

M-2015-2472452

ARENT FOX LLP
George P. Angelich
David Wynn
Eric Roman
George V. Utlik
1675 Broadway
New York, NY 10019
(212) 484-3900

HERRICK, FEINSTEIN LLP
John R. Goldman
Justin B. Singer
2 Park Avenue
New York, NY 10016
(212) 592-1460

Counsel for the Debtors

Counsel for the Plaintiff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
VIVARO CORPORATION, et al.,	Case No. 12-13810 (MG)
Debtors.	(Jointly Administered)
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF VIVARO CORPORATION, et al.,	
Plaintiff,	
v.	Adversary Proceeding No. 14-02213 (MG)
LEUCADIA NATIONAL CORPORATION, BALDWIN ENTERPRISES, INC., BEI PREPAID, LLC, BEI PREPAID HOLDINGS, LLC, PHLCORP, INC., LAN CUMMING, JOSEPH STEINBERG, DAVID LARSEN, ST FINANCE LLC, SAMER TAWFIK, AND DOES 1 - 12,	
Defendants.	

NOTICE OF JOINT MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND THE DEBTORS FOR AN ORDER APPROVING THE SETTLEMENT AGREEMENT WITH REPRESENTED DEFENDANTS UNDER RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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Dated: New York, New York
March 20, 2015

Counsel for the Plaintiff

ARENT FOX LLP

By: /s/ George P. Angelich
George P. Angelich
David Wynn
Eric Roman
George V. Utlik
1675 Broadway
New York, NY 10019
(212) 484-3900

Counsel for the Debtors

HERRICK, FEINSTEIN LLP

By: /s/ Justin B. Singer
John R. Goldman
Justin B. Singer
2 Park Avenue
New York, NY 10016
(212) 592-1460

Custom House, One Bowling Green, Courtroom 501, New York, NY 10004, on May 5, 2015 at 2:00 p.m.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Settlement Motion and the proposed Order Approving Settlement must be in writing, must conform to the Bankruptcy Rules and the Local Rules of the Bankruptcy Court for the Southern District of New York, must set forth the name of the objecting party, must state with particularity the basis for the objection and the specific grounds therefor, and must be filed with the Clerk of the Bankruptcy Court (with a courtesy copy delivered to Judge Glenn's Chambers) and served upon (a) counsel to the Plaintiff, Arent Fox LLP, 1675 Broadway, New York, New York 10019 (Attn: George P. Angelich, Esq.), (b) counsel for the Debtors, Herrick, Feinstein LLP, 2 Park Avenue, New York, NY 10016 (Attn: John R. Goldman, Esq.) and Cozen O'Connor, 277 Park Avenue, New York, NY 10172 (Attn: Frederick E. Schmidt, Jr., Esq.); (c) counsel to the Represented Defendants, DLA Piper LLP (US), 1251 Avenue of the Americas, 27th Floor, New York, NY 10020-1104 (Attn: Thomas R. Califano, Esq.); (d) the Office of the United States Trustee, 201 Varick Street, Room 1006, New York, NY 10014 (Attn: Andy Velez-Rivera, Esq.); and (e) all parties who have timely filed requests for notice under Rule 2002 of the Bankruptcy Rules, so as to be filed and actually received not later than April 28, 2015 at 4:00 p.m.

PLEASE TAKE FURTHER NOTICE that if no objections to the Settlement Motion are timely filed, served and received in accordance with this Notice, the Bankruptcy Court may grant the relief requested in the Settlement Motion and enter the proposed Order Approving Settlement without further notice or hearing.

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SECRETARY'S BUREAU

ARENT FOX LLP George P. Angelich David Wynn Eric Roman George V. Udlik 1675 Broadway New York, NY 10019 (212) 484-3900 Counsel for the Plaintiff UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK In re: VIVARO CORPORATION, et al., Debtors. THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF VIVARO CORPORATION, et al. Plaintiff, v. LEUCADIA NATIONAL CORPORATION, BALDWIN ENTERPRISES, INC., BEI PREPAID, LLC, BEI PREPAID HOLDINGS, LLC, PHLCORP, INC., IAN CUMMING, JOSEPH STEINBERG, DAVID LARSEN, ST JOFINANCE LLC, SAMER TAWFIK, AND DOES 1 - 12, Defendants.	HERRICK, FEINSTEIN LLP John R. Goldman Justin B. Singer 2 Park Avenue New York, NY 10016 (212) 592-1460 Counsel for the Debtors Chapter 11 Case No. 12-13810 (MG) (Jointly Administered) Adversary Proceeding No. 14-02213 (MG)
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**JOINT MOTION OF THE OFFICIAL COMMITTEE OF
 UNSECURED CREDITORS AND THE DEBTORS FOR AN ORDER APPROVING
 THE SETTLEMENT AGREEMENT WITH REPRESENTED DEFENDANTS
 UNDER RULE 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE**

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The Official Committee of Unsecured Creditors (the "Committee" or "Plaintiff") of the above-captioned debtors and debtors in possession, Vivaro Corporation ("Vivaro"); STi Prepaid, LLC ("STi Prepaid"); Kare Distribution, Inc.; STi Telecom, Inc.; TNW Corporation; STi CC 1, LLC; and STi CC 2, LLC (collectively, the "Debtors"), and the Debtors, through their respective undersigned counsel, file this joint motion (the "Settlement Motion") seeking an order (the "Order Approving Settlement," annexed hereto as Exhibit A), under Rule 9019 of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rule(s)"), approving the Settlement Agreement and General Release (the "Agreement" annexed hereto as Exhibit B), entered by and between (i) Plaintiff and the Debtors; and (ii) Defendants Leucadia National Corporation ("Leucadia"); Baldwin Enterprises, Inc. ("Baldwin"); BEI Prepaid, LLC ("BEI"); BEI Prepaid Holdings, LLC ("BEI Holdings"); Phicorp, Inc. ("Phicorp"); Ian Cumming; Joseph Steinberg; David Larsen; and Jim Continenza (collectively, the "Represented Defendants" and together with Plaintiff and the Debtors, the "Parties"), along with a proposed Final Order for Dismissal With Prejudice (annexed hereto as Exhibit C), seeking dismissal of all of the claims that were brought, or could have been brought, by the Committee or the Debtors against the Represented Defendants and Defendants Samer Tawfik ("Tawfik") and ST Finance, LLC ("ST Finance"), and together with Tawfik and the Represented Defendants, the "Defendants" in the above-captioned *adversary proceeding* (the "Adversary Proceeding"). *In support of the Settlement Motion, the Committee and the Debtors respectfully state as follows:*

I. PRELIMINARY STATEMENT

1. The Committee and the Debtors are pleased to have reached an \$8 million settlement in one of the most important litigations in these bankruptcy cases.

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2. While the Parties had discussed potential resolution of their disputes relatively early in the bankruptcy process, neither those initial discussions nor many months of subsequent attempts to engage in negotiations bore fruit, and ultimately litigation was commenced.

3. On February 3, 2015, the Court ended the Parties' stalemate when it granted in part, and denied in part, the Represented Defendants' motion to dismiss the complaint (the "Complaint," annexed as Exhibit A to the Agreement). The Court's February 3rd order was, in fact, the catalyst for the settlement proposed in the Agreement (Exhibit B hereto), and the Parties would not have been able to reach this compromise without the Court's attention and efforts.

4. The Committee and the Debtors respectfully request, pursuant to Bankruptcy Rule 9019, that the Court approve the Agreement settling all of the claims that were or could have brought by the Parties in this Adversary Proceeding in exchange for a payment of \$8 million from the Represented Defendants to the Debtors' estates.¹

II. JURISDICTION AND VENUE

5. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157(a) and 1334(a) because the claims asserted in this Adversary Proceeding arose in the Debtors' Chapter 11 Cases (defined below). This proceeding is a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2)(A). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409 and because the Debtors' Chapter 11 Cases are being administered in this Court. The bases for the relief requested in this Settlement Motion are sections 105(a) of title 11 of the United States Code (the "Bankruptcy Code"), Bankruptcy Rule 9019 and the Standing Stipulation and Order that authorizes Plaintiff to have the "sole and exclusive right and standing to assert, prosecute, and settle, by litigation or otherwise, as an independent representative of the Debtors' estates and for

¹ Given the large claims that are at stake, the Committee is serving this motion on all the creditors in the main bankruptcy case. This is to ensure that all creditors understand the Committee's reasoning, the impact of the proposed settlement, and the proposed settlement's terms.

