic rules for management under Chapter 11; (b) the debtor’s general partner had engaged in extraordinary instances of self-dealing; (c) the investigation of the debtor’s general partner required the appointment of an independent trustee; and (d) the court lacked confidence in the general partner’s ability and inclination to comply with its fiduciary duties. Id. at 358; see also In re AdBrite Corp., 290 B.R. 209, 217 (Bankr. S.D.N.Y. 2003) (a debtor-in-possession’s dereliction of its fiduciary duty to creditors is a basis to convert or dismiss a case).

In this case, while all the facts are not known, one important reason for the conversion of this case and the appointment of an independent chapter 7 trustee is to determine if there were any breaches of the fiduciary duties owed by any of the professionals in these cases. As stated above, the Post Confirmation Committee was required to provide the Reorganized Debtors “with copies of the

monthly statements for the Preference Account,” and further the Reorganized Debtors had the “right to audit the Preference Account, at the Reorganized Debtors’ expense, upon reasonable notice.” See Zipes Decl. Ex. A at ¶ 4.3(c). It is not clear whether a review of the monthly statements of the Preference Account would have alerted any fiduciary in this case to any irregularities. It is also unclear when the monies disappeared and what sum, if any, is still available in the Preference Account. However, these are all questions that a neutral independent Chapter 7 trustee will need to investigate.

The need for an independent third party fiduciary to review the facts of these events and take steps to remedy them if possible is obvious.<sup>3</sup> The Chapter 7 trustee would not interfere with any criminal or securities related investigations, but would safeguard the estates’ position while the facts are ascertained and the funds are recovered. Thereafter, the Chapter 7 trustee would also be in a position to make statutory distributions to the extent funds are recovered.

As the property of the estates revested in the Reorganized Debtors under the Plan, see Plan at ¶ 7.2, there does not appear to be a need for a trustee to operate or administer the Reorganized Debtors. The trustee’s role will be to administer the Plan assets and to make distributions to creditors.

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<sup>3</sup> The United States Trustee considered and rejected two potential alternatives to moving for the conversion of these cases. The first alternative was to seek the appointment of an examiner. However, as these are post-confirmation cases, the Bankruptcy Code does not authorize the Court to direct the appointment of an examiner. See 11 U.S.C. § 1104(c) (“If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, ... the court shall order the appointment of an examiner...”) (emphasis added). Similarly, the United States Trustee considered and rejected seeking an order revoking the order of confirmation in order to either appoint an examiner or a Chapter 11 trustee. Here, because the order of confirmation was entered more than 180 days ago, the court lacks the ability to revoke the order of confirmation. See 11 U.S.C. § 1144. Additionally, to the extent that any party would seek the appointment of a chapter 11 trustee or an examiner in these cases, the question of whether a bankruptcy court has the authority to appoint a Chapter 11 trustee after a plan has been confirmed in the absence of a specific reservation of such authority in the plan has not been reached by the Second Circuit. See In re American Preferred Prescription, Inc., 255 F.3d 87, 91 & n. 3 (2d Cir. 2001) (noting the statement of a commentator that the extent to which the bankruptcy court can or should exercise post-confirmation jurisdiction is an issue that has long troubled the bankruptcy court system).

WHEREFORE, the United States Trustee respectfully requests that the Court enter an order converting these Chapter 11 cases to Chapter 7 cases, pursuant to 11 U.S.C. § 1112(b), and granting such other and further relief as may be deemed just and proper.

Dated: New York, New York  
December 11, 2008

Respectfully submitted,

DIANA G. ADAMS  
UNITED STATES TRUSTEE

By:           /s/ Greg M. Zipes            
Greg M. Zipes  
Trial Attorney

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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

**DECLARATION OF GREG M. ZIPES IN SUPPORT OF UNITED STATES TRUSTEE’S MOTION TO CONVERT THESE CHAPTER 11 CASES TO CASES UNDER CHAPTER 7 AND PURSUANT TO LOCAL RULE 9077-1 IN SUPPORT OF THE ORDER TO SHOW CAUSE**

Pursuant to 28 U.S.C. § 1746, Greg M. Zipes declares as follows:

1. I am an attorney with the Office of the United States Trustee for Region 2 (the “United States Trustee”). I am assigned to this matter by my office and as such have knowledge and information about these Chapter 11 bankruptcy cases. I submit this Declaration in support of the motion of the United States Trustee under 11 U.S.C. § 1112 to convert these chapter 11 cases to chapter 7 cases.

2. A true and correct copy of the First Amended Joint Plan of Reorganization (Docket No. 1175) (as modified and without exhibits) is attached as Exhibit A.

3. A true and correct copy of the letter dated November 7, 2007 from the post confirmation committee of unsecured creditors (the “Post Confirmation Committee”) to creditors (Doc. No. 1833) is attached as Exhibit B.

4. A true and correct copy of the transcript of the hearing held on April 2, 2008 (Doc. No. 1887) is attached as Exhibit C.

5. A true and correct copy of relevant excerpts from the transcript of the hearing held on July 24, 2008 (Doc. No. 1947) is attached as Exhibit D.

6. On December 5, 2008, Alan Lipkin of Willkie Farr & Gallagher, counsel to the Reorganized Debtors, telephoned the United States Trustee’s Office and the Court, separately,

regarding information he had obtained relating to the monies being held in the escrow account (the "Preference Account") of Dreier LLP (the "Dreier Firm").

7. As a result of Mr. Lipkin's phone calls, the Court scheduled and held a telephone conference later that day with Mr. Lipkin and two representatives of the United States Trustee's Office. Post Confirmation Committee counsel, although advised of the conference, did not have a representative on the telephone. Upon information and belief based on information conveyed to me by my supervisor, Linda Riffkin, Assistant United States Trustee, who was present on the call, during that call, Mr. Lipkin advised the Court that approximately \$40 million of estate funds had never been transferred by the Dreier Firm to the Reorganized Debtors, as required for a final distribution to creditors in these cases, and that there was a possibility that some or all of those funds had been misappropriated from the Preference Account.

8. The United States Trustee is proceeding by Order to Show Cause and not by regular motion because of the need for an independent fiduciary to be appointed immediately in view of the extraordinary circumstances presented by the apparent loss of some or all the funds in the Preference Account.

I declare under penalty of perjury that the information contained in this Declaration is true and correct.

Dated: New York, New York  
December 11, 2008

/s/ Greg M. Zipes  
GREG M. ZIPES

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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

**FIRST AMENDED JOINT PLAN OF  
REORGANIZATION PROPOSED  
BY DEBTORS AND  
360NETWORKS (HOLDINGS) LTD.**

**August 14, 2002**

WILLKIE FARR & GALLAGHER  
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New York, New York 10019  
(212) 728-8000

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## INTRODUCTION

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., and 360pacific (USA) inc., as debtors and debtors in possession (collectively, the “Debtors”) in their procedurally consolidated chapter 11 cases, and 360networks (holdings) Ltd., hereby propose this First Amended Joint Plan of Reorganization:

## ARTICLE I.

### DEFINITIONS

As used in this Plan, the capitalized terms set forth below shall have the respective meanings specified below, with such meaning to be equally applicable to both the singular and plural:

1.1. **Additional Security** shall have the meaning set forth in Section 3.4(h) hereto.

1.2. **Administrative Claim** means an unsecured Claim for payment of costs or expenses of administration specified in sections 503(b) and 507(a)(1) of the Bankruptcy Code.

1.3. **Allowed Claim** means a Claim: (a) either (i) proof of which has been timely filed with the Bankruptcy Court or has been deemed timely filed by a Final Order; or (ii) if not so filed, scheduled by a Debtor other than as disputed, contingent or unliquidated; and (b) allowed by a Final Order, by the Plan, or because no party in interest timely has filed an objection, filed a motion to equitably subordinate, or otherwise sought to limit recovery on such Claim. An Allowed Claim shall not include interest accruing after the Petition Date on the amount of any Claim except as expressly provided herein.

1.4. **Allowed [Class Designation/Type] Claim or Allowed [Claim Designation/Type] Interest** means an Allowed Claim or an Allowed Interest in the specified Class.

1.5. **Bankruptcy Code** means sections 101, et seq. of title 11 of the United States Code, as now in effect or hereafter amended with retroactive applicability to the Chapter 11 Cases.

1.6. **Bankruptcy Court** or **Court** means the United States Bankruptcy Court for the Southern District of New York, or any other court exercising competent jurisdiction over the Chapter 11 Cases or any proceeding therein.

1.7. **Bankruptcy Rules** means the Federal Rules of Bankruptcy Procedure and the local rules of the Bankruptcy Court (including any applicable local rules of the United States District Court for the Southern District of New York), as applicable to the Chapter 11 Cases as now in effect or hereafter amended with retroactive applicability to the Chapter 11 Cases.

1.8. **Business Day** means any day except a Saturday, Sunday, or “legal holiday” as such term is defined in Bankruptcy Rule 9006(a).

1.9. **Carve Out Claims** means Preference Claims against the following:

(a) ADP, Inc., Cummins Rocky Mountain LLC, Anritsu Electronics Limited, Fibernet Telecom Group, Inc., ACSI Network Technologies, Charles Schwab & Co., Inc., Cigna Healthcare, GE Capital Fleet Services, Call-Net Enterprises, CNA Group Benefits, Liberty Funds Services, and Pipkin Inc. d/b/a Pipkin Construction.

(b) Encompass Electrical Technologies, except for Preference Claims based on equipment returned to or repossessed by sellers during the 90 days preceding the Petition Date;

(c) any Person that received less than an aggregate of \$100,000 from the Debtors during the 90 days preceding the Petition Date if: (i) such Person has been designated in writing by the Debtors prior to the Confirmation Date, accompanied by a written explanation of the Debtors’ rationale in so designating such entity; and (ii) the Debtors’ have a good faith belief (taking into consideration, among other things, the interests of unsecured creditors and the Debtors’ post-Effective Date enterprise) that the Committee’s pursuit of such action would be harmful to the Debtors’ ongoing operations or the Debtors elect to assume the related contract or lease; provided, however, that the aggregate payments during such 90-day period to those entities designated by the Debtors (including payments relating to assumed contracts or leases) may not exceed \$5.4 million without the consent of the Committee;

(d) Debtor Professionals;

(e) all present and former employees of the Debtors or their affiliates;

(f) the Prepetition Lenders, their professionals and all other Persons released pursuant to Section 7.5(b) of the Plan;

(g) any person or entity to the extent the Preference Claim against it previously was settled by an order of the Bankruptcy Court;

(h) any of the Debtors or the CCAA Plan Debtors, and any entity that is a wholly owned subsidiary of any of the Debtors or the CCAA Plan Debtors;

(i) any Person to the extent the Preference Claim against such Person is based on equipment returned to or repossessed by sellers during the 90 days preceding the Petition Date and not listed on Schedule 1.8(i) hereto; *provided, however*, that if any such unlisted equipment return is subsequently identified, then the Preference Claim based on such return shall be a Carve Out Claim only if the Debtors have a good faith belief (taking into consideration, among other things, the interests of unsecured creditors and the Debtors' post-Effective Date enterprise) that the Committee's pursuit of such action would be harmful to the Debtors' ongoing operations; and

(j) any Person on Schedule 1.8(j) hereto to the extent the Preference Claim against such Person is based on payments under agreements to be assumed by the Debtors, provided that such payments to Persons that received less than an aggregate of \$100,000 from the Debtors during the 90 days preceding the Petition Date shall be subject to the \$5.4 million limitation in Section 1.9(c).

1.10. **Cash** means cash and cash equivalents, including but not limited to bank deposits, checks, and other similar items in each case denominated in Dollars.

1.11. **Cash Collateral Order** means that certain Third Stipulation and Order Authorizing Use of Collateral and Providing Adequate Protection, dated December 19, 2001, approved by the Bankruptcy Court in the Chapter 11 Cases (including the predecessor Stipulations and Orders Authorizing Use of Collateral and Providing Adequate Protection insofar as they continue to govern any periods prior to December 19, 2001).

1.12. **CCAA** means Canadian Companies' Creditors Arrangement Act.

1.13. **CCAA Plan Debtors** means 360networks (holdings) ltd.; 360fiber ltd.; 360finance ltd.; Carrier Centers (Canada) Ltd; 360 Urbanlink Ltd.; 360networks (CDN fiber) ltd.; 360network services ltd.; and 360cayer ltée;

1.14. **CCAA Plan** means the plan of arrangement, dated July 18, 2002, filed by the CCAA Debtors in the Supreme Court of British Columbia.

1.15. **Chapter 11 Case** means the chapter 11 case of each Debtor pending before the Bankruptcy Court.

1.16. **Claim** means a claim against a Debtor, whether or not asserted, known or unknown, as such term is defined in section 101(5) of the Bankruptcy Code.

- 1.17. **Class** means a group of Claims or Interests as classified under the Plan.
- 1.18. **Class 4 Cash Distribution** means \$135,000,000.
- 1.19. **Committee** means the Official Committee of Unsecured Creditors in the Chapter 11 Cases appointed by the Office of the United States Trustee for the Southern District of New York, as such committee may be reconstituted from time to time.
- 1.20. **Committee Claims** mean all Preference Claims except Carve Out Claims and claims against the Leducor Group or Netrail, Inc.
- 1.21. **Committee Preference Fees** mean the Committee's professional fees and expenses incurred on or after July 1, 2002 regarding: (a) Committee Claims; (b) resolution of unsecured claims against the Debtors held by the targets of Committee Claims; and (c) Carve Out Claims.
- 1.22. **Committee Professionals** means Sidley Austin Brown & Wood LLP; Ernst & Young Corporate Finance LLC; Bragar Wexler Eigel & Morgenstern, LLP; and Shandro Dixon Edgson.
- 1.23. **Confirmation Date** means the date the Clerk of the Court enters the Confirmation Order on the Bankruptcy Court's docket.
- 1.24. **Confirmation Order** means the order of the Bankruptcy Court confirming the Plan pursuant to section 1129 of the Bankruptcy Code.
- 1.25. **Debtor Professionals** means Cahill Gordon & Reindel; Cline, Williams, Wright, Johnson & Oldfather, LLP; Davis Wright Tremaine LLP; Freshfields Bruckhaus Deringer; Lazard Frères & Co. LLC; and Willkie Farr & Gallagher.
- 1.26. **Debtors** has the meaning ascribed to such term on the first page of the Plan, with each of the Debtors individually referred to herein as a Debtor.
- 1.27. **Derivative Claim** means a claim that is property of any of the Debtors pursuant to section 541 of the Bankruptcy Code and any state or federal fraudulent conveyance, fraudulent transfer, preference, avoidance and other similar claims and causes of action for the benefit of creditors that the Debtors are authorized to pursue in accordance with the Bankruptcy Code and other applicable law.
- 1.28. **Disclosure Statement** means the Disclosure Statement respecting the Plan approved by the Bankruptcy Court pursuant to section 1125 of the Bankruptcy Code; as such Disclosure Statement may be amended, modified, or supplemented (and all exhibits and schedules annexed thereto or referred to therein).
- 1.29. **Disclosure Statement Order** means the order of the Bankruptcy Court approving the Disclosure Statement.

1.30. **Disputed Claim** means a Claim (or portion thereof) as to which: (a) an objection has been timely filed, and such objection has not been either: (x) withdrawn, or (y) overruled or denied in whole by a Final Order; (b) before the deadline for filing an objection to the Claim, the amount of the Claim specified in the applicable proof of Claim exceeds the amount of any corresponding Claim scheduled by the Debtors in the Schedules as being neither disputed nor contingent or no such amount is scheduled as being neither disputed nor contingent; (c) there is a dispute as to the classification thereof; or (d) the amount of such Claim (or such portion) is unliquidated.

1.31. **Distribution** means a distribution of Cash or other property pursuant to the Plan.

1.32. **Distribution Date** means any date that is: (a) the Effective Date; (b) the Initial Distribution Date; (c) any Interim Distribution Date; or (d) the Final Distribution Date.

1.33. **Dollars and the symbol \$** means dollars constituting legal tender for the payment of public and private debts in the United States of America.

1.34. **Effective Date** means a date to be determined by the Debtors that will be no later than the first Business Day that is 20 days after the later of: (a) the date each of the conditions to the Effective Date has been satisfied or waived, provided no stay of the Confirmation Order is then in effect; or (b) the date any stay of the Confirmation Order is vacated or, if section 8.2(a) of the Plan has not been waived, any appeal, rehearing, remand, or petition for certiorari regarding the Confirmation Order is resolved by Final Order in a manner that does not reverse or materially modify the Confirmation Order.

1.35. **Estimation Order** means an order or orders of the Bankruptcy Court estimating for voting and/or distribution purposes (under section 502(c) of the Bankruptcy Code) the aggregate Face Amount of Disputed Claims or one or more Disputed Claims in a Class. The defined term Estimation Order includes the Confirmation Order if the Confirmation Order grants the same relief that would have been granted in a separate Estimation Order.

1.36. **Existing Security** means the Liens held by the holders of Prepetition Lender Claims (or by the Prepetition Agent on its and their behalf) in or on the assets and properties of the Debtors to secure the Prepetition Lender Claims.

