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**ATTORNEYS FOR THE DEBTORS**

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

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

**MOTION FOR AUTHORITY TO SELL ASSETS FREE AND CLEAR OF ALL CLAIMS, LIENS, ENCUMBRANCES, AND INTERESTS, ASSUME AND ASSIGN EXECUTORY CONTRACTS, AND GRANT RELATED RELIEF (SHARES OF HOLDING PROTEL S.A. de C.V. AND RELATED ASSETS)**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON APRIL 15, 2005, AT 9:30 A.M. IN COURTROOM OF THE HONORABLE STEVEN A. FELSENTHAL, 1100 COMMERCE STREET, 14TH FLOOR, DALLAS, TEXAS. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY (20) DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

**TO THE HONORABLE STEVEN A. FELSENTHAL, CHIEF BANKRUPTCY JUDGE:**

The above-referenced debtors and debtors in possession (collectively, the “Debtors”)<sup>1</sup> file this Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests, Assume and Assign Executory Contracts, and Grant Related Relief (Shares of Holding Protel S.A. de C.V. and Related Assets) (the “Motion”) and in support thereof the Debtors would show as follows:

### **INTRODUCTION**

1. By this Motion, the Debtors seek entry of an Order authorizing the sale by VarTec Telecom, Inc. (“VarTec” or the “Seller”) to Potosi Inc.(the “Buyer”), or another bidder, of the following: (i) 42,367,020 shares (the “Shares”) of Holding Protel, S.A. de C.V. (“Protel”) owned by the Seller, of which 22,224,897 shares are Series B voting shares (represented by stock certificate No. 76) and 20,142,123 shares are Series N neutral / non-voting shares (represented by stock certificate No. 77); (ii) the Seller’s rights, title and interest in and to the Indefeasible Right of Use (IRU) Agreement dated December 11, 2001 between Operadora Protel, S.A. de C.V. (“Operadora”) and the Seller (as amended, the “IRU Agreement”); (iii) certain credits relating to the provision of telecommunications services by Operadora to the Seller arising out of that certain Letter of Agreement dated December 11, 2001 (as amended, the “Letter Agreement”) which credits were approximately US\$4,747,466 as of March 18, 2005 (the “Credits”); and (iv) certain contracts identified in Exhibit A (the “Contracts” and together with the Shares, IRU Agreement, and Credits, and any rights that Seller may have in the equipment

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<sup>1</sup> The Debtors include VarTec Telecom, Inc., Excel Communications Marketing, Inc., Excel Management Service, Inc., Excel Products, Inc., Excel Telecommunications, Inc., Excel Telecommunications of Virginia, Inc., Excel Teleservices, Inc., Excelcom, Inc., Telco Communications Group, Inc., Telco Network Services, Inc., VarTec Business Trust, VarTec Properties, Inc., VarTec Resource Services, Inc., VarTec Solutions, Inc., VarTec Telecom Holding Company, VarTec Telecom International Holding Company, and VarTec Telecom of Virginia, Inc.

relating to the IRU Agreement, the “Assets”) to that certain Asset Purchase Agreement dated March 18, 2005 by and between the Seller and the Buyer (the “Agreement”). A copy of the Agreement is attached hereto as **Exhibit 1**.

### **JURISDICTION AND PROCEDURAL BACKGROUND**

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This Motion concerns the administration of the estate; and therefore, it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. On November 1, 2004 (the "Petition Date"), the Debtors each filed a voluntary petition for relief (collectively, the “Cases”) under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Protel is not a Debtor in these Cases.

5. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

6. The Debtors’ Cases are jointly administered under Case No. 04-81694-SAF-11.

### **STATEMENT OF FACTS**

#### **VarTec and Its Businesses**

7. VarTec Telecom, Inc., a Texas corporation, (“VarTec”) along with its sixteen direct and indirect domestic subsidiaries, each of which is a Debtor, and four remaining non-debtor direct and indirect foreign subsidiaries (collectively, the “VarTec

Entities”),<sup>2</sup> is among the largest privately held companies providing telecommunications services in North America. The VarTec Entities, founded in DeSoto, Texas in February 1989, with current employees totaling over 1,100 in the aggregate (including approximately 800 in the Dallas metroplex), sell a full range of telecommunication products and services to customers. In 2003, the VarTec Entities had revenues of approximately \$1,260,000,000, and anticipate 2004 revenue in the approximate amount of \$800,000,000. As of the Petition Date, VarTec’s revenues had been derived primarily from three sale distribution channels: (a) Direct Marketing; (b) Commercial Services; and (c) Multi-Level Marketing.

8. The Direct Marketing channel, managed by VarTec and certain of its subsidiaries offers telecommunications services to small business and residential consumers, including local and long distance telephone services, wireless telephone services, and internet access. VarTec pioneered the “10-10 dial-around” long distance market by offering customers the opportunity to access VarTec’s discounted long distance services on a call-by-call basis by dialing “10-10” then a three-digit unique carrier access code. Under the “dial-around” model, a customer’s long distance usage is billed on her local phone service provider’s invoice, the local phone service provider collects the billed amounts, and the local phone service provider remits those collected amounts to VarTec.

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<sup>2</sup> Pursuant to that certain Order Approving Sale of Assets (Shares of VarTec Europe) Free and Clear of All Liens, Claims, Rights, Interests, and Encumbrances and Granting Related Relief [Docket No. 586] entered on December 17, 2004, VarTec Telecom International Holding Company sold all of the outstanding ordinary shares of VarTec Telecom Europe Limited and VarTec Telecom Belgium SPRL owned by it. This sale resulted in the disposition by VarTec of fourteen of its non-debtor indirect foreign subsidiaries.

9. While experiencing tremendous success with the “dial-around” model, VarTec began to offer other telecommunication services, including local and traditional long distance telephone services, wireless telephone service, and internet access, directly to small business and residential customers. VarTec is licensed to provide local and long distance telephone services in all fifty states, and marketed its products and services through, among other means, direct mail and magazine insert campaigns composed of several hundred million items to persons in a targeted market each year. VarTec also uses outbound telemarketing for targeted campaigns to attract new customers of existing products and to offer new and/or additional products to existing customers.

10. The Commercial Services channel, managed by VarTec Solutions, Inc. (formerly known as eMeritus Communications, Inc.) and certain of its subsidiaries (collectively, “VarTec Solutions”), provides customized voice, data, and internet services to commercial and wholesale carrier customers throughout the U.S. VarTec Solutions’ voice product offerings include switched and dedicated access, domestic and international toll-free service, calling cards, audio conferencing, and other specialized products. In addition, VarTec Solutions offers high-capacity data services that provide access to frame relay and IP networks. For carrier customers, VarTec Solutions offers the ability to co-locate their equipment inside carrier-class facilities, saving the cost and complications involved with building their own facilities.

11. Through the Multi-Level Marketing channel, which was managed by Excelcom, Inc. and certain of its subsidiaries (collectively, “Excel”), Excel offered telecommunications products and services to small business and residential consumers

similar to those offered by VarTec to its customers. Excel, which was acquired by VarTec in 2002, had an international network of over 106,000 independent representatives (collectively, the “IRs”) who marketed Excel’s products and services to small business and residential consumers and recruited new independent representatives to market such products and services. Each independent representative received commissions and bonuses based on, among other things, the success of the independent representatives recruited and a portion of the success of their recruits (referred to as a “downline”) and the usage of Excel products and services by customers of the independent representative and a portion of their downline. On March 1, 2005, the Court entered its Order [Docket 1026] authorizing the rejection of the Debtors’ executory contracts with each of the IRs.