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the benefit of the Debtors' estates and their creditors" this Adversary Proceeding. *See* Standing Stipulation and Order [Bankruptcy Case, ECF No. 552] at ¶ 1.

III. BACKGROUND²

A. Prepetition Transfers at Issue

6. At issue in this Adversary Proceeding were two groups of prepetition transfers from one or more of the Debtors to one or more of the Defendants. The Committee contends that the first group of transfers (the "STi Transfers"), which occurred in 2007 to 2008, were made from Debtor STi Prepaid to Defendant Baldwin when STi Prepaid was an indirect subsidiary of Baldwin and of Baldwin's parent company, Leucadia. The Committee further contends that the second group of transfers (the "Acquisition Transfers"), which occurred in 2010 to 2011, were made from Debtors Vivaro and STi Prepaid to Baldwin in repayment of a \$20 million loan that Baldwin made to Vivaro to finance Vivaro's purchase of STi Prepaid.

1. Leucadia's Ownership of STi Prepaid

7. In March 2007, Leucadia acquired a 75% interest in STi Prepaid from Defendant Tawfik for \$121.8 million. STi Prepaid was an LLC with two members: Defendant BEI, which owned a 75% interest, and ST Finance, which held the remaining 25% interest in STi Prepaid.

8. ST Finance was wholly-owned by Tawfik. BEI was a 90%-owned subsidiary of Defendant BEI Holdings, which was a wholly-owned subsidiary of Baldwin. Baldwin, in turn, was a wholly owned subsidiary of Defendant Phicorp, which was a wholly-owned subsidiary of Leucadia. The Complaint alleged that all or part of any money transferred from STi Prepaid to one of its parent entities was also upstreamed to BEI, Baldwin Holdings, Baldwin, Phicorp, and/or Leucadia

² The facts as set forth in the Settlement Motion are based on the contentions that Plaintiff made in this Adversary Proceeding. The Represented Defendants challenged and denied, and continue to challenge and deny, Plaintiff's contentions.

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2. STi Transfers

9. The STi Transfers consisted of four monetary wire transfers. The first, in the amount of \$15 million, took place on June 5, 2007. The second, in the amount of \$12 million, took place on November 5, 2007. The third and fourth were each in the amount of \$5 million, and took place on July 22, 2008 and December 31, 2008. Each of the wire transfers was from STi Prepaid to Baldwin.

10. According to the Committee's investigation of STi Prepaid's books and records, STi Prepaid was insolvent as of the time of the STi Transfers. For example, in November 2007, July 2008 and December 2008, STi Prepaid was operating with a negative equity of \$12.8 million (November 2007), \$13.9 million (July 2008), and \$16.8 million (December 2008), respectively. That is to say, the books and records of STi Prepaid showed that from November 2007 to December 2008, STi Prepaid's liabilities increasingly outstripped its assets, which is an indicator of insolvency.

11. The Committee's investigation further revealed that the close relationship between Debtor STi Prepaid and the Defendants, combined with the fact that the STi Transfers totaling \$37 million (which were not made to the members of STi Prepaid, but rather to a non-member Baldwin, and which directly or indirectly benefited the Defendants) contributed to STi Prepaid's insolvency, provided support for a claim of actual fraudulent conveyance against the Defendants.

12. As for June 2007, although STi Prepaid reflected a positive equity of \$36.4 million in that month, the books and records reveal that about \$30.7 million in "intangible assets" and about \$49.4 million in "capital" disappeared from the books by the next quarter. When adjusting its reported \$36.4 million in positive equity in June 2007 to account for phantom

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assets, the Committee concluded that STi Prepaid was operating with a negative equity, *i.e.*, in a state of insolvency, in June 2007 as well.

3. Acquisition Transfers

13. Vivaro acquired membership interests in STi Prepaid from Baldwin in October 2010 for a total purchase price of \$20 million (the "Acquisition"). To pay the \$20 million purchase price, Vivaro made an initial cash payment of \$600,000 to Baldwin, and borrowed the remaining \$19.4 million on a note issued by Baldwin to Vivaro and guaranteed by STi Prepaid (the "Note").

14. An examination of the books and records of the Debtors' estates revealed that Vivaro and STi Prepaid were both insolvent at the time of the Acquisition on both a standalone and consolidated basis, and that both companies remained insolvent throughout the time they were making the Baldwin Loan Repayments. Additional evidence of insolvency existed, such as, for example, the fact that Vivaro and STi Prepaid were unable to make timely payments on the Note within just a few months of the Acquisition. In fact, at one point Vivaro was repaying just one-sixth of the amount it was expected to repay Baldwin under the Note's repayment schedule.

15. By late 2011, Vivaro's and STi Prepaid's ongoing liquidity issues had resulted in the repayments to Baldwin falling behind. The repayment obligation was deepening the insolvency of Vivaro and STi Prepaid. To satisfy its repayment obligations under the Note, Vivaro took the drastic step of enlisting the help of a company called *The Receivables Exchange* ("TRE") to auction off STi Prepaid's receivables at a rate of about 85% of face value. TRE paid Baldwin the sum of \$7 million from the proceeds of the factored receivables that would otherwise have been due to STi Prepaid, an amount that Baldwin had previously agreed to accept in full and final satisfaction of the Baldwin note. In the end, as a result of the Debtors'

to exchange information about the claims and to continue a settlement dialogue. That exchange of information, however, was limited.

21. For months afterwards, the Parties continued to try to engage with one another in an effort to reach a resolution of their disputes. However, the Parties were not able to come to agreement on even the structure or format for settlement discussions. It eventually became apparent that neither the Committee nor the Debtors would be able to engage the Represented Defendants in substantive settlement discussions (in particular with respect to the STi Transfers) unless an adversary proceeding was commenced.

D. The Adversary Proceeding

22. The Committee and the Debtors entered into a *Stipulation and Order* that was approved by the Court on August 25, 2014 [Bankruptcy Case, ECF No. 552] (the "Standing Stipulation and Order"). whereby the Committee was vested with the authority and the sole exclusive right and standing to assert, prosecute, and settle, by litigation or otherwise, to commence and prosecute certain actions under the Bankruptcy Code, including this Adversary Proceeding.

23. On September 4, 2014, the Committee, by and through its retained counsel, commenced the Adversary Proceeding by filing the Complaint.

24. The Complaint asserts six causes of action. The first count is directed to avoiding the STi Transfers as fraudulent conveyances under Bankruptcy Code section 544 and NYDCL sections 273 and 274. The second, third and fourth counts are generally directed to avoiding Vivaro's Note, STi Prepaid's Note guaranty, the Cash Payment and the Note Payments as fraudulent obligations or transfers under Bankruptcy Code sections 544 and 548(a)(1)(B) and NYDCL sections 273 through 275. The fifth count is for recovery of the avoided transfers under Bankruptcy Code sections 550 and 551 and NYDCL sections 278 and 279. Finally, the sixth

deepening financial crisis (among other things), Baldwin was paid – and agreed to be satisfied by – only \$11.875 million of the \$19.4 million it was owed by Vivaro under the Note.

B. Debtors' Bankruptcy Cases

16. On September 5, 2012, a little over five years after the first STi Transfer was made in June 2007, the Debtors filed voluntary petitions for relief under chapter 11 the Bankruptcy Code in this Court, and their cases (the "Chapter 11 Cases") are being jointly administered under Bankruptcy Rule 1015(b).

17. The Debtors have been authorized to remain in possession of their property and to continue in the operation and management of their businesses as debtors in possession under sections 1107 and 1108 of the Bankruptcy Code.

18. On October 3, 2012, the Office of the United States Trustee for the Southern District of New York appointed Sprint International, Wind Telecom, D'exposito & Partners, LLC, Angel Telecom AG, and Digicel to the Committee³ in these Chapter 11 Cases under sections 1102(a) and 1102(b) of the Bankruptcy Code.

19. On October 4, 2012, at a meeting during which all five members of the Committee participated, the Committee selected Digicel as its chair and selected and formally voted to retain Arent Fox LLP as its counsel.

