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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x In re:	Chapter 11
360NETWORKS (USA) INC.**,** *et al.*	Case No 01-13721 (ALG)
Debtors. **----------x**	Jointly Administered

SUPPLEMENTAL OBJECTION OF JAMES YENZER TO PROPOSED SETTLEMENT BETWEEN REORGANIZED DEBTORS AND POST-CONFIRMATION REPRESENTATIVE AND FOR ORDER (i) COMPELLING REORGANIZED DEBTORS TO RETURN DISTRIBUTIONS; (ii) COMPELLING PRODUCTION OF CERTAIN DOCUMENTS; AND (iii) REQUESTING EQUITABLE SUBORDINATION OF ALL CLAIMS OF REORGANIZED DEBTORS

James Yenzer ("Movant" or "Yenzer"), by and through undersigned counsel, hereby files this Supplemental Objection to the Motion of the Post Confirmation Representative for Approval of Settlement Agreement, and further, requesting that the Court enter an Order (i)

compelling the Reorganized Debtors (as defined below) to return to the estates in the above-captioned bankruptcy cases (collectively, the "Estate") certain distributions made to them in September 2008 and November 2008; (ii) compelling production of certain transcripts of Rule 2004 examinations as well as certain email correspondence; and (iii) requesting that claims belonging to Reorganized Debtors be equitably subordinated to the claims of the creditors. In support of this Supplemental Objection, Yenzer respectfully states as follows:

BACKGROUND

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§1408 and 1409. This is a core matter pursuant to 28 U.S.C. §157(b)(2). The statutory predicates for the relief requested herein are §§ 105(a), 510 (c) and 1142 (b) of the Bankruptcy Code.

2. This objection is intended to supplement and amend the objection filed by Yenzer on or about August 15, 2011, wherein he raised certain objections to the proposed settlement by and between Steven J. Reisman[1,] the Post-Confirmation Representative ("Representative"), 360networks (USA) inc. and affiliated debtors ("Reorganized 360") of certain adversary proceeding actions.[2.]

1In response to the disappearance of funds meant for distribution to unsecured creditors, the United States Trustee made a motion on December 11, 2008 to convert these cases to cases under chapter 7 of the Bankruptcy Code. After a hearing held to address the U.S. Trustee's conversion motion, and in light of the responses filed by the Reorganized Debtors and the statements made by certain appearing creditors, the Court determined to appoint a Post-confirmation Representative of the Debtors' estates who would, among other things, be charged with duties such as: (i) to investigate and recommend steps regarding; as well as (ii) if authorized by this Court, to initiate, pursue, settle and collect any claims ("Claims") of the Debtors' estates, holders of Class 7 Claims, and the Committee based on the investment, disbursement, prior distribution, misappropriation, defalcation or other use or application of, or failure to use or apply, proceeds from Committee Claims and the Preference Account, each such term as defined in [the Plan].

Order Appointing Representative of the Debtors' Estates [Docket No. 1997], at2 (internal quotation omitted). By order entered on December 23, 2008 [Docket No. 1998], Steven J. Reisman was appointed Representative.

2 Another salient feature of the Plan was the vesting of authority in the Official Committee of Unsecured Creditors

A. Proposed Settlement Between the Representative and Reorganized 360 Victimizes Creditors at the Expense of Reorganized 360 and Should be Denied

3. As has been exhaustively presented, the Amended Joint Plan of Reorganization Proposed by Reorganized 360 ("Plan)[3], Net Preference Recoveries ("NPR") were defined pursuant to a formula that allowed holders of Class 7 Claims to recover 85% of the first $30 million of NPR and 80% of NPR over $30 million, with the Reorganized 360 recovering the balance. See Plan, at § 3.7(a). The Plan further provided for a portion of such NPR to be made payable to the Reorganized Debtors. See Id., at §§ 1.23, 4.3(a).

4. In the Settlement Agreement between Reorganized 360 and the Representative ("Settlement Agreement") (a copy of which is attached to the Settlement Motion as an exhibit), the Representative has proposed that Reorganized 360 pay the total of $8,200,000 ("Settlement Amount") to the Representative, but, most tellingly, an additional $2.875 million is to be taken from the Settlement Amount to pay the Chapter 11 Trustee as part of the settlement of the DLLP Preference Action.[4]

(the "Committee") to pursue the more than 300 avoidance actions and related claims objections that were anticipated to give rise to Net Preference Recoveries, the proceeds of which were to be placed in a Preference Account (as defined in the Plan) maintained and controlled by the Committee for ultimate distribution as provided pursuant to the Plan. See id., at § 4.3(b)(2).

