

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

IN RE:

VARTEC TELECOM, INC., *et al.*

Debtors.

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Case No. 04-81694-SAF-11

Chapter 11

Jointly Administered

**BROADWING COMMUNICATIONS, LLC'S OBJECTION TO THE
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' ASSETS)**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Broadwing Communications, LLC ("Broadwing"), a creditor and party-in-interest in the above-referenced matter, and files this Objection to the 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") ("Objection") and avers as follows:

I.
INTRODUCTION

1. Broadwing is a telecommunications carrier which, among other things, provides telecommunication services including voice, data, and long-haul transmission, collocation facilities, and private line services.

2. Broadwing provides telecommunications services to the Debtors pursuant to master services, and products and services agreements ("Service Agreements"). Broadwing continues to provide services to the Debtors on a post-petition basis pursuant to the Service Agreements.

3. On or about June 17, 2005, the Debtors filed a 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") ("Sale Motion"). By the Sale Motion, the Debtors seek authority to sell substantially all of their remaining assets and business operations (Proposed Sale) to Leucadia National Corporation ("Leucadia").

4. Also on or about June 17, 2005, the Debtors filed their Motion for Order (A) Approving Sale Procedures and Bid Protections in Connection with Sale of Certain Acquired 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) ("Sales Procedures Motion").

5. By order entered June 30, 2005 ("Procedures Order"), the Court approved the Sales Procedures Motion with certain modifications. The Procedures Order provides that issues raised in certain objections to the Sale Procedures Motion as to, *inter alia*, "assumption, assignment, and rejection of executory contracts and unexpired leases" and "substantive issues as to any asset purchase agreement" are reserved for the hearing on the Proposed Sale currently scheduled for July 27, 2005, at 9:00 a.m.

II. OBJECTION

6. There is ample case law holding that a debtor "should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets." *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983); *In re San Jacinto Glass Indus., Inc.*, 93 B.R. 934, 944 (Bankr. S.D. Tex. 1988)("If a §363(b) transaction effectively specifies the terms of a reorganization plan, then creditors would be denied their rights under Chapter 11"). When a debtor attempts to

dictate the terms of a plan of reorganization through a § 363 sale, as the current Debtors are attempting to do through the Proposed Sale, courts have held that the debtor must meet the requisites of disclosure, plan confirmation, and other creditor protections as set forth in the Bankruptcy Code. *See Braniff*, 700 F.2d at 940.

7. “The provisions of Section 363 permitting a trustee to use, sell, or lease the assets do not allow a debtor to gut the bankruptcy estate before reorganization or to change the fundamental nature of the estate’s assets in such a way that limits a future reorganization plan.” *In re The Babcock and Wilcox Company*, 250 F.3d 955, 960 (5th Cir. 2001) (emphases added). As stated in *Continental*:

Section 363 does not authorize a debtor and the bankruptcy court to short circuit the requirements of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a proposed transaction. When a proposed transaction specifies terms for adopting a reorganization plan, the parties and the court must scale the hurdles erected in Chapter 11. *See, e.g.*, such as: (i) 11 U.S.C. § 1125 (disclosure requirements); 11 U.S.C. § 1126 (voting); 11 U.S.C. § 1129(a)(7) (best interest of the creditor test); 11 U.S.C. § 1129(b)(2)(B) (absolute priority rule).

In re Continental Air Lines, Inc., 780 F.2d 1223, 1226 (5th Cir. 1986)(citing *Braniff*, 700 F.2d at 939) (5th Cir. 1983)).

