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

IN RE:	§	
	§	
VARTEC TELECOM, INC., et al.,	§	CASE NO. 04-81694-SAF-11
	§	
DEBTORS.	§	(Chapter 11)
	§	(Jointly Administered)
	§	
	§	Hearing Requested for
	§	March 23, 2005 at 1:30 p.m.

MOTION FOR ORDER (A) APPROVING SALE PROCEDURES AND BID PROTECTIONS IN CONNECTION WITH SALE OF CERTAIN ASSETS OWNED BY VARTEC TELECOM, INC.; (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)

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

The above-referenced debtors and debtors in possession (collectively, the "Debtors")¹ file this Motion for Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Assets Owned by VarTec Telecom, Inc.; (B) Scheduling an

¹ 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.

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 “Motion”) and in support thereof the Debtors would show as follows:

INTRODUCTION

1. By this Motion, the Debtors seek entry of an Order (a) approving the proposed sale procedures and bidding protections substantially in the form set forth below (the “Sale Procedures”) in connection with the proposed 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 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”); (b) setting April 14, 2005 at 9:30 a.m. as the date of the auction (the “Auction”) for the sale of the Assets, and April 15, 2005 at

9:30 a.m., or such other date as the Court's docket may accommodate, as the date of the hearing to consider approval of the sale (the "Sale Hearing"); (c) approving the Seller's proposed notice of the respective dates, times and places for the Auction and the Sale Hearing (the "Notice of the Auction and Sale Hearing") substantially in the form attached hereto as **Exhibit 1**; (d) providing the Buyer with expense reimbursement or a break-up fee and other bid protections; and (e) granting such other relief as is fair and equitable. A copy of the Agreement is attached hereto as **Exhibit 2**.

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”),² 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.

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

² 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

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

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.

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.³ 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 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.

³ 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.

Under the Agreement, the Buyer agrees to purchase the Assets from the Seller for consideration in the amount of US\$1,600,000.

14. Contemporaneous herewith, the Debtors file their Motion for Authority to Sell Assets Free and Clear of All Claims, Liens, Encumbrances, and Interests and Grant Related Relief (Shares of Holding Protel, S.A. de C.V. and Related Assets) (the "Sale Motion").

RELIEF REQUESTED

15. By this Motion, the Debtors respectfully request that, pursuant to Bankruptcy Code §§ 105, 363, 365 and 1146 and Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Court enter an Order (a) approving the Sale Procedures as set forth below in connection with the Seller's proposed sale of the Assets; (b) setting April 14, 2005 at 9:30 a.m. as the date for the Auction; (c) setting April 15, 2005 at 9:30 a.m., or such other date as the Court's docket may accommodate, as the date for the Sale Hearing in connection with the Sale Motion; (d) approving the Notice of the Auction and Sale Hearing; (e) providing the Buyer with expense reimbursement and bidder protections; and (f) granting such other relief as is fair and equitable.

The Sale Procedures

16. Pursuant to Bankruptcy Rule 6004(f)(1), sales of property outside the ordinary course of business may be by private sale or by auction. The Seller believes that good cause exists to expose the Assets to sale at auction and to approve the procedures proposed therefor. An Auction conducted substantially in accordance with the Sale Procedures will enable the Seller to obtain the highest and best offers for the Assets, thereby maximizing the value of the Debtors' estates.

17. The proposed Sale Procedures follow:

Assets to be Sold

The Assets to be sold consist 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 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"). The Assets shall be sold free and clear of all claims, liens, encumbrances, and interests. The Seller shall consider at an auction (the "Auction"), bids for the Assets in a single bid from a single bidder (or from two or more persons acting together pursuant to a non-collusive agreement between them). An initial bid in the amount of US\$1,600,000 in cash for the Assets has been received from the Buyer, the terms of which are set forth in the Agreement.

Selection of Qualified Bidders

Of the parties willing to submit a cash bid subject to the minimum overbid requirement set forth below (the "Potential Purchasers"), the Seller shall select the parties who possess the necessary qualifications to bid. In order to qualify as a Potential Purchaser, such bidder shall have demonstrated its willingness to bid in accordance with these Sale Procedures and shall have delivered to the Seller an executed confidentiality agreement in form and substance substantially the same as the confidentiality agreement by and between the Seller and the Buyer (the "Confidentiality Agreement") (except that such agreement shall permit disclosure of the bidder's interest and proposal (but not identity) to the Buyer). The Seller shall send a form of confidentiality agreement to any Potential Purchaser.