3Confirmed on October 2, 2002 and effective on November 12, 2002. The vast majority of recoveries to be afforded general unsecured creditors holding claims classified in Class 7 under the Plan were to be derived from the proceeds of avoidance actions. In the years that have passed since the Reorganized Debtors' emergence from chapter 11, the lead case has remained open for this purpose. Yet as avoidance actions were periodically resolved and the resultant proceeds were placed (and purportedly maintained) in the Preference Account, and as the balance in the Preference Account (purportedly) grew to tens of millions of dollars, no further distribution to Class 7 creditors was made, interim or otherwise -a situation that was frustrating to unsecured creditors, and certainly did not escape the notice of this Court.

4 The DLLP Preference Action seeks to recover as a preferential transfer $11.9 million of the 360 payments paid from a Dreier bank account within the preference period. In the initial days following the fallout occasioned by Mr. Dreier's arrest, details of the whereabouts of the Net Preference Recoveries were scant, with the notable exception of two sizeable payments made from the Preference Account to the Reorganized Debtors. See First Interim Report of the Post-confirmation Representative, Dated March 17, 2009 Docket Nos. 2027 and 2028] ("First Interim Report"); see also, Kinel Decl., at t[11. Ostensibly under the authority of Sections 4.3(a) and (c) of the Plan, and with the apparent consent of the Committee, the Reorganized Debtors received a transfer of $4.5 million on or about September 8, 2008,

5. In other words, the Class 7 creditors, through no fault of their own, must pay out of their own pockets close to $3 million for something over which they not only had no control but which has cost them dearly; namely, the Dreier disaster and as a result the creditors have received no distributions in this case. This is but one reason why the Settlement Agreement must be discarded in its entirety.

6. In the Settlement Motion, the Representative seeks approval of a settlement among the Representative, the trustee in the Dreier bankruptcy cases and Reorganized 360 and claims that the "[p]roposed Settlements were reached following extensive and vigorous negotiations over many months" among these parties. See Settlement Motion, ¶9.

7. However, at no point in the motion does the Representative provide a cogent argument as to why this Proposed Settlement is in the best interest of the Class 7 creditors. Indeed, it appears that the Representative is more interested in justifying a settlement that is quite beneficial to Reorganized 360, but which further victimizes the creditors in this case.[5]

8. Indeed, at the August 15, 2011 hearing on the settlement motion this court

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and another $11.9 million on or about November 17 , 2008, for a total of approximately $16.4 million ("Distributed Funds").

5 In his Fourth Interim Report of January 11, 2010 the Representative advised the court of his intention to pursue the Reorganized Debtors for the return of the Distributed Funds by adversary proceeding (See Fourth Interim Report, at ¶3). In his Fifth Interim Report of May 3, 2010, the post-confirmation representative advised the court that it appears to the Representative that he and the Reorganized Debtors have made substantial progress and may be approaching the final stages of agreement on the framework of a settlement that the Representative has determined is fair, equitable and in the best interests of the Estates. The Representative hopes to present a proposed settlement to the Court in the near future. Fifth Interim Report of the Post-Confirmation Representative Dated May 3, 2010, ¶10. Finally, the Sixth Interim Report dated November 9, 2010 advises that an agreement in principle with the Reorganized Debtors have been reached after numerous mediation sessions, however, the post-confirmation representative sizes that agreement cannot be advanced because this Court advised that the agreement should also resolve the potential claims with regard to the ex officio role of the Reorganized Debtors on the Committee. See Sixth Interim Report of the post-confirmation representative dated November 9, 2010, ¶7. The post-confirmation representative did advise that "[t]hrough these actions, the Representative endeavors to create, to the extent possible, a pool of funds available for distribution to the Estates' beneficiaries." Id. at ¶11. After submission of the Sixth Interim Report, essentially no further tangible progress was made until the representative filed his August 4, 2011 motion seeking approval of a settlement of the adversary proceeding against Reorganized Debtors ("Settlement Motion"). The Settlement Motion is docketed at Docket No. 2109.

