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**ATTORNEYS FOR THE DEBTORS**

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

<b>IN RE:</b>	§	
	§	
<b>VARTEC TELECOM, INC., et al.,</b>	§	<b>CASE NO. 04-81694-SAF-11</b>
	§	
<b>DEBTORS.</b>	§	<b>(Chapter 11)</b>
	§	<b>(Jointly Administered)</b>
	§	
	§	<b>Hearing Set for August 18, 2005</b>
	§	<b>at 2:30 p.m.</b>

**MOTION TO APPROVE SALE OF PERSONAL PROPERTY  
AT ADDISON II LOCATION**

**A HEARING ON THIS MATTER HAS BEEN SET FOR AUGUST 18, 2005 AT 2:30 P.M. IN THE COURTROOM OF THE HONORABLE STEVEN A. FELSENTHAL, UNITED STATES COURTHOUSE, 1100 COMMERCE STREET, DALLAS, TEXAS. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY (20) DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.**

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

The above-referenced debtors and debtors in possession (collectively, the “Debtors”)<sup>1</sup> file this Motion to Approve Sale of Personal Property at Addison II Location (the “Motion”) 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. This Motion concerns the administration of the estate; and therefore, it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

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. The Debtors’ Cases are jointly administered as *re VarTec Telecom, Inc.* (Case No. 04-81694-SAF-11).

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<sup>1</sup> 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**

### **Proposed Dispositions of Personal Property**

6. The Debtors contemplate selling or otherwise disposing of certain aged and/or unnecessary personal property, including furniture, computers, electronics, two golf carts, and other miscellany (the "Property") at the facilities occupied by the Debtors located at 4550 Excel Parkway, Addison, Texas, 75001 (the "Addison II").<sup>2</sup> The Debtors propose to hold an auction of the Property on August 30, 2005 at 10:00 a.m. (the "Auction").

7. Pursuant to the Court's Second Order Approving Retention of Rosen Systems, Inc. as Liquidator and Auctioneer [Docket No. 991], Rosen Systems, Inc. has been employed to market the Property and conduct the proposed auction. The total sales proceeds anticipated from the sale of the Property is approximately \$100,000.00 to \$150,000.00.

## **RELIEF REQUESTED**

### **Auction of the Property**

8. Pursuant to Bankruptcy Code §§ 105, 363, and 554, the Debtors request that the Court authorize them to sell or otherwise dispose of the Property, through an auction, free and clear of all liens, encumbrances, and interests.

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<sup>2</sup> Pursuant to the Court's Order Approving Sale of Surplus Personal Property [Docket No. 588] (the "Sale Order"), the Court authorized the Debtors to sell or otherwise dispose of aged or unnecessary personal property, including furniture, equipment, and inventory from time to time, through auction, private sale, or internet sale, free and clear of all liens. Although the Debtors believe that the sale of the Property by auction was authorized in the Sale Order, the Debtors request the relief provided herein out of an abundance of caution.

9. Bankruptcy Code § 363(b)(1) provides that “[t]he [debtor in possession], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1).

10. Bankruptcy Code § 363(f) authorizes a sale of property free and clear of all liens, interests, and encumbrances:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if –

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interests is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f); *Pelican Homestead v. Wooten (In re Gabel)* 61 B.R. 661, 667 (Bankr. W.D. La. 1985) (stating that a trustee may sell property of the estate for purposes other than in the ordinary course of business free and clear of all existing liens and encumbrances provided that any one of the conditions of Bankruptcy Code § 363(f) are met). Because Bankruptcy Code § 363(f) is drafted in the disjunctive, only one of the conditions set forth in that statute needs to be met for a sale free and clear of liens, interests, and encumbrances to occur.

11. The RTFC asserts a lien, interest, or encumbrance in the Property and has provisionally consented to the sale of the Property. Even absent consent from the RTFC, the Property could be sold free and clear of its interests (with such interests

attaching to the sale proceeds) so long as the RTFC could be compelled to accept money satisfaction of its interests in the property. See 11 U.S.C. § 363(f)(5).

12. Because certain of the Property may be of insignificant value, the Debtors also request authority to abandon or discard the property by any means as the Debtors may elect, including donating the Property to a charitable organization or removing the Property, as waste, in the exercise of the Debtors' business judgment.

13. Bankruptcy Code § 554(a) provides, "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). To prohibit such abandonment and disposal would burden the estates, and diminish the available distribution to their creditors.

