

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re Chapter 11
VIVARO CORPORATION, *et al.*, Case No. 12-13810 (MG)
Debtors. (Jointly Administered)
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SECOND INTERIM ORDER (I) AUTHORIZING DEBTORS IN POSSESSION TO OBTAIN POSTPETITION CREDIT PURSUANT TO 11 U.S.C. §§ 105, 362, AND 364; (II) GRANTING LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS; AND (III) SCHEDULING A FINAL HEARING

Upon the motion (the “Motion”) of Vivaro Corporation; STI Prepaid, LLC; Kare Distribution, Inc.; STi Telecom, Inc.; TNW Corporation; STi CC I, LLC; and STi CC II, LLC (collectively, the “Debtors”), debtors and debtors in possession, for entry of an interim order (the “Interim Order”), pursuant to sections 105, 362 and 364 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule 4001-2, (i) authorizing the Debtors to enter into an agreement to obtain carrier services on credit terms (the “Services”) with Next Communication, Inc. (“Next Comm”) and Angel Telecom (“Angel Telecom”) (each, a “Service Provider” and together, the “Service Providers”) pursuant to a certain binding term sheet among the Debtors and the Service Providers (the “Term Sheet,”)¹ annexed as Exhibit “B” to the Motion; (ii) granting liens and superpriority administrative expense status in connection with the Services pursuant to section 364 of the Bankruptcy Code; and (iii) scheduling a final hearing for entry of an order granting the relief requested in the Motion on a final basis (the “Final Order”) and approving the form of notice with respect to the final hearing pursuant to Bankruptcy Rules 2002, 4001 and 9014; and this Court having reviewed the Motion and all matters brought to the

¹ Capitalized terms not defined herein shall have the meanings ascribed to them in the Term Sheet.

Court's attention at the preliminary hearing, which was held on November 29, 2012 (the "Interim Hearing"); and the Court having scheduled a second interim hearing which was held on January 7, 2013 (the "Second Interim Hearing" and together with the Interim Hearing, the "Interim Hearings") to consider entry of this second interim order (the "Second Interim Order" and together with the Interim Order, the "Interim Orders"); and after due deliberation and consideration, the Court makes the following findings of fact and conclusions of law (to the extent any findings of fact constitute conclusions of law, they are adopted as such, and *vice versa*).

THE COURT HEREBY FINDS:

A. On September 5, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 the Bankruptcy Code in this Court, and orders for relief under section 301 of the Bankruptcy Code were entered in these cases (the "Chapter 11 Cases"). The Debtors are now operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. There is presently no pending request or motion for the appointment of a trustee or examiner. An official committee of unsecured creditors has been appointed in these Chapter 11 Cases and it has selected Arent Fox LLP as its counsel.

B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of these Chapter 11 Cases and the Motion in this district is proper pursuant to 28 U.S.C. § 1408.

C. An immediate and critical need exists for the Debtors to obtain carrier services on credit terms in order to continue the operations of their businesses. Without such credit, the Debtors are not likely to be able to continue to pay their payroll, pay other direct operating

expenses, or obtain goods and services needed to carry on their businesses during this sensitive period in a manner that will avoid irreparable harm to the Debtors' estates, creditors, customers, and employees. The Debtors are unable to obtain sufficient funds or credit terms in the form of unsecured credit or unsecured debt allowable under section 503(b)(1) of the Bankruptcy Code, as an administrative expense pursuant to section 364(a) or 364(b) of the Bankruptcy Code, unsecured debt having the priority afforded by section 364(c)(1) or secured debt as described in section 364(c)(2) or 364(c)(3) except as set forth herein.

D. Subject to the provisions of the Term Sheet, the Service Providers have agreed to provide post-petition carrier services on credit in accordance with the terms of the Term Sheet and the Interim Orders.

