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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	**Chapter 11**
	§	
VARTEC TELECOM, INC., *et al.*	§	**Case No.: 04-81694-HDH-11**
	§	**(Jointly Administered)**
	§	
Debtor.	§	**Expedited Hearing Date: June 1, 2006**
	§	**Expedited hearing Time: 1:30 p.m.**

OBJECTION OF SYMANTEC CORPORATION TO EXPEDITED MOTION TO APPROVE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES (SECOND SET OF MISCELLANEOUS CONTRACTS

SYMANTEC CORPORATION, a Delaware Corporation ("Symantec"), the successor-in-interest to Veritas Software Global Corporation ("Veritas") (Symantec and Veritas hereinafter are collectively referred to as "Symantec"), hereby objects (the "Objection") to the request of Vartec Telecom, Inc. and the above-captioned debtors[1] (collectively, the "Debtors"),

[1] According to the Motion, 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.,

each of whom is a debtor and debtor-in-possession in the above-captioned cases, to assume certain executory contracts as set forth in the *Expedited Motion To Approve Assumption And Assignment Of Executory Contracts and Unexpired Leases (Second Set of Miscellaneous Contracts)* (the "Motion").

SUMMARY OF RELIEF SOUGHT BY DEBTORS

The Motion seeks entry of an order authorizing the assumption and assignment of that certain executory contracts to Comtel Telcom Assets, LP, the purported assignee of Comtel Investments LLC (collectively, "Comtel")) pursuant to an *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)* (the "Comtel Sale Order"). *See* Motion at paragraph 9. Among the executory contracts that the Debtors seek to assume and assign to Comtel is a contract by and between the Debtors and Veritas described as follows: Software License and Service Agreement #05923, effective January 16, 2003, all associated Amendments, Registration Forms, and Purchase Orders related thereto for A01750F Foundation Suite Solaris v3 4, A02069F Database Edition for Oracle Solaris 3 0, A202088F, Database Edition for Sybase Solaris, A02097F Database Sybase SYMM Sun Solaris Standard, A03448F Database/Edition/HA for Oracle Solaris, A08974F Volume Manager Solaris v3 5, A08961F Database Edition for Oracle Solaris Enterprise Edition v 3 5, A08967F Foundation Suite HA Solaris v3 5, A08969F Foundation Suite Solaris v3 5 (hereinafter collectively referred to as the "Noticed Contract"). *See* Exhibit "A" to the Motion. As a condition of such proposed assumption and assignment, the Debtors propose (1) to pay $31,288 as the cure of a monetary default under the Notice Contract and (2) to pay an additional fee of $25,000 to Vartec for the assignment of the Notice Contract. *Id.*

VarTec Solutions, Inc., VarTec Business Holding Company, VarTec Telecom International Holding Company, and VarTec Telecom of Virginia, Inc.

SUMMARY OF RELIEF SOUGHT BY SYMANTEC

First, Symantec seeks entry of an order continuing the June 1, 2006 hearing set on the Motion on the grounds that the expedited setting of the hearing on this matter has denied Symantec an adequate opportunity to evaluate the Noticed Contract and the Debtor's request for entry of an order approving the assumption and assignment of such Notice Contract.

Second, pursuant to 11 U.S.C. §365 (c) and Rules 6006(a) and (c), and 9014 of the Federal Rules of Bankruptcy Procedure, Symantec seeks entry of an order denying the assumption by the Debtors of any executory contracts, including but not limited to the Noticed Contract and any and all executory contracts by and between Symantec and any of the Debtors on the grounds that (1) approval of the Motion on an expedited basis is a denial of Symantec's due process rights, and (2) that neither the Notice Contract or any other executory contract between the parties may be assumed or assigned without Symantec's express consent and Symantec has not consented to either such assumption or assignment (and does not hereby consent to such assumption or assignment of such executory contracts).

The Objection is based on the matters set forth herein, the files and records in this case and such other and further evidence that may be adduced at the trial on this matter.

GROUNDS FOR THE RELIEF REQUESTED BY SYMANTEC

A. Approval Of The Motion On An Expedited Basis Violates Symantec's Due Process Rights

1. Before a creditor's interests may be adversely affected by judicial action, the due process clause of the Fifth Amendment to the United States Constitution requires "notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." and to afford them an opportunity to present their objections. *See City of N.Y. v. New York, N.H. & H. R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953) (a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights); *U.S. v. Security Indus. Bank*, 459 U.S. 70, 75, 103 S.Ct. 407, 410, 74 L.Ed2d 235 (1982) (Bankruptcy

proceedings are subject to the fifth amendment); *Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985) *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). *Accord, In re Golden Books*, 269 B.R. 300, 305 (Bankr. D. Del. 2001) (Notice of a motion seeking authority to assume and assign executory contracts, including licenses of intellectual property, is governed by Federal Rule of Bankruptcy Procedure 6006(a)).

