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

<b>In re:</b>	§	<b>Case No. 04-81694-SAF</b>
<b>VARTEC TELECOM, INC., et al.,</b>	§	<b>(Chapter 11)</b>
	§	
<b>Debtors.</b>	§	<b>(Jointly Administered)</b>

**OBJECTION TO AMENDED EXPEDITED MOTION FOR RULE 2004  
EXAMINATION OF FORMER DIRECTORS AND OFFICERS OF THE DEBTORS**

Connie Mitchell and Ronald Hughes file this Objection to Amended Expedited Motion for 2004 Examination of Former Directors and Officers of the Debtors (the “Motion”) filed by the Official Committee of Unsecured Creditors (“Creditors Committee”), as follows:

**I.**

**INTRODUCTION**

The Court should deny the Creditors Committee’s Motion because the requested Rule 2004 examinations cannot be used to circumvent the requirements of Federal Rule of Civil Procedure 27. Last month, the Creditors Committee conducted a Rule 2004 examination of A. Joseph Mitchell, Jr. and others. Based on those examinations, the Creditors Committee clearly intends to institute an adversary proceeding against the former officers and directors of Debtors, which means that the

Creditors Committee is, *de facto*, an adverse party to the former officers and directors, including Connie Mitchell and Ronald Hughes. The Creditors Committee is now trying to circumvent Rule 27's pre-suit discovery limitations by using Rule 2004 examinations to secure pre-suit deposition testimony and documents from the former officers and directors, who they intend to sue. Accordingly, Connie Mitchell and Ronald Hughes respectfully request that the Court deny the Creditors Committee's Motion.

## II.

### PROCEDURAL HISTORY

1. On April 15, 2005, the Creditors Committee filed its Expedited Motion for Rule 2004 Examination of a Former Director and Officer of the Debtors ("April 15, 2005 Motion"), wherein the Creditors Committee requested a Rule 2004 examination of "Joe Mitchell, a former member of the board of directors of VarTec Telecom, Inc. ("VarTec") and the former president and chief executive officer of VarTec."<sup>1</sup>

2. The April 15, 2005 Motion stated, "Mr. Mitchell has documents, records, and other materials regarding the acts, conduct, property, liabilities, and financial affairs of Debtors, all of which are pertinent to the investigation of the Estate Claims."<sup>2</sup>

3. On May 11, 2005, Judge Felsenthal signed an order granting the April 15, 2005 Motion (the "May 11, 2005 Order").

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<sup>1</sup>April 15, 2005 Motion ¶ 5.

<sup>2</sup>*Id.* ¶ 9.

4. On May 24, 2004 conducted an oral deposition of Joe Mitchell. The Creditors C Committee conducted similar Rule 2004 examinations of Walter Frank, Jody Fail, and Robert Healea.

5. Based on those examinations, the Creditors Committee sent a letter to, *inter alia*, Connie Mitchell and Ronald Hughes, stating “the Committee hereby makes claims on behalf of the Debtors’ Estate against you as current or former officers and directors of Debtors. Accordingly, the Committee though this letter hereby makes claims against and demands monetary relief from you as set out herein. You should notify any insurance carrier that may cover your alleged liability for any such claims.”<sup>3</sup>

6. Although no adversary proceeding has yet been filed, the Motion at bar seeks deposition testimony and documents from Connie Mitchell and Ronald Hughes for use in connection with an adversary proceeding against them as former officers and directors.<sup>4</sup>

### III.

#### ARGUMENT AND AUTHORITIES

The Federal Rules of Civil Procedure – which govern discovery in adversary proceedings – disallow fishing expedition style discovery, whereas “Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions.”<sup>5</sup> The gap between “the broad nature of the Rule

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<sup>3</sup>See Letter from Peter Tierney to Connie Mitchell and Ronald Hughes, *et al.* (“Notification of Claims Letter”), dated May 26, 2005, attached hereto as Exhibit “A.”

<sup>4</sup>See generally Motion.

<sup>5</sup>*In re Enron Corp.*, 281 B.R. 836, 840 (S.D.N.Y. 2002); see also *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) (“The scope of this examination is admittedly unfettered and broad and indeed is commonly recognized as more in the nature of a

2004 exam and the more restrictive nature of discovery under the Federal Rules of Civil Procedure” provides the potential for a resourceful party – such as the Creditors Committee – to use Rule 2004 examinations “as a tactic to circumvent the safeguards of the Federal Rules of Civil Procedure.”<sup>6</sup> Courts must be vigilant to disallow Rule 2004 examinations where they “would unavoidably and unintentionally create a back door through which the [examiner] could circumvent the limitations of FED. R. BANKR. P. 7026 *et seq.*”<sup>7</sup>

Federal Rule of Civil Procedure 27 sets forth the procedure for obtaining pre-suit discovery in connection with an adversary proceeding.<sup>8</sup> Because the Creditors Committee has already notified Connie Mitchell and Ronald Hughes of its claims against them,<sup>9</sup> any pre-suit discovery from this point forward must conform to the limitations and requirements of Federal Rule of Civil Procedure 27, which cannot be circumvented via Rule 2004 examinations.<sup>10</sup>

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fishing expedition.”) (internal quotations and citations omitted); *First Financial Sav. Ass’n v. Kipp*, 86 B.R. 490, 491 (W.D. Tex. 1988) (“Bankruptcy Rule 2004 authorizes examination of any entity and the scope of such examination is virtually unlimited. As many courts have noted, the Rule allows an unrestrained fishing expedition.”).

<sup>6</sup>*In re Enron Corp.*, 281 B.R. at 840-41; *see also In re Bennett*, 203 B.R. at 28 (“[C]ourts are wary of attempts to utilize Fed.R.Bankr.P. 2004 to avoid the restrictions of the Fed.R.Civ.P. in the context of adversary proceedings.”); *cf. Kipp*, 86 B.R. at 491 (“Rule 2004 may not be used to circumvent the protections offered under the discovery rules, 7026 to 7037.”).

<sup>7</sup>*In re Bennett*, 203 B.R. at 30.

<sup>8</sup>FED. R. CIV. P. 27 (a)(1); *see Shore v. Acands, Inc.*, 644 F.2d 386, 388 (5<sup>th</sup> Cir. 1981).

<sup>9</sup>*See* Notification of Claims Letter, attached hereto as Exhibit A.

<sup>10</sup>*See In re Enron Corp.*, 281 B.R. at 840-41; *In re Bennett*, 203 B.R. at 28.

**IV.**

**REQUEST FOR RELIEF**

WHEREFORE Connie Mitchell and Ronald Hughes respectfully request that the Court deny the Amended Expedited Motion for 2004 Examination of Former Directors and Officers of the Debtors and grant all other appropriate relief.

Respectfully submitted, this 21<sup>st</sup> day of July, 2005.

**ARNETT GAUBERT, LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 21, 2005, I caused a true and correct copy of the foregoing document to be served on the following counsel of record, via ECF-electronic mail, as follows:

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/s/ Jamil N. Alibhai  
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