To be a "Qualified Bid," it must be a bid:

(i) that is an all cash bid that consists of an executed version of the Agreement acceptable to the Seller (with any alterations clearly marked) except for the purchase price which is subject to the overbid requirement set forth below (the "Bidder Agreement"), and that clearly specifies the cash amount the Potential Purchaser is willing to pay;

(ii) the cash amount of which (with respect to the initial round of bidding) is not less than US\$120,000 in excess of the consideration payable by the Buyer under the Agreement and with respect to each subsequent round of bidding at the Auction is at least US\$50,000 in excess of the aggregate consideration contained in the highest standing Qualified Bid;

(iii) that is accompanied by reasonably satisfactory evidence of committed financing or other ability to perform the transaction and provides an earnest money deposit of US\$500,000 (the "Earnest Money Deposit") in the form of a certified check or wire transfer to the Seller in care of The Bank of New York Trust Company, N.A. as escrow agent, such Earnest Money Deposit being refundable if the bid is not approved by the Bankruptcy Court as the highest bid;

(iv) that provides sufficient indicia that such potential bidder or its representative is legally empowered, by power of attorney or otherwise, and financially capable to (A) bid on behalf of such bidder; and (B) complete and sign, on behalf of such bidder, a binding and enforceable asset purchase agreement; and (C) not contain any contingencies to the validity, effectiveness, and/or binding nature of the offer including, without limitation, contingencies for financing, due diligence, or inspection; and

(v) that meets all other requirements of these Sale Procedures.

In order for a Potential Purchaser to qualify as a "Qualified Bidder" and be permitted to bid on the Assets, in the Seller's discretion, such Potential Purchaser:

(i) must have been deemed "financially qualified" by the Seller which at a minimum shall require any such Potential Purchaser to (x) provide documentation establishing that such person has sufficient cash on hand or a binding financial commitment from an established and financially sound financial institution to ensure such Potential Purchaser's ability to meet its commitment pursuant to its bid and to close the transaction within the time frame established, and (y) demonstrate to the Seller's satisfaction that it has the legal capacity to complete the sale it is proposing and to satisfy the conditions under the Bidder Agreement;

(ii) must have delivered to the Seller a Qualified Bid; and

(iii) must meet all other requirements of the Sale Procedures.

No Potential Purchaser will be a Qualified Bidder and have its bid considered by the Seller unless such party has met the above requirements. The Seller shall promptly notify any Potential Purchaser who is selected as a Qualified Bidder of such selection. The Seller shall also notify the Buyer of such selections.

The Agreement and Due Diligence

The Seller shall send to each Potential Purchaser a copy of the Agreement. The Seller will provide Potential Purchasers that have delivered to the Seller an executed confidentiality agreement in form and substance substantially the same as the Confidentiality Agreement reasonable access to the Seller's books, records, facilities, key personnel, officers, independent accountants and legal counsel for the purpose of conducting due diligence. Any information provided by or on behalf of the Seller to a Potential Purchaser shall also be provided, at the same time, to Buyer if such information has not already been provided to Buyer. The Seller is not required to provide confidential or proprietary information to a competitor if the Seller reasonably believes that such disclosure would be detrimental to the interests and operation of the Seller or any of the Seller's affiliates. The Seller will permit the Buyer and Potential Purchasers who have delivered to the Seller an executed confidentiality agreement in form and substance substantially the same as the Confidentiality Agreement to review agreements that contain provisions limiting or prohibiting the disclosure of certain information.

Submission of Bids

Any Potential Purchaser desiring to submit a Qualified Bid for the Assets (a "Bid") and to participate in the Auction shall deliver its Bid in writing to Vinson & Elkins L.L.P., Attn: William L. Wallander, 3700 Trammel Crow Center, 2001 Ross Avenue, Dallas, Texas 75201 such that the Bid is actually received not later than April 12, 2005 at 12:00 p.m. prevailing Central Time.

No Bid received at or prior to the Auction shall under any circumstances, (i) be deemed to be higher and better cash bid than the cash bid of the Buyer or (ii) be accepted by the Seller, unless, among other things, such Bid is for cash consideration of US\$120,000 more than the consideration payable by the Buyer under the Agreement.

