

Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Richard H. London, SBT #24032678
VINSON & ELKINS L.L.P.
Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
Tel: 214-661-7299
Fax: 214-220-7716

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-HDH-11
	§	
DEBTORS.	§	(Chapter 11)
	§	(Jointly Administered)
	§	
	§	Hearing Requested for September 29,
	§	2005 at 2:30 p.m.

MOTION TO AMEND AND MODIFY ORDER GRANTING MOTION TO INITIATE AND IMPLEMENT THE KEY EMPLOYEE RETENTION AND SEVERANCE PROGRAM

TO THE HONORABLE HARLIN D. HALE, UNITED STATES BANKRUPTCY JUDGE:

The above-referenced debtors and debtors in possession (collectively, the "Debtors")¹ file this Motion to Amend and Modify Order Granting Motion to Initiate and Implement the Key Employee Retention and Severance Program (the "Motion") and in support show as follows:

¹ The Debtors include VarTec Telecom, Inc., Excel Communications Marketing, Inc., Excel Management Services, Inc., Excel Products, Inc., Excel Telecommunications, Inc., Excel Telecommunications of Virginia, Inc., Excel Teleservices, Inc., Excelcom, Inc., Prime Business Communications, Inc., Telco Communications Group, Inc., Telco Network Services, Inc., VarTec Business Trust, VarTec Properties, Inc., VarTec Resources Services, Inc., VarTec Solutions, Inc., VarTec Telecom Holding Company, VarTec Telecom International Holding Company, and VarTec Telecom of Virginia, Inc.

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. On July 29, 2005, the Court entered its Order (A) Approving the Sale Free and Clear of All Liens, Claims, Rights, Interests and Encumbrances to Comtel Investments LLC and (B) Granting Related Relief (Substantially All of the Debtors' Remaining Assets) [Docket No. 1663] in which it authorized the sale of substantially all of the Debtors' remaining assets to Comtel Investments LLC ("Comtel") under the Asset Purchase Agreement dated July 25, 2005 by and among the Debtors and Comtel (the "APA").

FACTUAL BACKGROUND

Key Employee Order and Related Agreements

6. On January 18, 2005, the Court entered its Order Granting Motion to Initiate and Implement the Key Employee Retention and Severance Program [Docket

No. 810] (the “Key Employee Order”).² A copy of the Key Employee Order is attached hereto as **Exhibit A**. Pursuant to the Key Employee Order, the Court authorized the Debtors to make retention and severance payments under certain circumstances.

7. Under section 5.10 of the APA, Comtel agreed to assume substantially all of the various existing retention and severance benefits of the Debtors which would include the obligations pursuant to the Key Employee Order.

8. After the Debtors’ consultation with the Rural Telephone Finance Cooperative (the “RTFC”) and the Official Committee of Unsecured Creditors (the “Official Committee”), VarTec Telecom, Inc. and the Tier 1 Key Employee executed a Retention Agreement (the “Tier 1 Retention Agreement”), and VarTec Telecom, Inc. and each Tier 2, 3, and 4 Employee executed a Retention Agreement (the “Tiers 2, 3, and 4 Retention Agreement” and together with the Tier 1 Retention Agreement, the “Retention Agreements”).

9. The Key Employee Order approved the severance payments to Key Employees, but it did not identify all of the criteria for receiving these payments. The details of a Key Employee’s entitlement to a severance payment were set forth in the Retention Agreements themselves. With respect to severance benefits, the Tiers 2, 3, and 4 Retention Agreements provide as follows:

If the Employee is offered (but does not accept) employment by a Buyer which is substantially equivalent in title, description, salary and responsibility, and is at a location within 50 miles of the current work address, or the Employee (without regard to the terms and conditions of such employment) accepts employment with the Buyer, the Company will have no obligation to make the Severance Payment.

² Capitalized terms not defined herein shall have the meaning given to them in the Key Employee Order.

Tiers 2, 3, and 4 Retention Agreements at 2.³ The preceding passage from the Tiers 2, 3, and 4 Retention Agreements shall be referred to as the “Severance Provision.”

RELIEF REQUESTED

Basis for Relief

10. Pursuant to Bankruptcy Code §§ 105 and 363, the Debtors request that the Court authorize them to, among other things, (i) amend and modify the Tiers 2, 3, and 4 Retention Agreements with respect to the Severance Provision, and (ii) establish an escrow account for the benefit of the Tier 1 Key Employee.

