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**SPECIAL COUNSEL TO THE DEBTORS**

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

**IN RE:**

**VARTEC TELECOM, INC., *et al.*,**

**DEBTORS.**

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**CASE NO. 04-81694-HDH-11**

**(Chapter 11)**

**(Jointly Administered)**

**MOTION TO AUTHORIZE REJECTION OF MASTER SERVICE AGREEMENT  
BETWEEN VARTEC TELECOM, INC. AND UNIPONT HOLDINGS, INC.  
(AND BRIEF IN SUPPORT)**

**TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:**

**A HEARING WILL BE CONDUCTED ON THIS MATTER ON NOVEMBER 22, 2005 AT 1:30 P.M. IN THE COURTROOM OF THE HONORABLE HARLIN D. HALE, 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.**

VarTec Telecom, Inc., one of the above-referenced debtors and debtors in possession (collectively hereafter, the "Debtors")<sup>1</sup> files this Motion to Authorize Rejection of Master Service Agreement Between VarTec Telecom, Inc. and Unipoint Holdings, Inc. (and Brief in Support) (the "Motion"). In support thereof, VarTec Telecom, Inc. ("VarTec") would show:

### **JURISDICTION AND PROCEDURAL BACKGROUND**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This Motion 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. The Debtors' Cases are jointly administered under the case styled: *In re VarTec Telecom, Inc.*, Case No. 04-81694-HDH-11.
6. On July 29, 2005, the Court entered its order authorizing the sale of substantially all of the Debtors' assets [Docket No. 1663].
7. On or about August 15, 2005, the Debtors submitted to the Court the Stipulation and Order for Assumption and Assignment of Executory Contracts, and Related Cure, Among (I) the Debtors, (II) the SBC Telcos, (III) Comtel Telecom Assets, LP, and (IV) the RTFC (the

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<sup>1</sup> The Debtors in these bankruptcy cases 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.

"SBC Stipulation"). The SBC Stipulation was entered on the docket in the Cases on August 23, 2005 [Docket No. 1784].

8. On August 17, 2005, Unipoint Holdings, Inc. ("Unipoint") filed its Motion to Modify the December 2, 2004 Adequate Protection Stipulation and Consent Order or, Alternatively, to Compel Assumption/Rejection of Executory Contract (the "Unipoint Motion") [Docket Nos. 1766, 1777].<sup>2</sup>

### **FACTUAL BACKGROUND**

9. VarTec and Unipoint are parties to an April 16, 2002 master service agreement (as amended, and including all schedules, the "Master Service Agreement") under which Unipoint provides various services to VarTec.

10. By letter dated August 16, 2005, PointOne<sup>3</sup> notified VarTec that effective August 21, 2005, it was increasing the price for two services provided under the Master Service Agreement. The new rates represented a 600% increase in the price of one service, and a 2200% increase in the price of the other service.

11. On or about August 20, 2005, and in accordance with the Master Service Agreement, VarTec stopped using services provided by Unipoint under the Master Service Agreement. VarTec has not obtained services from Unipoint under the Master Service Agreement after August 20, 2005.

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<sup>2</sup> As alleged in the Unipoint Motion, one of the reasons that motion was filed was because the SBC Stipulation adversely affected the adequate protection provided under the Stipulation and Consent Order by and Among Certain Carriers and the Debtors Regarding Adequate Assurance/Adequate Protection of Future Payments, which was entered in the Cases in early December 2004. Because the Unipoint Motion relates to the SBC Stipulation, and because Kane Russell Coleman & Logan, P.C. ("KRCL") has been retained as special counsel to the Debtors concerning matters involving SBC entities, KRCL files this Motion on VarTec's behalf.

<sup>3</sup> Upon information and belief, "PointOne" is a name under which Unipoint Holdings, Inc. does business.

## **EXECUTORY CONTRACTS AND PERSONAL PROPERTY LEASES**

12. The Debtors are in the process of evaluating their executory contracts and unexpired leases of personal property. Although this review is still underway, the Debtors have identified certain executory contracts and personal property leases that are not essential to the Debtors' reorganization or continued operations.

13. VarTec has determined that it is no longer cost-effective to obtain services under the Master Service Agreement. Furthermore, VarTec has determined that it is no longer necessary to obtain any services from Unipoint under the Master Service Agreement. Accordingly, VarTec requests authority to reject the Master Service Agreement effective as of August 20, 2005.

## **RELIEF REQUESTED**

14. VarTec has determined that the rejection of the Master Service Agreement will avoid unnecessary and burdensome administrative claims against its estate. Pursuant to Bankruptcy Code § 365, VarTec has determined, in its business judgment, that it is in its best interest, and that of its estate, to reject the Master Service Agreement effective as of August 20, 2005, the date on which it stopped using services from Unipoint under the Master Service Agreement.

15. By this Motion, VarTec requests that the Court enter an order pursuant to Bankruptcy Code § 365 authorizing and approving the rejection of the Master Service Agreement as requested herein.

16. 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.

17. 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 & Mfg. 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)). As one court stated:

[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). Therefore, a debtor may reject any executory contract or unexpired lease provided it determines, in its business judgment, that rejection would be advantageous.

18. VarTec has determined, in its business judgment, that it is no longer necessary to obtain any services from Unipoint under the Master Service Agreement, and that the Master Service Agreement is no longer necessary to its operations or to effect a successful reorganization of its business. Since VarTec has ceased obtaining services under the Master Service Agreement, the Master Service Agreement does not benefit VarTec's estate.

**PRAYER**

VarTec requests that the Court enter an order authorizing the rejection of the Master Service Agreement effective as of August 20, 2005; and VarTec also requests such other and further relief to which it may be justly entitled.

Dated: September 28, 2005.

Respectfully submitted,

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

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By: /s/ Michael L. Scanlon

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**SPECIAL COUNSEL TO THE DEBTORS**

**CERTIFICATE OF SERVICE**

This is to certify that a copy of this motion was served via the Court's Electronic Case Filing (ECF) System on the 28th day of September 2005. A separate certificate of service shall be filed concerning service of this motion upon those who do not receive notice via the ECF System.

/s/ Michael L. Scanlon

Michael L. Scanlon