

B 104 (Rev. 2/92)		ADVERSARY PROCEEDING COVER SHEET (Instructions on reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)	
PLAINTIFFS VarTec Properties, Inc.			DEFENDANTS Republic Title of Texas, Inc.		
ATTORNEYS (Firm Name, Address and Telephone No.) Abigail Willie Vinson & Elkins LLP 2001 Ross Avenue, Suite 3700 Dallas, TX 75201 214.220.7700			ATTORNEYS (If known) Peter S. Graf Senior VP and General Counsel 2626 Howell Street, 10th Floor Dallas, TX 75204		
PARTY (Check one box only) <input type="checkbox"/> 1 U.S. PLAINTIFF <input type="checkbox"/> 2 U.S. DEFENDANT <input checked="" type="checkbox"/> 3 U.S. NOT A PARTY					
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of contract and recovery of wrongfully transferred funds.					
NATURE OF SUIT (Check the most appropriate box only.)					
<div style="display: flex; flex-wrap: wrap;"> <div style="width: 33%;"><input checked="" type="checkbox"/> 454 To Recover Money or Property</div> <div style="width: 33%;"><input type="checkbox"/> 455 To revoke an order of confirmation of a Chap. 11, Chap. 12 or Chap. 13 Plan</div> <div style="width: 33%;"><input type="checkbox"/> 456 To obtain a declaratory judgment relating to any of foregoing causes of action</div> <div style="width: 33%;"><input type="checkbox"/> 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property</div> <div style="width: 33%;"><input type="checkbox"/> 426 To determine the dischargeability of a debt 11 U.S.C. §523</div> <div style="width: 33%;"><input type="checkbox"/> 459 To determine a claim or cause of action removed to a bankruptcy court.</div> <div style="width: 33%;"><input type="checkbox"/> 458 To Obtain approval for the sale of both the interests of the estate and of a co-owner in property.</div> <div style="width: 33%;"><input type="checkbox"/> 434 To obtain an injunction or other equitable relief</div> <div style="width: 33%;"><input type="checkbox"/> 499 Other (specify)</div> <div style="width: 33%;"><input type="checkbox"/> 424 To Object or Revoke a discharge 11 U.S.C. §727</div> <div style="width: 33%;"><input type="checkbox"/> 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan.</div> </div>					
ORIGIN OF PROCEEDINGS (Check one box only) <input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed Proceeding <input type="checkbox"/> 4 Reinstated or Recaptured <input type="checkbox"/> 5 Transferred from Another Bankruptcy Court <input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23					
DEMAND NEAREST THOUSAND \$ 25,000.00		OTHER RELIEF SOUGHT			<input type="checkbox"/> JURY DEMAND
BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES					
NAME OF DEBTOR VarTec Telecom, Inc.			BANKRUPTCY CASE NO. 04-81694-SAF-11		
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas		DIVISIONAL OFFICE Dallas Division		NAME OF JUDGE Steven A. Falsenthal	
RELATED ADVERSARY PROCEEDING (IF ANY)					
PLAINTIFF		DEFENDANT		ADVERSARY PROCEEDING NO.	
DISTRICT		DIVISIONAL OFFICE		NAME OF JUDGE	
FILING FEE (Check one box only) <input type="checkbox"/> FEE ATTACHED <input checked="" type="checkbox"/> FEE NOT REQUIRED <input type="checkbox"/> FEE IS DEFERRED					
DATE Jul 18, 2005		PRINT NAME Abigail Willie		SIGNATURE OF ATTORNEY (OR PLAINTIFF) AS/ Abigail Willie	

Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Abigail B. Willie, SBT #24028226
VINSON & ELKINS L.L.P.
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
Tel: 214-661-7299
Fax: 214-220-7716
VarTec@velaw.com

ATTORNEYS FOR THE DEBTORS AND PLAINTIFF

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

In re	§	
	§	Case No. 04-81694-SAF-11
VARTEC TELECOM, INC., <i>et al.</i> ,	§	
	§	(Chapter 11)
Debtors.	§	(Jointly Administered)
	§	
VARTEC PROPERTIES, INC.,	§	
	§	
Plaintiff,	§	Adversary Proceeding
	§	No. 05-_____
v.	§	
	§	
REBPUBLIC TITLE OF TEXAS, INC.,	§	
	§	
Defendant.	§	

COMPLAINT

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

The above-referenced debtors and debtors in possession (collectively, the “Debtors” or the “Plaintiffs”)¹ file this Complaint (the “Complaint”) against Republic Title

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.

of Texas, Inc. (“Republic Title”), commencing the above-numbered adversary proceeding (the “Adversary Proceeding”) and in support show as follows:

JURISDICTION AND PROCEDURAL BACKGROUND

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157 as a proceeding arising under title 11 of the United States Code (the “Bankruptcy Code”). The Adversary Proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) because it involves matters concerning the administration of the estates.

