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ATTORNEYS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§	Case No. 04-81694-SAF
VARTEC TELECOM, INC., et al.,	§	(Chapter 11)
	§	
<i>Debtors.</i>	§	(Jointly Administered)
	§	Hearing (Expedited): July 22, 2005
	§	at 1:30 p.m. CST

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO THE DEBTORS' THIRD MOTION TO EXTEND
EXCLUSIVE PERIODS DURING WHICH DEBTORS MAY FILE
AND SOLICIT ACCEPTANCES OF A CHAPTER 11 PLAN
[Re Docket #1471]**

TO THE HONORABLE COURT:

The Official Committee of Unsecured Creditors (the "UCC") of the above-referenced debtors and debtors in possession (collectively, the "Debtors") files this Objection to the Debtors' Third Motion to Extend Exclusive Periods During Which Debtors May file and Solicit Acceptances of a Chapter 11 Plan, (the "Objection") and respectfully states as follows:

I. JURISDICTION AND PROCEDURAL BACKGROUND

1. 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”).

2. 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.

II. BACKGROUND FACTS

3. On February 4, 2005, the Debtors filed the Motion to Extend Exclusive Periods During Which Debtors May File and Solicit Acceptances of a Plan of Reorganization and Report Pursuant to Local Bankruptcy Rule 3016.1.

4. On February 24, 2005, the Court entered its Order Granting Extension of Exclusive Periods During Which Debtors May file and Solicit Acceptances of a Plan of Reorganization (Docket No. 988). The Court extended the exclusive period for the Debtors to file a plan through and including June 1, 2005 and the period for the Debtors to solicit acceptance of such plan through and including August 1, 2005.

5. On May 11, 2005, the Debtors filed the Second Motion to Extend Exclusive Periods During Which Debtors May File and Solicit Acceptances of a Plan of Reorganization and Report Pursuant to Local Bankruptcy Rule 3016.1. The Second Motion to Extend requested that this Court enter an order extending the Debtors’ exclusive time to file a Chapter 11 plan through and including August 1, 2005, and the exclusive period to solicit a Chapter 11 plan through and including October 1, 2005 without prejudice to their rights to seek further extensions.

6. On or about July 8, 2005, the Debtors filed the Third Motion to Extend Exclusive Periods During Which Debtors May File and Solicit Acceptances of a Plan of Reorganization and Report Pursuant to Local Bankruptcy Rule 3016.1. The Third Motion to Extend requests that this Court enter an order extending the Debtors' exclusive time to file a plan of reorganization through and including October 3, 2005, and the exclusive period to solicit a plan of reorganization through and including December 1, 2005 without prejudice to their rights to seek further extensions.

III. ARGUMENTS

7. The Court initially granted a three-month (92 day) extension for the Debtors to file a plan and a three month (92 day) extension to solicit acceptances of the plan, which was then followed by corresponding extensions of two-month (60 day) for each of such periods. The Debtors now request an additional two month extension to file a plan and to solicit acceptances of the plan.

8. This Third Motion can be granted only upon a stringent showing of good cause. 11 U.S.C. § 1121(d).

9. Although Section 1121(d) does not define "cause," courts have considered nine factors, among others, to determine whether cause exists: (a) the size and complexity of the case; (b) the necessity of sufficient time to permit the debtor to negotiate a Chapter 11 plan and prepare adequate information; (c) the existence of good faith progress toward reorganization; (d) the fact that the debtor is paying its bills as they become due; (e) whether the debtor has demonstrated reasonable prospects for filing a viable plan; (f) whether the debtor has made progress in negotiations with its creditors; (g) the amount of time which has elapsed in the case; (h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to

submit to the debtor's reorganization demands; and (i) whether an unresolved contingency exists. *In re Express One Int'l*, 194 B.R. 98 (Tex. E.D. Bankr. 1996).

A. Good Cause Has Faded

10. It is the Debtors' burden to clearly establish that "cause" exists for the granting of an extension of exclusivity.

11. The First, Second, and Third Motions to Extend are virtually identical in their analysis of the nine factor test and, aside from a recitation of events in the Cases, provide little basis for granting the requested extensions as necessary.

B. No Demonstrated Pathway to Confirmation of a Chapter 11 Plan

12. Whether or not sufficient with respect to the First and Second Motions to Extend, the Debtors' purported compliance with the requirements of Local Bankruptcy Rule 3016.1 is woefully inadequate. Without limitation:

- 1 The Debtors do not provide any realistic prospect or timetable for preparing and filing a Chapter 11 plan and corresponding disclosure statement within the requested extension.
- 1 Most importantly, the Debtors cannot provide any commitment from the Rural Telephone Finance Cooperative ("RTFC"), the purported secured creditor in the Cases, to support or fund the implementation of a Chapter 11 plan, including *inter alia* the required payment of priority and administrative claims, *i.e.*, those not assumed by the putative Buyer under the pending Debtors' Motion for Authority to Sell Assets Free and Clear of All Liens, Claims, Rights, Interests, and Encumbrances and for Related Relief (Substantially All of the Debtors' Remaining Assets) (the "Sale Motion") or those existing in a harvest mode of liquidation in the absence of a sale.
- 1 In the context of the Debtor's pending Sale Motion, the Debtors have indicated that formulation of a Chapter 11 plan within the requested extension period is unlikely. See, Omnibus Response to Objections to Debtors' Expedited Motion for Order (A) Approving Sale Procedures and Bid Protections in Connection With Sale of Certain Assets; (B) Scheduling an Auction and Hearing to Consider Approval of the Sale, (C) Approving Notice Relating to Sale; and (D) Granting Related Relief