The Auction and Selection of the Successful Bid

The Auction will be conducted at the offices of Vinson & Elkins L.L.P., 3700 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201, or at another location as may be timely disclosed by the Seller to Qualified Bidders, and shall commence on April 14, 2005 at 9:30 a.m. (the "Auction Date"). All Qualified Bidders must appear in person at the Auction, or through a duly authorized representative. The Seller shall consider Qualified Bids at the Auction in a single bid from a single bidder (or from two or more persons acting together pursuant to a non-collusive agreement between them). If multiple Qualified Bids satisfying all Auction requirements are received, each party shall have the right to continue to improve its bid at the Auction. The initial Bid received by the Seller from Qualified Bidders prior to the Auction must be for such cash consideration of US\$120,000 more than the consideration payable under the Agreement. Bidding increments for the Assets at the Auction shall be in aggregate minimum monetary increments of US\$50,000. In

calculating the highest and best bid for the Assets, the Buyer shall receive full credit for the amount of the Break-Up Fee (as defined below).

The Auction shall conclude as determined by the Seller after consideration of the bids received. At the conclusion of the Auction, and subject to Court approval following the Auction, the successful bid shall be selected by the Seller (the "Successful Bid").

Within six hours of the conclusion of the Auction, the entity that made the highest and best Bid or the entities that together (non-collusively) made the highest and best Bid (the "Successful Bidder") shall complete and sign all agreements, contracts, instruments or other documents evidencing and containing the terms and conditions upon which such Bid were made. Within forty-eight hours of the conclusion of the Auction, the Successful Bidder shall provide updated financial information showing its ability to close and it shall update and provide such additional financial information as required by the Debtors.

Break-Up Fee

The break-up fee in the amount of US\$20,000 (the "Break-Up Fee") shall be paid in the event the Buyer is not the Successful Bidder and a competing bidder is selected as the Successful Bidder.

Overbid Protection

Any Bid submitted by a party other than the Purchaser must be at least US\$120,000, in cash in excess of the consideration payable to the Seller under the Agreement.

Objections

Objections to the relief requested in the Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests and Grant Related Relief (Shares of Holding Protel S.A. de C.V. and Related Relief) [Docket No. ____] the "Sale Motion") shall be set forth in writing and shall specify with particularity the grounds for such objections or other statements of position and shall be filed with the Court by April 12, 2005 at 12:00 p.m. prevailing Central Time, and shall be served so as to be received by that same date and time on (i) the Seller at of VarTec Telecom, Inc., Attn: Michael G. Hoffman, 2440 Marsh Lane, Carrollton, Texas, 75006; (ii) the Seller's counsel at Vinson & Elkins L.L.P., Attn: William L. Wallander, 3700 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201; (iii) the RTFC's counsel at Fulbright & Jaworski L.L.P., Attn: Toby L. Gerber, 2200 Ross Avenue, Suite 2800, Dallas, Texas 75201; (iv) the Committee's counsel at Carrington, Coleman, Sloman & Blumenthal, L.L.P., Attn: Stephen A. Goodwin, 200 Crescent Court, Suite 1500, Dallas, Texas 75201; and (v) the Buyer's counsel at J. Nihill P.C., Attn: Julian D. Nihill, 4514 Cole Avenue, Suite 806, Dallas, Texas, 75205.

Court Approval

A hearing on the relief requested in the Sale Motion (the "Sale Hearing") will be held before the Honorable Steven A. Felsenthal, Chief Bankruptcy Judge on April 15, 2005, at 9:30 a.m. (prevailing Central Time). The sale of the Assets will be subject to the entry of an order of the Bankruptcy Court approving the Sale reasonably acceptable to the Seller and the Successful Bidder (the "Sale Order").

Closing

The closing of the sale of the Assets shall occur not later than 10:00 a.m., prevailing Central Time on the second business day after the Court has entered the Sale Order.

Failure to Consummate Purchase

If the Successful Bidder fails to consummate the purchase of the Assets, and such failure to consummate the purchase is the result of a breach by such Successful Bidder, the Earnest Money Deposit of such Successful Bidder shall be forfeited to the Seller, no Break-Up Fee shall be payable, and the Seller shall have the right to seek all available damages from and pursue all available remedies against such defaulting Successful Bidder. In the event that the Successful Bidder fails to consummate the purchase of the Assets, the Debtors shall have the right to consummate the purchase of the Assets with any other Qualified Bidder on the terms of its final Bid.

