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SPECIAL COUNSEL TO THE DEBTORS

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

IN RE:	§	
	§	
VARTEC TELECOM, INC., <i>et al.</i>,	§	CASE NO. 04-81694-SAF-11
	§	
DEBTORS.	§	(Chapter 11)
	§	(Jointly Administered)

MOTION TO SEAL TIME RECORDS RELATING TO SPECIAL
LITIGATION COUNSEL'S FEE APPLICATIONS

Hughes & Luce, LLP ("H&L"), special counsel to the debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), hereby requests an order permitting H&L to file under seal the time records that support its interim and final fee applications for compensation and reimbursement of expenses. As set forth below, it is both necessary and appropriate that the time records relating to H&L's fee applications be filed with the Court under seal.

JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On November 1, 2004 (the “Petition Date”), the Debtors filed their voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating and managing their businesses as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108. No trustee or examiner has been appointed in the Debtors’ chapter 11 cases. On November 2, 2004, the Court signed the Order Granting Complex Chapter 11 Bankruptcy Case Treatment.

3. On November 8, 2004, the Office of the United States Trustee (“UST”) appointed the statutory committee of unsecured creditors in the Debtors’ cases (the “UCC”). On December 8, 2004, and at the direction of the Court, the UST appointed the Official Committee of Excel Independent Representatives (the “IRC”).

4. Pursuant to the Final Order Approving the Employment of H&L as Special Counsel dated November 22, 2004, the Court authorized the Debtors to employ H&L *nunc pro tunc* as of the Petition Date with respect to those matters set forth in the H&L Employment Application. Contemporaneously with the filing of this Motion, H&L is filing its First Interim Fee Application for Allowance of Compensation for Services and Reimbursement of Expenses (the “H&L Fee Application”).

5. As the Court is aware, H&L represents the Debtors on multiple litigation-related and bankruptcy-related matters. In particular, the following are the primary litigation and bankruptcy matters for which H&L is seeking compensation pursuant to the H&L Fee Application:

- (a) Representation of the Debtors in connection with the bankruptcy proceedings of Teleglobe Communications Corporation, et al. in the United States Bankruptcy Court for the District of Delaware, in Teleglobe Inc., *et al.*’s related Canadian insolvency proceedings; and in related arbitration proceedings between the Debtors and Teleglobe Communications Corporation and Teleglobe Inc.;

- (b) Representation of the Debtors in connection with litigation filed against BCE, Inc., BCE Ventures and William D. Anderson, currently pending in the United States District Court for the District of Columbia;
- (c) Representation of the Debtors in connection with two litigation matters filed by Stephen R. Smith and pending in the 216th Judicial District Court, Kerr County, Texas and in the United States District Court for the Western District of Texas;
- (d) Representation of the Debtors in connection with litigation filed by Lisa Main, pending in the United States District Court for the Western District of Texas; and
- (e) Representation of the Debtors in connection with the bankruptcy proceedings of Lightyear Holdings, Inc. et al., pending in the United States Bankruptcy Court for the Western District of Kentucky;
- (f) Representation of the Debtors in connection with various pending or threatened disputes with numerous independent representatives of the Debtors.

6. In the H&L Fee Application, H&L is including summaries, organized by subject matter and month, of the services it rendered to the Debtors since the Petition Date. These summaries will be filed with the Court and will therefore be made available generally. Through this Motion, H&L seeks entry of an order allowing H&L to file under seal the invoices and time records that support the H&L Fee Application, and any future fee applications filed by H&L.

ARGUMENT

A. LEGAL STANDARD

7. In order to receive compensation for its representation of the Debtors, H&L must file periodic applications “setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.” Fed. R. Bankr. P. 2016(a). This District’s General Order No. 00-7 (Standing Order Concerning Guidelines for Compensation and Expense Reimbursement of Professionals) requires that all professionals provide descriptive time entries, in increments no greater than six minutes, that “identify the

person performing the service, the date(s) performed, what was done, and the subject involved.” General Order No. 00-7, at II(C). In fulfilling these obligations, H&L must provide the Court with billing records that reflect business confidences, strategic decisions and considerations of counsel, attorney-client privileged information, and information covered by the work product doctrine. This information, if accessed by the parties adverse to the Debtors in the above-described matters (the “Adverse Parties”), would give the Adverse Parties substantial and unfair insight into the thought processes, investigative strategy, and priorities of the Debtors and the Debtors’ attorneys, to the detriment of the Debtors and their constituencies.

