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**SPECIAL COUNSEL FOR THE DEBTORS**

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

In re: )  
)  
VARTEC TELECOM, INC., *et al.*, ) Case No. 04-81694-SAF-11  
) (Jointly Administered)  
Debtors. ) **No Hearing Set**

**DEBTOR'S RESPONSE AND OBJECTION TO UNIPOINT HOLDINGS, INC. MOTION TO MODIFY THE DECEMBER 2, 2004 ADEQUATE PROTECTION STIPULATION AND CONSENT ORDER OR, ALTERNATIVELY, TO COMPEL ASSUMPTION OR REJECTION OF EXECUTORY CONTRACT (WITH RESERVATION OF RIGHTS)**

VarTec Telecom, Inc. *et al.* (the "Debtors") files this the *Debtors' Response and Objection* (the "Response") to *Unipoint Holdings, Inc.* ("Unipoint") *Motion to Modify the December 2, 2004 Adequate Protection Stipulation and Consent Order or, Alternatively, to Compel Assumption or Rejection of Executory Contract* (the "Motion") and would respectfully show the Court as follows:

**I. PRELIMINARY STATEMENT**

1. For the reasons set forth below, the relief requested in the Motion to modify the December 2, 2004 Adequate Protection Stipulation and Consent Order should be denied as moot. As to the request in the Motion to set a date certain by which the Debtors will assume or reject

the Master Service Agreement dated April 2, 2002, as amended, including all schedules (the "MSA"), the Debtors' consent to an order setting the deadline to assume or reject the MSA of September 30, 2005. The Debtors' position as to this matter can be disposed of without a hearing upon a review of the pleadings.

## II. RESPONSE

2. Debtors admit paragraph 1 of the Motion.

3. Debtors admit paragraph 2 of the Motion.

4. In response to paragraph 3 of the Motion, Debtors admit that VarTec Telecom, Inc. ("VarTec") is a party to the MSA. The Debtors further admit that Unipoint asserts pre-petition and post-petition claims, however, the Debtors contest those claims. The Debtors admit that in the past VarTec has utilized services provided by Unipoint, but deny that VarTec has continued to do so after August 20, 2005.

5. In response to paragraph 4 of the Motion, the Debtors admit that the Court entered the Carrier Consent Order.<sup>1</sup> The Debtors admit that Unipoint is subject to the Carrier Consent Order. The Debtors deny that the provisions of the Carrier Consent Order are no longer sufficient to adequately protect Unipoint. The Debtors deny that Unipoint is entitled to additional adequate protection.

6. In response to paragraph 5 of the Motion, the Debtors admit that some of the Debtors and Unipoint were defendants in the Missouri Litigation. With respect to the claims of the SBC Telcos asserted in the Missouri Litigation, the Debtors maintain that the pleadings in that action set forth SBC Telcos' claims, and accordingly, deny Unipoint's characterization of

<sup>1</sup> Unless otherwise defined herein, initially capitalized terms shall have the same meaning as given in the Motion.

same. Debtors further admit that they commenced an FCC Action before the Federal Communication Commission (the "FCC") on or about August 20, 2004; however, such submission was in advance of the Missouri Litigation being filed, and moreover, the relationship to the types of claims asserted in the Missouri Litigation by the SBC would be the subject of any FCC determination. Telcos. The Debtors deny that they took any action before the FCC for purposes of assuring Unipoint of anything, and accordingly, deny Unipoint's characterizations regarding same.

7. The Debtors admit paragraph 6 of the Motion.

8. The Debtors admit paragraph 7 of the Motion, except as to the inaccurate spelling of one of the Comtel entities, properly spelled "Comtel Telcom Assets, L.P.", without the second "e" in the second word of the entity name

9. In response to paragraph 8 of the Motion, the Debtors maintain that the terms of the Stipulation speak for themselves and accordingly deny Unipoint's characterization of same. The Debtors are without knowledge or information sufficient to form a belief as to whether Unipoint is a solvent entity, and accordingly, deny same.

10. In response to paragraph 9 of the Motion, the Debtors maintain that the terms of the APA and stipulation between the Debtors and Comtel speak for themselves, and accordingly, deny Unipoint's characterizations as to same. With respect to Unipoint's communications with Comtel, the Debtors are without knowledge or information sufficient to form a belief as to the allegations regarding same, and accordingly, deny same. With respect to the Debtors agreements with SBC regarding the FCC Action and the risks to Unipoint regarding same, the Debtors are without knowledge or information sufficient to form a belief, and accordingly, deny same.

