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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)
	§	(Jointly Administered)
	§	
	§	Hearing Set for September 7, 2005 at
	§	2:30 p.m.

**MOTION TO APPROVE (I) CLOSING OF RENO CALL CENTER;
(II) REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED
LEASES; AND (III) SALE OF SURPLUS PERSONAL PROPERTY
FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS, AND ENCUMBRANCES**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON
SEPTEMBER 7, 2005 AT 2:30 P.M. IN COURTROOM OF THE
HONORABLE UNITED STATES BANKRUPTCY JUDGE, 1100
COMMERCE STREET, 14TH FLOOR, 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 UNITED STATES BANKRUPTCY JUDGE:

**MOTION TO APPROVE (I) CLOSING OF RENO CALL CENTER; (II) REJECTION OF EXECUTORY
CONTRACTS AND UNEXPIRED LEASES; AND (III) SALE OF SURPLUS PERSONAL PROPERTY
FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES**

The above-referenced debtors and debtors in possession (collectively, the “Debtors”)¹ file this Motion to Approve (I) Closing of Reno Call Center; (II) Rejection of Executory Contracts and Unexpired Leases; and (III) Sale of Surplus Personal Property Free and Clear of Liens, Claims, Interests, and Encumbrances (the “Motion”), and in support thereof would respectfully show the Court 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 under the Case styled *In re VarTec Telecom, Inc.*; Case No. 04-81694-SAF-11.

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.

FACTUAL BACKGROUND

6. VarTec Telecom, Inc. ("VarTec") operates a call center in Reno, Nevada (the "Reno Call Center") which services calls concerning, among other things, billing, service, and payment inquiries from residential customers of the Debtors' various lines of business. The Reno Call Center is staffed Monday through Friday, from 7:00 a.m. to 9:00 p.m., excluding holidays. Through VarTec Resource Services, Inc., the Debtors currently employ approximately 150 employees at the Reno Call Center. To reduce overhead expenses and otherwise realize cost savings, the Debtors have determined that the Reno Call Center should be closed on September 9, 2005. To accommodate the customer calls formerly serviced by the Reno Call Center, the Debtors have outsourced services relating to, among other things, wireless and commercial long distance customers to Aegis Communications Group pursuant to the Court's Order Granting Motion to Enter into Contract with Aegis Communications Group [Docket No. 1628], and they intend to route remaining calls to other vendors who currently provides other call center services to the Debtors under existing agreements.

7. Pursuant to the Worker Adjustment and Retaining Notification Act (the "WARN Act"), a business that employs (i) 100 or more full-time employees or (ii) 100 or more employees who, in the aggregate, work at least 4,000 hours per week (exclusive of overtime), must provide its employees, the state, and the chief elected local governmental official with advance notice of plant closings and mass layoffs. 29 U.S.C. § 2101(a)(1).

8. To comply with the WARN Act, the Debtors provided the following notices (collectively, the "WARN Act Notices") to the following parties informing them of the

Debtors' decision to close the Reno Call Center effective as of September 9, 2005: (i) a letter dated July 8, 2005 to The Honorable Robert Cashell, Mayor of Reno and The Honorable Charles McNeely, Reno City Manager, a copy of which is attached hereto as **Exhibit A-1**; (ii) a letter dated July 8, 2005 to the Department of Employment, Training and Rehabilitation, a copy of which is attached hereto as **Exhibit A-2**; and (iii) a letter dated July 11, 2005 to all employees of the Reno Call Center, a copy of which is attached hereto as **Exhibit A-3**.²

RELIEF REQUESTED

Basis for Relief

9. Pursuant to Bankruptcy Code §§ 105(a), 363, 365, and 554 the Debtors seek authority to, among other things, (i) close the Reno Call Center; (ii) reject certain executory contracts and unexpired leases associated with the Reno Call Center; and (iii) sell or otherwise dispose of surplus personal property currently located at the Reno Call Center.

Approval of WARN Act Notices

10. The Debtors request authority to close the Reno Call Center and terminate the employees as set forth in the WARN Act Notice.³ Given, among other things, reductions in call volume, the continued operation of the Reno Call Center is not economical relative to the costs associated with outsourcing the services provided at the Reno Call Center. By outsourcing the services currently provided by the Reno Call

² Out of respect for the privacy of their employees, the Debtors have not attached to this pleading a list of the employees receiving the WARN Act Notices. The Debtors will provide such information to the Court, if necessary.

³ The Debtors contemplate retaining approximately four employees after the stated termination date of September 9, 2005. The Debtors expect that those employees' employment would cease on or about September 20, 2005.

Center, the Debtors can eliminate substantial overhead associated with, among other things, the costs of the leased premises and employees.