14. The continued storage and maintenance of the Property is and will be burdensome to the estates. If the relief requested herein is not granted, the Debtors will be required to incur expenses without a corresponding benefit to their estates.

15. Although the Debtors have not comprehensively studied the state and local laws, statutes, rules and/or ordinances that will govern the Auction, such laws may have licensing or permitting requirements, statutory or regulatory waiting periods, and/or time limits that normally would govern auctions. Some localities may have statutes or regulations requiring creditor notification before bulk sales are conducted.

16. The Debtors submit that such requirements should not apply for the limited purpose of conducting the Auction. In this case, the Auction will be of limited duration and will not implicate any laws or regulations affecting public health or safety.

17. Bankruptcy courts have recognized that federal bankruptcy laws preempt state and local laws that conflict with the underlying policies of the Bankruptcy Code. See *In re Shenango Group, Inc.*, 186 B.R. 623, 628 (Bankr. W.D. Pa. 1995), *aff'd*, 112 F.3d 633 (3d Cir. 1997). Although preemption of state law is inappropriate when such law relates to the protection of public health and safety, see *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353-54 (9th Cir. 1994), preemption is appropriate when the state laws involved concern economic regulation. See *id.* at 1353; see also *In re Scott Housing Sys., Inc.*, 91 B.R. 190, 196-97 (Bankr. S.D. Ga. 1988). In this case, Bankruptcy Code § 363 would be undermined if the Court permitted state and local laws establishing licensing or permitting requirements, time limits or bulk sale restrictions to apply to the Auction because such laws would prevent, or at least significantly restrict, the Debtors' ability to maximize recoveries for all constituencies.

18. Accordingly, the Debtors request that the Court authorize them to conduct the Auction without the necessity of, and the delay associated with, obtaining various state licenses and/or satisfying any additional requirements in connection therewith. Likewise, the Debtors request that bulk sales laws, to the extent applicable, be waived as creditors are protected by the notice of this Motion being provided and the jurisdiction of the Court.

19. The Debtors also request that no other person or entity, including, but not limited to, any federal, state or local agency, department or governmental authority, be permitted to take any action to prevent, interfere with, or otherwise hinder consummation of the Auction. See, e.g., *Missouri v. U.S. Bankruptcy Court for the E.D. of Arkansas*, 647 F.2d 768, 776 (8th Cir. 1981).

### **Notice of the Auction and This Motion**

20. Under Federal Rule of Bankruptcy Procedure (“Bankruptcy Rule”) 2002(a) and (c), the Debtors are required to notify their creditors of the proposed sale of the Property, including a disclosure of the time and place of the Auction. The Debtors request that the requirements of Bankruptcy Rule 2002(a) and (c) be waived pursuant to, among other things, Bankruptcy Rule 2002(i). The Debtors shall serve this Motion by the electronic court filing system, electronic mail, or prepaid, first-class U.S. Postal Service, as the case may be, on the parties listed on the Debtors’ Master Service List, including the Official Committee of Unsecured Creditors, the Office of the U.S. Trustee, and the RTFC. The Debtors submit that the notice to be provided and the method of service proposed herein constitutes good, proper and adequate notice of the sale of the Property and the Auction. Therefore, the Debtors respectfully request that this Court approve the foregoing notice procedures.

### **WAIVER OF 10-DAY STAY**

21. Bankruptcy Rule 6004(g) provides, “An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.” FED. R. BANKR. P. 6004(g). The Debtors wish to consummate the sale of the Property as soon as possible, and request that any order entered by this Court approving the Motion provide that the ten-day stay imposed pursuant to Bankruptcy Rule 6004(g) is inapplicable.

### **PRAYER**

The Debtors request that the Court enter an Order authorizing them to sell or otherwise dispose of the Property, through an auction, free and clear of all liens,

encumbrances, and interests. The Debtors also request any other general relief to which they are entitled.

Dated this 26th of July, 2005.

Respectfully submitted,

**VINSON & ELKINS L.L.P.**

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By:           /s/ Abigail B. Willie            
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William L. Wallander, SBT #20780750  
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**ATTORNEYS FOR THE DEBTORS**

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**CERTIFICATE OF SERVICE**

This is to certify that on July 26, 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. A separate certificate of service shall be filed with respect to those parties on the Clerk's list who do not receive electronic e-mail service.

/s/ Abigail B. Willie  
One of Counsel

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