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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE:	§	
	§	
VARTEC TELECOM, et al	§	CASE NO. 04-81694
	§	(Chapter 11)
	§	Jointly Administered
DEBTORS	§	

**MOTION TO COMPEL DEBTOR TO  
ASSUME OR REJECT EXECUTORY CONTRACT**

Brightpoint North America L.P. (Brightpoint”) files its Motion to Compel Debtor to Assume or Reject Executory Contract (the “Motion”) as follows:

1. On November 1, 2004, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Since the filing of this case, the Debtor has remained in possession of its assets and has conducted its affairs pursuant to the provisions of 11 U.S.C. §§1107 and 1108.

2. The Court has jurisdiction over this matter pursuant to the provisions of 28 U.S.C. §§ 1334 and 157 and 11 U.S.C. §546. This matter constitutes a “core” proceeding within the meaning of 28 U.S.C. § 157(b)(2).

3. The Debtor is in the business of selling wireless communications devices and related accessories directly to end-users and companies. Brightpoint is in the business of selling wireless

communication devices and related accessories and providing a variety of services with respect thereto, including receiving, warehousing, fulfillment, programing, distribution and service.

#### Background Facts

4. Brightpoint and the Debtor executed a Service Agreement on March 10, 2004 (the “Service Agreement”) which provides that the Debtor deliver, or cause to be delivered, to Brightpoint certain Bailed Products and also to have Brightpoint procure certain Procured Products (as defined in the Agreement) from third parties to be delivered to customers of the Debtor at the Debtor’s direction. A true and correct copy of the Service Agreement and Attachments are attached hereto as Exhibit 1 and are incorporated herein by reference.

5. Pursuant to the terms of the Service Agreement, the Agreement shall remain in full force and effect until the second (2<sup>nd</sup>) anniversary of its execution. Either party may terminate the Agreement with, or without reason upon delivering sixty (60) days prior written notice to the other party.

6. Payment under the Service Agreement requires all invoices for Services to be paid within 30 days of receipt and all invoices for purchases of the Procured Products to be paid within one (1) day of the date of the invoice.

7. The Debtor is in pre-petition default of the Service Agreement in the amount of \$372,657.16.

8. The Debtor currently has a cash deposit with Brightpoint in the amount of \$102,114.75 that was delivered post-petition and has been replenished from time to time.

9. The Debtor continues to receive the benefits under the Service Agreement with Brightpoint.

### Basis to Compel Assumption or Rejection

10. Section 365(d)(2) provides that a chapter 11 debtor shall have until the time of confirmation to assume or reject executory contracts and unexpired leases of personal property.

11. Upon request however, the court may fix a deadline by which the debtor must assume or reject an executory contract or unexpired lease. *In re Heward Bros.*, 210 B.R. 475, 476 (Bankr. D. Idaho 1997). *In re Public Service Co. of New Hampshire*, 884 F.2d 11, 15-16 (1<sup>st</sup> Cir. 1989); *Matter of Braniff Airways, Inc.*, 783 F.2d 1283, 1285 (5<sup>th</sup> Cir. 1986) (“Typical remedy for a party to an unexpired lease who is suffering economic losses as a result of bankruptcy is to move for an order compelling the bankruptcy trustee to assume or reject.”) *Colorado Natl. Leasing, Inc. v. Gary Refining Co. (In re Mesa Refining, Inc.)*, 65 B.R. 724 (D. Colo. 1986) (granting motion to compel assumption or rejection of equipment lease protected lessor’s interest in equipment); *In re Taber Farm Assoc.*, 115 B.R. 455 (Bankr. S.D. N.Y. 1990) (ordering debtor to reject or assume where lessor could not be expected to continue to shoulder financial expenses or property without opportunity to sell it).

12. The reasoning behind such relief is that Section 362(d)(2) was intended to “... prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate.” *Cohen v. The Drexel Burnham Lambert Group, Inc. (In re The Drexel Burnham Lambert Group, Inc.)*, 138 B.R. 687, 698 n 16 (citing H.R. Rep. No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 348 (1977)); *see also In re Service Merchandise Company, Inc.*, 256 B.R. 744, 749 (Bankr. M.D. Tenn. 2000) (upon a motion to compel assumption or rejection, writing that “an open-ended extension is inconsistent with the spirit and intent of the Code”).

13. The Debtor continues to benefit from the services provided by Brightpoint despite being in default on its financial obligation under the Service Agreement. Brightpoint, however,

continues to honor its commitment under the Service Agreement without the ability to establish its own long-term business plan for its operations. Brightpoint continues to store the Bailed and Procured Products in its warehouses and dedicate its resources to performing under the Agreement. But for the Debtor's Products, the warehouse space could be dedicated to other profitable opportunities for Brightpoint. Moreover, Brightpoint necessarily is forced to forego other business opportunities that it might otherwise pursue but for its commitment to the Debtor under the Service Agreement.

14. If the Service Agreement is valuable to the Debtor's business, then the Debtor should assume the Agreement immediately and pay the cure amount of \$372,657.16. If the Agreement is of little or no value to the Debtor and the bankruptcy estate, then the Debtor should promptly reject the Agreement so that Brightpoint will have fair notice not to commit future business resources to additional performance under the Agreement.

WHEREFORE, PREMISES CONSIDERED Brightpoint North America, LP prays that this Court enter its order directing the Debtor to assume or reject the above referenced Service Agreement within 11 days of entry of an order granting this motion and for such other relief to which it may be entitled.

Respectfully submitted,

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By:           /s/ John Paul Stanford            
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ATTORNEY FOR BRIGHTPOINT NORTH  
AMERICA, L.P.

**NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, ROOM 12A24, DALLAS, TEXAS 75242-1496 BEFORE CLOSE OF BUSINESS ON APRIL 7, 2005, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.**

**ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.**

**IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.**

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2005 a true and correct copy of the foregoing Motion was served on those parties listed on the attached service list via regular U.S. mail, postage prepaid except for those parties served via ECF as indicated therein.

          /s/ John Paul Stanford            
John Paul Stanford