Return of Earnest Money Deposit.

If a Successful Bid has been selected and the sale of the Assets to a Successful Bidder has been approved by the Court, the Earnest Money Deposit of the other Qualified Bidders, other than the Buyer (whose Earnest Money Deposit shall be governed by the Agreement), who are not successful bidders shall be returned. The Earnest Money Deposit of the Successful Bidder shall be applied to the purchase price at the closing of the transaction contemplated by the Bidder Agreement.

18. The foregoing Sale Procedures provide an appropriate framework for selling the Assets and will enable the Seller to review, analyze and compare all bids received to determine which bid is in the best interests of the Seller's estate and creditors. Therefore, the Debtors respectfully request that this Court approve the Sale Procedures.

Notice of the Auction and Sale Hearing and Notice of Motion

19. Under Bankruptcy Rule 2002(a) and (c), the Debtors are required to notify their creditors of the proposed sale of the Assets, including a disclosure of the time and place of the Auction, the terms and conditions of the Sale, and the deadline for filing any objections thereto. The Notice of the Auction and Sale Hearing (a form of which is attached hereto as Exhibit 1) contains the type of information required under Bankruptcy Rule 2002(c), and also includes information on the Sale Procedures and the bidding protections. This information will enable interested parties to participate in the Auction and Sale Hearing if they choose. Accordingly, the Debtors request that this Court approve the form and content of the Notice of the Auction and Sale Hearing.

20. The Debtors shall serve this Motion by the electronic court filing system, electronic mail, or overnight delivery, as the case may be, on the parties listed on the Debtors' Master Service List. The Debtors propose to serve the Notice of the Auction and Sale Hearing together with the Sale Procedures within 2 days of the entry of the Order approving the relief requested herein (the "Sale Procedures Order"), by the electronic court filing system or first-class mail, postage prepaid, as the case may be, on the parties listed on the Debtors' Master Service List and all parties asserting a security interest in the Assets.

21. The Debtors submit that the notices to be provided and the method of service proposed herein constitute good, proper and adequate notice of the sale of the Assets and the proceedings to be had with respect thereto (including, but not limited to, the Auction and the Sale Hearing). Therefore, the Debtors respectfully request that this Court approve the foregoing notice procedures.

Bidding Protections Are Fair And Reasonable

22. The Debtors have been aggressively marketing the Assets. Although the Debtors have determined in their reasonable business judgment that an auction sale of the Assets at this time will result in the highest and best price for the Assets, the Auction would be of little value absent the Buyer setting the minimum purchase price for the Assets.

23. The Debtors request that the Court approve certain bidding protections for the Buyer that are customary in similar circumstances as set forth in the bidding procedures set forth above. The Break-Up Fee shall be (i) an administrative expense, and (ii) allowed and payable as set forth above.

24. There are several compelling business justifications for the proposed Sale pursuant to the Agreement, the most important of which is that the Agreement enables the Seller to preserve and maximize the value of the Assets.

25. The payment of the Break-Up Fee and the establishment of Bidding Protections are both reasonable and necessary to induce the Buyer to enter into the transactions encompassed by the Agreement and to obtain the highest price possible for the Assets.

26. The payment of a break-up fee is normal and customary in transactions of this nature. Such fees frequently have been approved in connection with asset sales in other chapter 11 cases. Break-up fees are a vital means by which a debtor in possession is enabled to manage value maximization risk by setting a value floor for assets to be conveyed; this is a key benefit to the Debtors and their estates and weigh heavily in favor of approving the Break-Up Fee. Moreover, without prompt approval of the Break-Up Fee, the sale process would be substantially hampered. Such fees encourage an initial purchaser to invest the time, effort and money necessary to consummate the purchase of

the Assets, despite the possibility that such purchaser may not ultimately acquire the property. A break-up fee is an important tool to be used to encourage bidding. Court approval of the Break-Up Fee is necessary, reasonable, and in the best interests of the Seller, its estate and creditors.