2. Venue is proper pursuant to 28 U.S.C. § 1409.

PROCEDURAL BACKGROUND

3. 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”).

4. 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.

5. The Cases are jointly administered as *In re VarTec Telecom, Inc., et al.* (Case No. 04-81694-SAF-11).

FACTUAL BACKGROUND

6. On February 28, 2005, the Court entered its Order Approving the Sale of Real Property in DeSoto, Texas, Free and Clear of All Liens, Claims, Interests, Encumbrances, and Taxes, and Waiving the Automatic Stay Imposed Under Federal Rule of Bankruptcy Procedure 6004(g) [Docket No. 1019] (the “Sale Order”), by the

Sale Order, the Court approved the sale of an undeveloped tract of land in DeSoto, Texas owned by VarTec Properties, Inc., one of the Debtors (the "Seller"), pursuant to a Contract for Sale dated October 22, 2004 and the First Amendment to the Contract for Sale dated January 20, 2005 (together, the "Contract"). The buyer under the Contract is Regional Management Properties, Inc. (the "Buyer"). The total sales price was \$455,000.00 and the Contract called for the Buyer to place \$25,000.00 of such sum into an escrow account at Republic Title of Texas, Inc. ("Republic Title") as earnest money (the "Funds") (Contract at 1.) Republic Title signed the Contract as escrow agent and agreed to "hold and disburse the [\$25,000.00] in accordance with the terms and provisions of this Contract..." (Contract at 15.)

7. On March 7, 2005, the Buyer notified the Seller that it was terminating the Contract and would not close on the proposed sale. On March 8 and 9, 2005 the Seller made written demand upon Republic Title for the Funds, to which the Seller has a good-faith claim pursuant to the Contract. Pursuant to Paragraphs 5 and 6 of the Contract, the Seller is entitled to the entirety of the Funds because the Buyer did not terminate on grounds that would entitled it to a return of the Funds. Additionally, the 120-day Inspection Period (as defined in amended Paragraph 5 of the Contract) expired as of February 19, 2005, and the Buyer did not purchase an extension pursuant to Paragraph 3. Accordingly, because the Buyer's termination was effected after the expiration of the Inspection Period, the Seller is entitled to receive the Funds in accordance with Paragraph 5.

8. On March 17, 2005, the Buyer wrongfully made a demand upon Republic Title for the Funds. Accordingly, the issue of which party is entitled under the Contract

to the Funds is not resolved and Republic Title has no authority or right to disburse the Funds, or to make a determination as to entitlement.

9. On June 22, 2005, the Seller contacted Republic Title by telephone to confirm the status of the Funds and ensure that they remained escrowed according to the terms of the Contract. During the course of that telephone conversation, the Seller was advised that Republic Title had taken it upon itself to release the Funds to the Buyer on March 31, 2005. Further, Republic Title had no record that it provided notice of this release to the Seller. The Seller, in fact, did not receive any such notice.

**FIRST CAUSE OF ACTION:
BREACH OF CONTRACT**

10. Pursuant to the Contract, Republic Title has authority to release the Funds only (a) to the party entitled to those Funds, and (b) five days after having delivered notice to the other party of its intention to do so. (Contract at 12.)

11. Despite these clear contractual directives, Republic Title released the Funds even though both parties claimed entitlement to the Funds and entitlement had not been legally resolved by a proper authority, and without providing any notice to the Seller of Republic Title's intention to release the Funds. Such conduct by Republic Title constitutes a breach of the Contract.

12. Because of Republic Title's flagrant breach of the Contract, the Funds were transferred without authority to the Buyer, thereby depriving the Seller of the opportunity to effectively pursue its claim to the Funds under the Contract.