1.37. **Face Amount** means respecting a Claim: (i) if the holder of such Claim has not filed a proof of Claim by the applicable bar date and there is no Final Order fixing such Claim, the amount of such Claim that is listed in the Schedules as undisputed, noncontingent and liquidated or, if no amount is listed, zero (\$0) dollars; (ii) if the holder of such Claim has filed a proof of Claim by the applicable bar date, the liquidated amount as stated in such proof of Claim, or, if no liquidated amount is listed, then zero (\$0) dollars

unless such amount is allowed or estimated by Final Order; (iii) an amount fixed or estimated by a Final Order; or (iv) in all other cases, zero (\$0) dollars.

1.38. **Final Distribution Date** means: (a) respecting each Claim that is not a Class 4 or 7 Claim, the first Business Day 20 days (or such longer period as may be reasonably determined by the Reorganized Debtors) after the later of (i) the Effective Date and (ii) the date such Claim becomes an Allowed Claim; (b) respecting Class 4 Claims, the Effective Date; and (c) respecting Class 7 Claims, the first Business Day 20 days (or such longer period as may be reasonably determined by the Reorganized Debtors and the Committee) after the later of the date on which: (i) all Disputed Claims in Class 7 have been resolved by Final Order; and (ii) all of the Committee Claims have been settled or resolved by Final Order.

1.39. **Final Order** means an order or judgment, as entered on the docket of the applicable court that has not been reversed, stayed, modified, or amended, and as to which: (a) the time to appeal, seek review or rehearing or petition for certiorari has expired and no timely-filed appeal or petition for review, rehearing, remand or certiorari is pending; or (b) any appeal taken or petition for certiorari filed has been resolved by the highest court to which the order or judgment was appealed or from which certiorari was sought.

1.40. **General Unsecured Claim** means any Claim that is not an: (a) Administrative Claim; (b) Priority Tax Claim; (c) Priority Claim; (d) Prepetition Lender Claim; (e) Nonconsensual Lien Claim; (f) Secured Claim; or (g) any other Claim included within any other Class other than Class 7.

1.41. **Holdings USA** means 360networks holdings (USA) inc.

1.42. **Impaired Class 6 Claims** means those Class 6 Claims to be treated under the Plan in a manner rendering such Claims impaired under section 1124 of the Bankruptcy Code, as identified on Schedule 1.42 hereto.

1.43. **Initial Distribution Date** means the first Business Day 20 days after the Effective Date, or such longer period as may be reasonably determined by the Reorganized Debtors, in consultation with the Committee, to make initial Distributions under the Plan (other than to holders of Class 4 Claims); *provided, however*, that in no event shall the Initial Distribution Date for Class 7 occur later than 45 days after the Effective Date without the Committee's consent.

1.44. **Intercompany Claim** means a Claim of any Debtor, CCAA Plan Debtor, or Nondebtor Affiliate against a Debtor.

1.45. **Interest** means an equity security, within the meaning of section 101(16) of the Bankruptcy Code, in a Debtor.

1.46. **Interim Distribution Date** means any date after the Initial Distribution Date on which the Reorganized Debtors and the Committee determine, in

their sole discretion, that an interim distribution should be made to Class 7 in light of, inter alia, resolutions of Disputed Claims, aggregate Net Preference Recoveries, and the administrative costs of such a distribution.

1.47. **JPMorgan Chase Bank** means JPMorgan Chase Bank, a New York banking corporation (formerly known as The Chase Manhattan Bank, N.A.).

1.48. **Ledcor Group** means Ledcor Industries Inc. and its following affiliates: Ledcor Design-Build (BC) Inc., Ledcor Industries Limited, and any other Ledcor Industries Inc. affiliate that did not receive over \$100,000 in the aggregate from the Debtors during the 90 days preceding the Petition Date identified by the Debtors in writing on or before the earlier of the Confirmation Date and October 1, 2002.

1.49. **Liens** means mortgages, deeds of trust, liens, and other security interests.

1.50. **Lump Sum Election** means the option of a holder of an Allowed Class 7 Claim to elect to receive pursuant to the Plan a Cash Distribution in lieu of New Parent Stock otherwise allocated on account of such Allowed Class 7 Claim, subject to the terms and conditions set forth in Section 3.7 of the Plan.

1.51. **Net Preference Recoveries** mean: (a) aggregate recoveries received by or on behalf of the Debtors (including all proceeds of Committee Claims) under sections 547 or 550 of the Bankruptcy Code solely from litigation or settlement of Preference Claims; less: (b) all out of pocket fees and expenses incurred by the Debtors, Reorganized Debtors, and the Committee (including, without limitation, all fees and expenses of professionals) from and after July 1, 2002, in analyzing, investigating, pursuing, or settling such claims, provided that: (i) respecting recoveries on Committee Claims, the only deductions shall be all Committee Preference Fees and Requested Debtor Fees; and (ii) respecting recoveries on Carve Out Claims, the only deductions shall be the aggregate out of pocket fees and expenses of the Debtors and Reorganized Debtors to the extent allocable to obtaining recoveries on Carve Out Claims.

1.52. **New Parent** means 360networks (holdings) Ltd., which will be the ultimate parent company of the Reorganized Debtors as of the Effective Date.

1.53. **New Parent Stock** means the new common stock of the New Parent to be issued on the Effective Date.

1.54. **New Senior Secured Notes** means the notes, dated as of the Effective Date, to be issued Ratably to the holders of Allowed Prepetition Lender Claims in the aggregate principal amount of \$215,000,000, with key terms including those on Schedule 1.54 hereto.

1.55. **New Long Term Incentive Plan** means a share incentive and award plan, providing for the discretionary grant to eligible plan participants, including

employees and outside directors, of various equity-based awards in the form of or relating to the New Parent Stock, including options to purchase shares of New Parent Stock.

1.56. **Nonconsensual Lien Claim** means a claim to the extent secured by a valid, binding, perfected, and enforceable (other than in respect of the stay of enforcement arising from Bankruptcy Code section 362) nonconsensual lien such as a mechanic's lien.

1.57. **Nondebtor Affiliate** means 360networks inc. and each of its wholly owned direct and indirect subsidiaries that is not a Debtor or a CCAA Plan Debtor.

1.58. **Non-Discharged Class 4 Claims** shall have the meaning set forth in Section 3.4(g) hereto.

1.59. **on notice** means, with respect to any specified act and any specified Person: (i) if such Person has consented to such act in writing, no additional notice and; (ii) otherwise, the provision to such Person of at least five business days' advance written notice of such act (which written notice must be furnished to such Person by hand, overnight courier, telecopier or other means reasonably intended to provide immediate or overnight delivery) and opportunity by such Person receiving such notice to object to such act before the Bankruptcy Court.

1.60. **Person** means any individual, corporation, partnership, association, indenture trustee, organization, joint stock company, joint venture, estate, trust, governmental unit or any political subdivision thereof, or any other entity.

1.61. **Petition Date** means June 28, 2001.

1.62. **Plan** means this First Amended Joint Plan of Reorganization proposed by the Debtors and 360networks (holdings) ltd., together with any amendments or modifications hereto as the Debtors may file hereafter (such amendments or modifications after the Confirmation Date only being effective if approved by order of the Bankruptcy Court).

1.63. **Preference Account** means an escrow or trust account maintained by and under the sole and exclusive control of the Committee that: (a) will hold funds advanced by the Debtors or Reorganized Debtors for Committee Preference Fees incurred after the Effective Date and the proceeds from Committee Claims; (b) from which will be paid post Effective Date Committee Preference Fees, Requested Debtor Fees, and any fees associated with maintaining or making distributions from such account; and (c) which shall constitute the source of distributions to be made under the Plan with respect to Net Preference Recoveries.

1.64. **Preference Claims** means claims of the Debtors under § 547 and/or § 548 of the Bankruptcy Code based on Cash payments or equipment returns made by the Debtors during the 90 days preceding the Petition Date.

1.65. **Prepetition Agent** means JPMorgan Chase Bank, as Administrative Agent under the Prepetition Credit Agreement.

1.66. **Prepetition Credit Agreement** means that certain Credit Agreement, dated as of September 29, 2000, as amended, among 360networks inc., 360networks holdings (USA) inc., JPMorgan Chase Bank, as Administrative Agent and Collateral Agent, Chase Securities, Inc., as Joint Book Manager and Co-Lead Arranger, Credit Suisse First Boston Corporation (successor in interest to DLJ Capital Funding, Inc.), as Joint Book Manager, Co-Lead Arranger and Co-Documentation Agent, Goldman Sachs Credit Partners L.P., as Arranger and Syndication Agent and Toronto Dominion (Texas), Inc., as Arranger and Co-Documentation Agent and the lenders from time to time parties thereto.

1.67. **Prepetition Lender Claim** means any Claim against a Debtor arising under: (a) the Prepetition Credit Agreement; (b) all agreements, documents, notes, instruments, and any other agreements delivered pursuant thereto or in connection therewith, including, without limitation, loans, advances, letters of credit and other financial accommodation; or (c) the Cash Collateral Order and any other postpetition cash collateral order related thereto.

1.68. **Priority Claim** means any Claim, if allowed, entitled to priority pursuant to section 507(a) of the Bankruptcy Code, other than: (a) an Administrative Claim (including a Professional Fee Claim); or (b) a Priority Tax Claim.

1.69. **Priority Tax Claim** means any Claim, if allowed, entitled to priority pursuant to section 507(a)(8) of the Bankruptcy Code.

1.70. **Professional Fee Claim** means an Administrative Claim for compensation or reimbursement of expenses pursuant to section 327, 328, 330, 331 or 503(b) of the Bankruptcy Code in connection with an application made to the Bankruptcy Court in the Chapter 11 Cases.

1.71. **Ratable, Ratably or Ratable Share** means a number (expressed as a percentage) equal to the proportion that an Allowed Claim in a particular Class bears to the aggregate amount of: (a) Allowed Claims; plus (b) Disputed Claims (in their aggregate Face Amount or as otherwise determined by the Bankruptcy Court) in such Class as of the date of determination. For purposes of Distributions under the Plan, such calculation shall be as of the date 10 Business Days (or such other fixed period reasonably determined by the Debtors or Reorganized Debtors and, for Class 7, the Committee) prior to each Distribution Date.

1.72. **Record Date** means the date provided in the Confirmation Order for determining which holders of Claims and Interests are entitled to Distributions under the Plan.

1.73. **Registration Rights Agreement** means the registration rights agreement between New Parent and certain holders of New Parent Stock.

1.74. **Reorganized 360** means, collectively, the Reorganized Debtors and the CCAA Plan Debtors.

1.75. **Reorganized Debtors** means, collectively, the Debtors on and after the Effective Date.

1.76. **Requested Debtor Fees** means out of pocket fees and expenses reasonably incurred by the Debtors or Reorganized Debtors respecting Committee Claims at the specific request of the Committee.

1.77. **Required Class 4 Holders** shall have the meaning set forth in Section 3.4(b) hereto.

1.78. **Schedules** means a Debtor's schedule of assets and liabilities filed with the Bankruptcy Court pursuant to sections 521 and 1106(a)(2) of the Bankruptcy Code.

1.79. **Secured Claim** means a Claim that is either secured by a lien on property in which a Debtor has an interest pursuant to section 506 or 1111(b) of the Bankruptcy Code or subject to setoff under section 553 of the Bankruptcy Code.

1.80. **Steering Committee** means the steering committee of holders of Prepetition Lender Claims, as such committee may be constituted from time to time.

1.81. **Unclaimed Property** means any Distribution under the Plan unclaimed by the holder of the Allowed Claim or Interest entitled to such Distribution 180 days after the Distribution Date applicable to such Distribution.

1.82. **Underlying Rights** mean all rights, whether written or oral, express or implied, public or private, that authorize a Debtor to construct, install, operate, maintain, repair, sell, assign, transfer, remove, abandon or provide services in or upon any public or private property, both real and personal, or within any federal, state or local jurisdiction, or any agency thereof, including without limitation, all agreements, franchises, leases, licenses, certificates, encroachments, permits, rights-of-way, authorizations, notices, waivers, releases, grants, rights, and interests providing such authorization. The foregoing expressly includes, but is not limited to, all of the following:

- (i) authorizations, licenses or certificates of public convenience and necessity from any state administrative agency including state public utility commissions or similar agencies with regulatory or administrative oversight of communications companies;

(ii) permits, notices, licenses, plans, authorizations or waivers from any federal, state, county, local agency, or any public or quasi-public agency required for compliance with any environmental requirements;

(iii) franchises, licenses, permits or agreements from any state, city, county, local or quasi-public entities or agencies;

(iv) easements, amended easements, communications easements, licenses, leases, agreements, consents, or letters authorizing a Debtor to operate in or upon private property or fixtures;

(v) easements, agreements, licenses or leases for real property housing communications equipment or used to interconnect with other communications providers or customers, including without limitation, point-of-presence sites, amplification and regeneration sites, collocation sites, manholes, meet-me-rooms, and building entries; and

(vi) permission from any Native American tribe or related organization, whether written or oral, for a Debtor to operate in or upon tribal lands.

## **ARTICLE II.**

### **CLASSIFICATION OF CLAIMS AND INTERESTS**

For purposes of the Plan, Claims and Interests are classified as follows:

- 2.1. **CLASS 1**: shall consist of all Administrative Claims.
- 2.2. **CLASS 2**: shall consist of all Priority Tax Claims.
- 2.3. **CLASS 3**: shall consist of all Priority Claims.
- 2.4. **CLASS 4**: shall consist of all Prepetition Lender Claims.
- 2.5. **CLASS 5**: shall consist of all Nonconsensual Lien Claims, with each such Claim secured by different collateral to be a separate subclass for all purposes under the Plan.
- 2.6. **CLASS 6**: shall consist of all Secured Claims against the Debtors other than the Prepetition Lender Claims and Nonconsensual Lien Claims, with each such Claim secured by different collateral to be a separate subclass for all purposes under the Plan.
- 2.7. **CLASS 7**: shall consist of all General Unsecured Claims.
- 2.8. **CLASS 8**: shall consist of all Intercompany Claims.

2.9. **CLASS 9**: shall consist of all Interests.

2.10. **General Rules of Classification.**

Generally, a Claim is classified in a particular Class for voting and distribution purposes only to the extent the Claim qualifies within the description of that Class, and is classified in another Class or Classes to the extent any remainder of the Claim qualifies within the description of such other Class or Classes. Unless otherwise provided, to the extent a Claim qualifies for inclusion in a more specifically defined Class and a more generally defined Class, it shall be included in the more specifically defined Class.

### **ARTICLE III.**

#### **TREATMENT OF CLAIMS**

Each Allowed Claim or Allowed Interest shall receive the treatment specified below for such Claim or Interest's Class in full settlement of all rights of the holder of such Allowed Claim or Allowed Interest; provided, however, that the holder of such Claim or Interest may agree to and receive less favorable treatment.

3.1. **Class 1 – Administrative Claims.** Class 1 is not impaired.

(a) Professional Fee Claims shall be paid in Cash in the amounts awarded on account thereof by order of the Bankruptcy Court as soon as practicable after such order is entered.

(b) Ordinary course Administrative Claims will be paid in accordance with the terms and conditions of the particular transaction giving rise to such liabilities.

(c) Other Administrative Claims shall be paid in Cash in full on the later of the Effective Date and the date any such Claim becomes an Allowed Claim.

3.2. **Class 2 – Priority Tax Claims.** Class 2 is not impaired.

(a) On the later of the Effective Date or as soon as reasonably practicable thereafter and 10 Business Days after the date on which a Class 2 Claim becomes an Allowed Claim, such Claim shall be paid in full, in Cash; provided, however, that the Debtors shall have the option, exercisable prior to the Effective Date, to pay any Priority Tax Claim over a period not longer than six (6) years from the date of assessment of the applicable tax, with interest on the unpaid portion payable annually in arrears at the rate of 5½% per annum (or such other rate of interest as may be ordered by the Bankruptcy Court prior to the Effective Date to provide the holders of Priority Tax Claims with deferred cash payments having a value, as of the Effective Date, equal to the allowed amount of such Priority Tax Claims, or as agreed to by the holder of the Claim and the Debtors). To the extent, if any, that a Priority Tax Claim also is secured by property of the Debtors, then the holder of such secured Priority Tax Claim shall retain its liens against such property until the relevant Priority Tax Claim is paid in full in accordance with this Section 3.2.

(b) Unless prior to the Confirmation Date the holder of a Priority Tax Claim files and serves on counsel to the Debtors a statement that the portion of any such Priority Tax Claim that is in the nature of a penalty is compensatory and not punitive, then such penalty portion shall be deemed to be disallowed and the holder of such Claim shall be entitled to no distribution on account of such penalty portion.

3.3. **Class 3 – Other Priority Claims.** Class 3 is not impaired.

On the later of the Effective Date or as soon as reasonably practicable thereafter and 10 Business Days after the date on which a Class 3 Claim becomes an Allowed Claim, such Claim shall be paid in full in Cash.

3.4. **Class 4 – Prepetition Lender Claims.** Class 4 is impaired.

