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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 Requested for October 18,
	§	2005 at 1:30 p.m.

**MOTION TO APPROVE EXECUTION OF TARPLEY LEASE
AGREEMENT AND REJECTION OF ADDISON II LEASE AGREEMENT**

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 Execution of Tarpley Lease Agreement and Rejection of Addison II Lease Agreement (the “Motion”) and in support thereof the Debtors would show as follows:

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.

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.

FACTUAL BACKGROUND

Addison II Lease

6. On March 21, 2005, the Court entered its Order Approving Debtors' Motion for Approval of the Sale of Real and Personal Property in Addison, Texas (Addison I and II Properties), Free and Clear of Liens, Interests, Encumbrances, and Taxes, and Waiving the Stay Imposed under Federal Rule of Bankruptcy Procedure 6004(g) [Docket No. 1094] (the "Sale Order"). In the Sale Order, the Court, among other things, approved the sale of real property and improvements located at 16675 Addison Road ("Addison I") and 4550 Excel Parkway ("Addison II") in Addison, Texas under that certain Amended and Restated Purchase and Sale Agreement and Escrow

Instructions dated March 18, 2005 (the "PSA") by and among the Debtors and SPI IH II, L.P. ("SPI").

7. The Sale Order contemplated that SPI would lease a portion of Addison II to VarTec Telecom, Inc., ("VarTec") and on March 18, 2005, VarTec and SPI executed that certain Lease (the "Addison II Lease").² A copy of the Addison II Lease is attached hereto as **Exhibit A**.

8. VarTec utilizes the Addison II Lease Premises to store telecommunications equipment and parts. Under the Addison II Lease, VarTec leases approximately 47,230 square feet of Addison II (the "Addison II Lease Premises") from SPI for a term of thirty-six months with monthly base rent of \$17,711.25. Paragraph 21 of the Addison II Lease provides, in relevant part, "Landlord acknowledges and agrees that Tenant, after entering into and taking possession of the Premises, may reject this lease, provided that such rejection occurs prior or pursuant to confirmation of a plan of reorganization or liquidation." *Addison II Lease* at 9.

Tarpley Lease

9. The Debtors no longer require the square footage provided under the Addison II Lease, and they have contacted a number of potential lessors concerning lease premises which would better suit their needs. The Debtors have identified such a lease premises, which is located at 2514 Tarpley Road, Suites 104 and 106, Carrollton, Texas, 75006 (the "Tarpley Lease Premises"). To that end, VarTec and CMK Associates, Ltd. ("CMK") have executed a Commercial Lease Agreement dated October 6, 2005 (the "Tarpley Lease") subject to Court approval. A copy of the Tarpley Lease is

² VarTec and SPI also executed a lease with respect to Addison II, which lease has expired.

attached hereto as **Exhibit B**. Under the Tarpley Lease, CMK would lease approximately 7,500 square feet to VarTec for an initial term of twelve and one-half months with two opportunities to renew at VarTec's option. During the initial term, monthly base rent is \$5,312.50, and VarTec agrees to provide CMK a security deposit of \$5,937.50.

RELIEF REQUESTED

Approval of Execution of Tarpley Lease

10. Pursuant to Bankruptcy Code §§ 105 and 363, the Debtors request approval of the execution of the Tarpley Lease. Bankruptcy Code § 363(b)(1) provides, "The trustee, 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).

11. The proposed use, sale or lease of property of the estate may be approved under Bankruptcy Code § 363(b) if it is supported by sound business justification. See, e.g., *In re Crutcher Resources Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987); *The Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) ("[F]or a debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business").

12. In the exercise of their business judgment, the Debtors have determined that the execution of the Tarpley Lease will benefit their estates. The Debtors no longer require the square footage provided under the Addison II Lease. The Tarpley Lease Premises provides the Debtors adequate space to store their telecommunications

equipment, and the monthly base rent under the Tarpley Lease would be approximately \$12,000 less than the comparable monthly base rent under the Addison II Lease. Further, by executing the Tarpley Lease and rejecting the Addison II Lease, the Debtors would be able to avoid their obligation to pay “additional rent” in the amount of approximately \$28,000 per month relating to operating expenses associated with Addison II. The Debtors expect “additional rent” under the Tarpley Lease to be less than \$1,500 per month. The Debtors’ management has discussed the proposed execution of the Tarpley Lease with representatives from Comtel Telcom Assets, L.P. (“Comtel”), and Comtel has indicated that it supports the execution of that agreement.

13. Therefore, in the exercise of their business judgment, the Debtors have determined that the execution of the Tarpley Lease should be approved.

Rejection of Addison II Lease

14. In connection with the execution of the Tarpley Lease, the Debtors seek approval of the rejection of the Addison II Lease. Pursuant to Bankruptcy Code § 365, the Debtors have determined, in their business judgment, that it is in their best interest, and that of their estates, to reject the Addison II Lease effective as of October 31, 2005 (the “Effective Date”).

15. 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.

16. 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)). The Sixth Circuit has 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, 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.

17. For the reasons set forth above, the Debtors have determined that they should reject the Addison II Lease as of the Effective Date.

PRAYER

The Debtors respectfully request that the Court enter an Order approving VarTec's execution of the Tarpley Lease and the rejection of the Addison II Lease as of the Effective Date. The Debtors also request that the Court grant them such other and further relief to which they may be justly entitled.

Dated: October 12, 2005

Respectfully submitted,

VINSON & ELKINS L.L.P.

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ATTORNEYS FOR THE DEBTORS

CERTIFICATE OF SERVICE

This is to certify that on October 12, 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 the following parties:

SPI IH II, L.P.
c/o SPI Holdings, LLC
650 California Street, Suite 1288
San Francisco, California 94108

SPI Holdings, LLC
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CMK Associates, Ltd.
c/o VPI, Inc.
5824 Broadwell Drive
Plano, Texas 75093

 /s/ Richard H. London
One of Counsel

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