C. Pre-Complaint Attempts to Negotiate a Settlement

20. In the months before commencing the Adversary Proceeding, the Committee made multiple good faith attempts to avoid litigation. For example, in October 2013, the Debtors and the Committee met with counsel for the Represented Defendants to discuss the claims that the Debtors' estates could potentially (and eventually did) assert against the Defendants on account of the STi Transfers and Acquisition Transfers. During this meeting, the Parties agreed

³ Sprint International and Angel Telecom AG have since resigned from the Committee.

count is for avoidance and recovery of the STi Transfers as actual fraudulent transfers under Bankruptcy Code sections 544, 548(a)(1)(A), 550, and 551 and NYDCL sections 276, 276-a, 278, and 279.

25. Even after filing the Complaint, the Parties continued their efforts to either negotiate or formally mediate a settlement to the Parties' dispute. However, the Parties were not able to agree on a framework for engaging in any such discussions.

26. On October 17, 2014, Plaintiff filed a motion to compel the Parties to mediate their disputes (the "Mediation Motion") [Adversary Proceeding, ECF No. 4]. The Represented Defendants opposed, and the Court denied, the Mediation Motion.

E. The Represented Defendants' Motion to Dismiss

27. On October 31, 2014, the Represented Defendants filed a motion to dismiss the Complaint under Rule 12(b)(6) for failure to state a claim on which relief can be granted (the "Motion to Dismiss") [Adversary Proceeding, ECF Nos. 7 and 8], denying the allegations in the Complaint and asserting various affirmative defenses. Defendants Tawfik and ST Finance were not party to the Motion to Dismiss and, in fact, are currently in default. More particularly, while Defendants Tawfik and ST Finance (the "Defaulting Defendants") were timely served by the Committee with the Complaint, they did not make an appearance in the case, did not file an answer to the Complaint or any motion, and did not join in the Represented Defendants' Motion to Dismiss.

28. At a hearing on November 10, 2014, the Court set the briefing and hearing scheduling on the Motion to Dismiss and suggested that the Parties meet and confer to try to narrow the scope of the issues in dispute.

29. In accordance with the Court's suggestion, the Parties met and conferred telephonically to attempt to narrow the issues in dispute. Plaintiff agreed to (and in fact did)

withdraw, without prejudice, its claims against four of the Represented Defendants: Ian Cumming, Joseph Steinberg, David Larsen and Jim Continenza (the "Individual Represented Defendants"). The Parties also agreed to exchange additional information.

30. On December 8, 2014, Plaintiff filed its opposition to the Represented Defendants' Motion to Dismiss [Adversary Proceeding, ECF No. 13], seeking denial of the Motion to Dismiss in its entirety with respect to the remaining five Represented Defendants: Leucadia, Baldwin, BEI, BEI Holdings, and Phlcorp (the "Corporate Represented Defendants").

31. On January 15, 2015, the Represented Defendants filed their reply [Adversary Proceeding, ECF No. 17], and on January 22, 2015, the Court heard oral argument on the Motion to Dismiss.

F. The Court's Decision On the Motion to Dismiss

32. On February 3, 2015, the Court issued its decision on the Motion to Dismiss. See *In re Vivaro Corp.*, 524 B.R. 536 (Bankr. S.D.N.Y. 2015) (the "Decision"). In the Decision, the Court dismissed without prejudice, and with leave to amend, Plaintiff's claims relating to (i) the two \$5 million STI Transfers made in 2008; (ii) the Acquisition Transfers; and (iii) actual fraud.

33. According to the Court, the claims relating to the 2008 STI Transfers were deficient in that the Complaint's allegations of negative equity were insufficient to support insolvency, which is a necessary element of a claim of constructively fraudulent transfer under the NYDCL. The Court granted Plaintiff leave to amend the Complaint to allege the amount of STI Prepaid's total assets and total liabilities at the time of those transfers as opposed to net negative equity figures.

34. As for the Acquisition Transfers, the Court found that the allegations of the Complaint were insufficient to plead a lack of reasonably equivalent value or fair consideration, which is required for adequately pleading constructive fraudulent transfer under the NYDCL.

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According to the Court, Vivaro's Note obligation was an antecedent debt, and thus there was a rebuttable presumption that any payments made by Vivaro on account of the Note were made for value. The Court granted Plaintiff leave to amend the Complaint to allege additional facts concerning: (i) whether the Acquisition of STI Prepaid by Vivaro was not the result of an arm's length negotiation; (ii) the value of Vivaro's membership interests in STI Prepaid; and (iii) whether neither Vivaro nor STI Prepaid (the guarantor under the Note) directly or indirectly benefitted from the Acquisition.

35. The Court denied the Represented Defendants' Motion to Dismiss the claims relating to the two 2007 STI Transfers, which totaled \$27 million.

36. The Court also rejected the Represented Defendants' argument that Plaintiffs' claims relating to the STI Transfers were time barred as a matter of law and should be dismissed on the pleadings without discovery.

37. The Represented Defendants argued that as a matter of law, each of Plaintiff's claims on account of the STI Transfers were barred by a "statute of repose" or "statute of limitations" under section 508(c) of New York Limited Liability Company Law ("NY LLC 508(c)"). NY LLC 508(c) limits actions for recovery of "wrongful" distributions from an LLC to its member to three years from the date of the distribution, thus shortening the six-year statute of limitations that is normally applicable to a fraudulent transfer claim by three years.

38. Plaintiff argued that NY LLC 508(c) does not apply to the STI Transfers because the facts available thus far show that the STI Transfers were not from STI Prepaid to its members, but rather from STI Prepaid to Baldwin. Thus, the STI Transfers were not distributions from an LLC to a member and therefore NY LLC 508(c) does not apply to the STI Transfers.

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39. In response to Plaintiff's argument, the Represented Defendants contended that it was not Baldwin, but BEI (a member of STI Prepaid) that was the ultimate recipient and beneficiary of the STI Transfers. According to the Represented Defendants, Baldwin was a mere intermediary recipient and therefore NY LLC 508(c) applies.

40. In view of the Parties' competing factual contentions, the Court decided that it could not conclude at the motion to dismiss stage that NY LLC 508(c) applied to the STI Transfers as a matter of law. Whether the STI Transfers were in fact "distributions" made to STI Prepaid's LLC "members" via Defendant Baldwin, an intermediary recipient, "is a disputed issue of fact that cannot be resolved on a motion to dismiss." Decision at 17.

G. The Proposed Settlement

41. Approximately one week after the entry of the Court's Decision, the Plaintiff, the Debtors and the Represented Defendants engaged in settlement discussions in an attempt to resolve all of their disputes and claims. At that time, the Represented Defendants made an \$8 million offer to resolve all of the claims in the Adversary Proceeding.

42. On February 19, 2015, after reaching a preliminary agreement with the Represented Defendants, the Committee (in consultation with the Represented Defendants) submitted a letter to Chambers representing that a settlement in principle had been reached and requesting to hold all deadlines in abeyance and to extend all dates in this Adversary Proceeding.

43. In the intervening days since the Court's Decision, the Parties have worked diligently to finalize the Agreement and certain ancillary documents.

44. Subject to the Court's approval, the Parties entered into the Agreement⁴, which contains the following terms:

(a) Represented Defendants shall make a settlement payment to Plaintiff totaling EIGHT MILLION AND 00/100 DOLLARS (\$8,000,000.00) in presently available funds (the "Settlement Funds"), pursuant to wire instructions to be provided by counsel for the Committee, by wire transfer within three (3) calendar days of the entry of Order Approving Settlement.

(b) The Agreement contains release and waiver of all claims that were or could have been asserted by the Committee or the Debtors against any of the Defendants, together with their current or former subsidiaries, affiliates, owners, employees, attorneys, agents, officers, directors, shareholders, members, successors, and assigns of the Defendants (the "Released Parties"), in this Adversary Proceeding.

(c) The released claims and releases and waivers provided to the Released Parties under the Agreement are not intended to benefit anyone not identified in the Agreement. Thus, the Agreement provides express language that the following actions and defendants are excluded from the release and waiver:

- i. any preference action or other proceeding commenced by the Debtors in connection with these Bankruptcy Cases that are pending as of the date of this Agreement, except for this Adversary Proceeding;
- ii. any anticipated preference action or legal proceeding that may be asserted by the Committee against the Debtors' directors and officers, Gustavo M. de la Garza Ortega, Marciel Com, S.A. de C.V., Progress International, L.L.C., Unifca Contact Media S.A. de C.V., Organizacion Radio Beep S.A. de C.V., or any of the Debtors' other insiders or related entities; or
- iii. any objection or defense to the allowance of a claim asserted against the Debtors or their estates in these Bankruptcy Cases by any of the Released Parties.