Class 4 Claims shall be treated as follows:

(a) Allowance. Prepetition Lender Claims shall be Allowed Claims against each of the Debtors in the aggregate amount of \$1,206,161,903.62 (including \$700,000 in stated amount of undrawn and outstanding letters of credit issued under the Prepetition Credit Agreement). As a component of the settlements embodied in the Plan, Class 4 Claims against all Debtors shall be aggregated for voting and distribution purposes, but for no other purposes.

(b) Distributions. On the Effective Date, under the Plan in combination with the CCAA Plan, each holder of an Allowed Prepetition Lender Claim shall receive: (i) its Ratable Share of the Class 4 Cash Distribution; *provided, however*, that the holders of not less than 66-2/3% in amount of Class 4 Claims (the “Required Class 4 Holders”) shall have the right, in their sole discretion and as evidenced by the written consent of the Prepetition Agent, to agree to defer payment of up to \$30,000,000 of the Class 4 Cash Distribution to all holders of Class 4 Claims until after the Effective Date on terms and conditions acceptable to the Required Class 4 Holders (it being understood and agreed that any such agreement by the Required Class 4 Holders to defer payment of such Cash shall be binding on all holders of Class 4 Claims, and such deferral, and any indebtedness or instruments evidencing the obligation of the Debtors to pay the deferred amount, shall be allocated Ratably among all holders of Class 4 Claims); *provided, further, however*, that the Prepetition Agent shall be authorized to withhold from such Cash an amount not to exceed 105% of the maximum liability (the “L/C Exposure Amount”) with respect to letters of credit issued under the Prepetition Credit Agreement and outstanding as of the Effective Date (collectively, the “Designated Letters of Credit”). The Prepetition Agent shall be authorized to reimburse itself in its capacity as Issuing Bank under the Prepetition Credit Agreement from the L/C Exposure Amount for any drawings under a Designated Letter of Credit. Upon the expiration, cancellation, or other termination of a Designated Letter of Credit, the Prepetition Agent shall distribute any amounts remaining from the L/C Exposure Amount attributable to such Designated Letter of Credit Ratably to the holders of the Allowed Prepetition Lender Claims; (ii) its Ratable Share of \$215,000,000 in principal amount of New Senior Secured Notes; (iii) its Ratable Share of 80.5% of the

New Parent Stock, subject to dilution through the exercise of options issuable pursuant to the New Long Term Incentive Plan; and (iv) the release set forth in Sections 7.4 and 7.5 of the Plan.

(c) Each holder of an Allowed Prepetition Lender Claim shall be entitled to retain all amounts paid to it or on its behalf as adequate protection and Reorganized 360 shall continue to pay the reasonable out of pocket professional fees of the holders of the Allowed Petition Lender Claims after the Confirmation Date solely with respect to matters relating directly to the Plan (including any distributions thereunder or consummation thereof) or the Chapter 11 Cases in accordance with the Cash Collateral Order.

(d) Distributions of Cash to be made by Reorganized 360 to or for the benefit of the holders of Allowed Prepetition Lender Claims pursuant to the Plan shall be made by wire transfer of immediately available funds denominated in Dollars to the Prepetition Agent in accordance with wire transfer instructions to be provided by the Prepetition Agent to Reorganized 360.

(e) Distributions of New Parent Stock and New Senior Secured Notes to be made by Reorganized 360 to or for the benefit of the holders of Allowed Prepetition Lender Claims pursuant to the Plan shall be delivered to the Prepetition Agent in accordance with instructions to be provided by the Prepetition Agent to Reorganized 360.

(f) Nothing contained in the Disclosure Statement, the Plan (including, without limitation, Sections 7.1, 7.2, 7.4 and 7.5 of the Plan) or the Confirmation Order, shall be deemed or construed, directly or indirectly, by implication or otherwise, to discharge, affect, limit, reduce, settle, compromise, release or otherwise impair (i) the obligations of any guarantor or any other obligor (other than the Debtors and the CCAA Plan Debtors) under, in respect of, or in connection with, the Prepetition Credit Agreement, the Security Documents (as defined in the Prepetition Credit Agreement) or the Guarantee Agreements (as defined in the Prepetition Credit Agreement) or (ii) any mortgages, deeds of trust, liens or other security interests against the property of any such guarantor or any such other obligor (other than the Debtors and the CCAA Plan Debtors) securing such obligations.

(g) Notwithstanding anything to the contrary in the Plan, including, Sections 7.1 or 7.2 of the Plan, or the Confirmation Order, \$215,000,000 in aggregate Allowed Class 4 Claims (the "Non-Discharged Class 4 Claims") shall not be discharged under the Plan, the Confirmation Order, or otherwise. From and after the Effective Date, the Non-Discharged Class 4 Claims: (i) shall be evidenced by the New Senior Secured Notes; and (ii) shall constitute the legal, valid and binding obligations of the Reorganized Debtors, enforceable against the Reorganized Debtors in accordance with the terms of the New Senior Secured Notes (as such New Senior Secured Notes may be amended, supplemented or otherwise modified from time to time). The Reorganized Debtors' obligations under the New Senior Secured Notes shall not be subject to challenge, avoidance, subordination or recharacterization under any applicable fraudulent conveyance, fraudulent transfer or similar law. In the event that payment of a portion of

the Class 4 Cash Distribution is deferred in accordance with Section 3.4(b) of the Plan, the amount deferred may, at the option of the Required Class 4 Holders, be designated as additional Non-Discharged Class 4 Claims.

(h) Notwithstanding anything to the contrary in the Plan, including, Sections 7.1 or 7.2 of the Plan, or the Confirmation Order, none of the Existing Security shall be released under the Plan, the Confirmation Order or otherwise. From and after the Effective Date: (i) the Existing Security, together with any new security instruments or documents that may be reasonably requested by the Prepetition Agent and delivered by the Reorganized Debtors (“Additional Security”), shall secure the obligations of the Reorganized Debtors under (or with respect to) the New Senior Secured Notes; (ii) the Existing Security and any Additional Security shall constitute, legal, valid, binding and perfected Liens, which Liens shall be enforceable against the assets and properties of the Reorganized Debtors in accordance with their terms (as such Liens may be amended, supplemented or otherwise modified from time to time); and: (x) in the case of the Existing Security, shall be senior in priority to all other Liens against such assets and property except any valid, perfected, and unavoidable prepetition Liens that were senior in priority to the Existing Security and were not released or discharged by the Plan; and (y) in the case of the Additional Security, shall have such priority as determined by applicable nonbankruptcy law; and (iii) neither the Prepetition Agent, any holder of a Prepetition Lender Claim nor any other Person shall be required to take any actions to perfect or re-perfect the Existing Security or any Additional Security, other than any actions that are required generally under applicable laws to maintain perfection of Liens. The Existing Security and any Additional Security shall not be subject to challenge, avoidance, subordination or recharacterization under any applicable fraudulent conveyance, fraudulent transfer, or similar law.

3.5. **Class 5 – Nonconsensual Lien Claims.** Class 5 is impaired. Each Claim in Class 5 shall be treated as a separate subclass for voting and distribution purposes under the Plan.

On the later of the Effective Date and 10 Business Days after the date on which a Class 5 Claim becomes an Allowed Claim, each such Claim shall be paid in full as follows:

(a) Amount. The amount of an Allowed Class 5 Claim shall be the lesser of: (i) the value (as of the Confirmation Date) of the collateral securing such Allowed Class 5 Claim; and (ii) the sum of: (A) the amount (as of the Petition Date) of the Debtors’ obligation to the holder of such Allowed Class 5 Claim secured by a valid, binding, perfected, and enforceable Nonconsensual Lien; plus (B) interest on such amount (exclusive of interest on any prepetition interest included therein) from the Petition Date through the Confirmation Date at 5½% per annum; plus (C) reasonable attorney’s fees, if any, due to the holder of such Allowed Class 5 Claim by contract.

Resolution of Allowed Amount. The amount of each such Allowed Claim shall be as listed on Schedule 3.5(a) hereto, assuming a Confirmation Date of August 31,

2002. If prior to the deadline fixed by the Bankruptcy Court in the Disclosure Statement Order, a holder of a Class 5 Claim fails to file with the Bankruptcy Court and serve on the attorneys for the Debtors an objection to the amount(s) set forth in such Schedule 3.5(a) respecting such Claim, then such holder shall be forever barred from asserting any Claims against the Debtors exceeding the proposed allowed amount of such Claim. If a timely objection to an amount listed on Schedule 3.5(a) to the Plan is served and filed by a holder of a Class 5 Claim, then such holder's Claim shall be deemed to be a Disputed Claim to be resolved in accordance with the Plan.

(b) Term. 10 years from the Effective Date.

(c) Amortization. Based on 20 years, payable quarterly in arrears, with any principal remaining outstanding due as a lump sum on maturity.

(d) Interest Rate. 5½% per annum, payable quarterly in arrears; provided, however, that interest accrued after the Confirmation Date but otherwise due before the Effective Date shall not be due until the end of the first quarter ending after the Effective Date.

(e) Prepayment. The Claim shall be prepayable without premium or penalty in whole or in part at any time prior to maturity.

(f) Collateral. As of the Effective Date, the Debtors' obligations to make the Plan payments on Nonconsensual Lien Claims shall be secured by the applicable Nonconsensual Lienholder's existing collateral to the same extent as existed on the Confirmation Date. To the extent, if any, that prior to the Confirmation Date or in the Confirmation Order, the collateral securing any of the Nonconsensual Lien Claims was transferred to one or more segregated Cash accounts by order of the Bankruptcy Court, then such Nonconsensual Lien Claims shall continue to be secured by such segregated cash accounts to the same extent as provided in the applicable order.

(g) Documentation. As a condition to receipt of any payments under the Plan, Nonconsensual Lienholders shall be required to execute any documents that the Debtors determine to be reasonably necessary or appropriate to evidence or implement any provision of this Section 3.5 or any other relevant provision of the Plan or the Confirmation Order.

(h) Lump Sum Alternative. The Debtors or Reorganized Debtors, as applicable, shall be authorized to satisfy any Allowed Nonconsensual Lien Claim in Cash with a discounted lump sum payment; provided, however, that (i) any such payments (or a series of related payments) of \$1,000,000 or more in the aggregate shall be on notice to the Prepetition Agent and (ii) if the Prepetition Agent objects to such payment (or such series of related payments) within the notice period applicable thereto, then Bankruptcy Court approval shall be required prior to the making of such payment (or such series of related payments). Subject to the occurrence of the Effective Date, each holder of an Allowed Nonconsensual Lien Claim may elect, on its ballot for voting on the Plan, to receive a

single lump sum payment equal to 50% of such Allowed Claim in lieu of any other distribution on such Allowed Claim under the Plan. Such election shall apply to such holder's entire Allowed Class 5 Claim. Any Cash settlement payable on a Nonconsensual Lien Claim secured by a segregated Cash account shall be paid from such account.

(i) Debtors' Option to Return Collateral. In lieu of the treatment described in subsections (a) through (h) above, the Debtors may satisfy any Allowed Class 5 Claim by transferring title to the property securing such Allowed Class 5 Claim to the holder of such Claim. Within thirty (30) days after mailing by the Debtors or Reorganized Debtors of notice of the election of this option, the holder of an Allowed Class 5 Claim shall be entitled to amend in writing or file a proof of claim for any unsecured deficiency Claim respecting such Claim (to the extent such holder has recourse to a Debtor respecting such Class 5 Claim, and provided the holder has timely filed a proof of claim respecting such Class 5 Claim or whose Class 5 Claim was listed in the Schedules as nondisputed, noncontingent, and liquidated). To the extent, if any, that any such unsecured deficiency Claim is or becomes an Allowed Claim, then such deficiency Claim shall be treated as an Allowed Class 7 Claim.

3.6. **Class 6 – Other Secured Claims.** Class 6 is not impaired, except for the Impaired Class 6 Claims (see Plan Schedule 1.42). Each Claim in Class 6 shall be treated as a separate subclass for voting and distribution purposes under the Plan.

(a) Election of Alternative Treatments. At the election of Reorganized Debtors, on or before the later of the Effective Date and 10 Business Days after the date on which a Class 6 Claim becomes an Allowed Claim, each such Claim, except for Impaired Class 6 Claims, shall be paid in full by either:

- (1) reinstating the Claim, that is, leaving unaltered the legal, equitable, and contractual rights respecting such Claim in accordance with section 1124 of the Bankruptcy Code, including: (A) curing all pre- and postpetition defaults other than defaults relating to the insolvency or financial condition of the relevant Debtor or its status as a debtor under the Bankruptcy Code; and (B) reinstating the maturity date of the Claim;
- (2) paying such Claim in full, in Cash, in an amount equal to such Allowed Class 6 Claim; or
- (3) transferring title to the property securing such Allowed Class 6 Claim to the holder of such Claim. Within thirty (30) days after mailing by the Debtors or Reorganized Debtors of notice of the election of this option (3), the holder of an Allowed Class 6 Claim shall be entitled to amend in writing or file a proof of claim for any unsecured deficiency Claim respecting such Claim (to the extent such holder has recourse to a Debtor respecting such Class 6 Claim, and provided the holder has timely filed a proof of claim respecting

such Class 6 Claim or whose Class 6 Claim was listed in the Schedules as nondisputed, noncontingent, and liquidated). To the extent, if any, that any such unsecured deficiency Claim is or becomes an Allowed Claim, then such Allowed Claim shall be treated as an Allowed Class 7 Claim.

(b) Impaired Class 6 Claims. Notwithstanding anything to the contrary contained in this Section 3.6, each Impaired Class 6 Claim shall be paid in full as follows:

(i) Term. 10 years from the Effective Date.

(ii) Amortization. Based on 20 years, payable quarterly in arrears, with any principal remaining outstanding due as a lump sum on maturity.

(iii) Interest Rate. 5½% per annum, payable quarterly in arrears; provided, however, that interest accrued after the Confirmation Date but otherwise due before the Effective Date shall not be due until the end of the first quarter ending after the Effective Date.

(iv) Prepayment. The Claim shall be prepayable without premium or penalty in whole or in part at any time prior to maturity.

(v) Collateral. As of the Effective Date, the Debtors' obligations to make the Plan payments on Impaired Class 6 Claims shall be secured by the applicable Class 6 Claim holder's existing collateral to the same extent as existed prior to the Confirmation Date.

(vi) Documentation. As a condition to receipt of any payments under the Plan, holders of Impaired Class 6 Claims shall be required to execute any documents that the Debtors determine to be reasonably necessary or appropriate to evidence or implement any provision of this Section 3.6 or any other relevant provision of the Plan or the Confirmation Order.

(vii) Lump Sum Alternative. The Debtors or Reorganized Debtors, as applicable, shall be authorized to satisfy any Allowed Impaired Class 6 Claim in Cash with a discounted lump sum payment; provided, however, that: (i) any such payments (or a series of related payments) of \$1,000,000 or more in the aggregate shall be on notice to the Prepetition Agent; and (ii) if the Prepetition Agent objects to such payment (or such series of related payments) within the notice period applicable thereto, then Bankruptcy Court approval shall be required prior to the making of such payment (or such series of related payments). Subject to the occurrence of the Effective Date, each holder of an Allowed Impaired Class 6 Claim may elect, on it's ballot for voting on the Plan, to receive a single lump sum payment equal to 50% of such Allowed Claim in lieu of any other distribution on such Allowed Claim under the Plan. Such election shall apply to such holder's entire Allowed Impaired Class 6 Claim.

(c) Resolution of Allowed Amounts. Schedule 3.6(c) to the Plan lists: (i) each Class 6 Claim; (ii) the amount in which each such Claim is proposed to be allowed; and (iii) the additional cure amount, if any, proposed to be paid if the Claim is to be reinstated. If prior to the deadline fixed by the Bankruptcy Court in the Disclosure Statement Order, a holder of a Class 6 Claim fails to file with the Bankruptcy Court and serve on the attorneys for the Debtors an objection to the amount(s) set forth in such Schedule 3.6(c) respecting such Claim, then such holder shall be forever barred from asserting any Claims against the Debtors exceeding the proposed Allowed amount of such Claim, and Reorganized Debtors shall be entitled to rely upon such amount(s) in selecting the treatment for the Claim under this section. If a timely objection to an amount listed on Schedule 3.6(c) to the Plan is served and filed by a holder of a Class 6 Claim, then such holder's Claim shall be deemed to be a Disputed Claim to be resolved in accordance with the Plan.

(d) Treatment of Offset Rights. To the extent a Class 6 Claim is partially an Allowed Secured Claim based on an offset right and partially an Allowed Claim of another type, such Claim shall be deemed to (x) have been setoff only to the extent of the allowed amount of the allowed fixed, liquidated, nondisputed, non-contingent Claim owing from the relevant Debtor and (y) be a Claim classified in another relevant Class for any excess of such Claim over the amount set off. If a Claim is fully an Allowed Secured Claim based on an offset right, then (A) the allowance of such Claim shall not affect any obligations or liabilities due and payable (at such time) to the relevant Debtor that are in an amount in excess of the amount offset and the payment of all amounts due and owing as of the Effective Date to such Debtor and (B) the turnover of any property of such Debtor held by such claimant on account of any unliquidated, disputed or contingent right of setoff shall be a precondition to the allowance of such Claim.

3.7. **Class 7 – General Unsecured Claims.** Class 7 is impaired.