E. Due and appropriate notice of the Interim Hearings has been provided (by hand, fax, overnight mail or courier) to counsel to the Service Providers, counsel to the Official Committee of Unsecured Creditors (the "Committee"), the United States Trustee and all entities that have filed and served upon the Debtors a notice of appearance and request for service of documents. In view of the urgency of the relief requested, such notice constitutes sufficient notice under Bankruptcy Rule 4001 and no other notice need be given.

F. Good cause has been shown for the entry of this Second Interim Order. Among other things, entry of this Second Interim Order will minimize disruption of the Debtors' businesses and operations and permit them to continue to meet payroll for their employees and other operating expenses, obtain needed supplies and retain customer and supplier confidence by demonstrating an ability to maintain normal operations. The credit arrangements authorized hereunder are vital to avoid immediate and irreparable harm to the Debtors' estates. Consummation of such financing therefore is in the best interests of the Debtors' estates.

G. The credit terms authorized hereunder have been negotiated in good faith and at arm's length among the Debtors and the Service Providers. The credit terms are fair and reasonable under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration. Any credit extended to the Debtors pursuant to this Second Interim Order shall be deemed to have been extended in good faith as required by, and within the meaning of, section 364(e) of the Bankruptcy Code, and the Service Providers shall have all of the protections thereunder.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Motion is granted on an interim basis and on the terms set forth herein. Any objections to the Motion with respect to the entry of this Second Interim Order that have not previously been withdrawn or resolved are hereby denied and overruled.

2. The Debtors are hereby authorized to obtain the Services. The Debtors are authorized to enter into such non-material modifications and amendments to the Term Sheet without further Court order as may be agreed upon in writing by the Debtors and the Service Providers.

3. The Debtors are hereby authorized obtain carrier services on credit from the Service Providers pursuant to the terms of the Term Sheet on a rolling basis, with invoicing for such services to occur no earlier than fifteen (15) days following the commencement of the provision of those Services for which payment is sought, and payment due no later than fifteen (15) days following the invoice date. Notwithstanding anything to the contrary above, the total amount of new credit to be provided hereunder by Next Communication, Inc., at any one time during the term of this agreement shall not exceed \$2.3 million (the "Next Comm Credit Cap")

and the total amount of credit to be provided by Angel Telecom at any one time during the term of this agreement shall not exceed \$1.7 million (the "Angel Telecom Credit Cap"). The Next Comm Credit Cap and the Angel Telecom Credit Cap are hereafter collectively referred to as the "Credit Cap" which shall not exceed the sum of \$4 million at any one time during the term of this agreement. If either the Next Comm Credit Cap or the Angel Telecom Credit Cap is exceeded, neither of the Service Providers shall terminate Services on credit provided that, prior to 2:00 p.m. on the next business day after such excess is incurred, the Debtors pay to the Service Providers an amount sufficient to reduce the total indebtedness under the Cap by \$500,000 (\$285,000 for Next Comm and \$215,000 for Angel Telecom). If the Debtors fail to make such payment by 2:00 p.m. on the next business day following the date on which the Next Comm Credit Cap or the Angel Telecom Cap is exceeded, then that Service Provider whose Cap has been exceeded may terminate Services without further order of the Court (the "Cap Termination Date").

4. Subject to the Credit Cap, the Service Providers shall provide all Services required by the Debtors on the terms and conditions set forth herein and in the Term Sheet. The obligation of the Service Providers to provide Services on credit as contemplated hereunder shall terminate on the earliest to occur of the following (the "Termination Date"): (i) February 15, 2013; (ii) the Services Termination Date (defined below); (iii) the date on which the Debtors close on the sale of all, or substantially all, of their assets pursuant to a transaction authorized by the Bankruptcy Court (the "Sale Date"); (iv) the effective date of a plan, the terms of which are acceptable to the Service Provider, confirmed by the Court (the "Plan Date"); and (v) the Cap Termination Date.