(d) The Agreement contains release and waiver of all claims that were or could have been asserted by the Represented Defendants against the Debtors, their estates, the Committee and its members, together with their respective current or former subsidiaries, affiliates, owners, employees, attorneys, agents, officers,

⁴ The Agreement was executed by Michael Sharp, Esq., General Counsel for Leucadia National Corporation and Jefferies Group LLC, on behalf of the Represented Defendants, by Thomas R. Caliendo, Esq. of DLA Piper LLP (US) as counsel for the Represented Defendants, by Mr. Philip Gund, in his capacity as the Debtors' Chief Restructuring Officer, on behalf of the Debtors, by Mr. Cosou Clarke, in his capacity as the Chairman of the Official Committee of Unsecured Creditors, and by George P. Angelich, Esq. of Arent Fox LLP as counsel for the Official Committee of Unsecured Creditors.

directors, shareholders, members, successors, and assigns of the Debtors, their estates, the Committee and its members.

(e) The Parties agreed not to initiate any complaint, investigation, or proceeding against each other with any other federal, state or local law enforcement, regulatory or administrative commission, group, board or person, whether public or private, regarding any facts, failure to act, omissions, facts, events, misrepresentations, transactions, occurrences or other matters which are the subject matter of the Adversary Proceeding or the Agreement.

(f) Plaintiff will submit a final order dismissing the action with prejudice.

IV. ARGUMENT

A. Applicable Legal Principles

45. Bankruptcy Rule 9019 provides, in relevant part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Settlements and compromises are "a normal part of the process of reorganization . . ." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1986) (quoting *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 130 (1939)); see also *In re Adelpia Commc'ns Corp.*, 327 B.R. 143, 159 (decision to accept or reject settlement lies within sound discretion of bankruptcy court), *adhered to on reconsideration*, 327 B.R. 175 (Bankr. S.D.N.Y. 2005).

46. In determining whether a proposed settlement or compromise is in the best interests of a debtor's estate, courts in the Second Circuit generally consider the following seven factors: (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex, costly and protracted litigation; (3) the paramount interests of the creditors, including benefits and the degree to which creditors affirmatively support the proposed settlement; (4) whether other interested parties support the settlement; (5) the competency and experience of counsel supporting the settlement; (6) the nature and breadth of releases to be obtained by officers and directors under the settlement; and (7) the

the Court granted Plaintiff leave to amend the Complaint (based, in part, on facts that Plaintiff set forth in its opposition to the Motion to Dismiss), and Plaintiff strongly believes that it has sufficient facts to successfully amend the Complaint to encompass all of the STi Transfers and the Acquisition Transfers, any such amendment would be subject to an additional motion to dismiss. Therefore, despite the strength of the merits of Plaintiff's claims in the Adversary Proceeding, Plaintiff must evaluate the benefit of accepting an immediate \$8 million settlement against the risks associated with (i) litigating the \$27 million surviving claims and (ii) amending the Complaint to re-assert the \$22.475 million in claims that the Court dismissed.

49. As is explained in further detail below, to ultimately prevail on the merits, Plaintiff will have to overcome the Represented Defendants' argument that the 2007 STi Transfers are time barred by NY LLC 508(c). In addition, discovery with respect to the 2007 STi Transfers is more complex (and expensive) because of the amount of time (7 to 8 years) that passed since those transfers were made. These are significant hurdles that must be overcome before Plaintiff can succeed on the merits of its surviving \$27 million claims. In light of these risks, a settlement for \$8 million – which is roughly 30% of the potential monetary value of the surviving claims relating to the 2007 STi Transfers – is a reasonable compromise.

50. Even if Plaintiff were able to successfully amend the Complaint, the same hurdles (i.e., the NY LLC 508(c) defense and the discovery-related issues) that apply to Plaintiff's \$27 million claim would apply to the 2008 STi Transfers, in which case the proposed settlement would represent a reasonable recovery of approximately 22%.

51. Assuming that the Complaint could be successfully amended to also encompass the \$12.475 million in Acquisition Transfers, the proposed \$8 million settlement would still be

extent to which the proposed settlement is the product of arm's-length bargaining. *Motorola, Inc. v. Official Comm. of Unsecured Creditors and JP Morgan Chase Bank, N.A. (In re Iridium Operating LLC)*, 478 F.3d, 452, 462 (2d Cir. 2007) (noting that the factors are based on the original framework announced by the Supreme Court in *TMT Trailer Ferry*); see also *In re WorldCom, Inc.*, 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006); accord *In re Texaco Inc.*, 84 B.R. 893, 802 (Bankr. S.D.N.Y. 1988).

47. In evaluating a compromise, a court need not determine that all of the foregoing factors favor approval of a compromise, and the proposed compromise need not be the best agreement that could have been achieved under the circumstances. *Adelpia Commc'ns*, 327 B.R. at 159-60; see also *Penn Centr.*, 596 F.2d at 1114. Instead, the court's proper "role is to determine whether the settlement as a whole is fair and equitable," *In re Lee Way Holding Co.*, 120 B.R. 881, 890 (Bankr. S.D. Ohio 1990), and falls "within the reasonable range of litigation possibilities." *In re Telesphere Commc'ns, Inc.*, 179 B.R. 544, 553 (Bankr. N.D. Ill. 1994) (citation omitted). In the Second Circuit, compromises in the bankruptcy context should be approved unless they "'fall below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (citation omitted).

B. The Proposed Settlement of \$8 Million Is Reasonable In View of the Risks Posed by the Represented Defendants' Defenses As Well As Significant Discovery Hurdles That Must Be Overcome to Prevail on the Merits

48. If litigation were to continue, the Plaintiff would first need to amend the Complaint. Only Plaintiff's constructive fraudulent conveyance claims relating to the \$27 million in STi Transfers that were made in 2007 survived the Court's Decision on the Represented Defendants' Motion to Dismiss. While the Court granted Plaintiff leave to amend its claims for avoidance and recovery of the 2008 STi Transfers (totaling \$10 million) and the Acquisition Transfers (totaling \$12.475 million), Plaintiff has not yet done so. Moreover, while

reasonable in view of additional hurdles and discovery-related issues, including discovery of foreign non-parties, which Plaintiff would need to overcome in order to prevail on those claims.

1. The Represented Defendants' Statute of Limitations Defense to the STi Transfer Claims Based On NY LLC 508(c)

52. The Court's Decision on the Represented Defendants' Motion to Dismiss appears to assume that the statute of limitations set forth in NY LLC 508(c) is applicable to fraudulent conveyance actions and therefore can, under the right factual circumstances, cut the New York's six-year statute of limitations for fraudulent conveyances claims to just three years. Therefore, Plaintiff must assume, for purposes of evaluating risks, that the Court would apply NY LLC 508(c) in the present case if it were to find (at summary judgment or after trial) that the STi Transfers were, in fact, distributions to BEI, a member of STi Prepaid during the relevant time period.

53. The facts that are currently available to Plaintiff indicate that the STi Transfers were not distributions to BEI (a member of STi Prepaid). Rather, the STi Transfers were directly to Baldwin, which was not a member. Therefore, Plaintiff would argue that Baldwin should not be entitled to the protection of NY LLC 508(c) given the facts as currently known to Plaintiff.

54. The Represented Defendants, however, contend that their internal records of intercompany money transfers will establish otherwise. They contend that those internal records will show that Baldwin was simply an intermediate transferee of the STi Transfers, and that the STi Transfers were in actuality made to BEI and for BEI's benefit. As a result, according to the Represented Defendants, BEI should be entitled to the protection of NY LLC 508(c).

55. For purposes of evaluating the settlement, Plaintiff must acknowledge that there exists at least the possibility that the Representative Defendants either have or may be able to obtain evidence sufficient to establish that NY LLC 508(c) is applicable to the STi Transfers. As

the existence of such evidence would likely result in the dismissal of Plaintiff's entire surviving \$27 million claim as untimely, it is reasonable to conclude that continued litigation poses a significant enough risk that a recovery of \$8 million – or approximately 30% of the surviving \$27 million claim – constitutes a reasonable settlement of the Adversary Proceeding.