8. For example, in *Braniff* the Fifth Circuit held that a proposed transaction was improper because, among other reasons, it “changed the composition of the [debtor’s] assets,” and “also had the practical effect of dictating the terms of any future reorganization plan.”¹ *Braniff*, 700 F.2d at 939-40. Further, if the proposed transaction had been approved “little would remain” in the estate and there would have been “little prospect or occasion for further

¹ The transaction in *Braniff* essentially provided for the debtor’s transfer of cash, airplanes and equipment, terminal leases and landing slots to the purchaser in exchange for return for travel scrip on the purchaser airline, unsecured notes, and a profit participation in the purchaser’s proposed operation. The transaction also required a significant restructuring of the rights of the debtor’s creditors.

reorganization.” *Id.* at 940. The impact of the Proposed Sale upon the current Debtors’ estates would be just as severe.

9. Moreover, as a result of a short-circuited plan process, the requirement set forth at § 365(d)(2) of the Bankruptcy Code – that a debtor must assume or reject executory contracts before confirmation – would be likewise compromised by the Proposed Sale. This, in turn, is in contravention of § 1129 which requires that a plan comply with “applicable provisions” of title 11.

10. These concerns have been briefed by other creditors and parties-in-interest in this case.² Broadwing hereby joins with and adopts the positions taken by other creditors and parties-in-interest in opposing the Proposed Sale, including issues related to the existence of a *sub rosa* plan of reorganization, and the Debtors’ attempt to transfer the benefits of its executory contracts to the prospective purchaser (likely Leucadia) without actual assumption, cure, and assignment as required by applicable provisions of the Bankruptcy Code.

² In particular, Broadwing joins in the objections raised in the following pleadings:

Objection of the Operating Telephone Company Subsidiaries of Verizon Communications, Inc. to 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; Docket No. 1425;

Objection of SBC Telcos to 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; Docket No. 1429;

Bellsouth’s’ Objection to Expedited Motion to Approve Sale Procedures; Docket No. 1430;

Objection by Qwest Corporation and Qwest Communications Corporation to 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; Docket No. 1438; and

Objection by TDS Telecommunications Corporation to 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”); and Motion to Compel Assumption of Executory Contracts, Docket No. 1550.

WHEREFORE Broadwing respectfully requests that this Court enter an order denying the Debtors' Proposed Sale, and that this Court grant Broadwing such other and further relief to which it may show itself to be justly entitled.

Dated: July 20, 2005.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/ Marvin E. Sprouse III

C. Wade Cooper
State Bar No. 04772700
Marvin E. Sprouse III
State Bar No. 2008067

100 Congress, Suite 1100
Austin, TX 78701
(512) 236-2000
(512) 236-2002 – Fax

ATTORNEYS FOR BROADWING
COMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

This is to certify that on this **20th** day of **July, 2005** a true and correct copy of the foregoing instrument was served United States Mail, postage prepaid upon the following:

Elizabeth Weller
LINEBARGER, GOGGAN BLAIR & SAMPSON
2323 Bryan Street, Suite 1600
Dallas, Texas 75201

Rex D. Rainach
3622 Government Street
Baton Rouge, LA 70806-5720

US TRUSTEE
1100 Commerce Street, Room 976
Dallas, Texas 75242-1496

Lisa A. Epps
SPENCER FANE BRITT AND BROWNE, LLP
1000 Walnut Street, Suite 1400
Kansas City, MO 64106-2140

Darryl S. Laddin
ARNALL GOLDEN GREGORY LLP
171 17th Street, Suite 2100
Atlanta, GA 30363

Marvin R. Mohny
900 Jackson Street, Suite 120
Dallas, Texas 75202

Vincent A. D-Agostino, Esq.
LOWENSTEIN SANDLER, P.C.
65 Livingston Avenue
Roseland, NJ 07068

Paul M. Rosenblatt
KILPATRICK STOCKTON
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309

David L. Woods
MCGUIR, CRADDOCK & STROTHER
500 N. Akard Street, Suite 3550
Dallas, Texas 75201

Abigail B. Willie
Richard H. London
William Louis Wallander
VINSON & ELKINS
3700 Trammel Crow Center
2001 Ross Avenue
Dallas, Texas 75201-2975

/s/ Marvin E. Sprouse III

Marvin E. Sprouse III