Modification of the Severance Provision

11. The Key Employees raised the following concern with respect to the Severance Provision: Under the terms of the Tiers 2, 3, and 4 Retention Agreements, if a Key Employee is offered employment by a buyer of the Debtors’ assets which is substantially equivalent in title, description, salary and responsibility, and is at a location within fifty miles of the current work address, and the Key Employee does not accept such employment ***because that buyer does not offer substantially equivalent severance benefits***, then the Debtors would “have no obligation to make the Severance Payment.” See *Tiers 2, 3, and 4 Retention Agreement* at 2. In that

³ The Tier 1 Retention Agreement contains a similar, but not identical, provision. It states,

Any termination, without cause, or any constructive termination of the Employee at any time shall accelerate all remaining payments hereunder, including the Severance Payment (as defined in paragraph C below) and such payments shall become immediately due and payable. For purposes of this Agreement, a constructive termination shall include a change in employment terms by the Company that does not provide an equivalent title, description, salary, or responsibilities or is at a location more than 50 miles from the current work address.

...

If the Employee is terminated, without Cause, the Employee shall receive the severance payment authorized under the KERP Order as set forth in Schedule 1 attached hereto (the “Severance Payment”) in addition to the unpaid Retention Payments provided under Section A above.

Tier 1 Retention Agreement at 2-3.

situation, the Tier 2, 3, and 4 Key Employees would be faced with two options – accepting the employment offer by the buyer or declining such employment offer and remaining with the Debtors – but they would not have any severance benefits.⁴

12. This was an unintended consequence of the Tiers 2, 3, and 4 Retention Agreements, and it does not further the goal of providing incentives for Key Employees to continue their retention by the Debtors. To alleviate this concern, the Debtors request that the Severance Provision be deemed modified to provide,

If the Employee is offered (but does not accept) employment by a Buyer which is substantially equivalent in title, description, salary, responsibility, **and severance benefits** and is at a location within 50 miles of the current work address, or the Employee (without regard to the terms and conditions of such employment) accepts employment with the Buyer, the Company will have no obligation to make the Severance Payment.

13. Absent the requested modification of the Severance Provision, the Debtors believe that a significant risk exists that a number of their Key Employees might seek employment elsewhere. The Key Employees' focused attention is necessary to close the transaction contemplated under the APA. To maximize the value of the estates, the Debtors believe that it is necessary to remove the distractions relating to the KERP and to seek the amendment and modification of the Key Employee Order.

Tier 1 Employee Provisions

14. Under the APA, Comtel is not required to assume the Debtors' obligations to the Tier 1 Employee (CEO, Michael G. Hoffman). Mr. Hoffman previously has made it clear to the Official Committee and the RTFC that he would shun any and all overtures from, or opportunities with, Comtel so that he would have no allegiance other than to the

⁴ Because the Tier 1 Retention Agreement has a slightly modified severance provisions, the Tier 1 Key Employee would not be faced with a similar scenario.

chapter 11 estates. In consideration thereof, the Tier 1 retention and severance obligations have been fully funded into a separate account with withdrawals therefrom being made for the benefit of Mr. Hoffman in accordance with the chronological schedule contained in the Tier 1 Retention Agreement.

15. In light of the approval of the entry of the Sale Order, the Debtors request authority to place the pre-funded retention and severance amounts for Mr. Hoffman with a third party with those funds to be paid to him in accordance with the chronological schedule provided in the Tier 1 Retention Agreement, or upon the earlier conversion of the Cases to cases under chapter 7 of the Bankruptcy Code so that such funds could not, under any circumstances, be claimed or deemed to be property of the Debtors' estates.

16. The severance payment to the Tier 1 Employee similarly shall be paid to Mr. Hoffman upon the earlier of (i) the conversion of the Cases to cases under chapter 7 of the Bankruptcy Code; or (ii) December 31, 2005, or at such other date (not to exceed March 31, 2006), if the Official Committee requests Mr. Hoffman's continued employment (to the extent such continued employment would not constitute a constructive termination) beyond December 31, 2005. The Debtors request that the Key Employee Order be modified and the Tier 1 Retention Agreement be deemed modified to reflect the same.

PRAYER

The Debtors respectfully request the Court (i) amend the Key Employee Order to modify the Severance Provision and authorize the Debtors to implement the Tier 1 Employee Provisions; and (ii) grant them such other and further relief to which they may be entitled.

Dated: September 22, 2005

Respectfully submitted,

VINSON & ELKINS L.L.P.

Trammell Crow Center
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201
Tel: 214-661-7299
Fax: 214-220-7716

By: /s/ Richard H. London
Daniel C. Stewart, SBT #19206500
William L. Wallander, SBT #20780750
Richard H. London, SBT #24032678

ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that on September 22, 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

CERTIFICATE OF CONFERENCE

On various occasions, the relief requested herein has been discussed with counsel for the RTFC, Official Committee, and Comtel. Counsel for each of these parties indicated that, after an initial review, their clients do not oppose the relief requested herein (although certain of the parties reserved the right to oppose the Motion after further consideration).

/s/ Richard H. London

One of Counsel

979216_5.DOC