### **Secured Debt**

12. VarTec is a borrower and the other Debtors (except VarTec Telecom of Virginia, Inc. and Excel Telecommunications of Virginia, Inc.) are guarantors under that certain First Amended and Restated Credit Agreement with the Rural Telephone Finance Cooperative (the “RTFC”), pursuant to which the existing secured indebtedness owing to the RTFC was restructured in the form of a secured term loan and a secured line of credit to the Debtor.<sup>3</sup> The secured line of credit is in the form of a revolving credit facility, for the working capital, credit, and liquidity needed by the Debtor to conduct general business operations. As of the Petition Date, the obligations to the

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<sup>3</sup> The capital stock of VarTec Telecom of Virginia, Inc. and Excel Telecommunications of Virginia, Inc. was pledged to the Rural Telephone Finance Cooperative under transactions completed in conjunction with the Credit Agreement.

RTFC consisted of (a) a term loan of approximately \$154,000,000 and (b) a revolving line of credit with a total commitment of \$70,000,000.

### **Proposed Sale of Protel and Related Assets**

13. The Seller, a Debtor in these Cases, owns 42,367,020 shares of Protel, has certain rights under the IRU Agreement and the Contracts, and holds certain Credits. Under the Agreement, the Buyer agrees to purchase the Assets from the Seller for cash consideration in the amount of US\$1,600,000.

14. Contemporaneously with the filing of this Motion, the Debtors filed their Motion for Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Assets Owned by the Debtors, (B) Scheduling an Auction and Hearing to Consider Approval of the Sale; (C) Approving Notice of Certain Dates, Times and Places; and (D) Granting Related Relief (Shares of Holding Protel S.A. de C.V. and Related Assets) (the "Sale Procedure Motion") by which they seek authority to implement certain bid procedures.<sup>4</sup>

### **RELIEF REQUESTED**

15. Pursuant to Bankruptcy Code §§ 105(a), 363, and 365 and Bankruptcy Rules 6004 and 6006, the Seller seeks authority to sell the Assets to the Buyer, or an alternate offerer who submits a higher and better offer at the auction of the Assets (the "Auction"), free and clear of claims, liens, encumbrances, and interests (the "Sale") with such claims, liens, encumbrances, and interests to attach to the proceeds of the Assets.

16. Bankruptcy Code § 363(f) provides, in pertinent part:

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<sup>4</sup> Capitalized terms not defined herein shall have the meaning giving to them in the Sale Procedure Motion.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interests is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); *Pelican Homestead v. Wooten (In re Gabel)* 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (stating that a trustee may sell property of the estate for purposes other than in the ordinary course of business free and clear of all existing liens and encumbrances provided that any one of the conditions of § 363(f) are met).

17. The RTFC asserts a lien on certain of the Assets. Upon information and belief, the RTFC will consent to the Sale, and in the alternative, it may be compelled to accept a money satisfaction of its interest.

18. Pursuant to Bankruptcy Code § 105(a), a bankruptcy court “may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” See 11 U.S.C. § 105(a). Bankruptcy Code § 363(b)(1) provides, “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

19. The proposed use, sale or lease of property of the estate may be approved under Bankruptcy Code § 363(b) if it is supported by sound business



justification. See e.g. *In re Terrace Gardens Park Partnership*, 96 B.R. 707, 714; see also *In re Crutcher Resources Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987) ("A Bankruptcy Judge has considerable discretion in approving a § 363(b) sale of property of the estate other than in the ordinary course of business, but the movant must articulate some business justification for the sale") (Bankr. W.D. Tex. 1989); *The Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) ("[F]or a debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business"). Further, in reviewing a proposed sale of assets, a bankruptcy court should give deference to the business judgment of a debtor in possession when it deems the sale to be appropriate. See *Esposito v. Title Ins. Co. (In re Fernwood Mkts.)*, 73 B.R. 616, 621 n.2 (Bankr. E.D. Pa. 1987).

20. The Debtors have determined in the exercise of their business judgment that the Sale of these non-core assets is in the best interest of their estates and creditors. The Debtors seek to sell the Assets to maximize the value of their estates. Through their investment bankers, Houlihan Lokey Howard & Zukin Capital Group, the Debtors have actively marketed the Assets for sale, and they believe that the proposed purchase price is satisfactory. Further, the Debtors are hopeful that the Auction, as proposed in the Sale Procedures Motion, will result in an increase of the purchase price.