11. In response to paragraph 10 of the Motion, the Debtors believe the evidence presented in connection with the Sale Motion sets forth the benefits to the Debtors, its estates, and its creditors and deny Unipoint's characterizations regarding same. The Debtors admit that the RTFC has alleged certain claims as of the Petition Date generally as outlined in paragraph 10. The Debtors admit that Comtel's winning bid, by itself, does not provide for payment in full of RTFC's alleged secured claims. The Debtors admit that, to date, budgets negotiated by the Debtors and approved by the Bankruptcy Court relating to cash collateral and post-petition financing do not include amounts to indemnify Unipoint. The Debtors deny that they have any specific obligation to indemnify Unipoint with respect to the Missouri Litigation, or otherwise, and in fact, maintain that Unipoint, in fact, owes duties of indemnification to the Debtors with respect to the Missouri Litigation. The Debtors deny that it is reasonably anticipated the Debtors' estate shall be administratively insolvent. The Debtors deny that RTFC and Comtel will benefit from the Debtors' continued use of Unipoint enhanced services platform. The Debtors further deny that Unipoint will bear the risk of any continued use by the Debtors of Unipoint's enhanced services platform.

12. In response to Unipoint's legal arguments set forth in paragraphs 11 through 20 of the Motion, the Debtors maintain that they are not required to admit or deny legal arguments. To the extent that said paragraphs contain factual allegations, the Debtors deny same. Moreover, the extent Unipoint's arguments reference quotations from specific documents or seek to characterize the legal rights of parties under certain documents, the Debtors maintain such documents speak for themselves, and accordingly, deny all such allegations.

13. In response to Unipoint's prayer, the Debtors deny that Unipoint is entitled to any additional adequate protection as prayed for in its Motion. The Debtors consent to the Court entering an order setting a deadline for it to assume or reject the MSA of September 30, 2005.

### **III. RESERVATION OF RIGHTS**

14. As set forth in more detail below, Unipoint has taken certain actions since the sale of substantially all of the Debtors' remaining assets to Comtel. The Debtors specifically reserve all rights, claims, and causes of action against Unipoint in regards to such actions. The filing of this responsive pleading shall not be deemed a waiver of any claims, rights or causes of action against Unipoint, including without limitation, claims and remedies for violation of the automatic stay, anti-competitive behavior, improper setoff, improper filing of proofs of claim in the Debtors' bankruptcy case, and any other rights, claims and remedies which the Debtors may have.

### **IV. OBJECTION**

15. Pursuant to the MSA, VarTec Telecom, Inc. ("VarTec") may use certain telecommunication services provided by Unipoint. None of the other Debtors are contracting parties to the MSA. Prior to August 11, 2005, VarTec utilized several types of services under the MSA: Vimt or Vwats service, also known as "VRLP," and Metered VPN services traffic (WATS).

16. Because of repeated problems with the quality of the services provided by Unipoint with respect to VRLP, the Debtors terminated the use of Unipoint for VRLP service on or about August 20, 2005.

17. On August 16, 2005, Unipoint gave notice that effective August 21, 2005 it was increasing the prices of the VRLP and the Metered VPN services. A true and correct copy of the

Price Increase Notice is attached hereto as Exhibit "A." The Price Increase Notice represented a **2200% increase** in the price of VRLP services and a **600% increase** in the price of Metered VPN services that had previously been provided to VarTec by Unipoint.

18. Accordingly, VarTec, in accordance with its rights under the MSA, ceased use of any services by Unipoint under the MSA as of August 20, 2005. Unipoint representatives have acknowledged to VarTec that VarTec is no longer transmitting any traffic over the Unipoint platform as of August 20, 2005.

19. Assuming, without admitting, the Debtors have any duties to indemnify Unipoint, which the Debtors deny, as a result of the Debtors discontinued use of Unipoint's services, there are no services which Unipoint is providing that would necessitate additional adequate protection.

20. Moreover on August 23, 2005, the District Court dismissed the Missouri Litigation as to Unipoint.

21. Accordingly, the Debtors maintain the Motion, as it relates to claims for additional adequate protection, is moot.

22. VarTec, however, maintains that it has claims against Unipoint under the MSA with respect to claims asserted in the Missouri Litigation, and reserves the right to assert same at a later date.

23. In addition, the Debtors maintain that Unipoint is improperly withholding funds remittable to eMeritus Communications, Inc. ("eMeritus"), on account of a purported right of setoff against amounts purportedly owed by VarTec under the MSA for pre-petition amounts due Unipoint. In addition to the lack of mutuality between such obligations, the agreements between

eMeritus and Unipoint especially prohibit any right of setoff by Unipoint, and accordingly, the Debtors maintain the actions by Unipoint are improper. eMeritus reserves the right to file additional pleadings in accordance with the Carrier Consent Order to request relief from the Court as to same.

24. VarTec continues to evaluate whether to reject the MSA outright or, simply not use the services provided by the MSA at this time.

WHEREFORE, the Debtors respectfully request that the Court deny Unipoint's request for additional adequate protection. Further, VarTec consents to the Court setting a deadline of September 30, 2005 for VarTec to assume or reject the MSA.

Dated: September 6, 2005.

Respectfully submitted,

**KANE, RUSSELL, COLEMAN & LOGAN, P.C.**

**BY:** /s/ Joseph A. Friedman  
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**SPECIAL COUNSEL TO THE DEBTORS**

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document was served on the following persons via United States first class mail, postage prepaid, on September 6, 2005.

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*/s/ Joseph A. Friedman*  
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