(Sale of Substantially All of the Debtors' Remaining Assets) (Docket No. 1435), at Exhibit "A", page 4, (re: "The delayed assumption and assignment of Assumed Contracts . . .").¹ The Debtors estimate that the final closing of their proposed sale transaction and the effective date of a plan will occur on or about March 1, 2006. Third Motion to Extend at ¶¶ 12 and 13.

- I In the context of the Sale Motion, it is unlikely that the Debtors will obtain all or 90% of the required FCC and PUC approvals within the requested extension period which will enable the Debtors to proceed to final closing of the Asset Purchase Agreement ("APA") contemplated in the pending Sale Motion. Accordingly, under the current construct of the Sale Motion and APA, the Debtors are simply unable to formulate a feasible plan within the requested extension period.²
- I In the context of a harvest mode liquidation in a chapter 11 context, it is all the more imperative that a plan of reorganization be confirmed and implemented (or, alternatively, that RTFC give sufficient written assurances to enable confirmation and implementation of a plan) early in the process, since RTFC will have no incentive at the end of the process to pay for the largesse of the chapter 11 protection it will by then have enjoyed.
- I The Debtors point to a contemplated settlement with "independent representative" claimants ("IRs") to be a cause for extension of exclusivity. However, as with payment of certain other pertinent administrative and priority claims required to implement a plan of reorganization,³ RTFC's counsel advised the parties in interest in open court on July 7, 2005 that RTFC is currently balking at the prospect of funding such a settlement.

13. The Debtors arguments for "cause" in allowing the extensions, although typical with respect to the First Motion to Extend and passable with respect to the Second Motion to

¹ "The Debtors do not seek to assume and assign Assumed Contracts after the confirmation of a plan. Even if the proposed sale would delay the confirmation of a plan, the proposed sale remains in the best interest of creditors ... These facts will clearly support holding off/coordinating on confirmation until the sale can be consummated at the Final Closing."

² The APA also requires HSR approval prior, which may also be a factor in delaying plan formulation, filing, or implementation. Moreover, to confirm a Chapter 11 plan, the Debtors will have to assume or reject leases and contracts. *See* Bankruptcy Code section 365(d)(2). The structure of the proposed sale effectively defers these decisions to final closing, which Debtors estimate to be March 2006.

³ If, for example, an IR settlement were projected to cost \$2.8 million overall, it could be argued that approximately \$2.2 million of such overall cost is attributable to priority claims held or asserted by (or on behalf of) the IR claimants.

Extend, do not suffice for the extension as requested in the Third Motion to Extend. *See, In re Curry Corp.*, 148 B.R. 754, 755-756 (Bankr. S.D.N.Y. 1992). Moreover, it is important that bankruptcy courts consider a debtor's request for an extension of exclusivity within the overall fabric of the case and treat it as a serious and potentially pivotal matter. *See, In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990).

14. The Debtors argue that cause exists to grant the extensions because their various efforts to date have been in good faith and not motivated by ulterior motives. While the Debtors *bona fides* in these two matters is not called into question at this time, the Debtors' good intentions do not alone support the requested extensions. Given the status of the Cases, it is much more important to know what RTFC is or is not committed to do to enable confirmation and implementation of a plan of reorganization (or whether it will even support a Chapter 11 plan) rather than what the Debtors hope or intend to do.

C. Non-opposition to a Thirty Day Extension

15. Because of the pending Sale Motion and the uncertainty surrounding which path will be taken in the Cases, the Committee does not oppose a one month extension (*i.e.*, to September 1, 2005 and November 1, 2005, respectively) of the exclusive periods.

D. Opposition to the Requested Sixty-Day Extension.

16. Thus, the Committee opposes the 60-day extensions as requested by the Debtors.

17. Moreover, any extensions beyond the one-month periods referenced above must be supported by a showing of extraordinary cause (*e.g.*, new and materially favorable developments, such as a meaningful commitment by RTFC to support and fund a Chapter 11 plan). Absent such extraordinary cause, the one month extensions suggested by the Committee

should be the final extensions granted, and the Debtors and RTFC should be put on notice thereof.

WHEREFORE, the UCC does not oppose a one month extension of the respective exclusive periods, does oppose the more open ended extensions requested by the Debtors, and requests the Court to put the Debtors and RTFC on notice that extraordinary cause will be required for any further extensions.

Dated: July 20, 2005.

Respectfully submitted,

/s/ Stephen A. Goodwin
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on July 20, 2005, a true and correct copy of the foregoing has been served, via ECF electronic mail and/or by regular United States Mail, postage-prepaid, on the parties listed on the Master Service List (*as of May 11, 2005*).

/s/ J. Michael Sutherland
J. Michael Sutherland