56. The Represented Defendants' NY LLC 508(c) defense, and the risks to recovery associated with it, applies equally to the 2008 STi Transfers. Accordingly, even if Plaintiff were able to amend successfully the allegations in the Complaint concerning the 2008 STi Transfers such that the potential value of Plaintiff's claim were increased to \$37 million (the full amount of the STi Transfers in 2007 and 2008), Plaintiff would still face the risk of zero recovery should the Represented Defendants meet their burden of proving that the STi Transfers were "distributions" to a member of STi Prepaid. In light of this risk, a recovery of \$8 million – or approximately 22% of the total potential claim value – would still represent a reasonable settlement.

57. Assuming that Plaintiff is able to amend the Complaint to successfully allege the Acquisition Transfers (\$12.475 million) as well, the potential maximum value of Plaintiff's claims would rise to \$49.475 million. However, should the Represented Defendants prevail on their NY LLC 508(c) argument, none of the \$37 million in STi Transfer-related claims would be recoverable. That is to say, there is a risk that the potential value of the claims may be reduced to \$12.475 million. Thus, an \$8 million recovery through settlement is reasonable.

2. Discovery Will Be Made More Expensive and Complex by the Number of Years that Have Passed Since the STi Transfers

58. Plaintiff has the burden of proving that the STi Transfers were fraudulent conveyances. Accordingly, the Plaintiff must prove insolvency during the numerous relevant time periods, as well as lack of fair consideration or reasonable value. Plaintiff will also likely

limitations defense (see discussion of NY LLC 508(c) *supra*), are an additional reason why the proposed \$8 million settlement is a reasonable compromise in the circumstances of this case.

C. Additional Discovery-Related Hurdles Would Need to Be Overcome to Ultimately Prevail on the Claims Relating to the Acquisition Transfers

62. In addition, proving that the Acquisition Transfers are fraudulent conveyances presents its own discovery challenges. While the length of time that has passed since the transfers were made is somewhat less than in the case of the STi Transfers, it is still the case that three to four years have passed since the Acquisition Transfers were made (the Acquisition Transfers were made from October 2010 to December 2011). As was previously explained, since those transfers, STi Prepaid was sold by Debtor Vivaro to Angel Americas. During Angel Americas' tenure, nearly all of the employees of STi Prepaid (who were familiar with the Acquisition Transfers, with STi Prepaid's financial state during those transfers, and with the facts concerning the negotiation and execution of Vivaro's acquisition of STi Prepaid from Leucadia) have left the company. As a result, to prove that the Acquisition Transfers were fraudulent conveyances, Plaintiff is required to locate witnesses and documentary evidence that may no longer be readily available and could be difficult to find. Plaintiff is also faced with the prospect of conducting extensive non-party discovery, including depositions of foreign nationals (a significant number of STi Prepaid's former managers currently reside in Mexico). As with the STi Transfers, these discovery-related issues will add significantly to the expense and complexity of litigating the Acquisition Transfers, and are yet additional reasons to consider the proposed \$8 million compromise as a reasonable one under the circumstances of this action.

have to gather evidence to rebut the Represented Defendants' argument that the STi Transfers were "distributions to a member" and therefore subject to NY LLC 508(c).

59. The STi Transfers were made almost eight years ago. Since then, STi Prepaid has had three different owners: the Corporate Represented Defendants; Vivaro; and now – since February 2013 – Angel Americas LLC (formerly known as Next Angel LLC).⁵ Given these multiple transfers of ownership and the length of time that has passed, there is an increased probability that relevant documentary evidence concerning the STi Transfers and STi Prepaid's financial state has either been lost or destroyed.

60. In addition, many, if not all, of the individuals with direct knowledge of such relevant facts also no longer work for either the Represented Defendants or STi Prepaid or the other Debtors. As a result, obtaining relevant evidence to support Plaintiff's claims for avoidance and recovery of the STi Transfers will require Plaintiff to locate, subpoena and depose non-party witnesses. Moreover, even if all needed non-party witnesses can be located and deposed, there is a risk that their memories of the relevant facts have faded given the length of time that passed since the STi Transfers were made.

61. These additional hurdles associated with pursuing discovery relating to the STi Transfers will, at a minimum, significantly increase the complexity and expense of litigation. At worst, they may materially interfere with Plaintiff's ability to gather sufficient evidence to meet its burden of proof and to ultimately prevail on the merits. These discovery-related issues, in combination with the possibility that the Represented Defendants will prevail on their statute of

⁵ Since the acquisition by Angel Americas, that enterprise has encountered its own series of operational challenges. For example, Angel Americas is engaged in its own major lawsuit with Mr. Gustavo M. de la Garza Ortega and his related entities. As this Court will note, Mr. Gustavo M. de la Garza Ortega is the ultimate owner of the Debtors and a stakeholder in Angel Americas. Angel Americas is the current repository of the Debtors' electronically stored data and many of the operational personnel who are legacy employees of Vivaro are actively engaged in running Angel Americas or have since been terminated.

D. Agreement Contains Tailored Releases and Expressly Excludes the Estates' Claims and Claims Objections Against Other Defendants, Including the Debtors' Directors and Officers and the Debtors' Insiders

63. In addition to the \$8 million settlement payment from the Represented Defendants, the Agreement contains releases and waivers with prejudice of all claims that were or could have brought by the Committee or the Debtors against three groups of Defendants: (1) the Individual Represented Defendants, against whom Plaintiff voluntarily dismissed its claims without prejudice prior to oral argument on the Motion to Dismiss, who are signatories to the Agreement through Leucadia's corporate in-house general counsel; (2) the Corporate Represented Defendants, who are signatories to the Agreement through Leucadia's corporate in-house general counsel and their outside counsel; and (3) the Defaulting Defendants, who have not appeared or otherwise defended in this Adversary Proceeding, and who are not signatories to the Agreement.

64. The release language includes affiliates and related parties of the Defendants. It is also a mutual release that releases the Debtors and the affiliates and related parties of the Debtors. The Defaulting Defendants are also parties to the release. None of the Defaulting Defendants has ever asserted a claim against the Debtors or the estates as far as Plaintiff and the Debtors are aware.

65. The mutual releases and waivers of claim contained in the Agreement do not apply to or benefit any entity other than the Parties. However, for the avoidance of doubt, the Agreement specifies that the scope of the release granted to the Released Parties does not extend to (i) defendants in any pending preference action or other proceeding commenced by the Debtors; (ii) any entity connected to the Debtors' directors and officers, Mr. Gustavo M. de la Garza Ortega, Marcatel Com, S.A. de C.V., Progress International, LLC, Unifica Contact Media

S.A. de C.V., Organizacion Radio Beep S.A. de C.V., or any of the Debtors' other insiders or related entities; or (iii) any entity that held any claims against the Debtors or their estates.

66. Thus, for example, if it is later discovered that a claim holder or preference defendant is an affiliate of a Defendant, such person or entity is not released under the Agreement. In addition, there are no circumstances in which the release can be relied upon by any of the Debtors' directors and officers, or any of the Debtors' insiders (such as Mr. Gustavo M. de la Garza Ortega, Marcatel Com, S.A. de C.V., Progress International, LLC). Thus, the Agreement contains tailored releases and benefits no entity other than the parties identified by Leucadia to Plaintiff and the Debtors. Indeed, the Committee fully intends to pursue claims against Mr. Gustavo M. de la Garza Ortega and his affiliates for preferences, as well as claims against the Debtors' directors and officers.

67. Moreover, the Adversary Proceeding is dismissed with prejudice. The statute of limitations to bring a claim under Section 546 of the Bankruptcy Code has expired. Thus, dismissal with prejudice of these claims coupled with the expiration of the statute of limitations renders time barred any further claims against the Parties.

V. CONCLUSION

68. Plaintiff's claims for avoidance and recovery of the STi Transfers totaling approximately \$27 million survived the Represented Defendants' Motion to Dismiss. Following the Court's decision on the Motion to Dismiss, Plaintiff planned to amend the Complaint by repleading the claims for avoidance and recovery of the Acquisition Transfers and the remaining two STi Transfers totaling approximately \$10 million. The Represented Defendants denied, and continue to deny, liability on the merits of the fraudulent conveyance claims (both constructive and actual) asserted by Plaintiff in the Complaint. The Committee and the Debtors had to consider two alternatives.