5. Prior to entry of the Final Order, the Term Sheet and the Interim Orders shall govern the financial and credit accommodations to be provided to the Debtors by the Service Providers.

6. As security for the Services, the Service Providers are each hereby granted, pursuant to sections 364(c)(2) and 364(d)(1) of the Bankruptcy Code, on a *pari passu* priority basis with each other, a first priority perfected priming lien on, and security interest in (the "Priming Liens"), all cash, cash equivalents, bank accounts, accounts receivable, other receivables, chattel paper, contract rights, inventory, instruments, documents, license agreements, securities (whether or not marketable), equipment, fixtures, software, leasehold interests and real property interests, franchise rights, patents, trademarks, tradenames, service marks, copyrights, intellectual property, general intangibles, phone numbers, customer relationships, customer lists, investment property, commercial tort claims, and all substitutions, accessions and proceeds of the foregoing, wherever located, including insurance or other proceeds, but specifically excluding any Avoidance Actions (the "Services Collateral"). "Avoidance Action(s)" means any and all causes of action and rights to recover or avoid transfers or to avoid any lien under chapter 5 of the Bankruptcy Code, including, but not limited to, sections 544, 545, 547, 548, 549, 550, 551 and 553 of the Bankruptcy Code, or any applicable state law, and the proceeds thereof, or otherwise to exercise the avoidance powers provided under the Bankruptcy Code. The Priming Liens shall be subject only to (i) the security interests in certificates of deposit securing letters of credit, (ii) the Carve-Out (as hereinafter defined), (iii) Avoidance Actions and the proceeds thereof, and (iv) the alleged security interests of Diga Entertainment up to \$190,000.

7. For the avoidance of doubt, any Universal Service Fund contribution obligations (the “USF Obligations”) that the Debtors recover from their end users through a federal universal service line item charge under 47 C.F.R. § 54.712 are not property of the Debtors’ estates under section 541 of the Bankruptcy Code and thus shall not be encumbered by any liens or security interests granted herein or otherwise consistent with 47 U.S.C. 254(d) and 47 C.F.R. §§ 54.706 and 54.712.

8. Except as expressly set forth in the Interim Orders: (a) the liens and security interests granted in the Interim Orders to secure the Services shall not be subject to any lien which is avoided and preserved for the benefit of the Debtors’ estates under section 551 of the Bankruptcy Code; and (b) the liens and security interests granted in the Interim Orders shall not be subordinated to or made *pari passu* with any other lien under section 364(d) of the Bankruptcy Code or otherwise. As used in the Interim Orders, “Carve-Out” means: (i) unpaid fees of the Clerk of the Court and the U.S. Trustee pursuant to 28 U.S.C. § 1930 and interest on such fees pursuant to 31 U.S.C. § 3717; (ii) allowed, accrued, but unpaid professional fees and expenses of the Debtors and of the Committee up to \$1.4 million.

9. In addition to the Priming Liens, all obligations of the Debtors under the credit transaction contemplated hereby and all amounts owing by the Debtors in respect thereof at all times shall have superpriority in accordance with the provisions of section 364(c)(1) of the Bankruptcy Code having priority over all administrative expenses of the kind specified in sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 546(c), 726, and 1114 or any other provision of the Bankruptcy Code, subject only to (a) the Carve-Out and (b) unpaid federal USF Obligations arising post-Petition Date up to an aggregate amount of \$50,000 for the post-petition period through the Termination Date. Notwithstanding the foregoing, nothing herein

shall limit or otherwise impair the pre-petition or post-petition claims that may be asserted by the Universal Service Administrative Company in respect of the Debtors' USF Obligations. The Service Providers' superpriority claim shall at all times be senior to the claims of any successor trustee or estate representative in the Chapter 11 Cases or any subsequent proceeding or case under the Bankruptcy Code.

