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SPECIAL COUNSEL FOR THE DEBTORS

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: § Case No. 04-81694-SAF-11
§
VARTEC TELECOM, INC., et al., §
§ Hearing: Fee Applications
Debtors. § April 13, 2005 at 1:30 p.m.

FEE APPLICATION COVER SHEET

First Interim Fee Application of Lynn Tilloston & Pinker, L.L.P.

Time Period: November 1, 2004 through February 28, 2005

Capacity: Special Counsel for the Debtors

Chapter: 11

Amount Requested:

Reductions:

Fees: \$30,513.00

Voluntary Reduction: \$ _____

Expenses: \$2,791.62

Voluntary Expense Reduction: \$ -0-

Total: \$33,304.62

Expenses:

WestLaw/Lexis/Online Research: \$222.36

Copies per page:

(a) Internal: 0.15 ¢

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Faxing Per page:

(a) Local: 0.50¢

(b) Long Distance: 0.75¢

(c) Receipt of faxes: No charge

Hourly Rates: Attorney

Paralegal:

Highest Rate: \$365.00 per hour

\$120.00 per hour

Hours Billed: 100.4

5.0

Average: \$297.94 per hour

\$120.00 per hour

/s/ Eric W. Pinker
Signature:

March 18, 2005
Date:

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In re: § Case No. 04-81694-SAF-11
§ (Jointly Administered)
VARTEC TELECOM, INC., et al., §
§ Hearing: Fee Applications
Debtors. § April 13, 2005 at 1:30 p.m.

**FIRST INTERIM APPLICATION OF LYNN TILLOSTON & PINKER, L.L.P.,
SPECIAL COUNSEL FOR THE DEBTORS FOR ALLOWANCE OF COMPENSATION
AND REIMBURSEMENT OF EXPENSES**

Notice Pursuant to L.B.R. 9007.1(b) and Notice of Hearing

A HEARING ON THIS MOTION IS SET FOR APRIL 13, 2005 AT 1:30 P.M. BEFORE JUDGE STEVEN A. FELSENTHAL AT THE UNITED STATES BANKRUPTCY COURT, 1100 COMMERCE STREET, DALLAS, TEXAS 75242.

ANY RESPONSE TO THIS MOTION MUST BE IN WRITING AND FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, DALLAS, TEXAS 75242, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY BEFORE THE CLOSE OF BUSINESS ON APRIL 11, 2005, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.

Lynn Tillotson & Pinker, L.L.P. ("LTP" or "Applicant"), Special Counsel to Vartec Telecom, Inc., and its affiliated entities (collectively, the "Debtors") in the above numbered and styled jointly administered bankruptcy proceeding, files this *First Interim Application for Allowance Of Compensation And Reimbursement Of Expenses* (the "Application"). In support of the Application, the Applicant would respectfully show the Court as follows:

CASE BACKGROUND

1. This Court has jurisdiction over the subject matter of this Application pursuant to the provisions of 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A)(B) and (O). This Application is filed pursuant to 11 U.S.C. §§ 331 and 503(b)(2) and Rule 2016 of the Federal Rules of Bankruptcy Procedure.

2. The Chapter 11 cases of the Debtors were commenced by the filing of each Debtor's respective voluntary petition under Chapter 11 of Title 11 of the United States Code (hereinafter the "Bankruptcy Code") on or about November 1, 2004 (the "Petition Date"). Since the Petition Date, the Debtors have managed their property and operated their businesses as debtors-in-possession pursuant to the provisions of Sections 1107 and 1108 of the Bankruptcy Code.

EMPLOYMENT/RETAINER INFORMATION

3. On or about November 4, 2004, the Debtors filed the *Application to Employ Lynn Tillotson & Pinker L.L.P. as Special Counsel* (the "Employment Application") [Docket No. 92].

4. On November 22, 2004, this Court entered its *Final Order Approving Application to Employ Lynn Tillotson & Pinker, L.L.P. As Special Counsel* (the "Employment Order") [Docket No. 267].

5. The terms of LTP's employment as special counsel to the Debtors are outlined in the Employment Application.

6. By further order of this Court, all professionals employed by the Debtors herein were to have provided monthly fee statements to other professionals on a monthly basis for review (the "Monthly Fee Statement"). After review of the Monthly Fee Statement, if no professional raised any objection to the Monthly Fee Statement as requested, the professional

was entitled to receive payment of eighty percent (80%) of the fees requested and one hundred percent (100%) of the expenses incurred on said Monthly Fee Statement.

CURRENT FEE APPLICATION PERIOD

7. From November 1, 2004 through February 28, 2005 (the "First Interim Application Period") the Applicant has expended a total of 105.4 hours of attorney and paralegal time in conjunction with service as special counsel to the Debtors. Total fees for the First Interim Application Period are \$30,513.00. Costs and expenses advanced by Applicant on behalf of the Debtors during the First Interim Application Period total \$2,791.62.

8. Applicant has requested a total of \$30,513.00 in fees and \$2,791.62 in expenses on account of its Monthly Fee Statements as previously presented to the other professionals employed by the Debtors' estate for their review and objection, if any. To date, Applicant has received \$20,808.77, which represents 80% of fees and 100% of expenses for the months of November and December 2004.¹ By this Interim Fee Application, Applicant seeks compensation for and reimbursement of the twenty percent (20%) "hold-back" of fees for November and December 2004, as well as full interim payment for the invoices for January 2005 and February 2005.

9. Applicant now seeks interim allowance of compensation for services performed and reimbursement of expenses incurred in connection with service as special counsel to the Debtors in this proceeding during the First Interim Application Period. A summary setting forth the monthly total of hours worked by attorneys and paralegals for whom compensation is sought and the standard hourly rates charged for their services during the First Interim Application Period is attached Exhibit "B."

¹ Applicant has not previously submitted its Monthly Fee Statements for January 2005 and February 2005. By this Application, Applicant seeks full interim reimbursement on account of these invoices.

10. A monthly invoice for the First Interim Application Period, showing time and expenses incurred for which compensation has not been received is attached hereto as Exhibit "C." Exhibit "C" is generated by Applicant in the ordinary course of its business and is compiled from manually prepared daily time sheets submitted generally on a contemporaneous basis by the attorneys and paralegals employed by LTP. Exhibit "C" contains a detailed listing of all services performed as special counsel to the Debtors by LTP the time spent and dates on which those services were performed, the attorneys and paralegals who performed the services and rates charged during the First Interim Application Period. LTP seeks allowance of all fees and expenses incurred on behalf of the Debtors during the First Interim Application Period.

11. Due to the limited scope of the Applicant's employment in this case, Applicant has not prepared a Project Summary, pursuant to the guidelines promulgated by the United States Trustee Office.

12. Applicant requests the Court award as interim compensation the total sum of \$33,304.62 for services rendered and expenses incurred from November 1, 2004 through February 28, 2005, and requests the Court order the Debtors to pay all amounts not previously paid in accordance with the previously submitted Monthly Fee Statements.

EVALUATION STANDARDS

13. The fees and expenses requested by this Application are an appropriate award for LTP's services in acting as Special Counsel for the Debtors in connection with this jointly administered bankruptcy case. Accordingly, they should be granted in the amounts requested herein.

A. LODESTAR RULE

14. The United States Supreme Court has stated its preference for the "lodestar" approach in determining allowable attorney fees. *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 106 S.Ct. 3088 (1986). The *Delaware Valley* case approved a two-step method of computing legal fees, which has come to be known as the "lodestar" method. The "lodestar" is determined by multiplying the number of attorney hours reasonably expended by a reasonable hourly fee rate. The "lodestar" derived through this calculation is presumed to be the reasonable fee to which counsel is entitled. *Blum v. Stenson*, 465 U.S. 886 (1984).

15. In adopting Bankruptcy Code section 330, Congress intended a retreat from doctrines that strictly limited fee awards to bankruptcy counsel less than what attorneys might have received for services of the same professional quality in non-bankruptcy cases. *In re Manoa Finance Co., Inc.*, 853 F.2d 687, 690 (9th Cir. 1988). In so holding, the *Manoa* Court relied on the legislative history of section 330 and the express policy of that section:

To compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11.

Id. at 690 (quoting 124 Cong.Rec 33, 994 (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 6505, 6511 (remarks of Sen. DeConcini in introducing an amendment to section 330)).

16. Congress intended courts to rely on the prevailing market as the ultimate arbiter of appropriate fees. *See In re Busy Beaver Building Centers, Inc.*, 19 F.3d 833 (3rd Cir. 1994) (noting that, under section 330(a), "the court should carefully consider relevant, competent evidence submitted with the fee application, provided as a supplement to the fee application, or presented at the hearing, . . . even if the evidence directly contradicts the court's own judgment").

See also *In re Continental Illinois Securities Litigation*, 962 F.2d 566, 568 (7th Cir. 1992), in which Judge Posner overruled the District Court's refusal to allow fees at the market rate on the grounds that:

[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.

962 F.2d at 568 (emphasis added). See also *In re JEF SABA, Inc.*, 172 B.R. 786 (Bankr. E.D.Pa. 1994) and *In re Rothman*, 206 B.R. 99 (Bankr. E.D.Pa. 1997).

17. As these courts have recognized, the Congressional mandate is clear. Under section 330(a), bankruptcy professionals must be compensated at rates commensurate with non-bankruptcy professionals. As the *Busy Beaver* court noted in allowing paralegal fees under section 330(a) that would be otherwise payable in the non-bankruptcy market:

Congress has unmistakably and expressly made a policy choice favoring full compensation for [professionals] over greater proportionate compensation to the debtors, creditors, and when in our constitutional republic a statute is constitutional, courts are not at liberty to substitute their favored policies for those Congress enacts, no matter how unwise the court finds them to be.

Busy Beaver, 19 F.3d at 851 (emphasis added). Consequently the fees requested in this case by LTP should be allowed at those rates ordinarily billed by its professionals.

18. After the determination of the "lodestar," the Court may make adjustments to the "lodestar," but adjustments are proper in "rare" and "exceptional" cases. *Id.*, at 898-901. Because of the emphasis on the amount of attorney time expended, the "lodestar" approach provides a more analytical framework than the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In fact, many of the *Johnson* factors, including the "novelty and complexity of the issues," "the special skill and experience of counsel," the "quality of representation" and the "results obtained" are normally reflected in the "lodestar" approach.

19. *In Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court set forth the following guidelines for the determination of a reasonable fee:

Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are more excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority." *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis omitted).

103 S. Ct. at 1933, 76 L. Ed.2d 40. The *Hensley* Court indicated that the Court may also evaluate each case's facts in relation to the *Johnson* factors, although many of these factors are subsumed in the "lodestar" calculation.

20. This case presents numerous novel and complex issues which require the special skills and experience of Applicant's members. Because of its members' skills and experience, Applicant believes it has minimized fees and other expenses incurred while serving as special counsel to the Debtors. Applicant has expended a total of 105.4 hours in time and labor serving as special counsel to the Debtors in this case. Applicant maintains the "lodestar" value for the First Interim Application Period is \$30,513.00.

B. FIRST COLONIAL FACTORS

21. Applicant's fees and expenses are also justified under the criteria set forth in *Johnson* and in *In re First Colonial Corp.*, 544 F.2d 1291 (5th Cir. 1977). A brief statement with regard to each of the 12 elements set out in the *Johnson* case is as follows:

a. **The time and labor required:** Applicant has expended a total of 105.4 hours in serving as special counsel to the Debtors during the First Interim Application Period. Applicant has incurred \$30,513.00 in legal fees in the representation of the Debtors during the First Interim Application Period. The time and hourly billing rate of

each attorney performing legal services on behalf of the Debtors are reflected in the summary attached hereto as Exhibit "B." A detailed description of the services rendered is provided in invoices attached as Exhibit "C."

b. **The novelty and difficulty of questions:** Applicant represents to the Court that the legal questions encountered in representing the Debtors were of a specific, complex and specialized nature, requiring a high degree of analytical skill and understanding in obtaining the results that have been obtained to date. Specifically, matters addressed by the Applicant during the First Interim Application Period include: (1) preparation of temporary restraining order and supporting brief; (2) advising the members of Debtors' management team regarding the bankruptcy issues associated with litigation matters being handled by the Applicant; (3) research and analysis of set off issues effecting the Debtors; and (4) preparation for and attendance at meetings with the Debtors' management team regarding pending issues in order to protect the interests of the Debtors' estate.