raised the exact same concern in a colloquy with Jerrold Bregman, Esquire, an attorney for the Representative:

> MR. BREGMAN: It's fundamentally a fairness point from our perspective. We think 360, reorganized 360 shouldn't receive any more than any other unsecured creditors of the 360s estates, and yet 360 also shouldn't be punished . . .
>
> So that was the framework, Your Honor. And from our perspective than we are, in fact, recovering approximately eighty-five percent –
>
> THE COURT: No, you're not recurring eighty-five percent. That is simply a false analysis. There may be a more reasonable number than forty cents, you've convinced me of that. But you're setting the world on its head by saying you're recovering eighty-five cents[6.]

9. Setting aside for the moment that as far as Movant is concerned the percentages are irrelevant because Reorganized 360 is entitled to no distribution, the Representative correctly set forth the relative NPR. Settlement Motion, ¶ 15. At the Settlement Motion hearing, Mr. Bregman argued that the settlement with Reorganized 360 was reasonable in part because Reorganized 360 is a creditor by virtue of the Caprock claim, Reorganized 360 would be entitled to some recovery of funds recycled to it and paid out to it as a general creditor.[7]

10. So, as advanced by the Representative (who is supposed to act in the best interest of the creditors, not Reorganized 360) the Class 7 Creditors will receive the total of $5.325 million (or approximately 40%) if the Settlement Agreement is approved, yet, according to the NPR, the Class 7 Creditors would have received 80 to 85% of the $16.4 million, or anywhere from

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6 Transcript of the 8/15/11 Hearing Regarding 1) Motion filed by the Representative of the Estates of 360networks (USA) Inc., et al for Approval of Settlement Relating to the Adversary Proceeding against 360 Networks (USA) Inc. before the Hon. Allan L Gropper, page 21, lines 6-19.

7 See, Transcript of Hearing Regarding Motion filed by the Representative of the Estates of 360networks (USA) Inc., et al for Approval of Settlement Relating to the Adversary Proceeding against 360 Networks (USA) Inc. before the Hon. Allan L Gropper, page 18, lines 9-21.

$13.12 million to $13.94 million.

11. Conversely, pursuant to the Settlement Agreement, Reorganized 360 will receive $8.2 million (50%) when, pursuant to the NPR, Reorganized 360 would have received 15-20% of the $16.4 million, or anywhere from $2.460 million to $3.28 million. It turns logic on its head to allege that the Class 7 Creditors benefit from the Settlement Agreement, when Reorganized 360 is receiving more than the Class 7 Creditors.

12. No explanation has been articulated by the Representative as to why Reorganized 360 should be entitled to keep any funds under these egregious circumstances, let alone an amount directly contrary to the Plan and to the detriment of the Class 7 Creditors[8]. However, as set forth below, there are many reasons why Reorganized 360 should receive very little, if any, of these distributions.

B. Reorganized 360's Role as *Ex Officio* Member of the Committee has not Been Explored and Should be Cause for Great Concern

13. At bottom, the issue that raises the most concern for Movant, and really should concern all creditors, is Reorganized 360's role as an *ex officio* member of the Committee. The basis for this concern is simple: it appears, without any evidence to refute it, that Reorganized 360 played an outsized and influential role on the Committee even though it was not a full Committee member, and that it very well may have used this position on the Committee to

8 Reorganized 360 received the second portion of the Distributed Funds. Indeed, with the payments of the more than $16 million in Distributed Funds, Reorganized 360 apparently has received (i) their full share of the Net Preference Recoveries under the Plan (approximately $11.2 million), (ii) reimbursement of certain fees to which they purportedly were entitled under Section 4.3(a) of the Plan (approximately $313,000) and (iii) incredibly, a distribution in partial satisfaction of a $23 million Class 7 unsecured claim against the estates that the Reorganized Debtors acquired (a $4,887,000 distribution). See First Interim Report, at ¶¶49, 5l-52. In stark contrast, unsecured creditors have received nothing in these cases other than the first distribution of illiquid stock made in 2002. Unlike Reorganized 360, Class 7 creditors have received none of their *pro rata* share of NPR, and likely will never see anything close to the anticipated 25% distribution that was imminent when the arrest of Mr. Dreier was announced, the fraud and conspiracy charges against Mr. Dreier were filed, and the subsequent implosion of the Dreier LLP firm resulted.

guarantee that it received funds that would have, and should have, gone to creditors.