13. Accordingly, Republic Title is liable to the Seller for all costs and damages incurred by the Seller related to this breach of the Contract. Additionally, Republic Title

is personally liable to the Seller for \$25,000.00 upon the Seller's proof of its entitlement to the Funds.

**SECOND CAUSE OF ACTION:
BREACH OF FIDUCIARY DUTY**

14. Under Texas law, Republic Title, as the escrow agent owed a fiduciary duty to the Seller. See *Watkins v. Williamson*, 869 S.W.2d 383, 387 (Tex. App.—Dallas 1983, no pet.).

15. By releasing the Funds without authority and in contravention of the Contract, Republic Title breached its fiduciary duty:

A. By failing to perform its duty of loyalty: in complete contradiction to the terms of the Contract and without any legal or contractual authority, Republic Title chose to distribute the contested Funds to the Buyer.

B. By failing to perform its duty of full disclosure: Republic Title failed to inform the Seller of its disbursement of the Funds; and

C. By failing to perform its duty to exercise a high degree of care to conserve the money in escrow and to pay it only to those persons entitled to receive it: both parties asserted claims to the Funds, and these conflicting demands had not been properly resolved; nonetheless, Republic Title, without any authority, distributed the Funds to the Buyer.

16. This breach of fiduciary duty directly and proximately injured the Seller by depriving it of the opportunity to receive the Funds should the Seller be found to be the entitled to the Funds and by causing the Seller to incur the expense of having to file and pursue this litigation. Accordingly, the Seller is entitled to all consequential and punitive

damages available under law for this breach of fiduciary duty, as well as to any costs and fees as may be allowed and any other relief to which the Seller is entitled.

CONTEMPT SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY

17. Regardless of whether the Seller ultimately is determined to be entitled to the Funds, at the time Republic Title transferred the Funds in breach of the Contract and in violation of its fiduciary duty, the Funds were property of the estate. See 11 U.S.C. § 541(a)(7) (defining property of the estate to include “any interest in property that the estate acquires after commencement of the case”). A contingent interest may be included in this specifically broad definition of property of the estate.

18. Upon the filing of a petition for bankruptcy relief, the automatic stay becomes effective and prohibits “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate,” 11 U.S.C. § 362(a)(3), without court authority pursuant to an order granting relief from the stay. As such, Republic Title’s transfer of estate property—an act of exercising unlawful control over the property of the estate in willful breach of the Contract and without Court authority—constitutes a violation of the automatic stay.

19. Pursuant to Bankruptcy Code § 105 and Federal Rule of Bankruptcy Procedure 9020, the Court may impose sanctions for contempt and provide a remedy for a violation of the automatic stay against a corporate debtor. See *First RepublicBank Corp. v. NCNB Tex. Nat’l Bank (In re First RepublicBank Corp.)*, 113 B.R. 277, 279 (Bankr. N.D. Tex. 1989). Accordingly, the Seller requests that such sanctions be imposed and Republic Title be ordered to immediately place \$25,000.00 into the escrow account, pending the legal and final determination of which party is entitled to the

Funds. The Seller also requests all consequential or punitive damages, as well as any associated costs or fees, and any other relief to which the Seller may be entitled.

PRAYER

WHEREFORE, the Seller respectfully prays that Republic Title be found liable for breach of contract, breach of fiduciary duty, and violating the automatic stay, and the Seller therefore be granted all relief to which it is entitled under law and equity, including but not limited to relief in the form of an order directing Republic Title to remit \$25,000.00 into the escrow account to replace the Funds it wrongfully transferred to the Buyer, consequential and punitive damages, and any other relief as may be proper.

Dated this 18th of July, 2005.

Respectfully submitted,

VINSON & ELKINS L.L.P.

Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
Tel: 214-661-7299
Fax: 214-220-7716

By: /s/ Abigail B. Willie
Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Abigail B. Willie, SBT #24028226

**ATTORNEYS FOR THE DEBTORS
AND PLAINTIFF**

CERTIFICATE OF SERVICE

This is to certify that on July 18, 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. Additionally, Republic Title of Texas, Inc. was served by first-class, prepaid U.S. postage at the following:

Republic Title of Texas, Inc.
Peter S. Graf
Senior Vice President and General Counsel
2626 Howell Street, 10th Floor
Dallas, Texas 75204

/s/ Abigail B. Willie

One of Counsel

985885.3_DOC