(a) **Distributions.** On the later of the applicable Distribution Date and ten Business Days after the date on which a Class 7 Claim becomes an Allowed Claim, each holder of an Allowed General Unsecured Claim shall receive its Ratable Share of: (i) 10% of the New Parent Stock; and (ii) 80% of the Net Preference Recoveries available for distribution on such Distribution Date after an appropriate reserve to cover the already incurred and anticipated future fees and expenses to be paid from the Preference Account; provided, however, that instead of such New Parent Stock, Allowed Class 7 Claims subject to the Lump Sum Election shall receive the applicable Cash payment on the later of the Initial Distribution Date and ten Business Days after the date on which a Class 7 Claim becomes an Allowed Claim. Subsequent distributions shall be made on any applicable Interim Distribution Date or the Final Distribution Date for Class 7.

(b) **Lump Sum Cash Payment Election** Subject to the occurrence of the Effective Date, the allowance of its Claim, and the funding limitations described in Subsection (c) below, each holder of a Class 7 Claim may elect, on such holder's ballot for voting on the Plan, to receive a single lump sum Cash payment of \$6.67 per share of New Parent Stock (based on a \$100 million ascribed value for the New Parent Stock of

Reorganized 360 and 15 million shares of New Parent Stock) in lieu of the New Parent Stock distributions described above and in full satisfaction of any and all distributions of New Parent Stock to be made under the Plan for such Allowed Class 7 Claim. Each holder of an Allowed Class 7 Claim of \$100,000 or less shall be deemed to have made the Lump Sum Election. The Lump Sum Election shall apply to such holder's entire Allowed Class 7 Claim; *provided, however*, that holders of Class 7 Claims in excess of \$100,000 who make the Lump Sum Election may nonetheless receive only a Ratable distribution of Cash plus a partial distribution of New Parent Stock to the extent that the aggregate dollar amount of Class 7 Claims for which the Lump Sum Election is made or deemed to have been made exceeds \$5 million (or such higher amount as the Funding Source (as defined below) may agree to fund).

**(c) Funding of Lump Sum Election Payments.** Payments to satisfy the Lump Sum Election shall be funded by Reorganized 360 or Reorganized 360's designee (in either case, the "Funding Source") in an aggregate amount equal to \$5,000,000 (or such higher amount as the Funding Source may agree to fund; provided, however, that if the Funding Source is Reorganized 360, then it shall not fund or agree to any such higher amount without the consent of the Prepetition Agent). To the extent, if any, such amount is insufficient to satisfy all Allowed Class 7 Claims subject to the election, all such Allowed Claims of \$100,000 or less shall be satisfied first and the remaining funds shall be allocated Ratably among the other Claims subject to the election with: (i) the holders of all such Allowed Claims retaining any New Parent Stock not so satisfied pursuant to the Lump Sum Election; and (ii) any holder of a Disputed Class 7 Claim making the Lump Sum Election to be allocated its Ratable Share based on the amount of the Allowed Class 7 Claim to which the Debtors in good faith believe the holder of such Disputed Claim should be entitled or based on an order of the Bankruptcy Court on a motion by a holder of a Disputed Class 7 Claim challenging the Debtors' determination of such holder's Ratable Share, and as to which motion such holder shall have the burden to establish there was no reasonable basis therefor. The New Parent Stock allocable to any Claim subject to the Lump Sum Election shall be delivered to the Funding Source. If a holder of a Class 7 Disputed Claim makes, or is deemed to have made, the Lump Sum Election, then the lump sum payment allocable to such Claim shall be held in escrow pending resolution of such Claim and paid once and to the extent such Claim becomes an Allowed Class 7 Claim, with any interest earned on such escrow to be paid to the Debtors to the extent the Disputed Claim becomes an Allowed Class 7 Claim and to the Funding Source to the extent the Disputed Claim is disallowed.

**(d) Prohibition on Multiple Recoveries.** As a component of the settlements embodied in the Plan, Class 7 Claims against all Debtors shall be aggregated for purposes of voting on and distribution under the Plan, but for no other purpose, and the Debtors' estates shall not be substantively consolidated. Accordingly, each holder of a Class 7 Claim shall be entitled to only one Class 7 Claim against and one recovery from the Debtors respecting the obligation or liability of any of the Debtors regardless of any legal theory that could make multiple Debtors liable for such obligation or liability. Duplicate Claims against multiple Debtors respecting a single obligation or liability shall be disallowed hereby so that only a single obligation or liability remains. Further, to the

extent, if any, that a creditor correctly asserts that one or more of the Debtors and one or more of the CCAA Plan Debtors both should be otherwise liable for a single claim, then: (i) such claim shall be allocated exclusively to the entity contractually or otherwise primarily obligated to satisfy such claim; or (ii) if no such entity exists, then to the extent at least one of the Debtors and at least one of the CCAA Plan Debtors otherwise would be jointly liable for any claim, such claim shall be allocated between the applicable Debtors and CCAA Plan Debtors based on their respective relative benefit from the transaction or occurrence giving rise to such claim and/or their respective relative degree of culpability, if any, for an event or act giving rise to such claim, as applicable.

Any allocation made pursuant to clauses (i) and (ii) above shall be made according to the following procedure: (a) based upon the criteria enumerated above, the Reorganized Debtors shall provide a recommendation to the Committee and to the monitor under the CCAA Plan as to how a particular Claim should be allocated; (b) if the Committee and the CCAA monitor agree upon the allocation of a particular claim, then such agreement shall be determinative of such allocation, subject to the right of the affected creditor to seek judicial review of such determination within ten days of receipt of notice of such determination; and (c) if the Committee and the CCAA monitor are unable to agree as to allocation of a particular claim, then any allocation of such claim to either the CCAA Plan Debtors or the Debtors shall be made by judicial determination.

(e) **Subordinated Claims.** Any Claim subordinated as provided in sections 510(b) or (c) of the Bankruptcy Code or otherwise to Class 7 Claims shall be provisionally in Class 7, but receive no Distributions on account of such Claim.

### 3.8. **Class 8 – Intercompany Claims**

Class 8 is impaired. Holders of Allowed Intercompany Claims shall not receive a Distribution on account of such Claims pursuant to the Plan. Allowed Intercompany Claims of the CCAA Plan Debtors or Nondebtor Affiliates shall be contributed to the capital of Holdings USA. Thereafter, Allowed Intercompany Claims held by other Debtors shall be cancelled. Notwithstanding the treatment of Class 8 Claims provided for herein, each of the holders of Class 8 Claims shall be deemed to have accepted the Plan.

### 3.9. **Class 9 – Interests**

Class 9 is impaired. Holders of Allowed Interests are not entitled to and shall not receive a Distribution on account of such Interests pursuant to the Plan. Instead, such Interests shall be retained; provided, however, that in the event necessary to obtain confirmation of the Plan under section 1129(b) of the Bankruptcy Code, then such Interests shall be cancelled and replaced by matching new common stock of the applicable Debtors.

ARTICLE IV.

MEANS OF IMPLEMENTATION OF THE PLAN

4.1. **New Parent Stock**

(a) **Issuance.** The New Parent Stock shall be issued by the New Parent and be a single class. Holdings USA shall issue shares of its stock to the New Parent in exchange for the shares of New Parent Stock to be distributed pursuant to the Plan.

(b) **Non-Voting Stock.** The certificate of incorporation and by-laws of each of the Reorganized Debtors shall, inter alia, prohibit the issuance of nonvoting stock to the extent required by section 1123(a) of the Bankruptcy Code.

(c) **Exemption From Securities Laws.** The Confirmation Order will provide that the offer and sale of the New Parent Stock and the New Senior Secured Notes that are issued pursuant to the Plan, including, without limitation, New Parent Stock issued pursuant to the New Long Term Incentive Plan, are exempt from registration pursuant to section 1145(a) of the Bankruptcy Code and that such New Parent Stock and New Senior Secured Notes may be resold by the holders thereof without restriction, except to the extent that any such holder is deemed to be an “underwriter” as defined in section 1145(b)(1) of the Bankruptcy Code with respect to the New Parent Stock or the New Senior Secured Notes.

4.2. **Corporate Actions**

(a) **Corporate Powers.** The Debtors shall continue to exist as subsidiaries of the New Parent after the Effective Date, with all of the powers of corporations under applicable law. After the Effective Date, each Reorganized Debtor may amend or modify its certificate of incorporation and by-laws in any manner consistent with the Plan, as permitted under applicable law and/or such certificate of incorporation and by-laws.

(b) **Employee Issues.** As of the Effective Date, the Reorganized Debtors will have authority, as determined by New Parent’s board of directors, to: (a) maintain, amend or revise existing employment, retirement, welfare, incentive, severance, indemnification and other agreements with their active directors, officers and employees, subject to the terms and conditions of any such agreement; and (b) enter into new employment, retirement, welfare, incentive, severance, indemnification and other agreements for active and retired employees; provided, however, that the Debtors’ severance policy approved pursuant to the order of the Bankruptcy Court, dated September 5, 2001, shall remain in place for at least one year after the Effective Date unless replaced by a policy no less favorable to officers, directors, and employees.

(c) **New Long Term Incentive Plan.** Immediately prior to the Effective Date, the Reorganized Debtors shall adopt and implement the New Long Term Incentive Plan without the need for any further corporate action in connection therewith.

**(d) Authorization.** The adoption of new or amended and restated certificates of incorporation and by-laws or similar constituent documents for the Reorganized Debtors; the initial slate of directors and officers for the Reorganized Debtors; the distribution of Cash pursuant to the Plan; the issuance and distribution of New Parent Stock and New Senior Secured Notes pursuant to the Plan; the adoption, execution, delivery and implementation of all contracts, leases, instruments, notes, guarantees, releases and other agreements or documents related to any of the foregoing; the adoption, execution and implementation of employment, retirement and indemnification agreements, incentive compensation programs, retirement income plans, welfare benefit plans and other employee plans and related agreements, including the New Long Term Incentive Plan; and the other matters provided for under the Plan involving corporate action to be taken by or required of any Debtor or Reorganized Debtor will occur and be effective as of the Effective Date, and will be authorized and approved in all respects and for all purposes without any requirement of further action by stockholders or directors of any of the Debtors.

#### **4.3. Pursuit of Preference Actions.**

**(a) Allocation of Proceeds.** Holders of Allowed Class 7 Claims will receive 80% and the Reorganized Debtors will receive 20% of Net Preference Recoveries from Committee Claims; *provided, however*, that solely if and to the extent the Debtors fail to provide the \$1,000,000 as and when provided in Subsection 4.3(d) below, the Debtors' 20% share shall be setoff by such unfunded amount and such setoff funds shall be applied to satisfy the Debtors' related obligation under Subsection 4.3(d). Net Preference Recoveries from Carve Out Claims that may be incorporated in any broader settlement with the preference recipient shall belong entirely to the Debtors, provided that the Debtors shall represent to the Committee that any such settlement was negotiated in good faith. Net Preference Recoveries from Carve Out Claims that are resolved individually, rather than as part of a broader settlement, shall be split on the 80%/20% basis.

#### **(b) Prosecution of Preference Claims.**

- (1) The Reorganized Debtors shall control and retain 100% of recoveries on all claims against any member of the Leducor Group, Netrail, Inc., or Debtor Professionals, including Preference Claims against any of the foregoing. Any settlement of claims against the Leducor Group shall require the waiver of all General Unsecured Claims against the Debtors asserted by each member of the Leducor Group or, absent such waiver, an alternative resolution satisfactory to the Committee. Absent a settlement of the Debtors' Preference Claims against the Leducor Group on or before April 30, 2003, such claims shall be treated in all respects as Committee Claims (and all related Committee fees and expenses shall be deemed to be Committee Preference Fees), except that the first \$500,000 of Net Preference Recoveries on such claims against the Leducor Group shall be paid to the Reorganized Debtors (or applied against the \$1

million payable by the Reorganized Debtors under Subsection 4.3(d) below) before the 80%/20% split for Net Preference Recoveries from Committee Claims applies.

- (2) The Committee shall be authorized and have the exclusive right to prosecute all Committee Claims on behalf of the Debtors' estates without further order of the Bankruptcy Court. The Committee shall deposit all proceeds from the prosecution or settlement of Committee Claims into the Preference Account. The Committee also shall be responsible for resolution of any General Unsecured Claims asserted by targets of Committee Claims. Any Committee Claim regarding which the potential defendant has asserted a General Unsecured Claim against the Debtors and with respect to which: (a) the Committee has not filed an adversary proceeding or a motion objecting to the prepetition claim of the target of the Committee Claim by 60 days after the Effective Date, or such later date as may be agreed to between the Committee and the Debtors, or ordered by the Court for cause shown; or (b) as to which on or before such date the Committee has informed the Reorganized Debtors in writing that the Committee does not intend to pursue the Committee Claim, shall revert (together with the related claims resolution responsibility) to the Reorganized Debtors' control and thereafter be deemed to be a Carve Out Claim. On or before the Effective Date, the Debtors shall provide the Committee with a schedule of potential "books and records" objections related to Committee Claims.

**(c) The Preference Account.** No distributions from the Preference Account shall be made unless and until the Reorganized Debtors first have been paid from such account an amount equal to all outstanding Requested Debtor Fees (or any such fees that are disputed have been reserved for). Subject only to the limited right of set-off provided herein, the Reorganized Debtors shall receive their 20% share of Net Preference Recoveries from the Preference Account on or before the date that any of the 80% share of the Net Preference Recoveries are distributed to holders of Allowed Class 7 Claims. The Committee promptly shall provide the Reorganized Debtors with copies of the monthly statements for the Preference Account together with a schedule of all deposits into and withdrawals from the Preference Account. The Reorganized Debtors shall have the right to audit the Preference Account, at the Reorganized Debtors' expense, upon reasonable notice. Either the Committee or the Reorganized Debtors shall have the right to object in the Bankruptcy Court on the basis that the Committee Preference Fees or Requested Debtor Fees are unreasonable.

**(d) Debtors' Contribution.** The Reorganized Debtors shall provide \$1,000,000 to cover Committee Preference Fees or as a contribution to recoveries on Committee Claims. For Committee Preference Fees incurred and billed during the period from the Effective Date until July 1, 2003, upon receipt of such monthly bills the

Reorganized Debtors promptly shall deposit an amount sufficient to pay such fees into the Preference Account so long as the aggregate amount paid by the Reorganized Debtors for Committee Preference Fees does not exceed \$1,000,000. As soon as practicable after July 1, 2003, the Debtors will deposit into the Preference Account, as a contribution to the Preference Account, an amount equal to \$1,000,000 less the sum of: (a) the aggregate amount paid by the Debtors for Committee Preference Fees for the period from July 1, 2002 to June 30, 2003; plus (b) any unreimbursed Requested Debtor Fees for such period. Any additional funding to cover Committee Preference Fees shall be paid only from net recoveries on Committee Claims.

**(e) Committee Reporting Requirements.** Every two weeks for the period through June 30, 2003, and monthly thereafter, the Committee shall provide the Reorganized Debtors with a written grid/chart that lists any settlement proposal made or received by the Committee respecting every Committee Claim. Upon request, the Committee promptly shall provide the Reorganized Debtors with a copy of any such written settlement proposal. The Reorganized Debtors shall keep all such information confidential and all such information shall be deemed shared pursuant to a joint defense agreement with the Committee so as to preserve the confidential nature of such information and the attorney-client and attorney work product privileges with respect to such information.

**(f) Reorganized Debtors Reporting Requirements.** Each month, the Reorganized Debtors shall provide the Committee with a written grid/chart that lists any settlement proposal made or received by the Reorganized Debtors respecting every Carve Out Claim. Upon request, the Reorganized Debtors promptly shall provide the Committee with a copy of any such written settlement proposal. The Committee shall keep all such information confidential and all such information shall be deemed shared pursuant to a joint defense agreement with the Reorganized Debtors so as to preserve the confidential nature of such information and the attorney-client and attorney work product privileges with respect to such information.

**(g) Cooperation.** The Debtors and Reorganized Debtors shall use their reasonable best efforts to timely cooperate with the Committee in its analysis, investigation, and pursuit of Committee Claims.

**4.4. Postconfirmation Operations.**

As of the Effective Date, the Reorganized Debtors may operate their businesses and use, acquire and settle and compromise claims or interests without supervision of the Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan and Confirmation Order, including Section 4.3 hereof. Without limiting the foregoing, the Reorganized Debtors may pay the charges they incur for professional fees, disbursements, expenses or related support services after the Confirmation Date (including any Professional Fee Claims) without any application to the Court.

**4.5. Directors of Reorganized Debtors**

(a) Initial Directors. On the Effective Date, the authority, power and incumbency of the persons then acting as directors of the Debtors shall be terminated and such directors shall be deemed to have resigned and the following three individuals shall become the directors of each of the Debtors with responsibility for the management, control and operations of each Reorganized Debtor:

- (1) Greg Maffei
- (2) Vanessa Wittman
- (3) Lin Gentemann

(b) Term. Each director will serve from and after the Effective Date until his or her successor is duly elected and qualified or until their earlier death, resignation or removal in accordance with the terms of the certificates of incorporation and by-laws or similar constituent documents of the applicable Reorganized Debtor and applicable state law.

**4.6. Debtors' Retention of Causes of Action**

(a) Except as provided in Sections 4.3 above and 7.4 and 7.5(b) below, on the Effective Date, all rights, claims, and causes of action of the Debtors pursuant to: (a) sections 541, 542, 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code; and (b) all other claims and causes of action of the Debtors against any Person (other than rights, claims and causes of action expressly released by the Debtors in the Plan or pursuant to a Final Order) shall be preserved and become property of the Reorganized Debtors. Except as provided in Section 4.3 above, on the Effective Date, the Reorganized Debtors shall be deemed the representative of their respective estates under section 1123(b) of the Bankruptcy Code and will be authorized and shall have the power to commence and prosecute any and all causes of action (other than rights, claims and causes of action expressly released by the Debtors in the Plan or pursuant to a Final Order) that could have been asserted by any of the Debtors respectively. ALL SUCH ACTIONS SHALL SURVIVE CONFIRMATION AND THE COMMENCEMENT OR

PROSECUTION OF SUCH ACTIONS SHALL NOT BE BARRED OR LIMITED BY ANY ESTOPPEL, WHETHER JUDICIAL, EQUITABLE, OR OTHERWISE.

(b) Except as provided in Sections 4.3 above and 7.5(b) below, on and after the Effective Date, the Reorganized Debtors may settle any claims of the Debtors pursuant to sections 541, 542, 544, 545, 547, 548, 549, 550, and 553 of the Bankruptcy Code held against: (i) employees of the Debtors or their Affiliates or against any Debtor Professionals, without the need for Court approval; provided however, that the Debtors shall provide at least 10 days' prior written notice to the Committee of any such settlement, and if the Committee objects within such 10 day period, such settlement may not be implemented without Committee consent or an order of the Court; and (ii) any of the Debtors or the CCAA Plan Debtors, and any entity that is a wholly owned subsidiary of any of the Debtors or the CCAA Plan Debtors.

#### **4.7. Effectuating Documents and Further Transactions**

Each Debtor and Reorganized Debtor shall be authorized to execute, deliver, file, or record such documents, contracts, instruments, releases, and other agreements and take such other action as may be necessary to effectuate and further evidence the terms and conditions of the Plan.

#### **4.8. Withdrawal of the Plan**

The Debtors reserve the right to withdraw or amend the Plan prior to the Confirmation Date. If the Debtors withdraw or amend the Plan, or if confirmation of the Plan does not occur, then the Plan and related Disclosure Statement shall be null and void, and nothing contained therein shall: (i) constitute a waiver or release of any Claims by or against, liens in property of, the Debtors; or (ii) serve as an admission of fact or conclusion of law or otherwise prejudice in any manner the rights of the Debtors in any further proceedings involving the Debtors.

#### **4.9. Value Creation Pool**

The Value Creation Pool authorized pursuant to an order of the Bankruptcy Court, dated December 20, 2001, shall be \$1,750,000 and distributions thereunder shall be payable on the Effective Date.

#### **4.10. Registration Rights Agreement**

On and after the Effective Date, New Parent, recipients of the New Parent Stock under the Plan, and the participants in the New Long Term Incentive Plan shall be bound by and have the benefit of the provisions of the Registration Rights Agreement.

**ARTICLE V.**

**CLAIMS RESOLUTION AND DISTRIBUTIONS**

**5.1. Distributions to Holders of Class 7 Claims**

(a) **Initial Distributions.** On the Initial Distribution Date or as soon as reasonably practicable thereafter, the Reorganized Debtors shall distribute the New Parent Stock (or cash for Allowed Class 7 Claims subject to the Lump Sum Election) and Net Preference Recoveries allocable to Allowed Claims held by members of Class 7. For the purpose of calculating the amount of New Parent Stock and Net Preference Recoveries to be distributed to holders of Allowed Claims in Class 7 on the Initial Distribution Date, all Disputed Claims in Class 7 will be treated as though such Claims will be Allowed Claims in the amounts asserted or as estimated by the Court pursuant to section 502(c) of the Bankruptcy Code, as applicable.

(b) Upon any Interim Distribution Date, the Reorganized Debtors may make interim Distributions of New Parent Stock to holders of Allowed Class 7 Claims pursuant to and consistent with resolutions of Disputed Claims since the date of the immediately prior Distribution.

(c) On the Final Distribution Date or as soon as reasonably practicable thereafter, the Reorganized Debtors shall make the balance of all Distributions required under the Plan.

**5.2. Compensation for Services Related to Distributions.**

(a) The Reorganized Debtors may employ or contract with other entities to assist it in making the Distributions required by the Plan.

(b) In consideration for providing services related to Distributions, any entity employed by the Reorganized Debtors for such services shall receive from the Reorganized Debtors, without the need for further Bankruptcy Court approval, reasonable compensation for such services and reimbursement of reasonable out-of-pocket expenses incurred in connection with such services. These payments will be made on terms agreed to with Reorganized Debtors and shall not be deducted from distributions to be made pursuant to the Plan to holders of Allowed Claims and Interests.

**5.3. Miscellaneous Distribution Provisions**

(a) **Method of Cash Distributions.** Except as set forth in Section 3.4(e) of the Plan, any Distribution of Cash to be made by the Reorganized Debtors pursuant to the Plan may be made by draft, check, wire transfer, or as otherwise required or provided in any relevant agreement or applicable law.

(b) **Fractional Plan Securities.** Notwithstanding any other provision of the Plan, only whole numbers of shares of New Parent Stock will be issued. When any

Initial Distribution or Interim Distribution on account of an Allowed Claim would otherwise result in the issuance of a number of shares of New Parent Stock that is not a whole number, the actual distribution of shares of such stock only will include the next lower whole number. When any Distribution on a Final Distribution Date on account of an Allowed Claim would otherwise result in the issuance of a number of shares of New Parent Stock that is not a whole number, the actual distribution of shares of such stock will be rounded to the next higher or lower whole number as follows: (i) fractions equal to or greater than  $\frac{1}{2}$  will be rounded to the next higher whole number; and (ii) fractions less than  $\frac{1}{2}$  will be rounded to the next lower number. The total number of shares of New Parent Stock specified to be distributed to a Class of Claims will be adjusted as necessary to account for the rounding provided for herein. If, as a result of such rounding, the amount of shares of New Parent Stock to be distributed to a particular Class differs from the aggregate number of shares of New Parent Stock specified to be distributed pursuant to the Plan to that Class, the aggregate number of shares of New Parent Stock specified with respect to such Class will be adjusted upward or downward to provide for the appropriate distribution of New Parent Stock, as the case may be. No consideration will be provided in lieu of fractional shares that are rounded down, except that with respect to Initial Distributions or Interim Distributions, such fractional shares shall, with respect to each Allowed Claim, be deemed held by the Reorganized Debtors, in trust, for the benefit of the holder of such Allowed Claim, to be aggregated with the remaining Distribution to be allocated to such holder on the Final Distribution Date.

(c) **Distributions on Non-Business Days.** Any payment or Distribution due on a day other than a Business Day shall be made, without interest, on the next Business Day.

(d) **No Distribution in Excess of Allowed Amount of Claim.** Notwithstanding anything to the contrary herein, no holder of an Allowed Claim shall receive in respect of such Claim any Distribution (with non-Cash distributions ascribed the value set forth herein or in the Disclosure Statement) in excess of the allowed amount of such Claim plus interest at the rate of 5½% per annum. Except as expressly provided herein, no Claim shall be allowed to the extent that it is for postpetition interest.

(e) **Disputed Payments.** If any dispute arises as to the identity of the holder of an Allowed Claim entitled to receive any Distribution under the Plan, the Reorganized Debtors may retain such Distribution, in trust, until its disposition is determined by a Final Order or written agreement among the interested parties to such dispute and withhold from such Distribution an amount equal to the reasonable fees and costs incurred by the Reorganized Debtors in resolving such dispute.

(f) **De Minimis Distributions.** No: (i) Cash payment of less than \$100.00; or (ii) distribution of less than ten shares of New Parent Stock, shall be required to be made to the holder of any Claim until the Final Distribution Date for the relevant class.

(g) **Withholding Taxes.** Any federal or state withholding taxes or other amounts required to be withheld under any applicable law shall be deducted and withheld from any Distributions hereunder.

(h) **Estimation of Disputed Claims.** Unless otherwise provided for herein, upon notice and a hearing, the Court shall estimate the aggregate Face Amount of all Disputed Claims in any Class that are disputed, contingent and/or unliquidated. The aggregate Face Amount of: (a) Disputed Claims and (b) Allowed Claims shall set the maximum allowable aggregate amount of Claims in each relevant Class that is eligible to receive Distributions hereunder. The existence of a Disputed Claim in any Class shall not impair or impede the making of a Distribution to Allowed Claims in the same or other Classes. If the allowed amount of any particular Disputed Claim is reconsidered under section 502(j) of the Bankruptcy Code and Bankruptcy Rule 3008 and/or is allowed in an amount that is greater than the estimated amount of such Claim, or the ultimately allowed amount of all Disputed Claims in a particular Class is greater than the estimated aggregate Face Amount of such Claims, no claimant shall have recourse against the Reorganized Debtors (or any property thereof), any Distribution made to a creditor in any other Class herein, or any Distribution, previously made on account of any Allowed Claim (however, nothing herein shall modify any right of a holder of a reconsidered Claim under the penultimate sentence of section 502(j) of the Bankruptcy Code).

(i) **Distribution When a Disputed Claim Becomes an Allowed Claim.** Promptly after a Disputed Claim becomes an Allowed Claim, unless a later time is provided for in the Plan or by agreement of the parties, the Reorganized Debtors shall make a Distribution to the holder of such Allowed Claim as if such Claim had been an Allowed Claim on the Effective Date.

(j) **Allocation of Distributions.** Distributions hereunder made in respect of any Allowed Claim that includes an interest component shall be allocated *pro rata* to the principal and interest components of such Allowed Claim.

#### 5.4. **Objections to Claims.**

Unless otherwise ordered by the Bankruptcy Court, all objections to Claims shall be filed with the Bankruptcy Court and served on the applicable claimant on or prior to one-hundred and eighty (180) days after the later of: (a) the Effective Date; and (b) the date a Claim is filed with the Bankruptcy Court and served on counsel for the Reorganized Debtors and the Committee.

#### 5.5. **Settlement of Claims.**

Subsequent to the Effective Date, the Reorganized Debtors shall have the authority to resolve any Disputed Claim (except if such Disputed Claim is a Committee Claim) for an Allowed Claim of less than \$1,000,000 without further Court order and subject only to the filing of a notice of such settlement with the Court. Any such settlement shall be binding upon all parties in interest in the Chapter 11 Cases; *provided, however*, that with respect to any settlement that provides for an Allowed Class 7 Claim in

excess of \$100,000, the Reorganized Debtors shall provide the Committee with a written explanation of the basis for the proposed settlement and any relevant documentation and such settlement shall be subject to objection by the Committee within ten days of service of such a notice of settlement, in which case such settlement only may be consummated with the Committee's consent or after entry of an order by the Court approving such settlement.

**5.6. Unclaimed Property.**

After 180 days following the relevant date of a Distribution, the holders of Allowed Claims and Interests otherwise entitled to receive the Distribution on such date shall cease to be entitled thereto, and such Unclaimed Property shall be retained by the Reorganized Debtors, except with respect to any unclaimed Cash distributed from the Preference Account, which shall be redeposited into the Preference Account and distributed as if it were the proceeds of a Committee Claim.

**5.7. Voting of Certain New Parent Stock.**

New Parent Stock that is Unclaimed Property or held for Disputed Claims shall not be voted at any meeting of the stockholders of New Parent.

**5.8. Setoffs and Recoupment.**

Reorganized Debtors may, but shall not be required to, set off or recoup against any Allowed Claim and the distributions to be made pursuant to the Plan on account of such Claim, claims of any nature that the Debtors or Reorganized Debtors may have against the holder of such Allowed Claim; provided, however, that neither the failure to effect such a setoff or recoupment nor the allowance of any Claim against the Debtors or Reorganized Debtors shall constitute a waiver or release by the Debtors or Reorganized Debtors of any claim that the Debtors or Reorganized Debtors may possess against such holder.

Notwithstanding the foregoing, upon request of the Committee, the Debtors shall not unreasonably withhold the waiver of their right to set off or recoup against any Allowed Claim held by a target of a Committee Claim, any claims of the Reorganized Debtors arising after the Effective Date.

**5.9. Professional Fee Claims.**

The Confirmation Order shall provide for a bar date for the filing of Professional Fee Claims. Notice of entry of the Confirmation Order shall be served on all professionals employed by the Debtors or other parties in interest. Any Person that fails to file a proof of such Claim or application on or before the time and date established in the Confirmation Order shall be forever barred from asserting such Claim against any of the Debtors or their successors or property and the holder thereof shall be enjoined from commencing or continuing any action, employment of process or act to collect, offset or recover such Claim.

**ARTICLE VI.**

**EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

**6.1. Rejection of Executory Contracts and Unexpired Leases.**

(a) Leases and Contracts to be Rejected. On the Confirmation Date, but subject to the occurrence of the Effective Date, pursuant to section 365 of the Bankruptcy Code, all of the Debtors' executory contracts and unexpired leases shall be deemed rejected except those that: (i) are the subject of motions to assume or reject pending on the Confirmation Date; (ii) were assumed or rejected before the Confirmation Date; (iii) are listed on Schedule 6.2(a) annexed hereto; (iv) are Underlying Rights; (v) are agreements, obligations, security interests, or similar undertakings that the Debtors list on Schedule 3.6(c) hereto as a Secured Claim of the Debtors, but the Bankruptcy Court later determines are subject to assumption or rejection; and (vi) executory contracts and unexpired leases that the Debtors contend have been terminated by their terms prior to the Confirmation Date due to a breach by the non-Debtor party, but which the Bankruptcy Court later determines are still in effect; provided, however, that the Debtors shall not be required to assume or reject any executory contract or unexpired lease with any party that is a debtor under the Bankruptcy Code or similar insolvency proceeding unless and until such contract or lease has been assumed or rejected by such other party.

(b) Effect of Post-Confirmation Rejection. The entry by the Bankruptcy Court after the Confirmation Date of an order authorizing the rejection of an executory contract or unexpired lease shall result in such rejection being a prepetition breach under sections 365(g) and 502(g) of the Bankruptcy Code.

(c) Deadline to File Rejection Damage Claims. Each Person who is a party to a contract or lease rejected under the Plan must file with the Bankruptcy Court and serve on the Debtors' attorneys and the Committee's attorneys, not later than thirty (30) days after the Confirmation Date, a proof of Claim for damages alleged to arise from the rejection of the applicable contract or lease or be forever barred from filing a Claim, or sharing in distributions under the Plan, related to such alleged rejection damages.

**6.2. Assumption of Executory Contracts and Unexpired Leases**

(a) Leases and Contracts to be Assumed. As of the Confirmation Date, but subject to the occurrence of the Effective Date, the Debtors shall be deemed to have assumed pursuant to section 365 of the Bankruptcy Code: (i) all executory contracts and unexpired leases listed on Schedule 6.2(a)(1) hereto based on the cure amounts listed in such Schedule; and (ii) all unexpired Underlying Rights agreements to which any of the Debtors are a party (except those on Schedule 6.2(a)(2) hereto, which lists those Underlying Rights agreements to be rejected), with the applicable cure amounts for each Underlying Rights agreement to be assumed pursuant to the Plan to be \$0 unless an amount is listed for such agreement on Schedule 6.2(a)(3) hereto. The listing of a contract or lease on any schedule to the Plan will not constitute an admission by the Debtors that

such contract or lease is an executory contract or unexpired lease or that the Debtors have any liability thereunder.

(b) Deadline to Object to Cure Amounts. If prior to the Confirmation Date or such other date as the Bankruptcy Court may fix, a party to an executory contract or unexpired lease listed on Schedule 6.2(a)(1) or to a Underlying Rights agreement fails to file with the Bankruptcy Court and serve upon the attorneys for the Debtors an objection to the applicable cure amount listed on Schedule 6.2(a)(2) or 6.2(a)(3) or \$0 for Underlying Rights not listed on Schedule 6.2(a)(2) or 6.2(a)(3), then such party shall be forever barred from asserting any additional or other amounts against the Debtors respecting such cure amount.

(c) Method of Cure. At the election of the Reorganized Debtors, any monetary defaults under each executory contract and unexpired lease to be assumed under the Plan shall be satisfied pursuant to section 365(b)(1) of the Bankruptcy Code, in one of the following ways: (a) by payment of the default amount in Cash within thirty (30) days after the Effective Date or such longer period ordered by the Bankruptcy Court; or (b) on such other terms as may be agreed to by the parties to such executory contract or unexpired lease. If a dispute occurs regarding: (x) the cure amount; (y) the ability of the applicable Debtor to provide adequate assurance of future performance under the contract or lease to be assumed; or (z) any other matter pertaining to assumption, then the cure payments required by section 365(b)(1) of the Bankruptcy Code shall be made following the entry of a Final Order resolving the dispute and approving assumption. Notwithstanding any provision of an executory contract or unexpired lease to the contrary, assumption of any such contract or lease shall not require: (i) the delivery, reaffirmation, or assumption of any new or existing guaranty of a Debtor's obligations under such contract or lease; or (ii) the resolution of any Nonconsensual Lien Claim or Impaired Class 6 Claim whose treatment is provided for in the Plan. Notwithstanding anything herein to the contrary, the Debtors shall retain their right to reject any executory contract or unexpired lease that is subject to a dispute concerning the cure of any defaults until 30 days after such dispute is resolved by a Final Order.

(d) Continuation of Stay. The automatic stay provided under section 362(a) of the Bankruptcy Code shall remain in effect to stay the termination of any contract or lease listed on Schedule 6.2(a)(1), including, without limitation, any surety bonds, until such time as the relative rights and obligations of the parties with respect to any such agreements has been determined by a Final Order.

## **ARTICLE VII.**

### **EFFECT OF THE PLAN ON CLAIMS AND INTERESTS**

#### **7.1. Discharge.**

(a) **Scope.** Except as otherwise provided in the Plan or Confirmation Order, in accordance with section 1141(d)(1) of the Bankruptcy Code, entry of the

Confirmation Order acts as a discharge, effective as of the Effective Date, of all debts of, Claims against, liens on, and Interests in each of the Debtors, their assets or properties, which debts, Claims, liens, and Interests arose at any time before the entry of the Confirmation Order. The discharge of the Debtors shall be effective as to each Claim, regardless of whether a proof of claim therefore was filed, whether the Claim is an Allowed Claim or whether the holder thereof votes to accept the Plan. On the Effective Date, as to every discharged Claim and Interest, any holder of such Claim or Interest (including, without limitation, any options to purchase stock of any Debtor) shall be precluded from asserting against any Debtor formerly obligated with respect to such Claim or Interest, or against such Debtor's assets or properties, any other or further Claim or Interest based upon any document, instrument, act, omission, transaction or other activity of any kind or nature that occurred before the Confirmation Date.

(b) **Injunction.** In accordance with section 524 of the Bankruptcy Code, the discharge provided by this section and section 1141 of the Bankruptcy Code, *inter alia*, acts as an injunction against the commencement or continuation of any action, employment of process or act to collect, offset or recover the Claims and Interests discharged hereby.

(c) **Release of Liens; Cancellation and Surrender of Instruments, Securities and Other Documentation**

(i) Turnover of Property. Unless a particular Claim is reinstated, each holder of: (A) a Class 6 Secured Claim; (B) a Claim that is purportedly secured (other than Prepetition Lender Claims); or (C) a Class 5 Nonconsensual Lien Claim, shall, on or immediately before the Effective Date: (x) turn over and release to the Debtors any and all property of the relevant Debtor that secures or purportedly secures such Claim; and (y) execute such documents and instruments as such Debtor or Reorganized Debtor requires to evidence such claimant's release of such property.

(ii) Release of Liens, etc. On the Effective Date, except for liens securing claims in Classes 4, 5, or 6 expressly provided to be retained pursuant to the Plan, all mortgages, deeds of trust, liens or other security interests against the property of any Debtor will be fully released and discharged, and all of the right, title and interests of any holder such mortgages, deeds of trust, liens or other security interests, including any rights to any collateral thereunder, will revert to the applicable Reorganized Debtor. Each holder of any Allowed Claim (other than holders of Allowed Prepetition Lender Claims) shall surrender to the Reorganized Debtors any note, instrument, or certified security evidencing such Claim. No Distribution hereunder shall be made to or on behalf of any holder of a Claim unless and until such holder executes and delivers to the relevant Debtor or Reorganized Debtor such release of liens or other items described above, or demonstrates non-availability of such items to the satisfaction of the Reorganized Debtors, including requiring such holder to post a lost instrument or other indemnity bond; provided, however, that holders of Allowed Prepetition Lender Claims shall not be required to tender any notes or instruments evidencing Prepetition Lender Claims to receive their Distribution hereunder, so long as the Distribution may be made to JPMorgan Chase Bank

as Administrative Agent. The Reorganized Debtors reasonably may require the holder of any such Claim (other than holders of Prepetition Lender Claims so long as the Distribution may be made to JPMorgan Chase Bank as Administrative Agent) to hold the Reorganized Debtors harmless up to the amount of any Distribution made in respect of such unavailable note, instrument, document, certificate, agreement, certified security or other item evidencing such Claim. Any such holder that fails to execute and deliver such release of liens or other items described above or satisfactorily explain their non-availability to the Reorganized Debtors within 180 days of the Effective Date shall be deemed to have no further Claim against the Debtors, the Reorganized Debtors, or their property in respect of such Claim and shall not participate in any Distribution hereunder, and the Distribution that would otherwise have been made to such holder shall be treated as Unclaimed Property; provided that any such holder of a Disputed Claim shall not be required to execute and deliver such release of liens until the time such Claim is allowed or disallowed. To the extent any holder of a Claim fails to release the relevant liens as required above, the Reorganized Debtors may act as attorney-in-fact, on behalf of the holders of such liens, to provide any releases as may be required in connection with the Plan.

**(d) Satisfaction of Claims and Interests in any Debtor.** The treatment to be provided for respective Allowed Claims or Interests in each Debtor pursuant to the Plan shall be in full satisfaction, settlement, release and discharge of such respective Claims or Interests.

#### **7.2. Revesting and Vesting**

Except as otherwise provided in the Plan, on the Effective Date all property comprising the estates of the Debtors shall vest in the applicable Reorganized Debtor, free and clear of all claims, liens, charges, encumbrances and interests of creditors and equity security holders (except to the extent that such claims, liens, charges, encumbrances and/or interests have been reinstated, or as otherwise expressly provided herein).

#### **7.3. Survival of Certain Indemnification Obligations.**

Except as otherwise specifically provided in the Plan, the obligations of the Debtors to indemnify individuals who serve or since the Petition Date served as their respective directors, officers, agents, employees, representatives, and others, including (without limitation) professional persons retained by any Debtor, pursuant to such Debtor's respective certificates of incorporation, by-laws, applicable statutes and preconfirmation agreements in respect of all present and future actions, suits and proceedings against any of such officers, directors, agents, employees, representatives, and others, including (without limitation) professional persons retained by any Debtor (in their capacities as such), based upon any act or omission related to service with, for, or on behalf of any of the Debtors before or after the Petition Date as such obligations were in effect at the time of any such act or omission, shall not be discharged or impaired by confirmation or consummation of the Plan but shall survive unaffected by the reorganization contemplated by the Plan and shall be performed and honored by each

respective Debtor or Reorganized Debtor regardless of such confirmation, consummation, and reorganization; *provided, however*, that indemnification obligations based on any act or omission that occurred prior to the Petition Date shall be discharged by consummation of the Plan, but such discharge shall not affect the right of any indemnified Person to: (a) recover under available director and officer insurance coverage (but, for the avoidance of doubt, any claim of such Person to which an insurer may be subrogated is not exempt from discharge); and (b) to use such indemnification obligation as a defense or offset against any claim asserted against such indemnified Person.

**7.4. Limitation of Liability.**

NEITHER THE DEBTORS, REORGANIZED DEBTORS, THE CCAA PLAN DEBTORS, 360NETWORKS INC., THE COMMITTEE, JP MORGAN CHASE BANK AS ISSUING BANK, ADMINISTRATIVE AGENT AND COLLATERAL AGENT UNDER THE PREPETITION CREDIT AGREEMENT, THE OTHER AGENTS AND THE ARRANGERS UNDER THE PREPETITION CREDIT AGREEMENT, THE STEERING COMMITTEE, AND THE HOLDERS OF PREPETITION LENDER CLAIMS, NOR ANY OF THEIR RESPECTIVE PRESENT OR FORMER DIRECTORS, OFFICERS, EMPLOYEES, PREDECESSORS, SUCCESSORS, MEMBERS, AGENTS, REPRESENTATIVES, ATTORNEYS, ADVISORS, FINANCIAL ADVISORS, ACCOUNTANTS, UNDERWRITERS, APPRAISERS, AND INVESTMENT BANKERS (IN EACH INSTANCE ACTING IN SUCH CAPACITY), SHALL HAVE OR INCUR ANY LIABILITY TO ANY PERSON FOR ANY ACTION TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH OR RELATED TO THE FORMULATION, NEGOTIATION, PREPARATION, DISSEMINATION, IMPLEMENTATION, CONFIRMATION, OR CONSUMMATION OF THE PLAN, THE DISCLOSURE STATEMENT, ANY CONTRACT, RELEASE, OR OTHER AGREEMENT OR DOCUMENT CREATED OR ENTERED INTO, OR ANY OTHER ACTION TAKEN OR OMITTED TO BE TAKEN IN CONNECTION WITH THE PLAN OR THE CHAPTER 11 CASES, AND ALL CLAIMS BASED UPON OR ARISING OUT OF SUCH ACTIONS OR OMISSIONS SHALL BE FOREVER WAIVED AND RELEASED; *PROVIDED, HOWEVER*, THAT THIS SECTION SHALL HAVE NO EFFECT ON THE LIABILITY OF ANY ENTITY: (a) THAT OTHERWISE WOULD RESULT FROM ANY ACTION OR OMISSION TO THE EXTENT THAT SUCH ACTION OR OMISSION IS DETERMINED IN A FINAL ORDER TO HAVE CONSTITUTED WILLFUL MISCONDUCT; and (b) TO THE EXTENT OF ANY RECOVERIES FOR A PREPETITION CLAIM AGAINST A RELEASED PARTY THAT MAY BE OBTAINED AGAINST A THIRD-PARTY INSURER (BUT, FOR THE AVOIDANCE OF DOUBT, ANY CLAIM TO WHICH AN INSURER MAY BE SUBROGATED SHALL REMAIN SUBJECT TO THIS RELEASE).

**7.5. Release and Waiver of Claims.**

(a) **Release by Holders of Claims or Interests.** The following releases and waiver shall be valid, binding, and enforceable and shall supplement any benefits from

sections 524 and 1141 of the Bankruptcy Code to the Debtors or Reorganized Debtors and to other parties involved in these Chapter 11 Cases:

**AS OF THE CONFIRMATION DATE, BUT SUBJECT TO THE OCCURRENCE OF THE EFFECTIVE DATE: NONE OF: (i) THE DEBTORS AND THE REORGANIZED DEBTORS AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS; (ii) THE CCAA PLAN DEBTORS AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS; (iii) JP MORGAN CHASE BANK AS ISSUING BANK, ADMINISTRATIVE AGENT AND COLLATERAL AGENT UNDER THE PREPETITION CREDIT AGREEMENT, THE OTHER AGENTS AND THE ARRANGERS UNDER THE PREPETITION CREDIT AGREEMENT, THE STEERING COMMITTEE, AND THE HOLDERS OF PREPETITION LENDER CLAIMS (ALL SUCH PERSONS REFERRED TO IN CLAUSES (i), (ii) AND (iii) ARE REFERRED TO HEREIN COLLECTIVELY AS THE “RELEASED PERSONS”); (iv) THE RELEASED PERSONS’ AND 360NETWORKS INC.’s RESPECTIVE PRESENT OR FORMER DIRECTORS, OFFICERS, EMPLOYEES, PREDECESSORS, SUCCESSORS, MEMBERS, AGENTS, REPRESENTATIVES, ATTORNEYS, ADVISORS, FINANCIAL ADVISORS, ACCOUNTANTS, UNDERWRITERS, APPRAISERS, AND INVESTMENT BANKERS (IN EACH INSTANCE ACTING IN SUCH CAPACITY); AND (v) ANY PERSON CLAIMED TO BE LIABLE DERIVATIVELY THROUGH ANY RELEASED PERSON OR 360NETWORKS INC., SHALL HAVE OR INCUR ANY LIABILITY TO ANY PERSON FOR ANY CLAIM, OBLIGATION, RIGHT, CAUSE OF ACTION OR LIABILITY (INCLUDING, BUT NOT LIMITED TO, ANY CLAIMS ARISING OUT OF ANY ALLEGED FIDUCIARY OR OTHER DUTY AND THE AVOIDANCE OF PREFERENCES OR FRAUDULENT CONVEYANCES OR ANY DERIVATIVE CLAIMS) WHETHER KNOWN OR UNKNOWN, FORESEEN OR UNFORESEEN, EXISTING OR HEREAFTER ARISING, BASED ON WHOLE OR IN PART ON ANY ACT OR OMISSION, TRANSACTION OR OCCURRENCE FROM THE BEGINNING OF TIME THROUGH THE EFFECTIVE DATE IN ANY WAY RELATING TO THE DEBTORS, THE CHAPTER 11 CASES, OR THE PLAN AS WELL AS TO THE CCAA PLAN DEBTORS, THE NONDEBTOR AFFILIATES, OR THE CCAA PLAN; AND ALL CLAIMS BASED UPON OR ARISING OUT OF SUCH ACTIONS OR OMISSIONS SHALL BE FOREVER WAIVED AND RELEASED (OTHER THAN THE RIGHT TO ENFORCE THE DEBTORS’ OR THE REORGANIZED DEBTORS’ OBLIGATIONS UNDER THE PLAN, OR THE CCAA PLAN DEBTORS’ OBLIGATIONS UNDER THE CCAA PLAN -- INCLUDING, WITHOUT LIMITATION, ANY OBLIGATIONS CONSTITUTING ADMINISTRATIVE CLAIMS ARISING UNDER ANY SETTLEMENT AGREEMENT APPROVED BY THE BANKRUPTCY COURT IN THE CHAPTER 11 CASES OR THE CCAA COURT IN THE CCAA CASES -- AND THE CONTRACTS, INSTRUMENTS, NOTES, RELEASES, AGREEMENTS AND DOCUMENTS DELIVERED UNDER ANY SUCH PLAN); *provided, however,* THAT NO RELEASE PROVIDED UNDER THE PLAN SHALL AFFECT THE LIABILITY OF ANY PERSON: (a) THAT OTHERWISE WOULD RESULT**

**FROM ANY ACTION OR OMISSION TO THE EXTENT THAT SUCH ACTION OR OMISSION IS DETERMINED IN A FINAL ORDER TO HAVE CONSTITUTED WILLFUL MISCONDUCT; and (b) TO THE EXTENT OF ANY RECOVERIES FOR A PREPETITION CLAIM AGAINST A RELEASED PARTY THAT MAY BE OBTAINED AGAINST A THIRD-PARTY INSURER (BUT, FOR THE AVOIDANCE OF DOUBT, ANY CLAIM TO WHICH AN INSURER MAY BE SUBROGATED SHALL REMAIN SUBJECT TO THIS RELEASE); and *provided further, however*, THAT NOTWITHSTANDING THE RELEASES PROVIDED UNDER THE PLAN, ANY CLAIM ASSERTED AGAINST THE REORGANIZED DEBTORS PURSUANT TO SECTION 7.3 OF THE PLAN SHALL REMAIN SUBJECT TO ANY RIGHT OF SET-OFF THAT OTHERWISE WOULD BE AVAILABLE TO ANY OF THE DEBTORS OR THE REORGANIZED DEBTORS IN THE ABSENCE OF ANY SUCH RELEASE.**

**(b) General Release by Debtors Related to Prepetition Lenders .**

As of the Confirmation Date, but subject to the occurrence of the Effective Date, pursuant to Bankruptcy Rule 9019 and in consideration for, among other things, the concessions by the holders of Prepetition Lender Claims made pursuant to the Plan and otherwise, the Debtors and the Reorganized Debtors will be deemed to forever release, waive and discharge all claims (including Derivative Claims), obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising in law, equity or otherwise, that are based in whole or in part on any act, omission, transaction or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Chapter 11 Cases or the Plan that such entity has, had or may have against JPMorgan Chase Bank as issuing bank, administrative agent and collateral agent under the Prepetition Credit Agreement, the other agents and the arrangers under the Prepetition Credit Agreement, the Steering Committee, the holders of Prepetition Lender Claims and each of their respective present or former directors, officers, employees, predecessors, successors, members, attorneys, accountants, underwriters, investment bankers, financial advisors, appraisers, representatives and agents, acting in such capacity in connection with the Debtors; provided, however, that the Debtors shall retain the right to review and object to any fees and expenses sought to be reimbursed by any such Person.

**(c) Injunction Related to Releases.**

As further provided in Section 7.1(b) of the Plan, the Confirmation Order will permanently enjoin the commencement or prosecution by any entity, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action or liabilities released pursuant to the Plan.

**(d) No Third Party Release of U.S.A. Environmental or Tax Claims .**

Notwithstanding anything in this Article VII or the Confirmation Order to the contrary, no release of non-Debtors or related injunction on behalf of non-Debtors shall apply to environmental or tax claims of the United States of America or any agency thereof.

**7.6. Retention and Enforcement of Claims .**

Except as otherwise provided in the Plan (including Section 4.3 hereof), or in any contract, instrument, release or other agreement entered into in connection with the Plan or by order of the Court, in accordance with section 1123(b) of the Bankruptcy Code, the Reorganized Debtors, on behalf of each of the Debtors, shall retain and may enforce any claims, rights and causes of action that any Debtor or estate may hold. The Reorganized Debtors or any successor to it may pursue those claims, rights and causes of action in accordance with what is in its best interests.

**ARTICLE VIII.**

**CONDITIONS TO CONFIRMATION AND EFFECTIVE DATE**

**8.1. Conditions to Confirmation.**

The Bankruptcy Court will not enter the Confirmation Order unless and until the following conditions have been satisfied or duly waived pursuant to Section 8.3 of the Plan:

(a) The Confirmation Order shall be reasonably acceptable in form and substance to the Debtors and the Prepetition Agent and, with respect to any provisions materially affecting the Committee, Committee Claims or distributions to holders of Class 7 Claims, shall be reasonably acceptable to the Committee.

**8.2. Conditions to Effective Date.**

The Effective Date will not occur and the Plan will not be consummated unless and until each of the following conditions have been satisfied or duly waived pursuant to Section 8.3 of the Plan:

(a) The Confirmation Order shall have become a Final Order.

(b) The CCAA Plan shall have been approved by the CCAA Court by a Final Order.

(c) Reorganized 360 shall have at least \$35,000,000 of Cash on hand, exclusive of Cash to be distributed or reserved for either Distributions or other amounts due under the Plan or the CCAA Plan.

(d) All documents, instruments and agreements contemplated to be entered into, delivered and/or created in connection with the Plan and/or the CCAA Plan,

including, without limitation, any amended certificates of incorporation and by-laws of the Reorganized Debtors and the CCAA Plan Debtors, the New Senior Secured Notes, the Registration Rights Agreement and the New Long Term Incentive Plan, shall be reasonably acceptable in form and substance to the Debtors and the Prepetition Agent and, with respect to any provisions materially affecting Committee Claims or distributions to holders of Class 7 Claims, shall be reasonably acceptable to the Committee.

(e) The Debtors shall have obtained all authorizations, consents and regulatory approvals, if any, required to be obtained, and filed all notices and reports, if any, required to be filed, by the Debtors in connection with the Plan's effectiveness, including without limitation any notification or report in compliance with, or consent or approval under, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and the rules and regulations thereunder and any applicable waiting period with respect to each (including extensions) shall have expired or been terminated or the requisite consent or approval required thereby shall have been obtained without any material condition or limitation.

### 8.3. **Waiver of Conditions to Confirmation Date and Effective Date.**

(a) **Waiving Party.** Other than the requirements set forth in Section 8.1(a) of the Plan, each of the conditions to confirmation of the Plan or the occurrence of the Effective Date may be waived in whole or part by the Debtors with the consent of the Prepetition Agent and, with respect to any provisions materially affecting the Committee, Committee Claims or distributions to holders of Class 7 Claims, the Committee, with such Committee consent not to be unreasonably withheld.

(b) **Effect of Waiver or Failure to Waive.** Any such waiver(s) shall not affect the relevant Debtors' benefits under the "mootness doctrine." The failure to satisfy or waive any condition may be asserted by any Debtor, regardless of the circumstances giving rise to the failure of such condition to be satisfied (including, without limitation, any act, action, failure to act, or inaction by any of the Debtors). The failure of a Debtor to exercise any of the foregoing rights shall not be deemed a waiver of any other rights and each such right shall be deemed an ongoing right that may be asserted or waived (as set forth herein) at any time or from time to time.

(c) **Method of Waiver.** To be effective, any such waiver(s) must be in writing and filed with the Bankruptcy Court.

### 8.4. **Effect of Nonoccurrence of the Conditions to Effective Date.**

If each of the conditions to the occurrence of the Effective Date has not been satisfied or duly waived on or before the first Business Day that is more than 179 days after the Confirmation Date (or by such later date as the Debtors propose and the Bankruptcy Court approves, after notice and a hearing), upon motion by any party in interest, the Confirmation Order may be vacated by the Bankruptcy Court; *provided, however*, that notwithstanding the filing of such a motion, the Confirmation Order shall not

be vacated if each of the conditions to the Effective Date is either satisfied or duly waived before the Bankruptcy Court enters an order granting the relief requested in such motion. If the Confirmation Order is vacated pursuant to this section, then the Plan shall be null and void in all respects, and nothing contained in the Plan shall: (a) constitute a waiver or release of any Claims against, liens on property of the Debtors; or (b) prejudice in any manner the rights of any of the Debtors, including (without limitation) the right to seek further extensions of the exclusivity periods under section 1121(d) of the Bankruptcy Code, which exclusivity periods shall be deemed to have been extended to the date sixty (60) days after the date of entry of any order vacating the Confirmation Order, subject to the rights of any party to seek to shorten the exclusivity periods after notice and hearing.

## **ARTICLE IX.**

### **ADMINISTRATIVE PROVISIONS**

#### **9.1. Retention of Jurisdiction**

Notwithstanding confirmation of the Plan or occurrence of the Effective Date, the Court shall retain jurisdiction for the following purposes:

(a) Determination of the allowability of Claims and Interests upon objection to such Claims or Interests by a Debtor, Reorganized Debtors, other successors to any of the Debtors or any other party in interest and the validity, extent, priority and nonavoidability of consensual and nonconsensual liens and other encumbrances;

(b) Determination of any Debtor's tax liability pursuant to section 505 of the Bankruptcy Code;

(c) Determination of Professional Fee Claims and any disputes regarding Committee Preference Fees or Requested Debtor Fees;

(d) Approval, pursuant to section 365 of the Bankruptcy Code, of all matters related to the assumption, assumption and assignment, or rejection of any executory contract or unexpired lease of any of the Debtors;

(e) Determination of requests for payment of administrative expenses entitled to priority under section 507(a)(1) of the Bankruptcy Code, including compensation of parties entitled thereto;

(f) Resolution of controversies and disputes regarding the interpretation of the Plan;

(g) Implementation of the provisions of the Plan and entry of orders in aid of confirmation and consummation of the Plan, including, without limitation, appropriate orders to protect the Debtors and their successors from actions by creditors and/or interest holders of the Debtors or any of them and resolving disputes and

controversies regarding property of the estates and Reorganized Debtors that is subject to restructuring negotiations on and after the Confirmation Date;

(h) Modification of the Plan pursuant to section 1127 of the Bankruptcy Code;

(i) Adjudication of any causes of action that arose preconfirmation or in connection with the implementation of the Plan, including avoidance actions, brought by a Debtor, Reorganized Debtor, other successor of any of the Debtors as the representative of the Debtors' estates or party in interest (as a representative of any Debtor's estate);

(j) Adjudication of Committee Claims;

(k) Entry of a Final Order closing the Chapter 11 Cases;

(l) Resolution of disputes concerning any Claims for disputed Distributions;

(m) Resolution of any disputes concerning any release of a nondebtor hereunder or the injunction against acts, employment of process or actions against such nondebtor arising hereunder;

(n) Resolution of any disputes concerning whether a Person had sufficient notice of: (i) the Chapter 11 Cases; (ii) the applicable Claims' bar date; (iii) the hearing on the approval of the Disclosure Statement as containing adequate information; (iv) the hearing on confirmation of the Plan for the purpose of determining whether a Claim is discharged hereunder; or (v) for any other purpose;

(o) Issuance of injunctions, grant and implementation of other orders, or taking such other actions as may be necessary or appropriate to restrain interference by any Person with consummation or enforcement of the Plan;

(p) Resolution of controversies and disputes regarding settlement agreements, orders, injunctions, judgments, and other matters entered or approved by the Bankruptcy Court in connection with any adversary proceeding, discovery, or contested matter in any of the Chapter 11 Cases;

(q) Correction of any defect, cure of any omission or reconcile any inconsistency in the Plan, the Confirmation Order, organizational documents of Reorganized Debtors or any other documents relating to the Plan, as may be necessary to carry out the purposes or intent of the Plan;

(r) Adjudication of any pending adversary proceeding, or other controversy or dispute, in any of the Chapter 11 Cases, which arose pre-confirmation and over which the Bankruptcy Court had jurisdiction prior to confirmation of the Plan;

(s) Entry and implementation of such orders as may become necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked, or vacated; and

(t) Determination of any other matters that may arise in connection with or related to the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release, or other agreement or document created in connection with the Plan or Disclosure Statement.

## 9.2. **Governing Law.**

Except to the extent the Bankruptcy Code, Bankruptcy Rules, or other federal laws apply, the rights and obligations arising under the Plan shall be governed by the laws of the State of New York, without giving effect to principles of conflicts of law.

## 9.3. **Amendments.**

(a) **Pre-Confirmation Amendments.** The Debtors reserve the right to modify the Plan at any time prior to the Confirmation Date.

### (b) **Postconfirmation Amendment Not Requiring Resolicitation**

After the entry of the Confirmation Order, the Debtors may modify the Plan to remedy any defect or omission or to reconcile any inconsistencies in the Plan or in the Confirmation Order, as may be necessary to carry out the purposes and effects of the Plan, provided that: (i) the Debtors obtain approval of the Court for such modification, after notice and a hearing; and (ii) such modification shall not materially and adversely affect the interests, rights, treatment or Distributions of any Class of Allowed Claims or Allowed Interests under the Plan or the Committee. Any waiver under Section 8.3 hereof shall not be considered to be a modification of the Plan.

## 9.4. **Successors and Assigns.**

The rights, benefits, and obligations of any Person named or referred to in the Plan shall be binding upon, and shall inure to the benefit of, the heir, executor, administrator, successor, or assign of such Person.

## 9.5. **Severability.**

Should any provision in the Plan be determined to be unenforceable following the Confirmation Date, such determination shall in no way limit or affect the enforceability and operative effect of any and all other provisions of the Plan; provided that the Plan, as modified, meets the requirements of the Bankruptcy Code, including, without limitation, section 1127 of the Bankruptcy Code.

**9.6. Confirmation Order and Plan Control.**

To the extent the Confirmation Order and/or the Plan is inconsistent with the Disclosure Statement, any other agreement entered into between or among any Debtor(s), or any of them and any third party, the Plan shall control. To the extent of any inconsistencies between the Plan and the Confirmation Order, the Confirmation Order shall control.

**9.7. Payment of Statutory Fees.**

All fees payable pursuant to section 1930 of title 28, United States Code, due and payable through the Effective Date shall be paid by the Debtors or the Reorganized Debtors on or before the Effective Date and amounts due thereafter shall be paid by the Reorganized Debtors in the ordinary course.

**9.8. Continuation of Injunctions and Stays.**

Unless otherwise provided, all injunctions or stays ordered in the Chapter 11 Cases, pursuant to section 105 of the Bankruptcy Code or otherwise, and extant on the Confirmation Date shall remain in full force and effect unless or until subsequently modified or terminated.

**9.9. Application of Bankruptcy Code section 1146(c).**

The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under the Plan shall be entitled to the tax treatment provided by sections 1146(c) of the Bankruptcy Code and each recording or other agent of any governmental office shall record any such documents of issuance, transfer, or exchange without any further direction or order from the Court.

**9.10. Rules of Construction.**

(a) **Undefined Terms.** Any term used herein that is not defined herein shall have the meaning ascribed to any such term used in the Bankruptcy Code and/or the Bankruptcy Rules, if used therein.

(b) **Interpretation.** (i) The words “herein,” “hereof,” “hereunder,” and other words of similar import refer to the Plan as a whole, not to any particular section, subsection, or clause, unless the context requires otherwise; (ii) whenever it appears appropriate from the context, each term stated in the singular or the plural includes the singular and the plural and each pronoun stated in the masculine, feminine, or neuter includes the masculine, feminine, and the neuter; (iii) captions and headings to articles and sections of the Plan are inserted for convenience or reference only and are not intended to be a part or to affect the interpretation of the Plan; and (iv) the rules of construction set forth in section 102 of the Bankruptcy Code shall apply, unless superseded herein or in the Confirmation Order.

**9.11. Creditors' Committee.**

After the Effective Date of the Plan, the duties of the Committee shall be limited to: (a) handling Committee Claims and related General Unsecured Claims resolutions; (b) appearing in connection with any appeals or motions for reconsideration brought by any party in interest or modification of the Confirmation Order or the Plan; (c) review of Professionals Fee Claims; (d) review of and objection to any settlement of a Claim against the Debtors where such settlement would provide for an Allowed Class 7 Claim in excess of \$100,000; (e) fulfilling its role with respect to the allocation of Claims between the CCAA Plan Debtors and the Debtors pursuant to Section 3.7(d) of the Plan; and (f) objection to any General Unsecured Claim in excess of \$100,000 not otherwise covered by this section if, after providing ten (10) days' written notice to the Reorganized Debtors, the Committee maintains a good faith belief that the Reorganized Debtors have no valid business judgment for not objecting to such claim. As provided in Section 4.3(d) hereof, fees related to clause (a) above shall be paid by the Debtors for the period prior to the Effective Date or from the Preference Account. The reasonable fees and expenses of the Committee in performing its role under clauses (b), (c), (d) and (e) of this Section 9.11 shall be paid by the Reorganized Debtors; *provided, however*, that Debtors also shall pay the reasonable fees and expenses for the Committee's role under clause (f) of this section respecting a particular claim objection if:

- (1) the Committee requests a written explanation by the Reorganized Debtors of the basis for any decision not to object to a particular General Unsecured Claim in excess of \$100,000 and the Reorganized Debtors fail to provide such explanation; or
- (2) the Committee determines in good faith that the explanation provided by the Reorganized Debtors for their decision not to pursue such objection does not represent sound business judgment under the standard generally applicable under section 363 of the Bankruptcy Code, and the Bankruptcy Court agrees with the Committee's determination.

Any other reasonable fees and expenses incurred by the Committee after the Effective Date in performing its authorized role with respect to clause (f) of this section or for any role not specified herein shall be paid from the Class 7 portion of the Net Preference Recoveries. Post Confirmation, the fees and expenses of the Committee and Committee Professionals (including any additional professionals retained by the Committee) may be paid by the Debtors or from the Preference Account, as the case may be, without application to or order from the Court.

Respectfully submitted,

360networks (USA) inc.

360networks Michigan LLC

Debtor and Debtor in Possession

Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

Telecom Central, L.P.  
Debtor and Debtor in Possession

360networks Mississippi LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks holdings (USA) inc.  
Debtor and Debtor in Possession

360networks Tennessee LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360fiber inc.  
Debtor and Debtor in Possession

360carrier management inc.  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360fiber (USA 2) inc.  
Debtor and Debtor in Possession

TRES Management LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360fiber (USA 3) inc.  
Debtor and Debtor in Possession

Meet Me Room LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks (USA) of Virginia inc.  
Debtor and Debtor in Possession

Carrier centers Georgia, inc.  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

Carrier Center LA, Inc.  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks Illinois LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

Texas Carrier Centers Inc.  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks Iowa LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360pacific (USA) inc.  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks Kentucky LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

360networks Louisiana LLC  
Debtor and Debtor in Possession

By: /s/ Gregory B. Maffei  
Name: Gregory B. Maffei  
Title: Authorized Officer

# DREIER<sup>LLP</sup>

ATTORNEYS AT LAW

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Norman N. Kinel *Partner*  
Direct 212 328 6115  
nkinel@dreierllp.com

November 7, 2007

**All Creditors of 360networks (USA) inc., et. al.**

Re: In re 360networks (USA) inc., et al., Case No. 01-13721 (ALG)  
Projected Amounts and Timing of Distributions to Creditors

Dear Creditor,

We represent the Official Committee of Unsecured Creditors of 360networks (USA) inc. (the "Committee"), and are writing to you because our records reflect that you hold an unsecured claim against 360networks (USA) inc. and/or its affiliated debtors (collectively, "360").

As a result of certain significant recoveries which we have recently obtained on behalf of the Committee (including \$45.5 million from Nortel Networks Inc. and \$9.9 million from Sycamore Networks Inc.), you may have already been contacted or may in the future be contacted by "claims traders," seeking to buy your claim against 360. The purpose of this letter is to notify you of the currently projected percentage and timing of distributions to be made to creditors so that you may assess whether you wish to retain or sell your claim (a decision about which unfortunately we are not permitted to provide advice).

By way of background, 360 confirmed a Plan of Reorganization (the "Plan") that authorized the Committee to prosecute lawsuits (the "Avoidance Actions") seeking to avoid and recover certain transfers that 360 made within the 90-day period before filing their bankruptcy cases. The Plan provided that unsecured creditors holding allowed claims against 360 will receive cash distributions (in addition to distributions of stock that were made shortly after the Plan became effective) on a *pro rata* basis based on the recoveries obtained by the Committee in the Avoidance Actions (net of all fees and expenses). The Plan provided for a distribution to unsecured creditors of 85% of the first \$30 million of the Net Recovery (meaning the net amount recovered from all of the Avoidance Actions, after deductions for fees and expenses) and 80% of any Net Recovery in excess of \$30 million, with the balance in each instance going to 360.