14. Indeed, the appointment and entire term of Reorganized 360 as *ex officio* member of the Committee is cloaked in secrecy. Undersigned counsel cannot locate any entry on the docket whereby application was made to appoint Reorganized 360 in this position, nor has an order of this court approving such appointment been discovered. It further does not appear that Reorganized 360's role as *ex officio* member was disclosed to any creditor outside of the Committee.

15. The first inkling that Reorganized 360 began to exert an outsize influence on the Committee was in the May 14, 2010 Rule 2004 examination of Norman Kinel ("Kinel Dep."), counsel for the Committee[9]:

> Q. The question is, was the committee involved in the decision to move the funds from Chase to an account at another bank?
>
> A. Generally.
>
> Q. What do you mean by general?
>
> A. The committee was aware of the decision to earn a higher rate of interest. However, most of the detailed discussions took place with 360.
>
> Q. When you say the discussions took place with 360, with whom on behalf of 360 did you have those discussions?
>
> A. Ron Gustafson and Chris Mueller[10].

16. The role of Reorganized 360 as *ex officio* member of the Committee with unparalleled influence was further borne out when - in responding to questions as to why Mr. Kinel was emailing Mr. Gustafson and Mr. Mueller in October 2007 about putting Nortel money

9 Kinel Dep. p. 81, lines 2-16.
10 Mr. Gustafson was a general counsel of Reorganized 360 and Mr. Mueller was CFO and CEO of Reorganized 360.

into a CD and advising them of various rates for various CD's-Mr. Kinel provided:

> Q. Why are you having this communication with 360 about the funds that are on deposit?
>
> A. **At this point in time 360 was an ex officio member of the committee and functionally was more involved in what was happening with the committee on a day-to-day basis much more than any committee member was.** (Emphasis supplied.)[11]

17. There can be no clearer indication that Reorganized 360 exerted an outsize influence on the Committee than the above testimony of Mr. Kinel. The question must be asked: Did Reorganized 360 use this influence to improperly receive distributions to which it was not entitled, or perhaps, use inside information gleaned from its role on the Committee to influence this distribution. Why was the role of Reorganized 360 not properly disclosed and vetted, especially when Reorganized 360 began repurchasing its shares? Why has the role of Reorganized 360 as *ex officio* member of the Committee been essentially ignored, when this issue is of paramount importance to the creditors and is practically screaming out for a thorough dissection? These are all questions which, to date, have not been asked, and certainly have not been answered, all to the detriment of the creditors.

18. Before this Court approves a settlement relative to Reorganized 360's exposure in this case, it is important that certain issues be clarified regarding the manner in which Reorganized 360 engaged in repurchases of its shares of common shares, and particular attention should be made to Reorganized 360's role as an *ex officio* member of the Committee and the information it may have obtained in that capacity and ultimately used for its own benefit.

19. It is unclear whether Reorganized 360 even disclosed its status as an *ex officio* member to prospective and actual sellers and whether such sellers would have considered

11 Kinel Dep. 93:3-9.

such information material in their evaluation whether to sell their stock. Given the perfect information that Reorganized 360 possessed regarding its own affairs, it is similarly unclear what information was given to prospective sellers regarding the financial condition and affairs of Reorganized 360. This issue is certainly heightened in Reorganized 360's proposed letter agreement with respect to the repurchase of shares. The relevant language in the letter provides that "one or the other party [which could only be 360] may have material non-public information". One party's possession of material, non-public information in a transaction with another is obviously inside information and a fraud; it cannot be waived.

20. Reorganized 360 has not provided any information on to and in what manner the offer to repurchase was made. While Reorganized 360 was a private company at the time, it likely still had a significant number of shareholders and the securities laws, particularly those related to repurchases and tender offers, still applied. While it is not our intention to accuse Reorganized 360 of any wrongdoing, there are questions that have not been answered and until the proper proof is put forth, the settlement should not be approved.