27. The determination of whether a break-up fee should be allowed is made based on whether the fees and expenses are necessary to preserve the value of the estate. *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527, 534 (3d Cir. 1999). The considerations that underlie a debtor's business judgment to pay a break-up fee are relevant to the Court's determination of the request. *Id.* Indeed, courts have evaluated break-up fee arrangements under the business judgment rule standard. *Cottle v. Storer Communications, Inc.*, 849 F.2d 570 (11th Cir. 1988); *CRTF Corp. v. Federated Dep't Stores*, 683 F.Supp. 422 (S.D.N.Y. 1988); *In re Integrated Res., Inc.*, 147 B.R. 650, 657 (S.D.N.Y. 1992), *appeal dismissed by* 3 F.3d 49 (2d Cir. 1993).

28. It is well-established that "[a] bankruptcy court should uphold a break-up fee which was not tainted by self-dealing and was the product of arm's-length negotiations." *In re Integrated Res., Inc.*, 147 B.R. at 658. In the instant case, the proposed Break-Up Fee is the product of good faith, arm's-length negotiations between the Seller and the Buyer. The Break-Up Fee is 1.25% of the consideration to the Seller pursuant to the Agreement. It is the Seller's business judgment that the Break-Up Fee is fair and reasonable in the perspective of the time, effort, cost and expense that the Buyer has incurred in negotiating the Agreement and will continue to incur and the aggregate consideration to be paid by the Buyer.

29. Further, the Break-Up Fee is necessary to enhance and preserve the value of the Assets for the Seller's estate and to allow it to obtain the best "stalking horse" bid possible. Without the "stalking horse" bid, the amount received by the estate from the Assets would be minimized. If higher and better bids for the Assets are received, it will be because the Buyer has served as a "stalking horse" for such offers.

30. The Break-Up Fee of 1.25% is below the spectrum of termination fees approved by bankruptcy courts in chapter 11 cases, including those of the Debtors. See e.g., *In re VarTec Telecom, Inc.*, Case No. 04-81694 (SAF) (Bankr. N.D. Tex. November 23, 2004) (court approved a break-up fee of 3.07% in connection with a proposed \$6,500,000 sale); *In re Ameriserve*, Case No. 00-0358 (PJW) (Bankr. D. Del., September 27, 2000) (Court approved a break-up fee of 3.64% or \$4,000,000 in connection with \$110,000,000 sale); *In re Montgomery Ward Holding Corp., et al.*, Case No. 97-1409 (PJW) (Bankr. D. Del., June 15, 1998) (Court approved termination fee of 2.7%, or \$3,000,000, in connection with \$110,000,000 sale of real estate assets); see also *Integrated Res.*, 147 B.R. at 648; *In re Crowthers McCall Pattern, Inc.*, 113 B.R. 877, 879 (Bankr. S.D.N.Y. 1990); *In re 995 Fifth Ave. Assocs., L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989).

31. As stated, the Agreement is subject to higher and better offers received pursuant to the Sales Procedures. If higher and better offers emerge, they will be considered with reference and by comparison to the terms of the Agreement. The Break-Up Fee will be paid from the overbid amount received so that there will be no loss or prejudice to the estate or its creditors if this Motion is approved. Therefore, the Break-Up

Fee should be approved because it is necessary to maximize the value of the Assets, and it does not prejudice the Seller's estate.

Acceptance of Back-Up Bid

32. If the Qualified Bidder with the highest and best bid, whether the Buyer or other Successful Bidder, fails and refuses to close the transaction, the Debtors also seek the authority of this Court to accept, in their sole discretion, the bid of, and close the sale transaction with, the Qualified Bidder that submitted the second highest and best bid.

No Prior Request

33. No prior request for the relief sought herein has been requested from this Court or any other court.

PRAYER

The Debtors respectfully request that the Court (a) approve the Sale Procedures as set forth herein; (b) set April 14, 2005 at 9:30 a.m. as the date for the Auction; (c) set April 15, 2005 at 9:30 a.m., or such other date as the Court's docket may accommodate, as the date for the Sale Hearing; (d) approve the Notice of the Auction and Sale Hearing; (e) provide the Buyer with bidder protections: and (f) grant such other relief as is fair and equitable.

Dated: March 21, 2005

Respectfully submitted,

VINSON & ELKINS L.L.P.

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By: /s/ William L. Wallander
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Richard H. London, SBT #24032678

ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that on March 21, 2005, a copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Northern District of Texas. A separate certificate of service shall be filed with respect to those parties on the Clerk's list who do not receive electronic e-mail service.

/s/ Richard H. London

One of Counsel