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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)

**MOTION TO ASSUME AND ASSIGN EXECUTORY CONTRACTS
WITH AUTHORIZED REPRESENTATIVES**

A HEARING WILL BE CONDUCTED ON THIS MATTER ON JANUARY 23, 2006, 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.

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 Assume and Assign Executory Contracts with Authorized Representatives (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.

6. 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

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.

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").

STATEMENT OF FACTS

Agreements with Authorized Representatives

7. Certain of the Debtors entered into Authorized Representative/Dealer Agreements (the "Contracts") with certain entities (the "Representatives"). Below is a list of the Contracts and Representatives:

Representatives	Contracts	Debtors
Dinan, Inc. 3125 Bross Road Hastings, MI 49058	Authorized Representative Agreement dated January 17, 2002	VarTec Solution, Inc. (as successor to eMeritus Communications, Inc.)
Global Communications Networks Systems, Inc. 10 Summer Tree Run Sparta, NJ 07871	Authorized Representative Agreement dated May 19, 2000	VarTec Solution, Inc. (as successor to Teleglobe Business Solutions, Inc.)
Global Systems Telecom, Inc. 2301 W. Sample Road Building 3, Suite 6A Pompano Beach, FL 33073	Authorized Dealer Agreement dated November 1, 1996	Telco Communications Group, Inc.
J3 LLC 13236 N. 7th Street, 4-228 Phoenix, AZ 85022	Authorized Representative Agreement dated November 7, 2001	VarTec Solution, Inc. (as successor to eMeritus Communications, Inc.)
TMS 836 E. Rand Road PMB #265 Arlington Heights, IL 60004	Authorized Representative Agreement dated October 11, 2000	VarTec Solution, Inc. (as successor to Teleglobe Business Solutions, Inc.)
U.S. Telebrokers, Inc. 8390 E. Via de Ventura F110-220 Scottsdale, AZ 85258	Authorized Representative Agreement dated September 18, 2001	VarTec Solution, Inc. (as successor to eMeritus Communications, Inc.)

A copy of the Contracts themselves are not attached but will be provided to parties in interest upon the receipt of a written request sent to Vinson & Elkins L.L.P., Attn: Pam Lewis, Paralegal, Trammell Crow Center, 2001 Ross Avenue, Suite 3700, Dallas, Texas

75201-2975. Under the Contracts, the Representatives are authorized to procure new customers for the Debtors. In return for procurement of new customers, the Representatives receive a commission.

8. The Debtors do not owe any arrearages to the Representatives under the Contracts. The Representatives have continued to procure customers for the Debtors since the Petition Date. The Representatives are experienced in securing new customers for the Debtors.

RELIEF REQUESTED

9. The Debtors seek to simultaneously assume and assign the Contracts to Comtel on the Final Closing Date (as defined in the APA). The Contracts are beneficial to the Debtors' business because the Representatives procure new telecommunication customers for the Debtors. Likewise, when the Final Closing Date occurs, such Contracts should be beneficial to Comtel. However, the Debtors seek to wait for assumption until the Final Closing Date to avoid incurring administrative expenses if Final Closing Date does not occur for some unforeseen circumstance.

Assumption Standard

10. 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).

11. Bankruptcy Code § 365(b)(1) further states:

(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).

12. Bankruptcy Code § 365 does not provide a standard for determining when a debtor in possession can assume an unexpired lease. 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).

13. 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)).

Assignment Standard

14. A debtor in possession may assign an unexpired lease under Bankruptcy Code § 365(f)(2) only if:

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

Application of Standards

15. The Debtors have determined that the assumption and assignment to Comtel of the Contracts as of the Final Closing Date would be beneficial. In making such determination, the Debtors have taken into account, *inter alia*, that there is no cost to cure because no defaults exist and there is value added to the Debtors' estates from the services provided under the Contracts. Sound business reasons exist for the assumption of the Contracts, and in the exercise of their business judgment, the Debtors have determined that assumption and assignment to Comtel as of the Final Closing Date is in the best interests of the Debtors' respective estates, their creditors and other parties-in-interest.

16. Because there are no monetary defaults to cure under the Contracts, the Debtors comply with Bankruptcy Code § 365(b)(1)(A) and (f)(2). Further, the Debtors have provided the Representatives 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). As evidenced by the payments and obligations fulfilled by the Debtors prior to and

during the pendency of the Cases, the Debtors and Comtel will be able to satisfy the obligations under the Contracts as they arise.

17. As no monetary default cure amounts are owed to the Representatives and adequate assurance of future performance has been provided to the Representatives, the Debtors have satisfied the requirements of Bankruptcy Code § 365, and they request authority to assume and assign the Contracts to Comtel as of the Final Closing Date.

PRAYER

The Debtors respectfully request that the Court enter an Order authorizing them to (i) simultaneously assume and assign the Contracts to Comtel on the Final Closing Date; and (ii) grant the Debtors such other and further relief to which they may be justly entitled.

Dated: December 22, 2005

Respectfully submitted,

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