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directors and officers as well as a complaint for avoidance and recovery of certain preferences against Mr. Gustavo M. de la Garza Ortega and his related entities. Plaintiff has until June 15, 2015, to file such complaints pursuant to certain tolling agreements between (i) Plaintiff and (ii) the Debtors' directors and officers, Mr. Gustavo M. de la Garza Ortega and his related entities.

72. The Agreement was reached by the Parties after, good faith, arm's-length negotiations, and each of the Parties is represented by their independent competent legal counsel. The Agreement was signed by and between (i) both the Debtors and the Committee (as an independent representative of the Debtors' estates and for the benefit of the Debtors' estates and their creditors) and (ii) the Represented Defendants. The Agreement is supported by sound justification because it lays the foundation for the Debtors and the Committee to move forward with prosecuting the remaining litigation claims of the Debtors' estates against other defendants and eventually proposing a plan of liquidation to establish a process for potential distributions to unsecured creditors of the Debtors' estates.

73. If approved, the Agreement will eliminate the substantial costs, delay and uncertainty associated with continued litigation and will result in the immediate return of substantial funds to the Debtors' estates. Thus, the Agreement represents a fair and equitable compromise, particularly in light of the complexity of the disputes and issues raised in the Adversary Proceeding.

74. Without approval of the Agreement, litigation of Plaintiff's claims against the Defendants will be complex, costly and protracted. The Agreement, by contrast, brings the necessary substantial funds in the amount of \$8 million into the Debtors' bankruptcy estates within three days of approval of the Settlement Motion, and allows Plaintiff to resolve the

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69. As a first alternative, the estates could proceed with the litigation which would require amending the Complaint; engaging in extensive discovery to find evidence in support of Plaintiff's actual and constructive fraudulent claims; and retaining a valuation and insolvency expert to analyze and address various contested issues, including the value of the Debtors' intangible assets and liabilities and the Debtors' state of insolvency in 2007, 2008 and 2010. While Plaintiff is prepared to file an amended complaint and proceed with discovery in accordance with the Court's Case Management and Scheduling Order, continued litigation will certainly be complex and costly.

70. As a second alternative, the estates could accept an \$8 million settlement offer from the Represented Defendants. This would require releasing total claims against the Defendants of \$50 million. See Section IV.B., *supra*. As explained above, the claims had certain issues relating to (i) the Represented Defendants' potential statute of limitations defense to avoidance and recovery of the STi Transfers; (ii) potentially stale or missing documentary evidence due to the amount of time that has passed since the transfers at issue were made; and (iii) the increased expense and complexity associated with the pursuit of extensive non-party discovery, including discovery in foreign countries, from former employees of the Represented Defendants and the Debtors.

71. The settlement does not affect any claims of the estates against preference defendants, claim holders, the Debtors' directors and officers, or Mr. Gustavo M. de la Garza Ortega. Those claims are retained and not released, and therefore, there are still significant claims left for the estates to pursue. Indeed, under the Standing Stipulation and Order, the Court granted Plaintiff exclusive right and standing to pursue certain claims against the Debtors' directors and officers. Plaintiff is in the process of drafting a complaint against the Debtors'

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Adversary Proceeding without incurring further risks and costs of litigation. Thus, the Agreement was entered into on behalf of these bankruptcy estates and is in the best interest of the Debtors' estates and all of their creditors.

75. For the foregoing reasons, the terms of the Agreement fall above the lowest point in the range of reasonableness, and approval of the Agreement is in the best interests of the Debtors' estates and their creditors. Accordingly, it is respectfully requested that the Agreement be approved by the Court.

VI. NOTICE

76. Plaintiff and the Debtors provided notice of the relief sought in this Settlement Motion by serving copies of the motion, together with related documents and the proposed order upon (a) counsel to the Represented Defendants, DLA Piper LLP (US), 1251 Avenue of the Americas, 27th Floor, New York, NY 10020-1104 (Attn: Thomas R. Califano, Esq.); (b) the Office of the United States Trustee, 201 Varick Street, Room 1006, New York, NY 10014 (Attn: Andy Velez-Rivera, Esq.); (c) Defendants Finance and Tawfik at their last known addresses; (d) all parties who have filed requests for notice under Bankruptcy Rule 2002; and (e) all creditors.

77. Plaintiff and the Debtors respectfully submit that such notice is sufficient under the Bankruptcy Code and the Bankruptcy Rules and that no other notice is necessary.

78. No previous motion for the relief sought has been made to this or any other court.

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VII. REQUEST FOR RELIEF

WHEREFORE Plaintiff and Debtors respectfully request that the Court enter the proposed order, substantially in the form annexed hereto as Exhibit "A", approving the Agreement.

Dated: New York, New York
March 20, 2015

Counsel for the Plaintiff

ARENT FOX LLP

By: /s/ George P. Angelich
George P. Angelich
David Wynn
Eric Roman
George V. Utlik
1675 Broadway
New York, NY 10019
(212) 484-3900

Counsel for the Debtors

HERRICK, FEINSTEIN LLP

By: /s/ Justin B. Singer
John R. Goldman
Justin B. Singer
2 Park Avenue
New York, NY 10016
(212) 592-1460

EXHIBIT A

ORDER APPROVING SETTLEMENT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
VIVARO CORPORATION, *et al.*, :
Debtors. :
THE OFFICIAL COMMITTEE OF :
UNSECURED CREDITORS OF VIVARO :
CORPORATION, *et al.*, :
Plaintiff, :
v. :
LEUCADIA NATIONAL CORPORATION, :
BALDWIN ENTERPRISES, INC., BEI :
PREPAID, LLC, BEI PREPAID HOLDINGS, :
LLC, PHLCORP, INC., IAN CUMMING, :
JOSEPH STEINBERG, DAVID LARSEN, ST :
FINANCE LLC, SAMER TAWFIK, AND :
DOES 1 - 12, :
Defendants. :

Chapter 11
Case No. 12-13810 (MG)
(Jointly Administered)

Adversary Proceeding No. 14-02213 (MG)

ORDER APPROVING SETTLEMENT

Upon the joint motion by the Official Committee of Unsecured Creditors of Vivaro Corporation, *et al.* ("Plaintiff") and the Debtors in the underlying bankruptcy proceedings (the "Settlement Motion")¹ for an order under Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing and approving the Settlement Agreement and General Release (the "Agreement"), annexed hereto as Exhibit A, entered by and between (i) Plaintiff and Debtors; and (ii) Defendants Leucadia National Corporation; Baldwin Enterprises, Inc.; BEI Prepaid, LLC; BEI Prepaid Holdings, LLC; Phlcorp, Inc.; Ian Cumming; Joseph

Steinberg; David Larsen; and Jim Continenza (collectively, the "Represented Defendants" and together with ST Finance, LLC and Samer Tawfik, the "Defendants"); and the Court having jurisdiction to consider the Settlement Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Settlement Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and the Parties having consented to the entry of final orders or judgments by this Court; and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having reviewed the Settlement Motion; and approval of the Agreement being within the sound discretion of the Court; and the Court finding that reasonable notice of the Settlement Motion was provided to all necessary parties; and the Court having determined that no other or further notice of the Settlement Motion is required; and no objections to the relief sought in the Settlement Motion having been timely filed; and the Agreement being fair and equitable, in the best interests of the Debtors' estates and their creditors, and above the lowest point in the range of reasonableness; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED that the Agreement and all of the releases and other provisions therein are approved under Bankruptcy Rule 9019, and the terms of the Agreement are fully incorporated herein, and the Parties are authorized to take all actions provided under the Agreement; and it is further

ORDERED that within seven (7) calendar days of receiving the Settlement Funds, Plaintiff shall submit to Chambers a Final Order for Dismissal with Prejudice of the Lawsuit against the Defendants, substantially in the form annexed hereto as Exhibit B; and it is further

ORDERED that this Order shall be in full force and effect upon its entry; and it is further

¹ To the extent not otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Settlement Motion

ORDERED that, to the extent this Order is inconsistent with the terms and conditions of the Settlement Agreement, the terms and conditions of the Settlement Agreement shall control.