Rejection of Executory Contracts and Unexpired Leases

11. As a result of the proposed closing of the Reno Call Center, the Debtors will no longer need the (i) goods and services provided to them under various executory contracts and unexpired leases of personal property (the "Agreements") and (ii) the premises leased to them under that certain Lease Agreement dated August 28, 1996 by and between Corporate Properties Associates 2 and Corporate Properties Associates 3, on the one hand, and Excel Teleservices, Inc., on the other hand (the "Real Property Lease"); and therefore, they request authority to reject the Agreements effective on September 9, 2005 and the Real Property Lease effective on September 30, 2005. A table summarizing the Agreements is attached hereto as **Exhibit B**.

12. Bankruptcy Code § 365 provides that the Debtors, "subject to the Court's approval, may assume or reject any executory contract and 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 executory contracts and unexpired leases.

13. Bankruptcy Code § 365 does not provide a standard for determining when a debtor's rejection of an executory contract or 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 (1984) and *Group of Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U.S. 523 (1943)).

14. Discussing the business judgment standard, the Sixth Circuit noted, “[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 (1983) (emphasis added).

15. Therefore, the Debtors may reject any executory contract or unexpired lease provided that they determine, in their business judgment, that rejection would be advantageous to them.

16. In the exercise of their business judgment, the Debtors have determined that the Agreements and Real Property Lease will no longer be necessary to their operations or to effect successful reorganizations of their businesses. The proposed closing of the Reno Call Center will render the Agreements and Real Property Lease superfluous, and the failure to reject the Agreements and Real Property Lease could result in the incurrence of unnecessary expense. As such, the Debtors request that the Court authorize the rejection of each of the Agreements effective as of September 9, 2005 and of the Real Property Lease effective as of September 30, 2005.

17. Further, the Debtors request that the Court set October 31, 2005 as the deadline by which parties to the Agreements or Real Property Lease must file proofs of claim, if at all, in which they allege damages arising out of the rejection of the Agreements or Real Property Lease.

Auction of Surplus Personal Property at the Reno Call Center

18. Pursuant to Bankruptcy Code §§ 105, 363, and 554, the Debtors request authority to sell through an auction, or otherwise dispose of, certain surplus personal property that currently is located at the Reno Call Center, including furniture, equipment, and inventory (collectively, the “Property”), free and clear of all liens, claims, interests, and encumbrances. A table summarizing a majority of the Property proposed to be sold is attached hereto as **Exhibit C**. The Debtors contemplate holding an online auction of the Property on or about September 20, 2005 (the “Auction”), and they have retained Rosen Systems, Inc. to conduct the Auction.⁴

19. 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).

20. 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 interest 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

⁴ Pursuant to the Court’s Second Order Approving Retention of Rosen Systems, Inc. as Liquidator and Auctioneer [Docket No. 991], the Court authorized the Debtors to retain Rosen Systems, Inc. to conduct subsequent auctions of personal property, such as the Auction.

- (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 § 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, CLAIMS, interests, and encumbrances to occur.

21. The Rural Telephone Finance Cooperative (the “RTFC”) is the only party which asserts a lien, claim, interest, or encumbrance in the Property, and the Debtors will inquire whether it consents to the proposed disposition. 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).⁵

22. 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 their business judgment. Bankruptcy Code § 554(a) provides, “[A]fter 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

⁵ Under the Asset Purchase Agreement dated July 25, 2005 by and among the Debtors and Comtel Investments L.L.C., the proceeds from the sale of the Property will remain in the estates pending the final closing of the sale.

would burden the Debtors' estates and diminish the available distribution to their creditors.

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

24. 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 of the localities may have statutes or regulations requiring creditor notification before bulk sales are conducted.

25. 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.

26. 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,⁶ 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

⁶ *See In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353-54 (9th Cir. 1994).

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.

27. 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.

28. 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

29. Under 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 or first class United States mail, as the case may be, on the parties listed on the Debtors' Master Service List, including the Official Committee of Unsecured Creditors and the Official Committee of Excel Independent Representatives. The Debtors submit that the

notice to be provided and the method of service proposed herein constitute good, proper and adequate notice of the sale of the Property and of the Auction. Therefore, the Debtors respectfully request that this Court approve the foregoing notice procedures.

PRAYER

The Debtors request that the Court enter an Order (i) approving (A) the closing of the Reno Call Center and the terminating of employees as set forth in the WARN Act Notices; (B) the rejection of the certain executory contracts and unexpired leases associated with the Reno Call Center; and (C) the auctioning of the surplus personal property located at the Reno Call Center, and (ii) granting such other and further relief, both general and specific, to which the Debtors may be justly entitled.

Dated: August 15, 2005

Respectfully submitted,

VINSON & ELKINS L.L.P.

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By: /s/ William L. Wallander
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ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that on August 15, 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/ Richard H. London

One of Counsel

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