21. The Representative and Reorganized 360 both claim that the Settlement is appropriate for a number of reasons which have been adequately covered in their motion and supplemental filings[12]. These are false arguments because Reorganized 360's claim to any recovery should be equitably subordinated to the Class 7 claims, because Reorganized 360 failed to disclose that it was an *ex officio* member of the committee and that Reorganized 360 exerted an

12 In its Statement in Support of the Representative's Settlement Motion (docketed at 2119 and filed on 9/29/11), Reorganized 360 makes the unbelievable claim that "[u]ntil the Representative assumed his role . . . there was no person or entity to whom Reorganized 360 could have paid over any funds." Frankly, this statement borders on the ludicrous. Reorganized 360 could have deposited these funds with the Court, or moved for an appointment of an escrow agent to hold the funds, or taken any number of other steps to place these funds with a neutral third party. Statements such as this are indicative of Reorganized 360's condescending attitude towards the creditors.

undue influence on the committee so that Reorganized 360 received distributions despite its actions to improperly conceal its committee role.

22. Suffice it to say that Movant does not agree on the efficacy of the proposed settlement, unless one supports the proposition that the Settlement is good for Reorganized 360; that much seems certain. The Settlement, however, cannot be claimed to be sufficient for the creditors in this case that have waited approximately 10 years for a distribution, only to be denied time and time again. Then, at the end, the Representative, who is supposed to be looking out for the interests of the creditors, strikes what appears to be a sweetheart deal with Reorganized 360, all at the expense of the same creditors the Representative is required to represent.

23. In their several submissions, both the Representative and Reorganized 360 urge this Court to approve the Settlement Agreement.

24. To make matters worse, despite several requests from undersigned counsel, the Representative has refused to provide to counsel and documentation or transcripts from the Rule 2004 examinations the Representative conducted of the various parties to determine whether there was clear malfeasance on the part of Reorganized 360 or any other party. To date, without explanation, counsel for the Representative has failed and/or refused to provide such transcripts and documents.

25. However, it is abundantly clear that producing the transcripts will be not be sufficient: in order to truly understand the relationship between Reorganized 360 and the Committee. What is needed is copies of <u>all</u> correspondence between the Committee and Reorganized 360 for the time period Reorganized 360 was an *ex officio* member of the Committee.

26. It is conceivable that a review of these transcripts would provide answers to

some of the questions raised by this objection and by the Court itself. However, without an opportunity to review such documentation, there can be no way to determine the extent of the problem and one must assume the worse without evidence to the contrary.

RELIEF REQUESTED

27. Yenzer respectfully requests entry of an Order of this Court compelling (i) the Reorganized Debtors to return the Distributed Funds for the benefit of these chapter 11 estates, with interest accruing from the respective dates of distribution; (ii) the Representative to produce all transcripts of Rule 2004 Examinations as well as certain other documents pertaining to Reorganized 360's role as *ex officio* member of the Committee; and (iii) equitably subordinating the claim of Reorganized 360 to all other claims.

ARGUMENT

28. Section 105(a) of the Bankruptcy Code provides that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Moreover, section 1142(b) of the Bankruptcy Code provides that "[t]he court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan." 11 U.S.C. § 1142(b).

29. More specifically, however, is 11 U.S.C. § 510 (c) which provides that after notice and a hearing, the court may—

> (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest;

***

30. The concept of equitable subordination, as developed by case law, is that a claim may normally be subordinated only if its holder is guilty of some misconduct. In Benjamin v. Diamond (In re Mobile Steel Corp.), 563 F.2d 692 (5th Cir. 1977) .the Court of Appeals for the Fifth Circuit proposed three conditions that must be satisfied before exercise of the power of equitable subordination is appropriate:

(i) The claimant must have engaged in some type of inequitable conduct;

(ii) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and

(iii) Equitable subordination must not be inconsistent with the provisions of the Bankruptcy Act

31. Here, Movant submits that Reorganized 360 has engaged in misconduct sufficient to impose equitable subordination on its entire claim. Unless creditors elected to receive cash in lieu of stock under the Plan, it is highly probable that Reorganized 360 used its position to advantageously repurchase its shares without ever disclosing to any of the sellers of such shares that it sat on the Committee and thus could be in a position to gain inside information advantageous to it and it alone.

32. The Plan clearly provides for the general unsecured creditors to receive 85% of the first $30 million of Net Preference Recoveries, and 80% of all Net Preference Recoveries in excess of $30 million, with the remaining share to be distributed to the Reorganized Debtors. See Plan, at §§1.23, 4.3(a), a.3(c). Under the circumstances, it is "necessary for the consummation of the Plan" within the meaning of section 1142(b) of the Bankruptcy Code that

Reorganized 360 return the Distributed Funds, so that Class 7 creditors may receive their relative share of NPR available for distribution.

