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PROPOSED ATTORNEYS FOR THE DEBTORS

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)**
	§	**(Joint Administration Requested)**

MOTION TO AUTHORIZE REJECTION OF NONRESIDENTIAL
REAL PROPERTY LEASE AND BRIEF IN SUPPORT
(TULSA, OKLAHOMA – CALL CENTER 823)

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUTPCY COURT AT EARL CABELL BUILDING, UNITED STATES COURTHOUSE, 1100 COMMERCE STREET, ROOM 1254, DALLAS, TEXAS 75242 BEFORE CLOSE OF BUSINESS ON NOVEMBER 24, 2004, WHICH IS TWENTY (20) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE MUST BE IN WRITING AND FILED WITH THE CLERK, AND A COPY MUST BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING WILL BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.

IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")[1] file this Motion to Authorize Rejection of Nonresidential Real Property Lease and Brief in Support (Tulsa, Oklahoma – Call Center 823) (the "Motion") and in support thereof the Debtors would show as follows:

JURISDICTION AND PROCEDURAL BACKGROUND

1. 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)(A).

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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. Contemporaneously with the filing of this Motion, the Debtors filed their Expedited Motion for Joint Administration of Cases.

[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.

STATEMENT OF FACTS

VarTec and Its Business

6. VarTec Telecom, Inc., a Texas corporation, ("VarTec") along with its sixteen direct and indirect domestic subsidiaries, each of which is a Debtor, and eighteen non-debtor direct and indirect foreign subsidiaries (collectively, the "VarTec Entities"), is among the largest privately held companies providing telecommunications services in North America and Europe. The VarTec Entities, founded in DeSoto, Texas in February 1989, with current employees totaling over 1,300 worldwide (including approximately 1,000 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 $900,000,000. VarTec's revenues have been derived primarily from three sale distribution channels: (a) Direct Marketing; (b) Commercial Services; and (c) Multi-Level Marketing.

7. 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.

8. 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 small business and residential customers. VarTec is licensed to provide local and long distance telephone services in all fifty states, and markets 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.

9. 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.

10. Through the Multi-Level Marketing channel, which is managed by Excelcom, Inc. and certain of its subsidiaries (collectively, “Excel”), Excel offers 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, has an international network of over 130,000 independent representatives who market Excel’s products and services to small business and residential consumers and recruit new independent representatives to market such products and services. Each independent representative receives 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”), the usage of Excel products and services by customers of the independent representative and a portion of their downline.

Secured Debt

11. 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 (the “Pre-Petition Loan 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.[2] 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

[2] 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.

Petition Date, the total outstanding obligation to the RTFC consist 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.

<u>The Industry</u>

12. Prior to 1996, local telecommunications services were provided exclusively by traditional, monopoly providers, or incumbent local exchange carriers (the "ILECs"). Pursuant to the Telecommunications Act of 1996 (the "Telecommunications Act"), which was enacted to promote competition in the local telecommunications industry, ILECs were required to provide competitors, such as the Debtors, access to their networks to allow those competitive local exchange carriers (the "CLECs") to offer local telecommunications services. The terms, conditions, and prices charged by ILECs to CLECs are provided in agreements – referenced as interconnection agreements – governed by rules and regulations promulgated by the FCC and various state agencies or public utility commissions. As consideration for relinquishing their monopoly positions, the ILECs were authorized to offer long distance telecommunications services, both out-of-region and in-region (where they were an ILEC) provided certain terms and conditions were satisfied.

13. ILECs, CLECs, and long distance carriers utilize each other's networks to transmit the voice and data traffic of their customers. The framework and pricing of the exchange of voice and data traffic between ILECs and CLECs, on the one hand, and long distance carriers, on the other hand, is governed by multiple laws, regulations, tariffs, and interconnection agreements. For example, if an ILEC or a CLEC' s customer originates a call that is carried to its destination by one of the Debtors, the respective

Debtor will bill the CLEC or ILEC on a minute of use basis; if a customer of one of the Debtors originates a call that is carried to its destination by an ILEC or a CLEC, the ILEC or CLEC will bill the respective Debtor on a minute of use basis. This is known as reciprocated or intercarrier compensation.[3]

14. To effectuate the billing, collection, and maintenance of account information, the Debtors often entered into agreements with various ILEC and CLEC, under which such ILEC or CLEC bills customers for the services provided by the Debtors, collects the billed amount for the Debtors, and pays or remits to the Debtors the collected amounts periodically.

15. The deregulation of local and long distance telecommunication services pursuant to the Telecommunications Act resulted in increased competition and decreased local and long distance rates. Despite successfully competing in the telecommunications industry for almost fifteen years, (i) VarTec's lack of brand name recognition comparable to some of its competitors in the more intensively competitive telecommunications market, (ii) customer attrition exacerbated by aggressive customer win-back campaigns by the dominant telco providers, and (iii) the margin compromises caused by increasing wholesale rates while retail rates are suffering, have all made it difficult for VarTec to maintain its historical revenue and profitability levels.