10. Each of the following shall constitute an Event of Default: (i) failure to make payments when due of any amount owing to either Service Provider, including any fees owed hereunder, when due; (ii) dismissal of the Bankruptcy Cases or conversion of any of the Bankruptcy Cases to a chapter 7 case; (iii) appointment of an interim or permanent chapter 11 trustee, or examiner with expanded powers or any similar person relating to the operation of the business of any Debtor; (iv) the filing of a motion by the Debtors, the Committee or an estate representative seeking, or entry of an order granting, financing from any person other than a Service Provider under section 364(c) or 364(d) of the Bankruptcy Code (other than with respect to a financing used to pay in full the Service Providers); (v) the filing of a motion by the Debtors, the Committee or an estate representative to grant any liens on any of the Services Collateral; (vi) the filing of a motion by the Debtors, the Committee or an estate representative, or the allowance of any claim to recover from any portion of the Services Collateral any costs or expenses of preserving or disposing of the Services Collateral under section 506(c) of the Bankruptcy Code; (vii) the entry of an order confirming a plan or approving the sale of substantially all of the Debtors' assets that does not contain a provision for the termination of the Service Providers' commitment to extend credit to the Debtors and for the repayment in full of all sums owed by the Debtors to the Service Providers; (viii) the entry of an order granting any other superpriority administrative claim or superpriority lien equal to or superior to that granted

to the Service Providers, unless consented to by the Service Providers; and (ix) the Interim Orders are stayed, amended, modified, reversed or revoked in any respect without the Service Providers' prior written consent. If an Event of Default occurs, the Service Providers shall be entitled to all reasonable attorney's fees, costs and expenses (with the reasonableness of such fees, costs and expenses subject to Court approval) incurred from the date of any such Event of Default until payment in full of all sums owing the Service Providers.

11. Upon the occurrence of an Event of Default, either Service Provider may (i) declare the Debtors to be in default; and (ii) provide written notice to the Debtors and counsel to the Committee of such default. With respect to an Event of Default caused by the Debtors' failure to make payments when due (a "Payment Default"), the Service Providers may terminate services, except that the Debtors shall have a period of three (3) business days from the date of the Payment Default (the "Payment Default Cure Period") to cure such default in the event the Debtors timely pay at least 75% of the amount due and owing under the subject invoice(s) on the date due. If the Debtors make such payment of 75%, the Debtors shall also have the right to seek an expedited hearing within the Payment Default Cure Period for a determination that no Payment Default has occurred and enjoining the Service Providers from exercising any remedy with respect to such Event of Default. If the Bankruptcy Court does not enter such a declaration during the Payment Default Cure Period, and if the Debtors have not cured any Payment Default within the Payment Default Cure Period, the Service Providers may terminate their obligation to provide Services to the Debtors (the "Services Termination Date").

12. With respect to any non-monetary of Event of Default, the Debtors shall have five (5) business days from the giving of notice to either cure such Event of Default or to seek an expedited hearing with the Bankruptcy Court for a declaration that no Event of Default has

occurred and enjoining the Service Providers from exercising any remedy with respect to such Event of Default. If the Bankruptcy Court does not enter such a declaration within three (3) business days of the filing of the Debtors' motion, then the Service Provider may exercise any and all remedies available at law or equity, without necessity for seeking relief from the automatic stay.

13. The Service Providers shall be entitled to a fee of ten (10%) of their respective portion of the Credit Cap (the "Fee"), payable as follows: (i) Five (5%) percent to be paid over five weeks following entry of the Interim Order in equal weekly installments to each Service Provider; (ii) Five (5%) percent to be paid to each Service Provider within three (3) business days of the Termination Date. In addition to the Fee, the Debtors shall pay to the Service Providers interest, at the rate of five (5%) percent, on an annualized basis, on all outstanding amounts due on the earlier to occur of: (i) the Sale Date; (ii) the Plan Date; or (iii) an uncured Event of Default. Additionally, to reimburse the Service Providers for their legal fees and costs incurred in connection with the extension of credit hereunder, the Debtors shall reimburse each Service Provider \$25,000 for their reasonable attorneys' fees, to be paid at the earlier to occur of: (i) the Sale Date; (ii) the Plan Date; or (iii) an uncured Event of Default.