33. Although the statutory authorities cited above provide ample basis for the Court to grant the relief requested herein, more importantly, general principles of fairness and equity demand that Reorganized 360 to return the Distributed Funds for ratable distribution to all parties-in-interest that were entitled to receive a share of NPR. Why should Reorganized 360 continue to enjoy the benefit of any distribution while unsecured creditors bear a substantial burden visited on the Estate by the Dreier disaster? At a hearing held to consider certain matters incident to the retention of the Representative, this Court raised that very question:

> THE COURT: Because I want you to thoroughly investigate when the money came in, where it went, and why there wasn't a distribution [to unsecured creditors] earlier. I want to know also how it happened that there was a distribution to 360networks and I want to know why 360networks should be holding its pro rata share of the distribution whereas the other creditors are left with nothing. I was told, although I have no firsthand knowledge, that there was a distribution of its share of the escrow fund to 360networks. The debtor was entitled to 15 and then I think to 20 percent or maybe it's vice versa.
>
> MR. HARRISON: Vice versa, Your Honor.
>
> THE COURT: Twenty percent and then l5 percent of the proceeds. And 360networks was [inaudible] to get and I believe they were paid and I want to know why they should retain this money whereas the other creditors are holding the bag and why all creditors shouldn't be treated alike and under what authority a distribution was made to one without a ratable distribution to everyone. These are my initial questions. [13]

13 Transcript of Hearing Regarding Representative's Application for an Order Specifying Compensation and the Powers of the Representative and Authorizing the Retention of Curtis, Mallet-Prevost, Colt & Mosle Before the Honorable Allan L. Gropper [sic] United States Bankruptcy Judge, Jan.22, 2009 Docket No. 20A9] (1/22/09 Tr."), at 8:14-16, 9:13-10:4.5

34. Movant respectfully submits that there is no reasonable response to the question of why Reorganized 360 should receive any distribution and general unsecured creditors of their estates get less than to what they are entitled.

35. Reorganized 360 and the Representative argue that these distributions were lawfully made, insofar as the Plan gave Reorganized 360 the ability to request their share of the NPR before final distributions were made to unsecured creditors. [14] However, it is not clear from the language of the Plan or otherwise that it was ever intended that Reorganized 360 receive their distributions before distributions to general unsecured creditors -as was the case with the first of the payments constituting the Distributed Funds -given that the Class 7 distribution was not going to be made until mid-December 2008 even under the best of circumstances.

36. Reorganized 360 might also cite the apparent consent of the Committee for the making of the transfers constituting the Distributed Funds (Kinel Decl., at ¶11, but the Committee's blessing does not have quite the effect it might have once had, in light of all that has transpired in this case. The Committee is not a truly independent voice for unsecured creditors anymore, where Reorganized 360 has been functioning as an *ex officio* member of the Committee for some time and, by the Reorganized 360's own account, became intimately involved in the negotiation and settlement of the avoidance actions giving rise to the NPR See 7/24/08 Tr., at 18:15-20 ("The committee came up with a compromised [sic] proposal which was 360 was made

14 15. Section 4,3(c) of the Plan provides, in pertinent part, that:

> 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 Debtors Fees (or any such fees have been accounted for). Subject only to the limited right of set-off provided herein, the Reorganized Debtors shall receive their share of Net Preference Recoveries from the Preference Account on or before the date that any of the Committee Will Cover a Percentage of the Net Preference Recoveries are distributed to holders of Allowed Class 7 Claims.

Plan, at §4.3 (c).

an *ex officio* non-voting member of the committee. And that worked out productively, 360 got involved. 360 individuals were actually representatives at certain mediation discussions, representatives of the 'committee' as the business person.").

37. Finally, and most importantly, even if the Plan provided for the payments and the Committee's consent somehow validated them under the extant circumstances, there can be no credible justification whatsoever for allowing Reorganized 360 to continue retain any Distributed Funds in light of the fact that unsecured creditors have gotten nothing in this case, likely will not receive a distribution anytime soon, and even given all the time in the world, the Representative may never be able to recover enough monies for the benefit of the Estate to afford unsecured creditors their *pro rata* share of NPR to which they otherwise would have been entitled under the Plan.