Challenges

16. In the weeks preceding the Petition Date, several ILECs, CLECs, and long distance carriers with whom the Debtors have interconnection or access

[3] A long distance carrier can also be an ILEC or a CLEC.

agreements have (i) threatened to terminate services provided to the Debtors, (ii) requested security deposits, and/or (iii) offset amounts owed to the Debtors. The actions of the ILECs, CLECs, and long distance carriers have impaired the Debtors' liquidity.

17. In addition to the matters discussed above, because of various disputes[4] with Teleglobe Inc. ("Teleglobe") regarding VarTec's acquisition of certain of the companies now associated with Excel and VarTec Solutions (the "Acquired Companies"), VarTec has had to spend millions of dollars in the past several years supporting the Excel companies (for which it had anticipated reimbursement), which has financially weakened the Debtors.

18. The combination of these economic and financial events has impaired the Debtors' liquidity and compelled the Debtors to commence these Cases in order to maximize the value of their assets for the benefit of their creditors and other constituencies under chapter 11 of the Bankruptcy Code.

Tulsa, Oklahoma – Call Center 823 Lease

19. On August 31, 2000 Texas RRI, Ltd. and Detroit Avenue Properties, L.L.C. (the "Landlord") executed that certain Aurora Building Office Lease Agreement (as amended, supplemented, and modified, the "Lease") for the lease to Texas RRI, Ltd. of approximately 9,555 square fee of nonresidential real property located at 823 South Detroit Avenue, Tulsa, Oklahoma, 74120 (the "Lease Premises") for a 5-year period commencing on September 8, 2000. Texas RRI, Ltd. assigned the Lease to

[4] Such disputes have spawned considerable litigation, including an arbitration between VarTec and Teleglobe's bankruptcy estate.

VarTec Telecom, Inc. (as successor in interest to VarTec CRM, Inc.) ("VarTec Telecom"). Basic Rent under the Lease is approximately $8,618.42 per month. A copy of the Lease is not attached hereto but will be provided to parties in interest upon the receipt of written request delivered to Vinson & Elkins L.L.P., Attn: Pam Lewis, Paralegal, 3700 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201-2975.

20. The Debtors abandoned the Lease Premises over two years ago and they do not have a business need for the Lease Premises. Therefore, the Debtors have determined in their business judgment to reject the Lease.

RELIEF REQUESTED

21. VarTec Telecom does not intend to use the Lease Premises and it has determined that the rejection of the Lease is advantageous to it and will avoid unnecessary and burdensome administrative claims against its estate. As a result, VarTec Telecom has determined, in its business judgment, that it is in its best interest and that of its estate to reject the Lease pursuant to Bankruptcy Code § 365.

22. By this Motion, the Debtors request entry of an order pursuant to Bankruptcy Code § 365 authorizing and approving the rejection of the Lease, effective as of the actual date on which the Debtors notify the Landlord in writing that they have removed their personal property which is located at the Lease Premises, or that they have abandoned such remaining personal property.

23. Bankruptcy Code §365 provides that the Debtors, "subject to the Court's approval, may assume or reject any . . . unexpired lease of the debtor." 11 U.S.C. § 365(a). A debtor operating its business pursuant to Bankruptcy Code §§ 1107 and

1108 must use reasonable judgment in ordinary business matters in its determination of whether to reject unexpired leases.

24. Bankruptcy Code § 365 does not provide a standard for determining when a debtor's rejection of an unexpired lease is appropriate. *In re Monarch Tool & Manufacturing Co.*, 114 B.R. 134 (Bankr. S.D. Ohio 1990). However, most courts acknowledge that the business judgment standard should be applied to determine "whether to authorize the rejection of executory contracts and unexpired leases." *In re Federated Department Stores, Inc.*, 131 B.R. 808, 811 (Bankr. S.D. Ohio 1991) (citing *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 523, 104 S.Ct. 1188, 1194-95, 79 L.Ed.2d 482 (1984), and *Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523, 63 S.Ct. 727, 87 L.Ed. 959 (1943)). As the Sixth Circuit observed, "[A] bankruptcy court . . . need determine only . . . whether disaffirmance would be advantageous to the debtor. The burden or hardship which rejection would impose on other parties to such a contract *is not* a factor to be weighed by the bankruptcy court in ruling upon the debtor's application." *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187, 189 (6th Cir.) (dicta), *cert. denied,* 464 U.S. 908, 104 S.Ct. 263, 78 L.Ed.2d 247 (1983) (emphasis added). Therefore, VarTec Telecom may reject any unexpired lease provided that it determines in its business judgment that rejection would be advantageous to it.

25. Because Bankruptcy Code § 365(d)(3) requires that a debtor timely perform all of its obligations, arising from and after the petition date under any unexpired lease of nonresidential real property until such lease is assumed or rejected, VarTec Telecom requests that this Court approve the rejection of the Lease, *nun pro tunc,* as of

the Petition Date. By doing so, VarTec Telecom will avoid the incurrence of unnecessary administrative expenses. Further, any personal property remaining at the Lease Premises is burdensome and of inconsequential value and benefit to VarTec Telecom's estate.

PRAYER

The Debtors respectfully request that the Court enter an Order authorizing the rejection of the Lease effective as of Petition Date and the abandonment of any personal property remaining at the Lease Premises. The Debtors requests such other and further relief to which they may be justly entitled.

Respectfully submitted,

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