8. Section 107(b) of the Bankruptcy Code permits the Court to restrict access to filings in bankruptcy proceedings that otherwise would be public. Whether to allow or deny access is a decision “best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978); *see also In re Phar-Mor, Inc.*, 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995) (11 U.S.C. § 107 “codified the Supreme Court’s *Nixon* decision in the bankruptcy setting”). If a party can demonstrate sufficient need for limitations upon public access to court filings, the Court may craft a sealing order that narrowly addresses the disclosure concerns. *See e.g., Bank of America Nat’l Trust and Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986).

B. THE COURT SHOULD SEAL H&L’S TIME RECORDS TO PROTECT THE PRIVILEGED NATURE OF THE RECORDS

9. Attorney fee statements and billing documents describing the nature of the work performed on behalf of a client are confidential and protected by the attorney-client privilege and attorney work product doctrine. *See, e.g., In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982) (“bills, ledgers, statements, time records and the like which also reveal the nature of the

services provided” fall within attorney-client privilege); accord, e.g., *Colonial Gas Co. v. Aetna Cas. & Sur. Co.*, 144 F.R.D. 600, 607 (D. Mass. 1992); *Real v. Continental Group, Inc.*, 116 F.R.D. 211, 214 (N.D. Cal. 1986). Accordingly, using their supervisory powers over access to bankruptcy filings, bankruptcy courts have often permitted attorneys to file invoices with special protections, such as filing under seal, “for the purpose of protecting references to [their] research and strategies and other sensitive information from public disclosure.” *In re Marine Power & Equip. Co.*, 67 B.R. 643, 649 n.3 (Bankr. W.D. Wash. 1986) (noting prior order permitting attorney to file invoices under seal); see also *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474, 484 n.10 (Bankr. D. Utah 1991) (where “[s]everal of the estates’ professionals are engaged in litigation in which the opposing party is a member of the unsecured creditors’ committee,” bankruptcy court permitted unredacted fee applications to be filed under seal, “[t]o prevent disclosing work-product, waiving the attorney-client privilege, or revealing litigation strategy”).

10. Here, H&L’s applications for compensation are required to detail the “services rendered” in the course of H&L’s representation of the Debtors. The details supporting H&L’s applications thus potentially would disclose confidential, attorney-client privileged, and work-product protected information to the Adverse Parties. For example, an Adverse Party might discern from these materials the Debtors’ and H&L’s strategies for prosecuting its claims against the Adverse Parties, including the identity of the potential legal and factual questions being considered and addressed. Public disclosure of this privileged information would allow an Adverse Party to gain access to important information that it otherwise never could discover.

11. Moreover, such disclosures could be used as a sword in later attempts to overcome an assertion of privilege by the Debtors. This is a substantial concern given the impact

that the resolution of the disputes with the Adverse Parties may have on the Debtors' bankruptcy estates.

12. The relief sought in this Motion is limited solely to the unredacted time records that are contained in the invoices, as the fee applications themselves will be publicly filed and will contain summaries of the services H&L has provided to the Debtors. This limited relief is narrowly tailored to fulfill the Court's desire that bankruptcy proceedings be as transparent as possible, while allowing the Court to receive — under seal — the complete, detailed billing records in order to properly assess H&L's fee requests.

13. Furthermore, the public interest is not harmed by denying access to the information that H&L requests to seal. Any interest that a party would have as a potential creditor of the Debtors' estates would be protected by the Court's role in reviewing fee application requests. In short, absent a sealing order, the Debtors' bankruptcy estates face a clear and significant risk that the Debtors' litigation and bankruptcy strategies would be jeopardized by public disclosure of H&L's time records.

14. Finally, H&L also proposes that the necessary arrangements to maintain confidentiality with respect to any hearing relating to the sealed time records shall be addressed at such hearing.

CONCLUSION

WHEREFORE, H&L respectfully requests that the Court (i) grant the Motion; (ii) enter an order allowing H&L to file its unredacted time records with the Court under seal; and (iii) grant H&L such other and further relief to which it is entitled.

Dated: March 21, 2005.

Respectfully submitted,

HUGHES & LUCE, L.L.P.

/s/ Thomas W. Paxton

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**SPECIAL COUNSEL TO THE
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Motion to Seal Time Records Relating to Special Litigation Counsel's Fee Applications was served on those parties receiving electronic notices on this 21st day of March, 2005.

/s/ Thomas W. Paxton

Thomas W. Paxton