Dated: New York, New York
May __, 2015

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A TO ORDER APPROVING SETTLEMENT- OMITTED

SETTLEMENT AGREEMENT

(For a copy, please see Exhibit A to the Committee's and Debtors' Joint Motion For An Order Approving The Settlement Agreement With Represented Defendants Under Rule 9019)

EXHIBIT B TO ORDER APPROVING SETTLEMENT - OMITTED

FINAL ORDER FOR DISMISSAL WITH PREJUDICE

(For a copy, please see Exhibit C to the Committee's and Debtors' Joint Motion For An Order Approving The Settlement Agreement With Represented Defendants Under Rule 9019)

EXHIBIT B

SETTLEMENT AGREEMENT AND GENERAL RELEASE

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE (this "Agreement"), dated as of March 4, 2015 is made by and between, (i) Plaintiff the Official Committee of Unsecured Creditors of Vivaro Corporation, et al. ("the Committee") appointed by the Office of the United States Trustee for the Southern District of New York (the "US Trustee") on October 3, 2012 under section 1102 of title 11 of the United States Code (the "Bankruptcy Code") in the bankruptcy case number 12-13810 (MG) (the "Bankruptcy Cases"), pending in the United States Bankruptcy Court for the Southern District of New York (the "Court") and Vivaro Corporation; STI Prepaid, LLC; Kare Distribution, Inc.; STI Telecom, Inc.; TSNW Corporation; STI CC 1, LLC; and STI CC 2, LLC (collectively, the "Debtors"), and (ii) Defendants Leucadia National Corporation; Baldwin Enterprises, Inc.; BEI Prepaid, LLC; BEI Prepaid Holdings, LLC; Pilcom, Inc.; Ian Cummings; Joseph Steinberg; David Larsen; and Jim Continenza (collectively, the "Represented Defendants"). In this Agreement, the Represented Defendants, along with ST Finance, LLC ("Finance") and Senior Tawfik ("Tawfik"), shall be collectively referred to herein as the "Defendants." Further, the Debtors, the Committee, and the Represented Defendants are sometimes referred to collectively herein as the "Parties" or individually, as a "Party".

WHEREAS, on or about September 5, 2012, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, commencing the Bankruptcy Cases;

WHEREAS, on or about October 3, 2012, the US Trustee appointed Sprint International; Wind Telecom; D'oposito & Partners, LLC; Angel Telecom AG; and Digicel to the Committee pursuant to sections 1102(a) and 1102(b) of the Bankruptcy Code;

WHEREAS, by Stipulation and Order dated August 25, 2014 [Bankruptcy Case, ECF No. 552], the Court granted to the Committee authority and the sole exclusive right and standing to assert, prosecute, and settle, by litigation or otherwise, to commence and prosecute actions under the Bankruptcy Code, including the Adversary Proceeding;

WHEREAS, on or about September 4, 2014, the Committee, by and through its retained counsel, filed a complaint against the Defendants, annexed hereto as Exhibit A (the "Complaint"), which initiated adversary proceeding number 14-02213 (MG) (the "Adversary Proceeding");

WHEREAS, in the Complaint, the Committee asserts multiple causes of action against the Defendants, including but not limited to (i) avoidance of transfers made from STI Prepaid LLC to one or more of the Debtors in June 2007, November 2007, July 2008 and December 2008 as alleged fraudulent conveyances under the Bankruptcy Code and New York Debtor Creditor Law, and (ii) avoidance of payments and obligations made to one or more of the Defendants in connection with the acquisition of membership interests in STI Prepaid LLC by:

¹ The Debtors are Vivaro Corporation; STI Prepaid, LLC; Kare Distribution, Inc.; STI Telecom, Inc.; TSNW Corporation; STI CC 1, LLC; and STI CC 2, LLC.

² Sprint International and Angel Telecom AG resigned from the Committee since then.

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Vivaro Corporation as alleged fraudulent conveyances under the Bankruptcy Code and New York Debtor Creditor Law;

WHEREAS, on October 1, 2014, the Court issued Summons and Notice of Pretrial Conference in the Adversary Proceeding, which was served on the Defendants;

WHEREAS, the Represented Defendants denied and still deny the allegations of the Complaint and asserted various affirmative defenses as more fully set forth in the Memorandum of Law of Motion to Dismiss Complaint Pursuant to Rule 12(b)(6) filed by the Represented Defendants (the "Motion to Dismiss") [Adversary Proceeding, ECF No. 8];

WHEREAS, the Committee filed an opposition to the Represented Defendants' Motion to Dismiss [Adversary Proceeding, ECF No. 13], and the Represented Defendants filed their reply to the Committee's opposition [Adversary Proceeding, ECF No. 17];

WHEREAS, on January 22, 2015, the Court heard oral argument on the Motion to Dismiss and issued its Memorandum Opinion and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss on February 3, 2015 (the "Decision") [Adversary Proceeding, ECF No. 20];

WHEREAS, the Committee is prepared to file an amended complaint;

WHEREAS, subsequent to the entry of the Decision, the Committee and the Represented Defendants engaged in settlement discussions in an attempt to resolve any and all disputes, claims, complaints, grievances, charges, actions, petitions, and demands between them, including, but not limited to all claims alleged in the Complaint and the Adversary Proceeding;

WHEREAS, on February 19, 2015, the Committee submitted a letter to Chambers requesting to hold all deadlines in abeyance and to extend all dates in the Adversary Proceeding;

NOW THEREFORE, without admission of fault or liability and for the sole purposes of ending the Adversary Proceeding and resolving the claims that have been, or could have been, asserted by each of the Parties and the Defendants, in consideration of the mutual releases and promises made herein, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Full Settlement. The Parties do hereby fully and finally settle any and all disputes, claims, demands, and causes of action brought, or which could have been brought, in law or in equity, relating to, or arising out of, or in any way connected with the Debtors, their creditors or their businesses, or related to the Adversary Proceeding, including but not limited to, any and all claims seeking avoidance of money transferred or obligations granted, claims for compensatory and statutory damages, damages in tort or contract, injunctive relief, declaratory relief, punitive damages, interest, costs, attorneys' fees, civil rights violations, federal claims, state statutory or common law claims, lost profits, lost income, loss of personal property, loss of personal, financial and/or business reputation, consequential and/or incidental damages, and any other claim of damages, whether known or unknown, whatsoever related to such claim or allegation, claimed, or which could have been claimed, in the Adversary Proceeding or any other action between the Parties. The Parties acknowledge and agree that this Agreement shall not be subject

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to any claim of mutual mistake or mistake of facts. For the avoidance of doubt, this Agreement is a settlement of claims and counterclaims that were or could have been asserted by the Committee or the Debtors against any of the Defendants, or by the Defendants against the Debtors, their assets, the Committee or its members, in the Adversary Proceeding.

2. Consideration. The Represented Defendants agree to remit the sum of EIGHT MILLION AND 00/100 DOLLARS (\$8,000,000.00) in presently available funds ("Settlement Funds"), pursuant to wire instructions to be provided by counsel for the Committee, by wire transfer within three (3) calendar days of the entry of an order approving this Agreement by the Bankruptcy Court ("Approval Order"), substantially in the form annexed hereto as Exhibit B.

3. Dismissal of Pending Lawsuit. Counsel for the Committee shall file a motion pursuant to Rule 9019 for approval of this Agreement in the Court. The Committee will submit a Final Order for Dismissal with Prejudice of the Lawsuit against the Defendants substantially in the form annexed hereto as Exhibit C within seven (7) calendar days of receiving the Settlement Funds.

4. Denial of Liability. It is understood by the Committee that the Represented Defendants have denied and still deny liability on the merits of such claims and that this Agreement is entered into purely as a compromise of disputed matters for the purpose of avoiding the uncertainty associated with the Adversary Proceeding and the further costs of defending such Adversary Proceeding. The settlement of claims asserted in the Adversary Proceeding and the obligations created by this Agreement are not, and shall not be, construed as an admission of liability of the Parties or any other person or entity on any claim whether or not asserted in the Adversary Proceeding. Nothing contained in this Agreement shall be construed at any time as an admission by any Party of any wrongdoing or liability to any of the Parties.