c. **Skill requisite to perform services properly:** Applicant's law firm has members who have performed services on behalf of the Debtors who specialize in the practice of bankruptcy law. Due to their expertise and skill in this specialized area of law, Applicant believes more time could easily have been employed by less experienced counsel. The array of legal considerations presented in this proceeding and the prompt and skillful action taken to resolve those problems by Applicant required a meaningful degree of expertise and experience. Applicant's personnel were accordingly utilized as evidenced by Exhibit "C."

d. **Exclusion of other employment:** Applicant has not declined other employment, but has insured it has sufficient personnel to serve as special counsel to the Debtors in this case. Applicant does not believe this factor, the exclusion of other employment, by itself is meaningful to this Court's review of the Applicant's requested fees and expenses.

e. **Customary fees:** The fees applied for herein are equivalent to customary fees in other proceedings for similar services rendered and results to date. Applicant's cost structure minimizes expenses for two reasons:

- i) costs charged are well below market; and
- ii) favorable rates from firm vendors further reduce costs.

These reasons are discussed in more detail below.

First, Applicant's internal cost structure is substantially below market. Applicant's firm charges twenty-five cents per in-house copy, which is approximately ten cents below the normal market rate. This has resulted in a savings to the Debtors' estate. As a result of Applicant's costs structure being significantly below market, these savings have been passed on to the Estate.

Finally, Applicant has not charged any mileage for driving to meetings, hearings and related travel.

f. **Time limitations:** A summary of hours expended and the detailed description of the work performed during each of those hours as described in Exhibit "C" attached hereto, acting as special counsel to the Debtors often required prompt and intensive action in many of the activities of the case.

g. **Amount involved and results obtained:** Applicant has been an active participant on behalf of the Debtors in these proceedings. Applicant has actively participated in the matters for which it was retained as special counsel, and continues the process of identifying issues relevant to this case.

h. **The experience, reputation and abilities of the attorneys:** Applicant would show that Eric W. Pinker earned his law degree from the University of Texas in 199 and has been practicing in the area of complex commercial litigation since that time. Mr. Pinker practices in the area of complex commercial litigation throughout the country. Mr. Pinker has charged an hourly rate of \$365.00 for time billed during the First Interim Application Period. Applicant believes Mr. Pinker's rate is reasonable and is justified in light of his experience and is well within local market rates. Similarly, other professionals of Applicant who rendered services to the Debtors during the First Interim Application Period are well-qualified and skilled to perform the services required.

i. **Undesirability of the case:** Applicant does not feel the subject case or the representation of the Debtors as special counsel in this proceeding was "undesirable."

j. **The nature and length of the professional relationship with the client:** Applicant's relationship with the Debtors is a single event.

k. **Awards in similar cases:** Applicant believes that the fees requested herein are certainly reasonable and are less than or at least in line with fees for cases of similar difficulty and problems.

APPLICANT REPRESENTATIONS

22. Applicant maintains the services rendered on behalf of the Debtors are of a reasonable value in the amount of \$30,513.00. Applicant further represents that the fees applied

for are in conformity with fees allowed in similar proceedings for similar services rendered and results obtained. Applicant's expenses incurred on behalf of the Debtors are reasonable and are of the kind and price normally charged to non-bankruptcy clients of LTP. LTP respectfully requests that the Court take judicial notice of the awards which have been made in similar proceedings in this Court and in other Bankruptcy Courts in the State of Texas.

23. Applicant has made no agreement for the sharing of compensation of expenses herein although such fees are shared by members of the firm according to the firm's agreement.

24. Applicant was at all times a "disinterested person" and has not represented or held an interest adverse to the estate on the matters on which it was employed in compliance with 11 U.S.C. § 327(a).

WHEREFORE, Applicant respectfully prays that the Court (1) allow the reasonable compensation for professional services rendered herein as special counsel for the Debtors in the sum of \$30,513.00 and for reimbursement of out of pocket expenses incurred herein as special counsel for the Debtors in the sum of \$2,791.62 for a total of \$33,304.62 for the First Interim Application Period; (2) order the Debtors to make payment to Applicant of its previously unpaid fees and expenses in the aggregate amount of \$12,495.85, and (3) for such other and further relief as this Court deems just.

SUMMARY OF EXHIBITS

Exhibit "A" – Final Order Approving the Employment of Lynn Tillotson & Pinker, L.L.P. as Special Counsel for the Debtors [Docket No. 267]

Exhibit "B" – Billing Summary

Exhibit "C" – Monthly Invoices