21. Having exercised sound business judgment in determining to sell the Assets, the Sale should be approved.

22. Bankruptcy Code § 363(m) states, in relevant part:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

23. The Sale and Agreement are the result of an arm's-length, good-faith negotiation between the Seller and Buyer. The Seller and Buyer have retained legal counsel and conducted due diligence, and they have negotiated and agreed upon the terms of the Agreement. The Debtors believe the Buyer is a "good-faith" purchaser within the meaning of Bankruptcy Code § 363(m). Accordingly, at the hearing to approve the Sale (the "Sale Hearing"), the Debtors will request findings and protections pursuant to Bankruptcy Code § 363(m).

24. Pursuant to Bankruptcy Code § 365, the Seller requests authority to assume and assign to the Buyer, or alternatively, to the highest bidder at the Auction, the IRU Agreement and those Contracts part of the sale transaction that are executory contracts.

25. Bankruptcy Code § 365(f)(2) provides, in pertinent part, that:

The trustee may assign an executory contract or unexpired lease of the Debtors only if –

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2). Pursuant to Bankruptcy Code § 365(a), a debtor “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the Debtors.” 11 U.S.C. § 365(a).

26. Although Bankruptcy Code § 365 does not set forth standards for courts to apply in determining whether to approve a Debtors in possession’s decision to assume an executory contract, courts have consistently applied a “business judgment” test when reviewing such a decision. See, e.g., *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523, 550 (1953); *Matter of Talco, Inc.*, 558 F.2d 1369, 1173 (10th Cir. 1977). A Debtor satisfies the “business judgment” test when it determines, in good faith, that assumption of an executory contract will benefit the estate and the unsecured creditors. *In re FCX, Inc.*, 60 B.R. 405, 411 (Bankr. E.D. N.Y. 1986).

27. Pursuant to Bankruptcy Code § 365(b)(1), a debtor must cure certain defaults prior to assumption. 11 U.S.C. § 365(b)(1). Upon information and belief, Operadora estimates that the aggregate amount of all cure and similar payments relating to alleged monetary defaults by the Buyer under the Contracts or otherwise relating to the Assets is \$630,016.83 (the “Arrearage”). Under the Agreement, the Buyer agrees to cure the Arrearage.

28. The assumption and assignment of the IRU Agreement and Contracts that are executory as set forth in the Agreement is necessary to effectuate the transaction contemplated by the Seller and Buyer.

29. The meaning of “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given “practical, pragmatic

construction.” See *Carlisle Homes, Inc., v. Arrari (In re Carlisle Homes, Inc.)*, 103 B.R. 524, 538 (Bankr. D.N.J. 1989). See also *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985) (adequate assurance of future performance does not mean an absolute assurance that Debtors will thrive and pay rent); *In re Bon Ton Rest. & Pastry Shop, Inc.*, 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985). The Buyer has the financial ability to perform under the IRU Agreements and the Contracts, and if necessary, the Seller will provide proof of adequate assurances at the Sale Hearing.

30. Therefore, assumption and assignment of the IRU Agreement and the Contracts that are executory are appropriate under the circumstances.

#### **WAIVER OF 10-DAY STAY**

31. Bankruptcy Rule 6004(g) provides, “An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” FED. R. BANKR. P. 6004(g). Bankruptcy Rule 6006(d) provides, “An order authorizing the trustee to assign an executory contract or unexpired lease under §365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.” FED. R. BANKR. P. 6006(d). Because the parties intend to close the Sale of the Assets as soon as practicable after the entry of an Order approving the Sale, the Debtors request that the Court waive the 10-day stay provided in Bankruptcy Rules 6004(g) and 6006(d).

## **PRAYER**

The Debtors request that this Court enter an Order approving the Sale and granting them such other and further relief, both general and specific, to which they may be justly entitled.

Dated: March \_\_, 2005.

Respectfully submitted,

**VINSON & ELKINS L.L.P.**

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**ATTORNEYS FOR THE DEBTORS**



**EXHIBIT 1**