2. The Motion is before the Court on an expedited basis and, effectively, adjudicating the Motion on June 1, 2006 denies Symantec a reasonable opportunity to be heard on this matter. In order to adequately respond to the Motion, Symantec must review the Notice Contract and analyze all related factual and legal issues that bear on the Debtors' right to assume and assign the Notice Contract, including (without limitation) whether the Motion seeks assumption of all executory contracts between the parties or only some of such contracts or whether the Debtor has complied with the mandates governing assumption and assignment of executory contracts as set forth in Section 365(b), (c) and (f) of the Bankruptcy Code. But, in this instance, this reasoned analysis has been denied by virtue of the expedited hearing set by the Court without a reasonable opportunity to object to setting the hearing on an expedited basis. Therefore, approval of the assumption or assignment of such executory contracts based on the record before this Court and at this June 1, 2006 hearing constitutes a denial of Symantec' due process rights.

B. <u>The Symantec Contracts Cannot Be Assumed Or Assigned Without Symantec' Consent</u>

3. Prior to commencement of the Debtor's bankruptcy cases, Veritas granted certain licenses (the "Veritas Licenses") to certain of the Debtors permitting use of certain computer software (the "Licensed Software") owned by Veritas, and entered into other software license

and support agreements (the "SLSAs" as hereinafter defined) and maintenance and service agreements (the "Maintenance Agreements"), including (without limitation) the Notice Contract. (Hereinafter, the Veritas Licenses, the SLSAs, the Maintenance Agreements, and the Noticed Contract are referred to collectively as the "Veritas Contracts".) The Veritas Licenses provide, in pertinent part, that no licensee of such Licensed Software (such as the Debtors in this instance) are permitted to assign or otherwise transfer the Licenses without consent of Veritas. Veritas has not, and does not hereby, consent to the assumption or assignment of the Noticed Contract or any other executory contract by the Debtors.

4. The Licensed Software (which is the subject of the Veritas Licenses) is protected by copyrights pursuant to Title 17 of the United States Code (the "Copyright Act"), and Veritas is the owner of such copyrights. Further, Veritas has granted Debtors only a non-exclusive right to use the copyrighted Licensed Software and has not consented to either the assumption or the assignment of such software to any third party. Pursuant to 11 U.S.C. §365(c), the Debtors may not assume or assign a particular executory contract if applicable non-bankruptcy law (such as the Copyright Act) requires the consent of the non-debtor party to the contract to consent to its assignment. In this instance, the Licensed Software is subject to the Copyright Act and cannot be assumed or assigned without Veritas' consent.

1. <u>The Notice Contract Is an Executory Contract</u>.

5. Generally, courts find that "intellectual property licenses [are] 'executory' within the meaning of section 365(c) because each party to the license had the material duty of 'refraining from suing the other for infringement of any of the [intellectual property] covered by the license . . .' " *In re Golden Books*, 269 B.R. 300, 309 (Bankr. D. Del. 2001) *quoting In re Access Beyond Tech., Inc.*, 237 B.R. 32 (Bankr. D. Del. 1999). Accordingly, a debtor in possession cannot assume such contracts except if the debtor complies with the assumption

requirements set forth in 11 U.S.C. §365. *See Perlman v. Catapult Entertainment, Inc.* (*In re Catapult Entertainment, Inc.*, 165 F.3d 199, *cert. denied*, 120 S.Ct. 369 (1999); *Everex Systems, Inc. V. Cadtrak Corp*. (*In re CFLC, Inc*, 89 F.3d 673, 677 (9th Cir. 1996) (nonexclusive license is an executory contract); *Fenix Cattle Co. v. Silver* (*In re Select-A-Seed Corp*.), 625 F.2d 290, 292, (9th Cir. 1990) (copyright license for use of computer software is an executory contract); *In re Patient Education Media, Inc*., 210 B.R. 237, 241 (Bankr. S.D.N.Y. 1997); *In re Golden Books*, *supra*; *In re Access Beyond Tech., Inc., supra*.

6. In this case, assuming the Noticed Contract (as set forth in the Motion) necessarily would entail assumption of a SLSA and several Licenses, such contracts are "executory contract" within the meaning of Section 365 of the Bankruptcy Code because they impose on-going obligations on the parts of both parties to the agreement. Thus Symantec, for its part, must permit the continued use of the Licensed Software according to the terms of the License, while the Debtor must limit its use to the restrictions set forth and permit Symantec to monitor or audit such use throughout the term of the Licenses. Therefore, the Noticed Contract (which includes Licenses) constitutes an executory contract within the meaning of 11 U.S.C. §365 and the Debtor is not permitted to assume or assign the SLSA (including the License) unless complies with the mandatory requirements imposed by 11 U.S.C. §365(b) and (c)(1).