14. The Priming Liens and all other liens and security interests granted in the Interim Orders shall be, and they hereby are, deemed perfected, and no further notice, filing or other act shall be required to effect such perfection.

15. The provisions of this Second Interim Order shall be binding upon and inure to the benefit of the Service Providers, the Debtors and their respective successors and assigns (including any trustee or other fiduciary hereafter appointed as a legal representative of the Debtors or with respect to the property of the estates of the Debtors).

16. Based on the findings set forth in this Second Interim Order and in accordance with section 364(e) of the Bankruptcy Code, which is applicable to the postpetition credit arrangement contemplated by this Second Interim Order, in the event any or all of the provisions of this Second Interim Order are hereafter modified, amended, or vacated by a subsequent order of this or any other court, no such modification, amendment, or vacation shall affect the validity and enforceability of any lien, security interest or priority authorized or created hereby. Notwithstanding any such modification, amendment, or vacation, any claim granted hereunder arising prior to the effective date of such modification, amendment, or vacation shall be governed in all respects by the original provisions of this Second Interim Order, and the Service Providers shall be entitled to all of the rights, remedies, privileges, and benefits, including the liens and priorities granted herein, with respect to any such claim.

17. The Court has considered and determined the matters addressed herein pursuant to its powers under the Bankruptcy Code, including the power to authorize the Debtors to obtain credit on the terms and conditions upon which the Debtors and the Service Providers have agreed. Thus, each of such terms and conditions constitutes a part of the authorization under section 364 of the Bankruptcy Code, and is, therefore, subject to the protections contained in section 364(e) of the Bankruptcy Code.

18. A hearing (the “Final Hearing”) shall be held on February 7, 2013 at 5:00 p.m.

19. The Debtors shall serve by United States mail, first class postage prepaid, copies of this Second Interim Order and the proposed Final Order. (a) counsel to the Committee; (b) the Office of the United States Trustee; (c) counsel to Next Comm; (d) counsel to Angel Telecom; (e) all parties known to the Debtors to have liens on or security interests in any of the Debtors’ assets; (f) the Internal Revenue Service; and (g) all parties who have timely filed requests for

notice under Rule 2002 of the Bankruptcy Rules. The Final Hearing notice shall state that any party in interest objecting to the relief requested herein shall file written objections with the United States Bankruptcy Court Clerk for the Southern District of New York no later than 4 p.m. on February 1, 2013, which objections shall be served so that the same are received on or before such date by:

- (a) Frederick E. Schmidt, Jr., Herrick, Feinstein LLP, 2 Park Avenue, New York, NY 10016, Counsel to the Debtors;
- (b) George P. Angelich, Arent Fox LLP, 1675 Broadway, New York, New York 10019, Counsel for the Committee;
- (c) Andy Velez-Rivera, the Office of the United States Trustee, Southern District of New York, 33 Whitehall Street, 21st Floor, New York, NY 10004;
- (d) Michael I. Goldberg, Akerman Senterfitt LLP, 350 East Las Olas Boulevard, Suite 1600, Fort Lauderdale, FL 33301, Counsel to Next Communications, Inc.;
- (e) Stephen B. McNally, Wuersch & Gering LLP, 100 Wall Street, 10th Floor, New York, New York 10005, Counsel to Angel Telecom

20. To the extent any provisions in this Second Interim Order conflict with any provisions of the Motion, the Term Sheet, or the Interim Order, the provisions of this Second Interim Order shall control.

21. This Second Interim Order shall constitute findings of fact and conclusions of law and shall take effect immediately upon execution hereof. There is no just reason to delay enforcement or appeal of this Second Interim Order.

Dated: January 7, 2013
New York, New York

/s/Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge