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**SPECIAL COUNSEL FOR 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)**

**DEBTORS' MOTION TO AUTHORIZE ASSUMPTION OF NONDISCLOSURE  
AGREEMENT BETWEEN DEBTORS AND SBC TELECOMMUNICATIONS, INC.  
AND ITS AFFILIATES (AND BRIEF IN SUPPORT)**

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

The debtors and debtors in possession (collectively hereafter, the "Debtors")<sup>1</sup> file this Motion to Authorize Assumption of Nondisclosure Agreement Between the Debtors and SBC Telecommunications, Inc. (now known as SBC Operations, Inc.) and Its Affiliates (and Brief in Support) (the "Motion"), and in support thereof would show as follows:

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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.

## **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. The Debtors' Cases are jointly administered under the case styled: *In re VarTec Telecom, Inc.*, Case No. 04-81694-HDH-11.

## **STATEMENT OF FACTS**

### **VarTec and Its Business**

6. VarTec Telecom, Inc., a Texas corporation, ("VarTec") along with its sixteen direct and indirect domestic subsidiaries, each of which is a Debtor, and eighteen non-debtor direct and indirect foreign subsidiaries, is among the largest privately held companies providing telecommunications services in North America and Europe. VarTec's revenues had been derived primarily from three sale distribution channels: (a) Direct Marketing; (b) Commercial Services; and (c) Multi-Level Marketing.

### **Executory Contracts and Personal Property Leases**

7. 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 the assumption of which

would be advantageous to the Debtors' estates. Among these contracts is a prepetition nondisclosure agreement entered into in early 2004 between SBC Telecommunications, Inc. (now known as SBC Operations, Inc.) and each of its affiliates<sup>2</sup> (collectively "SBC") and VarTec Telecom, Inc., and each of its subsidiaries and affiliates (the "Nondisclosure Agreement"). A copy of the Nondisclosure Agreement is attached to this Motion as Exhibit A. The Nondisclosure Agreement relates to "negotiations concerning the terms and conditions, including prices, of a private commercial agreement between the Parties." Nondisclosure Agreement at 1.

### **Relief Requested**

8. The purpose of this Motion is to authorize the Debtors to assume the Nondisclosure Agreement so that the above-described negotiations concerning a private commercial agreement may be concluded. In addition, Comtel Telecom Assets, LP (Comtel"), the purchaser of substantially all of the assets of the Debtors, will execute an addendum to the Nondisclosure Agreement, or such other document as may be deemed appropriate by Comtel and SBC, to indicate Comtel's agreement to be bound by the terms of the Nondisclosure Agreement. This will allow the Debtors, SBC, and Comtel to exchange and discuss confidential information previously provided by SBC to the Debtors in connection with the negotiation of a proposed private commercial agreement among SBC and the Debtors. In turn, the Debtors will determine whether they will enter in a private commercial agreement with SBC, and Comtel will determine whether it will accept an assignment from the Debtors of such an agreement.

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<sup>2</sup> SBC Telecommunications, Inc. changed its name to SBC Operations, Inc. in January 2005. The affiliates of SBC Operations, Inc. include: Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, The Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Nevada Bell Telephone Company, and The Woodbury Telephone Company. SBC Operations, Inc. and these entities just listed shall be referred to in this Motion as "SBC."

9. Pursuant to Section 365 of the Bankruptcy Code, and in the exercise of their business judgment, the Debtors have determined that it will be advantageous to assume the Nondisclosure Agreement. In particular, concluding negotiations concerning a private commercial agreement among SBC and the Debtors is necessary in order to allow the Debtors to provide various services to its clients in light of recent Federal Communications Commission ("FCC") rulings, and in advance of a March 11, 2006 deadline established by the FCC. In the absence of a nondisclosure agreement, such negotiations cannot be concluded. By this Motion, the Debtors request entry of an order pursuant to Bankruptcy Code § 365 authorizing and approving the assumption of the Nondisclosure Agreement.

10. Section 365 of the Bankruptcy Code 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). The "business judgment" test governs whether a court should authorize a debtor to assume a contract. *See In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 172 (Bankr. E.D. Va. 1993); *In re Del Grosso*, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990). As stated in the *Del Grosso* case:

In general, the standard to be applied for approval of the assumption is the business judgment standard, which requires a sufficient showing of (1) whether performance of the contract will be advantageous to the estate, and (2) whether the estate will be able to perform. If both questions are resolved in the affirmative, the trustee is normally allowed to assume, regardless of the opposition of the other party to the contract.

*Id.*

#### **Other Matters**

11. SBC does not oppose the Motion.

12. The Debtors represent to SBC that they are aware of no past or present breaches of the Nondisclosure Agreement by either the Debtors or SBC. In turn, SBC represents to the

Debtors that it is aware of no past or present breaches of the Nondisclosure Agreement by either the Debtors or SBC.

13. The Debtors will request that this Motion be heard on an expedited basis on November 22, 2005 at 1:30 p.m., the next regularly scheduled pre-set hearing date in these bankruptcy cases, or as soon thereafter as the Court's calendar will permit.

**PRAYER**

The Debtors request that the Court enter an order authorizing the assumption of the Nondisclosure Agreement. The Debtors also request such other and further relief to which they may be justly entitled.

Dated: November 8, 2005.

Respectfully submitted,

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By: /s/ Michael L. Scanlon  
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**SPECIAL COUNSEL FOR THE DEBTORS**

**CERTIFICATE OF SERVICE**

This is to certify that on November 8, 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 Master Service List that do not receive electronic e-mail service.

/s/ Michael L. Scanlon  
Michael L. Scanlon