2. Federal Law Requires Consent of a Copyright Owner To Transfer or Assign A Copyright.

7. Under applicable federal law, the holder of a non-exclusive license of a copyright does not obtain the rights of ownership, but acquires only a personal interest in a copyright. *See In re CFLC, Inc., supra*; *In re Patient Education Media, Inc., supra*; *In re Golden Books*, *supra*; *In re Access Beyond Tech., Inc., supra*. Further, a nonexclusive license of a copyright is personal to the transferee and cannot be assigned without the consent of the licensor. *Id. See*

also Unarco Industries, Inc. v. Kelley Co., 465 F.2d 1303, 1306 (7th Cir.1972*); In re Valley Media, Inc.*, 279 B.R. 105, 135-136 (Bankr.D.Del.2002); *In re Patient Education Media, Inc.*, *supra; In re Golden Books, supra*; *In re Access Beyond Tech., Inc., supra*.

8. Under Title 17 of the United States Code (the "Copyright Act") and federal common law pertaining to copyrights, a copyright owner (such as Symantec in this instance) does not have to consent to the assignment of any license of that copyrighted material to any third party (such as the License or the Licensed Software in this instance). *See In re Patient Education Media, Inc.*, 210 B.R. at 241 (copyright license) *citing In re CFLC, Inc.*, 89 F.3d at 679. *See also Harris v. Enus Records Corp.*, 734 F.2d 1329, 1333-34 (9th Cir. 1984) (copyright licenses are not transferable without the licensor's consent); S*ol Solutions, Inc. v. Oracle Corp.*, 1991 WL 626458 at 5 (N.D. Cal., December 18, 1991) (*quoting* 17 U.S.C. §102) (software license that explicitly reserves all copyrights and other ownership rights to the licensor cannot to any such request).

3. <u>A Debtor In Possession Cannot Assume A Non-Exclusive License of A Copyright Over The Objection Of the Owner of the Copyright.</u>

9. Pursuant to 11 U.S.C. §365(c)(1), a debtor in possession may not assign a non-exclusive license in a copyright absent the consent of the owner of that patent or copyright. *See In re Patient Education Media, Inc., supra*; *In re Golden Books, supra*; *In re Access Beyond Tech., Inc., supra*. As previously stated, Symantec has not and does not hereby consent to the assumption of the License or the Software.

C. <u>The Proposed Amount of the Monetary Cure and Transfer Fee Are Not Correct.</u>

10. Assuming, *argumendo*, that Symantec would consent to the assumption and assignment of the Noticed Contract as sought by the Motion, it submits that the proposed monetary cure is incorrect and that the transfer fee proposed is unacceptable. Instead, Symantec

submits that the amount of the pre-petition monetary cure that would have to be paid is not less than $93,051.51, the amount of the post-petition monetary default is not less than $154,448.80, and the amount of the transfer fee is not less than $50,000.

D. SLSA Should Be Rejected If the Debtor Cannot Satisfy §365

11. Symantec has not and does not hereby consent to assumption and assignment of the Noticed Contract or any other Symantec Contract. Accordingly, unless and unless the Debtors pay the amounts set forth above as a condition of the proposed assumption and assignment, of the Noticed Contract Symantec contends that the Noticed Contract and any other executory contracts between the parties (including any License or a SLSA) must be rejected.

WHEREFORE, pursuant to 11 U.S.C. §365(b), (c) and §365(f) and Fed. R. Bankr. P. 6006(a) 9014, Symantec seeks entry of an order denying the assumption and assignment of any Symantec Contracts, including without limitation the Noticed Contract, any Licenses, SLSAs or Maintenance Agreements, unless Symantec expressly consents to assumption and assignment of the Symantec Contracts as mandated by applicable non-bankruptcy law and 11 U.S.C. §365(c)(1) and upon such terms as Symantec deems necessary and appropriate (such as payment of a transfer fee).

Further, to the extent that the SLSAs, License or other Symantec Contracts are not assumed with Symantec' consent, Symantec seeks entry of an order (1) directing that the Debtors certify that all of Symantec Licensed Software and any other intellectual property subject to the Symantec Contracts has been deleted from any and all assets sold, transferred or abandoned to any third party or that may be acquired pursuant to any further sales and (2) granting such further and additional relief as may be necessary to assure that the none of Symantec' Licensed Software or copies thereof are transferred as part of any assets and that the Debtor has taken all actions necessary to delete all copies of the Licensed Software or other intellectual property subject to

the Licenses from any assets.

Further, Symantec requests such other and further relief as may be permitted by law or equity.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served by electronic mail upon counsel for the Debtor, Official Committee of Unsecured Creditors, the Ad Hoc Committee of Independent Representatives, and Official Committee of Excel Independent Representatives. Moreover, parties who have so registered with the Court (including counsel for the Debtor, the various committees, and any parties having made an appearance and requested notice) shall receive notification via the Court's ECF system, and are considered served pursuant to the Administrative Procedures incorporated into the Order Adopting Administrative Procedures For Electronic Case Filing, General Order 2003-01.2.

/s/ Douglas Wade Carvell, P.C.
One of Counsel