5. Release and Waiver of Plaintiff's Claims. Upon receipt of the Settlement Funds, and barring any breach of this Agreement by the Defendants, the Committee and the Debtors, including their subsidiaries, affiliates, owners, employees, attorneys, agents, officers, directors, shareholders, members, successors, and assigns, hereby unconditionally and irrevocably release, waive and forever discharge the Defendants, together with their current or former subsidiaries, affiliates, owners, employees, attorneys, agents, officers, directors, shareholders, members, successors, and assigns of the Defendants (the "Released Parties") from any and all debts, claims, obligations, suits, judgments, remedies, demands, damages, losses, liabilities, rights, actions, arbitrations, causes of action, expenses, contracts (with the exception of this Agreement), promises, awards, and suits of any kind whatsoever, whether liquidated or unliquidated, accrued or contingent, known or unknown, foreseen or unforeseen, and any and all further liability of whatever kind or nature that now exists, or existed from the beginning of time to the date of this Agreement, which the Committee and/or the Debtors have had at any time, may have now or may have in the future against Defendants relating to, or arising out of, or in any way connected with the Debtors, their estates, their creditors, or their businesses, or related to the Adversary Proceeding and the Bankruptcy Cases, including without limitation any loss, damage, or injury whatsoever resulting from any act or omission by or on the part of the Defendants or omitted prior to the date of execution of this Agreement. The Committee and the Debtors further agree not to initiate any complaint, investigation, or proceeding against any of the Defendants with any other federal, state or local law enforcement, regulatory or

administrative commission, group, board or person, whether public or private, regarding any fees, failure to act, omissions, facts, events, misrepresentations, transactions, occurrences or other matters which are the subject matter of the Adversary Proceeding or this Agreement. The Committee and the Debtors hereby agree, covenant and contract never to assert a claim against or sue any of the Defendants for any claim. The Committee and the Debtors represent and warrant that either the Committee or the Debtors are the owners of all claims released under this Section 5, that neither has transferred, assigned or otherwise conveyed any of their respective rights, title or interests in or to any claims, and that this Agreement has been duly executed and delivered by each of the Committee and the Debtors and is the valid and binding obligation of the Committee and the Debtors, enforceable against the Committee and the Debtors in accordance with its terms. Additionally, the Committee and the Debtors, including their subsidiaries, affiliates, owners, employees, attorneys, agents, officers, directors, shareholders, members, successors, and assigns, hereby unconditionally and irrevocably waive and forever discharge each of the Released Parties from any and all claims that were or could have been asserted in the Adversary Proceeding.

For the avoidance of doubt, the Released Parties and the released claims under this Agreement expressly exclude:

- (a) any preference action or other proceeding commenced by the Debtors in connection with these Bankruptcy Cases that are pending as of the date of this Agreement, except for this Adversary Proceeding;
- (b) any anticipated preference action or legal proceeding that may be asserted by the Committee against the Debtors' directors and officers, Gustavo M. de la Garca Ortega, Marcelino Com, S.A. de C.V., Progress International, LLC, Unifon Comunic Media S.A. de C.V., Organización Radio Hrep S.A. de C.V., or any of the Debtors' officers or insiders or related entities; or
- (c) any objection or defense to the allowance of a claim asserted against the Debtors or their estates in these Bankruptcy Cases by any of the Released Parties.

6. Release and Waiver of Represented Defendants' Claims. Upon receipt by the Committee of the Settlement Funds, and barring any breach of this Agreement by the Committee or the Debtors, the Represented Defendants, including their subsidiaries, affiliates, owners, employees, attorneys, agents, officers, directors, shareholders, members, successors, and assigns, hereby unconditionally and irrevocably release, waive and forever discharge the Debtors, their estates, the Committee and its members, together with their respective current or former subsidiaries, affiliates, owners, employees, attorneys, agents, officers, directors, shareholders, members, successors, and assigns of the Debtors, their estates, the Committee and its members, from any and all debts, claims, obligations, suits, judgments, remedies, damages, losses, liabilities, rights, actions, arbitrations, causes of action, expenses, contracts (with the exception of this Agreement), promises, awards, and suits of any kind whatsoever, including but not limited to a claim arising out of the Represented Defendants' payment of the Settlement Funds under section 302(b) of the Bankruptcy Code, whether liquidated or unliquidated, accrued or contingent, known or unknown, foreseen or unforeseen, and any and all further liability of whatever kind or nature that now exists, or existed from the beginning of time to the date of this

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EXHIBIT A TO THE SETTLEMENT AGREEMENT - OMITTED

COMPLAINT

(For a copy, please see Docket of Adversary Proceeding No. 14-02213, ECF No. 1)

THE REPRESENTED DEFENDANTS,
LEUCADIA NATIONAL CORPORATION,
BALDWIN ENTERPRISES, INC.,
BHI PREPAID, LLC, BHI
PREPAID HOLDINGS, LLC, PHILCORP,
INC., IAN CUMMING, JOSEPH STEINBERG,
DAVID LARSEN AND JIM CONTINENZA

OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF
VIVARO CORPORATION, ET AL.

Dated: _____

Dated: _____

By: 
Authorized Signatory

By: _____
Authorized Signatory

DEBTORS VIVARO CORPORATION
STI PREPAID, LLC; KARE DISTRIBUTION,
INC.; STI TELECOM, INC.;
TNW CORPORATION; STI CC 1, LLC;
AND STI CC 2, LLC

Dated: _____


By: _____
Authorized Signatory

DLA PIPER LLP (US)
Attorneys for Represented Defendants
Leucadia National Corporation, Baldwin
Enterprises, Inc., BHI Prepaid, LLC, BHI
Prepaid Holdings, LLC, Philcorp, Inc., Ian
Cumming, Joseph Steinberg, David Larsen
and Jim Continenza

ARENT FOX LLP
Attorneys for Plaintiff
Official Committee of Unsecured
Creditors of Vivaro Corporation, et al.

Dated: March 12, 2015

Dated: _____

By: 
Thomas Califano
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 335-4500
Facsimile: (212) 335-4501

By: _____
George P. Angelich
1675 Broadway
New York, NY 10019
Telephone: (212) 484-3900
Facsimile: (212) 484-3990

EXHIBIT B TO THE SETTLEMENT AGREEMENT - OMITTED

ORDER APPROVING SETTLEMENT

(For a copy, please see Exhibit A to the Committee's and Debtors' Joint Motion For An
Order Approving The Settlement Agreement With Represented Defendants Under Rule
9019)

EXHIBIT C TO THE SETTLEMENT AGREEMENT - OMITTED

FINAL ORDER FOR DISMISSAL WITH PREJUDICE

(For a copy, please see Exhibit C to the Committee's and Debtors' Joint Motion For An
Order Approving The Settlement Agreement With Represented Defendants Under Rule
9019)

EXHIBIT C
FINAL ORDER FOR DISMISSAL WITH PREJUDICE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

VIVARO CORPORATION, *et al.*,

Debtors.

THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS OF VIVARO
CORPORATION, *et al.*,

Plaintiff,

v.

LEUCADIA NATIONAL CORPORATION,
BALDWIN ENTERPRISES, INC., BEI
PREPAID, LLC, BEI PREPAID HOLDINGS,
LLC, PHLCORP, INC., IAN CUMMING,
JOSEPH STEINBERG, DAVID LARSEN, ST
FINANCE LLC, SAMER TAWFIK, AND
DOES 1 - 12,

Defendants.

Chapter 11

Case No. 12-13810 (MG)

(Jointly Administered)

Adversary Proceeding No. 14-02213 (MG)

FINAL ORDER FOR DISMISSAL WITH PREJUDICE

Based upon the Settlement Agreement and General Release (the "Agreement")¹ entered by and between (i) Plaintiff and Debtors; and (ii) Defendants Leucadia National Corporation, Baldwin Enterprises, Inc., BEI Prepaid, LLC, BEI Prepaid Holdings, LLC, Phlcorp, Inc., Ian Cumming, Joseph Steinberg, David Larsen, and Jim Continenza (collectively, the "Represented Defendants") and together with ST Finance, LLC and Samer Tawfik, the "Defendants"), which was approved by this Court's *Order Approving Settlement* [ECF No. ___], it is hereby

¹ To the extent not otherwise defined herein, all capitalized terms shall have the meanings ascribed to them in the Settlement Motion [ECF No. ___].

ORDERED that the Adversary Proceeding in its entirety and all claims against the Defendants in the Adversary Proceeding are hereby dismissed with prejudice; and it is further

ORDERED that the Parties will pay their own respective costs of court in the Adversary Proceeding and their own attorneys' fees incurred in connection with the Adversary Proceeding, except for any necessary payment to enforce the Settlement Agreement.

Dated: New York, New York
May __, 2015

UNITED STATES BANKRUPTCY JUDGE

Vivaro Corporation
c/o GCG
PO Box 9944
Dublin, OH 43017-5944

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