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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-HDH-11
	§	
DEBTORS.	§	(Chapter 11)
	§	(Jointly Administered)
	§	
	§	Hearing Set for November 1, 2005 at
	§	1:30 p.m.

**MOTION TO APPROVE ASSUMPTION OF
EXECUTORY CONTRACTS AND BRIEF IN SUPPORT
(EDIFY CORPORATION)**

A HEARING WILL BE CONDUCTED ON THIS MATTER ON NOVEMBER 1, 2005, AT 1:30 P.M. IN 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.

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 Approve Assumption of Executory Contracts and Brief in Support (Edify Corporation) (the “Motion”) and in support thereof the Debtors would 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)(A) and (M).

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.

STATEMENT OF FACTS

6. On December 15, 1998, Excel Management Service, Inc. (“EMS”) and Edify Corporation (“Edify”) executed a Software License and Services Agreement (as

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.

amended, supplemented, and modified, the “Agreement”) which provides certain general terms and conditions that govern the relationship between EMS and Edify.

7. As contemplated under the Agreement, from time to time, EMS and VarTec Telecom, Inc. (“VTI”) (under the Agreement) purchased certain perpetual licenses (collectively, the “Licenses”) and related product support and software update services (collectively, the “Support”) from Edify. The purchases of the Licenses and Support are evidenced by purchase orders, or schedules, associated with the Agreement (the “Associated Agreements”). Certain of the Licenses and Support were used in connection with the Debtors’ domestic operations (the “U.S. Services”) and others were used in connection with the operations of the Debtors’ former Canadian subsidiaries (the “Canadian Services”). The Associated Agreements relating to the U.S. Services shall be referred to as the “U.S. Associated Agreements,” and the Associated Agreements relating to the Canadian Services shall be referred to as the “Canadian Associated Agreements.” Tables identifying the U.S. Associated Agreements and the Canadian Associated Agreements are attached hereto as **Exhibits A** and **B**, respectively.

8. The Licenses and Support have been used by the Debtors in connection with the operation of call center services. Specifically, the licensed software has been used by the Debtors to train employee and non-employee call center attendants, provide problem solving tools to those attendants, and track customer inquiries.

9. Prior to the expiration of the term of the U.S. Associated Agreements relating to the Support, EMS and VTI renewed the term of that Support at a cost of \$67,000 for a term of 12 months commencing on July 1, 2005.

10. On May 5, 2005, the Court entered its Order [Docket No. 1285] approving the sale of the capital stock of the Canadian subsidiaries to ACN Canada Acquisition, Inc. (“ACN”). Under the transition services agreement with ACN, the Debtors contemplated assigning the Canadian Associated Agreements under certain circumstances, and as a result, on August 15, 2005, the Debtors, ACN, and Edify completed the documentation needed to assign the Canadian Associated Agreements.

11. The Debtors have determined that they should assume the Agreement and the U.S. Associated Agreements and assume and assign to ACN the Canadian Associated Agreements. In making these determinations, the Debtors have considered that there is no cure cost associated with the assumption of those agreements.

RELIEF REQUESTED

12. Bankruptcy Code § 365(a) provides, “[T]he trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

13. Bankruptcy Code § 365(b)(1) states as follows:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

14. Bankruptcy Code § 365 does not provide a standard for determining when a debtor in possession can assume an executory contract. Courts have held that “the act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party’s services.” See *MMR Holding Corp. v. C & C Consultants, Inc. (In re MMR Holding Corp.)*, 203 B.R. 605, 612 (Bankr. M.D. La. 1996).

15. To assess whether the unexpired agreement is beneficial to the estate, the debtor in possession must “take full account” of the cost incurred to cure the existing defaults. See *Century Indemnity Co. v. NGC Settlement Trust (In re National Gypsum Co.)*, 208 F.3d 498, 506 (5th Cir. 2000) (citing *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Inc.)*, 167 F.3d 843, 849 (4th Cir. 1999)).

16. In the exercise of their business judgment, the Debtors have determined that the assumption of the Agreement and the U.S. Associated Agreements are in their best interests and those of their creditors. The U.S. Licenses and related Support are valuable tools used in connection with the call centers with which the Debtors deal, and they anticipate that they will continue to require the services provided under those Agreements. No cost associated with the cure of defaults exists with respect to the Agreement or the U.S. Associated Agreements, and Edify agrees to consent (if its consent is necessary) to the assignment to Comtel Investments L.L.C., or its assign, of the Agreement and U.S. Associated Agreements if and when such an assignment determination is made. Further, Edify agrees to permit the Debtors to terminate or reject the U.S. Associated Agreements and any claims relating thereto will be deemed to be general unsecured claims against EMS and VTI’s respective bankruptcy estates.

17. The Debtors have provided Edify adequate assurance of future performance. The Court in *In re Texas Health Enterprises, Inc.* stated, “Adequate assurance of future performance ‘is to be given a practical, pragmatic construction based upon . . . the circumstances of [the] case.’” 246 B.R. 832, 834 (Bankr. E.D. Tex. 2000) (quoting *In re Prime Motor Inns, Inc.*, 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994)). The *Texas Health* court continued, “Assurance of future performance is adequate if performance is likely (i.e. more probable than not) and the degree of assurance necessary to be deemed adequate ‘falls considerably short of an absolute guaranty.’” *Id.* (citing *In re PRK Enterprises, Inc.*, 235 B.R. 597, 603 (Bankr. S.D. Tex. 1999)) (internal citations omitted). Since the Petition Date, the Debtors have satisfied obligations as they have arisen, and nothing suggests that the Debtors will be unable to continue to do so.

18. Pursuant to Bankruptcy Code § 365 and with the agreement of Edify, the Debtors seek to assign the Canadian Associated Agreements to ACN effective as of August 15, 2005. The assignment of those agreements was contemplated under the transition services agreement executed by the Debtors and ACN. Further, the proposed assignment will not result in the Debtors’ incurrence of additional expense.

PRAYER

The Debtors respectfully request that the Court enter an Order (i) approving the assumption of the Agreement and the U.S. Associated Agreements and the assumption and assignment to ACN of the Canadian Associated Agreements; and (ii) granting them such other and further relief to which they may be justly entitled.

Dated: September 30, 2005

Respectfully submitted,

VINSON & ELKINS L.L.P.

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By: /s/ Richard H. London
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ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that on September 30, 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 and with respect to the following party:

Mike Vedda
Edify Corporation
2840 San Tomas Expressway
Santa Clara, CA 95051

/s/ Richard H. London

One of Counsel

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