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The current total amount of allowed claims against 360 (the "Claims Base") is approximately \$275 million and is not expected to change significantly. Based on the Claims Base and the amounts recovered to date by our firm through the Avoidance Actions, we currently estimate that in addition to the 360 stock that they have already received, creditors holding allowed unsecured claims against 360 will receive cash distributions of **no less than 15%** of the face amount of their claims (the "Projected Distribution Percentage"). Depending on the outcome of the remaining Avoidance Actions (including one action in which the Committee is seeking to recover approximately \$17.3 million and another in which it is seeking to recover approximately \$1.8 million), **the Projected Distribution Percentage is likely to increase, possibly materially.**

As to the timing of distributions, the \$9.9 million recovery from Sycamore is being paid in 3 installments, with the first \$3.3 million already having been received and the remaining installments due in January and April 2008. Accordingly, to avoid the time, expense and administrative complications involved with multiple distributions, it is anticipated that there will only be a single cash distribution to creditors. We estimate that this distribution will take place in the **late second quarter or early third quarter of 2008**, by which time we hope all or nearly all of the Avoidance Actions will have been resolved. In the meantime, the proceeds obtained to date from the Avoidance Actions remain in an interest-bearing account.

Please be advised that both the amount and timing of the distributions discussed above are **good faith estimates** and do not constitute a binding commitment in either regard. We can assure you, however, that we will continue to do our best to maximize the amounts and expedite the timing of distributions to creditors.

Finally, because of the very large number of creditors who are receiving this letter and in the interests of fairness to all, it will not be possible for us or the Committee to respond to individual inquiries seeking additional information about recoveries to creditors beyond what has been provided in this letter. We appreciate your understanding in that regard.

Very truly yours,



Norman N. Kinel

Dreier LLP  
*Counsel to the Official Committee of  
Unsecured Creditors of 360networks  
(USA) inc.*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 01-13721(ALG)  
. .  
. .  
360NETWORKS (USA) INC., .  
et al., . One Bowling Green  
. New York, NY 10004  
Debtors. .  
. April 2, 2008  
. . . . . 12:08 p.m.

TRANSCRIPT OF HEARING  
BEFORE HONORABLE ALLAN L. GROPPER  
UNITED STATES BANKRUPTCY COURT JUDGE

TELEPHONIC APPEARANCES:

For the Debtor: Kirkland & Ellis LLP  
By: MARC KIESELSTEIN, ESQ.  
200 East Randolph Drive  
Chicago, IL 60601-6636  
  
Dreier LLP  
By: TERENCE D. WATSON, ESQ.  
NORMAN N. KINEL, ESQ.  
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Proceedings recorded by electronic sound recording, transcript  
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## TELEPHONIC APPEARANCES (Cont'd):

For U.S. Relocation: Dombroff Gilmore Jaques & French  
By: DENNIS E. FRENCH, ESQ.  
KAREN M. BERBERICH, ESQ.  
1676 International Drive Penthouse  
McLean, VA 22102

1 THE COURT: Who is on the line, please?

2 MR. FRENCH: Dennis French from Dombroff Gilmore on  
3 behalf of the U.S. Relocation.

4 MS. BERBERICH: Karen Berberich of Dombroff Gilmore,  
5 as well.

6 MR. KIESELSTEIN: Good afternoon, Your Honor. Marc  
7 Kieselstein of Kirkland & Ellis on behalf of the SIRVA debtors.

8 MR. WATSON: Good morning, Your Honor. Terence  
9 Watson of Dreier LLP on behalf of Plaintiffs 360Networks,  
10 Unsecured Committee. With me is Norman Kinel.

11 THE COURT: All right. I have Judge Peck's order,  
12 and I'm going to go ahead and decide the case, but I don't know  
13 the remaining part of the case. I don't know when I'll get  
14 around to it. When is the debtors' bankruptcy case scheduled  
15 for confirmation?

16 MR. KIESELSTEIN: Your Honor, again, Mark Kieselstein  
17 on behalf of the debtors. We're scheduled to have a  
18 confirmation hearing commencing on April 18th with a spillover  
19 date of April 21st. I can tell Your Honor that under the  
20 structure of our plan, the claim of 360Networks is in a class  
21 that's not receiving a recovery. That's not -- that's the  
22 subject of objections to come for certain, but at least as our  
23 time is structured, the amount of the claim is somewhat  
24 irrelevant if our structure's upheld because there'd be no  
25 distribution regardless of the number.

1           Obviously, knowing the outcome would be helpful in  
2 terms of, you know, both consensual resolutions, if there were  
3 to be any, and knowing that there's, in fact, a valid claim  
4 that's asserted against the estates. But, as a matter of  
5 strict plan structure, it's actually not that relevant.

6           MR. KINEL: Your Honor, Norman Kinel. Mr.  
7 Kieselstein is correct in that a certain number of unsecured  
8 creditors and putting 360Networks' committee has been  
9 classified in a separate class and are entitled to no  
10 distribution under the prepackage plan. There's an unsecured  
11 creditors committee in the case. A member of the 360Networks  
12 committee is on the unsecured creditors committee, and both 360  
13 itself, as well as the committee and as well as other members  
14 who've been -- other creditors who've been classified to  
15 receive no distribution have already filed objections to the  
16 plan, and as we sit here today, there will be a contested  
17 confirmation hearing. And certainly we hope, as does the  
18 committee in the SIRVA case hope that there will be a  
19 resolution so that there will be a recovery to creditors such  
20 as our clients, the 360Networks Committee.

21           So, to us, I think both with the Serva debtors and  
22 the plaintiffs in this action for Your Honor more of a view  
23 that knowing -- liquidating this claim, had it been fully  
24 briefed, would be helpful in terms of any resolution that might  
25 be arrived at, or if the plan is not confirmed because it's

1 unconfirmable as we maintain, or whatever happens it'll be very  
2 helpful to know whether, in fact, the 360Networks Committee,  
3 the plaintiffs in this action, have a claim. We obviously  
4 believe we do have a claim, and we're looking to Your Honor to  
5 issue a ruling as soon as possible. Thank you.

6           THE COURT: Well, Mr. Kinel, I am sorry. Is Mr.  
7 Watson with you? We've had a number of very useful conferences  
8 with Mr. Watson. You've now returned. And I can at least  
9 respond to you by stating that it's apparently up to your  
10 committee to decide how much money they want to spend on  
11 fighting with another bankrupt company, and they certainly  
12 may -- I don't know that there's anything in our plan that  
13 impedes your ability to spend your constituent's money in that  
14 regard. But, I don't think you can have any hope that I will  
15 enter a final decision on the enormously burdensome papers that  
16 I have before me before the 18th of April which is 16 days from  
17 now.

18           I have hundreds of pages of argument. I have  
19 thousands of pages of documents attached. I do not in any way  
20 imply by that statement that your firm, Mr. Kinel, is  
21 responsible for this amount of paperwork. Indeed, the  
22 responsibility is primarily on your opponents who have taken  
23 great liberties with the Court's time and patience in this case  
24 and have raised argument after argument on a very tardy  
25 schedule.

1           However, the parties have seen fit simply to lift the  
2 stay, and I have to decide what I have before me. And even if  
3 it transpires that there is no distribution to the 360Networks'  
4 case, I presume that I will simply go forward and decide the  
5 issues that I have. If anybody wants to get a preliminary view  
6 as to the merits of the case, I've already issued one decision,  
7 and it's there for anybody to read.

8           I had hoped that there would be some resolution with  
9 Kirkland & Ellis involved. At least there's a lawyer now who  
10 knows something about preference law, at least as it's  
11 ordinarily construed by the bankruptcy courts, but I know that  
12 there are other things on the table between now and April 18th  
13 or thereafter. So, I will do my job as it's been handed to me  
14 by the parties, but I cannot in any way give any indication  
15 that I can do it by the 18th of April. Anything else today?

16           MR. KINEL: No, Your Honor, we certainly understand  
17 and appreciate your efforts. Thank you very much.

18           THE COURT: Well, Mr. Kinel, while I have you on the  
19 line, of the dozens of suits, is this -- I know you have one  
20 other bankrupt defendant. What goes around comes around, I  
21 guess. But, other than the two bankrupt defendants that you  
22 have, are all the other matters now resolved?

23           MR. KINEL: Yes, Your Honor. I'm pleased to report  
24 -- I think Mr. Watson reported to Your Honor's clerk that we  
25 are -- other than U.S. Relocation, the other matter referred

1 to, a judgment's been entered, so there's nothing for Your  
2 Honor to do. But, we are -- we have completed -- resolved  
3 every last preference action, and unfortunately for Your Honor,  
4 U.S. Relo is the only outstanding one.

5 THE COURT: Well, it's too bad because, as I  
6 understand it, you're holding up a distribution to creditors  
7 because of this.

8 MR. KINEL: Well, Your Honor, I wouldn't characterize  
9 it that way. There are some issues on the distribution that  
10 will be worked on and there will be a very significant  
11 distribution made in a matter of months. And in the meantime,  
12 the money is earning a kind of nice interest rate. So, no one  
13 is upset and it really --

14 THE COURT: Well, you have a committee and I have to  
15 presume that they know what they're doing. All right.

16 MR. KIESELSTEIN: Your Honor, this is Mark  
17 Kieselstein. I wanted to apologize for dumping this hand  
18 grenade in your lap in this fashion.

19 THE COURT: No, it's not -- you have nothing to  
20 apologize for.

21 MR. KIESELSTEIN: Well, I, you know -- Your Honor,  
22 may I suggest, you know, given that it sounds like it would be,  
23 you know, not humanly possible to be done by the 18th that  
24 perhaps we wait and see what happens on the 18th. And if, you  
25 know, there is not going to be a distribution regardless of the

1 outcome of this case and that plan goes effective and it's not  
2 appealed from, then it would seem a complete waste of your time  
3 to have to, you know, then labor to write the opinion. I have  
4 no idea if things are going to play out that way, but, you  
5 know, we'll know soon enough.

6 THE COURT: Well, that sounds sensible, but I  
7 wouldn't want to be certain that Mr. Kinel would agree with it.  
8 But, in any event, I'm not going to, you know -- I'll start  
9 work when I can, but certainly, I would appreciate being kept  
10 informed as to developments. I would note for Kirkland's  
11 benefit that there was a mediation in the case. It was  
12 unsuccessful.

13 Most of the issues in this case have already been  
14 decided, and have been decided in the plaintiff's favor. I  
15 don't think, on the basis of the current record, that there's  
16 any question that the plaintiffs have some claim under my  
17 outstanding decision. I don't know how -- whether that's --  
18 there are, you know, a lot of offsets that are being thrown  
19 around, so this may be not entirely accurate, but I think that  
20 there certainly is an indication of some claim.

21 I don't know whether as things stand now and  
22 considering the time, that mediation of the final issues would  
23 make any sense or not. But, I'm not going to pull that work,  
24 but I do appreciate your comment and would appreciate being  
25 informed of any developments before Judge Peck.

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MR. KINEL: Absolutely.

THE COURT: Thanks very much.

MR. KINEL: Thank you, Your Honor.

MS. BERBERICH: Thank you.

\* \* \* \* \*

**C E R T I F I C A T I O N**

I, Kathleen Betz, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter, and to the best of my ability.

*Kathleen Betz*

DATE: April 16, 2008

KATHLEEN BETZ

J&J COURT TRANSCRIBERS, INC.

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 01-13721

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In the Matter of:

360NETWORKS (USA) INC. AND

360NETWORKS CORPORATION,

Debtors.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 24, 2008

11:06 a.m.

B E F O R E:

HON. ALLAN L. GROPPER

U.S. BANKRUPTCY JUDGE

1 money would earn interest and there would be a single  
2 distribution at the end. At least that was the hope.

3 So I think that, as Mr. Lipkin highlighted, it's an  
4 escrow account maintained and held by the committee for the  
5 benefit -- if Your Honor goes back and looks at the plan, it's  
6 only for the benefit of allowed Class 7 claims. Class 7 is  
7 general unsecured creditors. 360 does have its interest  
8 pursuant to the plan, but no one else has any rights to those  
9 funds. If there are any administrative claims against the  
10 debtors, which we, of course, believe there are not, they  
11 presumably would have to be paid by the debtors, who Mr. Lipkin  
12 indicated is a functioning entity. Or if there are claims  
13 against professionals, each of those firms are viable firms and  
14 have protections of their own. So we don't think there's any  
15 real issue here and we think it would be a terrible shame, at  
16 this point, if this action -- it certainly wasn't our intent in  
17 bringing it, would hold up distributions to creditors which we  
18 hope to make within the next -- our current projection is early  
19 September because if Your Honor signs Mr. Lipkin's order  
20 there's a forty-five day waiting period to get some information  
21 from creditors or tax ID numbers.

22 But, other than that, we're ready to go, we're ready  
23 to blow this money out and pay it to creditors.

24 THE COURT: Are you saying you want to make one  
25 distribution? If you recover anything in the malpractice

1 action, you're going to have to make a second distribution,  
2 isn't that correct?

3 MR. KINEL: That's correct. The original plan wound  
4 up being -- there's a hole in it because when the original plan  
5 and the decisions were made to make one distribution, the  
6 malpractice action had not been commenced. The decision to  
7 make it had not been made.

8 THE COURT: Where is the one distribution, where did  
9 that come from?

10 MR. KINEL: As I --

11 THE COURT: I always assumed that that was a  
12 decision, right or wrong, of the committee. They wanted to  
13 hold enormous sums of money in their accounts as these  
14 preference cases wound their way to termination.

15 MR. KINEL: Your Honor, that wouldn't be entirely  
16 accurate for the following reasons. As you may recall, the  
17 bulk of the money, the net preference recoveries that we have  
18 today, came from three actions. Nortel, Pirelli --

19 THE COURT: I know that, but Nortel is awhile ago.

20 MR. KINEL: -- and Sycamore. Nortel is the oldest.  
21 Nortel is almost a year old, I think. Sycamore and Pirelli was  
22 resolved only this year. And the decision to -- as a matter of  
23 fact, there was discussion after the Nortel money came in about  
24 making a distribution at that time. And in consultation with  
25 360, who is the body -- the entity who, under the plan,

1 physically is going to cut the checks, the decision was made --

2 THE COURT: That's what I thought, the committee  
3 decided in its business judgment that it would prefer to make  
4 one distribution and hold the funds until this all got  
5 resolved. I thought that's what happened.

6 MR. KINEL: That's correct.

7 THE COURT: And --

8 MR. KINEL: I just wanted to point out that it was in  
9 consultation with the debtors as well.

10 THE COURT: All right.

11 MR. KINEL: I have nothing further, Your Honor.  
12 Unless you have questions for me.

13 THE COURT: Thank you.

14 MR. KINEL: Thank you.

15 THE COURT: Anyone else?

16 MR. BIENENSTOCK: Thank you. Good morning, Your  
17 Honor. Martin Bienenstock of Dewey & LeBoeuf for Peter  
18 Morgenstern and Gregory Blue.

19 Our limited objection raised two issues. As Mr.  
20 Lipkin advised, one has been take care of, that was the  
21 extension issue.

22 The second issue was this paragraph 11 in the  
23 proposed order, which says "the reorganized debtors," not the  
24 committee "the reorganized debtors are authorized and directed  
25 to make plan distributions without regard to claims not

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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

**ORDER TO SHOW CAUSE SCHEDULING A HEARING TO CONSIDER  
THE APPLICATION OF THE UNITED STATES TRUSTEE  
TO CONVERT THESE CHAPTER 11 CASES TO CHAPTER 7 CASES  
PURSUANT TO SECTION 1112(b) OF THE BANKRUPTCY CODE**

Upon the memorandum of law of the United States Trustee for Region 2 (the “United States Trustee”) in support of a motion for an order pursuant to 11 U.S.C. § 1112(b) of the Bankruptcy Code converting these confirmed Chapter 11 cases to Chapter 7 cases (the “Motion”); and upon the declaration of Greg M. Zipes dated December 11, 2008; and it appearing that an order to show cause scheduling a hearing to consider the Motion is necessary and beneficial to the estate and its creditors; and no further notice need be given; and after due deliberation and sufficient cause appearing therefor, it is hereby

**ORDERED**, that the reorganized debtors (the “Reorganized Debtors”) and the official committee of unsecured creditors (the “Post Confirmation Committee”) show cause at \_\_\_ a.m. on \_\_\_\_\_, 2006 (the “Hearing”) before the Honorable Allan L. Gropper, Bankruptcy Judge, in the United States Bankruptcy Court, Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004, or as soon after as counsel may be heard, why this Court should not enter an order granting the relief requested in the Motion; and it is further

**ORDERED**, that service of this Order To Show Cause and the supporting documents by \_\_\_ o'clock on \_\_\_\_\_ upon: (a) the Reorganized Debtors by Alan J. Lipkin, Esq., Willkie Farr & Gallagher, 787 Seventh Avenue, New York, New York 10153; (b) the Post Confirmation Committee by Norman Kinel, Esq., Dreier LLP, 499 Park Avenue, New York, New York 10022; (c) the individual members of the official committee of unsecured creditors listed on the Notice of Appointment dated July 12, 2001; and (d) the receiver Mark Pomerantz, Esq., at Paul Weiss Rifkin Wharton & Garrison, LLP, 1285 Avenue of the Americas, New York, New York 10019-6064, by overnight mail, shall be deemed good and sufficient service and notice of the Motion and the hearing scheduled herein, and that no other or further notice is necessary or required; and it is further

**ORDERED**, that responses and objections, if any, to the relief requested in the Motion shall be made so as to be received by the United States Trustee and filed with the Court no later than \_\_\_\_\_.

Dated :           New York, New York  
                  December \_\_\_\_\_, 2008

HONORABLE ALLAN L. GROPPER  
BANKRUPTCY JUDGE