38. To add insult to injury, Reorganized 360 did not just obtain their putative share of NPR in receiving the Distributed Funds. In receiving nearly $5 million on account of the $23 million claim Reorganized 360 acquired from CapRock Communications, Inc. ("Cap Rock Claim") which made them holders of approximately 8% of the allowed unsecured claims pool (see First Interim Report, at 49) they are the only creditor of the Estate to have received a portion of their "final" Class 7 distribution. Section a.3(c) of the Plan certainly did not authorize Reorganized 360 to receive their Class 7 distribution before everyone else.

CONCLUSION

39. The settlement proposed by the Representative and Reorganized 360 is bad for the creditors of the estate and should be denied by this Court. There has been no attempt by the Representative to investigate Reorganized 360's conduct as *ex officio* member of the

Committee and the Representative seems content to ignore this issue. Reorganized 360 has had this $16 million for almost three years, yet creditors have yet to receive any interest payments for the time that Reorganized 360 had this money. The proposed settlement is not only bad for the creditors but is also contrary the Plan and equitable principles.

40. For all of the foregoing reasons, Yenzer believes it is abundantly clear that Reorganized 360 should be compelled to do what they should have done voluntarily months ago: Return the Distributed Funds to the Estate, with accrued interest, for ratable distribution to every party-in-interest that has a right to receive Net Preference Recoveries.

PROCEDURE

41. Notice of this Motion has been provided to: (i) counsel to Reorganized 360; (ii) the Office of the United States Trustee for the Southern District of New York; (iii) counsel to the Representative; and (iv) all parties requesting notice in these cases after the Effective Date of the Plan pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure.

42. Because the legal authorities upon which this Motion relies are set forth herein, Yenzer respectfully requests that the requirement of the filing and service of a separate memorandum of law under Rule 9013-1(b) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of New York be deemed satisfied.

43. Yenzer has not requested the relief sought by this Motion from this Bankruptcy Court or from any other Court.

WHEREFORE, for the reasons set forth herein, Yenzer respectfully requests that this honorable Court enter an order, substantially in the form annexed hereto: (i) requiring Reorganized 360 to return the Distributed Funds to these chapter 11 estates, with accrued interest;

(ii) directing the Representative to produce all documents and transcripts requested by Movant; (iii) equitably subordinating the claims of Reorganized 360 to those of all other creditors; and (iv) granting such other and further relief as is just and proper under the circumstances.

Dated: New York, New York
October 3, 2011

Respectfully submitted,
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

----------x	Chapter 11
In re:	
	Case No 01-13721 (ALG)
360NETWORKS (USA) INC.**,** *et al.*	
	Jointly Administered
Debtors.	
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ORDER (i) COMPELLING REORGANIZED DEBTORS TO RETURN DISTRIBUTIONS; (ii) COMPELLING PRODUCTION OF CERTAIN DOCUMENTS; AND (iii) REQUESTING EQUITABLE SUBORDINATION OF ALL CLAIMS OF REORGANIZED DEBTORS

Upon consideration of the motion dated October 3, 2011 ("Motion") seeking an order of this Court (i) compelling reorganized debtors to return distributions; (ii) compelling production of certain documents; and (iii) requesting equitable subordination of all claims of reorganized; and due and proper notice of the Motion having been given and no other or further

notice being necessary or required under the circumstances; and the requirement of the filing and service of a separate memorandum of law pursuant to Rule 9013-1 (b) of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of New York being satisfied by the authorities cited in the Motion; and the Court having found that cause exists for granting the relief requested in the Motion; it is hereby

ORDERED, that the Motion is granted; and it is further

ORDERED, that Reorganized 360 is directed to return the Distributed Funds to the Estate forthwith, together with any interest accruing on the Distributed Funds from the respective dates of distribution; and it is further

ORDERED , that the Representative or any other party in possession produce within ten (10) days of the date of this Order all transcripts of Rule 2004 Examinations conducted by the Representative and all correspondence between the Committee and Reorganized 360 relating to Reorganized 360's tenure as *ex officio* member of the Committee; and it is further

ORDERED, that all claims of Reorganized 360 with regard to any distribution in this case are equitably subordinated to those of all other creditors

THE HONORABLE ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE