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ATTORNEYS FOR THE OFFICIAL COMMITTEE OF EXCEL INDEPENDENT REPRESENTATIVES

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| In re | ) | Chapter 11 Case |
| VARTEC TELECOM, INC., et al., | ) | Case No. 04-81694-SAF-11 |
| | ) | Jointly Administered |
| Debtors. | ) | |
| | ) | Hearing Date and Time: |
| | ) | [To Be Determined] |

**APPLICATION OF THE OFFICIAL COMMITTEE OF EXCEL INDEPENDENT REPRESENTATIVES FOR ENTRY OF AN ORDER (I) PURSUANT TO 11 U.S.C. § 105(a) MODIFYING THE COURT'S DECEMBER 9, 2004 ORDER AND (II) PURSUANT TO 11 U.S.C. § 1103 AND FED. R. BANKR. P. 2014 AUTHORIZING RETENTION OF SCOULER ANDREWS LLC AS CLAIMS CONSULTANT NUNC PRO TUNC TO JANUARY 31, 2005**

TO: THE HONORABLE STEVEN A. FELSENTHAL,
UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Excel Independent Representatives (the "IR Committee") appointed in the chapter 11 cases of the above-referenced debtors and debtors in possession (collectively, the "Debtors") files this application (the "Application") for entry of an order (i) pursuant to section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") modifying that certain order dated December 9, 2004 (the "12/9/04 Order") of the United States

Bankruptcy Court for the Northern District of Texas (the "Court") directing the appointment of the IR Committee and (ii) pursuant to section 1103 of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") authorizing the retention of Scouler Andrews LLC ("Scouler Andrews") as claims consultant nunc pro tunc to January 31, 2005 for the IR Committee as set forth more fully in the attached proposed engagement letter (the "Engagement Letter"), and in support of this Application, respectfully states as follows:

## JURISDICTION AND VENUE

1. This court has jurisdiction to consider this Application pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief sought herein is sections 105(a) and 1103(a) of the Bankruptcy Code.

## PROCEDURAL BACKGROUND

2. On or about November 1, 2004 (the "Petition Date"), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with this Court, commencing their respective chapter 11 cases (the "Cases").

3. Also on November 1, 2004, the Debtors filed a motion (the "IR Rejection Motion") seeking authority from this Court to reject approximately 130,000 IR Agreements (as defined below) with independent representatives of Excel Telecommunications (the "IR's").

4. By order dated November 2, 2004, the Cases are being jointly administered. The Debtors are in possession of their property and operating their businesses as debtors and debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. On or about November 8, 2004, the Office of the United States Trustee (the "U.S. Trustee") appointed the Official Committee of Unsecured Creditors (the "VarTec Committee,"

and together with the IR Committee, the "Committees") pursuant to section 1102 of the Bankruptcy Code.

6. Pursuant to the 12/9/04 Order, the Court directed the IR Committee "to address the issues related to the Excel IRs and attempt to negotiate a global and comprehensive settlement of all Excel IR claims." 12/9/04 Order at ¶3. While authorizing the IR Committee to engage counsel to represent it in these Cases, the 12/9/04 Order prohibited the IR Committee "from engaging separate accountants and/or financial advisors; rather the accountants and/or financial advisors engaged by both the Debtors and the VarTec Committee shall be responsible for providing the IR Committee information it requests to address the Excel issues and claims." 12/9/04 Order at ¶5.

7. On January 26, 2005, the Committees signed the Joint Stipulation of the Official Committee of Unsecured Creditors and the Official Committee of Excel Independent Representatives Regarding Case Management Procedures (the "Stipulation"). Significantly, the Stipulation sets forth the agreement and understanding of the Committees that based upon the complex nature of the claims the IRs have against the Debtors' estates, the IR Committee's retention of a claims consultant is appropriate in these Cases.

## FACTUAL BACKGROUND

8. Prior to the Petition Date, Debtor Excel Telecommunications, Inc. and its affiliated Debtors (collectively, "Excel") employed a multi-level marketing channel to offer its various telecommunication products and services. Excel is a subsidiary of Debtor VarTec Telecom, Inc. ("VarTec"). The multi-level marketing channel consists of: (i) the Excel IR's, who

act as the exclusive marketing arm for Excel;[1] (ii) training directors ("TDs"), whose primary responsibility is to train IRs;[2] and (iii) ambassadors (the "Ambassadors"), who represent the highest level an IR can reach in the Excel marketing channel.

9. Each IR is required to sign an Independent Representative Application and Agreement (each, an "IR Contract") and pay an enrollment fee in order to become an IR. IR's who contract to become a managing representative pay an enrollment fee of $399; those who choose to become a sales associate pay an enrollment fee of $199 (collectively, the "IR Enrollment Fees"). Similarly, on the anniversary of each IR, each is required to pay an annual renewal fee of $199 (each, an "IR Renewal Fee").[3] Failure to pay the IR Renewal Fee results in the termination of the IR contract.

10. Each TD is required to sign a Training Director Application Agreement (the "TD Contract," and together with the IR Contract, the "IR Agreements") in order to become a TD. TDs that are training directors pay a certification fee of $345 and thereafter, pay a $100 annual renewal fee in order to retain this status. TD's that are regional training directors pay a certification fee of $200 and, thereafter, pay a $100 annual renewal fee in order to retain this status. TD's that are national training directors pay a certification fee of $400 and, thereafter, pay an annual $200 renewal fee in order to maintain this status. The certification fees that training directors, regional training directors and national training directors pay are collectively referred to herein as the "TD Certification Fees." The renewal fees that training directors,

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1 The position of IR consists of various levels, including managing representative, senior representative, regional director, executive director, senior director, and executive senior director.

2 The position of TD consists of various levels, including training director, regional training director, and national training director.

3 The amount paid by each IR in respect of the IR Renewal Fee can vary depending on the IR's length of service with Excel.

regional training directors and national training directors pay are collectively referred to as the "TD Renewal Fees."

11. The Excel Agreements specifically provide that the IR Enrollment Fees and TD Certification Fees are subject to a 10-day cancellation period, pursuant to which the IR or TD is entitled to a full refund of the IR Enrollment Fee or TD Certification Fee paid to Excel.[4]

12. IR's can earn commissions and bonuses based on, among other things, the success of the IR's recruited and a portion of the success of their recruits (referred to as a "Downline"), the usage of Excel products and services by customers of the IR's and a portion of their Downline. Rejection Motion at ¶10. Similarly, TD's can earn commissions for IR's that they train or supervise training.

13. Accordingly, there are various types of claims the IR's and TD's have against the Debtors' estates, including without limitation, (i) commissions earned both prior to and after the Petition Date, (ii) future commissions on existing customers procured by the IR's, (iii) IR Enrollment Fees and TD Certification Fees, (iv) commissions earned both prior to and after the Petition Date on account of the Debtors' European business;[5] and (v) IR Renewal Fees and TD Renewal Fees (collectively, the "IR Claims").

14. Given the complex nature of the IR Claims, and the even more difficult task of calculating such claims, the IR Committee is in need of a firm qualified to assist it in understanding the amount, validity, priority and extent of the IR Claims in these Cases. In that

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[4] Upon information and belief, various IRs and TDs paid their respective IR Enrollment Fee or TD Certification Fee, as the case may be, during the 10-day period immediately preceding the Petition Date, but were unable to exercise their reclamation rights due to the Debtors' commencement of these Cases.

[5] The Debtors' European business was sold by order of the Court dated December 17, 2004.

regard, the IR Committee has selected Scouler Andrews to act as its claims consultant as set forth in the proposed Engagement Letter for the purpose of:[6]

a. Assisting the IR Committee with an assessment and calculation of the IR claims.

b. Assisting the IR Committee and its counsel with negotiations for the potential resolution of such claims.

c. Providing testimony, if necessary, as requested by the IR Committee.

## RELIEF REQUESTED

15. By this Motion, the IR Committee seeks entry of an order by the Court (i) modifying the 12/9/04 Order to the extent necessary to permit the IR Committee to retain Scouler Andrews as a claims consultant as set forth herein and (ii) authorizing the IR Committee to retain Scouler Andrews to act as claims consultant nunc pro tunc to January 31, 2005 for the IR Committee in these Cases as set forth in the proposed Engagement Letter.

## BASIS FOR RELIEF

A Modification of the 12/9/04 Order is Warranted

16. Section 105(a) of the Bankruptcy Code provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules or to prevent the abuse of process.

11 U.S.C. § 105(a). As stated by the United States Supreme Court in United States v. Energy Resources Co., 495 U.S. 549 (1990):

[6] A true and correct copy of the proposed Engagement Letter is attached as Exhibit A hereto.

> "[The] statutory directive [behind Section 105(c) of the Bankruptcy Code] is consistent with the traditional undertaking that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."

Id. at 545; see also Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 760 (5th Cir. 1995).

17. In the instant case, the equities weigh heavily in favor of modifying the 12/9/04 Order so as to permit the IR Committee to retain a claims consultant. As outlined above, the IR Committee needs to retain a claims consultant to assist the IR Committee in assessing and calculating the IR Claims in order to properly carry out the Court's directive that the IR Committee attempt to negotiate a settlement of the potential IR Claims as expeditiously as possible.

18. Absent the ability to retain a claims consultant to help it assess and calculate the IR Claims, the IR Committee will be forced to rely solely on the Debtors' professionals in assessing the validity, priority and extent of the IR Claims. Given such inherent conflict, the IR Committee believes that it will be difficult, if not impossible, for the IR Committee to adequately represent the interests of its constituents without the assistance of a qualified claims consultant to assist it in reviewing and calculating the IR Claims.

19. Accordingly, the IR Committee respectfully requests that the Court modify its 12/9/04 Order to the extent necessary so as to permit the IR Committee to retain a claims consultant as set forth herein.

The IR Committee Should Be Authorized to Retain Scouler Andrews as its Claims Consultant

20. The IR Committee submits that the retention of a claims consultant is necessary for the IR Committee to carry out its duties in these Cases. In that regard, the IR Committee has selected Scouler Andrews to act as its claims consultant as set forth in the proposed Engagement

Letter, subject to this Court's approval. The affidavit of Daniel Scouler (the "Scouler Affidavit") in support of this Application is attached hereto as Exhibit B.

21. Section 1103(a) of the Bankruptcy Code provides:

> At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

11 U.S.C. § 1103(a).

22. Scouler Andrews is well-qualified to serve as the IR Committee's claims consultant expert because of its extensive experience in the telecommunications industry and in representing creditors in both bankruptcy and restructuring matters. The IR Committee firmly believes that Scouler Andrews will provide these necessary services in a cost-effective, efficient and timely manner.

23. Subject to this Court's approval and in accordance with sections 328, 330 and 331 of the Bankruptcy Code, the Bankruptcy Rules and the Local Rules and Orders of this Court, the IR Committee proposed to retain Scouler Andrews as set forth in the proposed Engagement Letter at its customary hourly rates in providing the following services:

1. Assisting the IR Committee with an assessment and calculation of the IR claims.

2. Assisting the IR Committee and its counsel with negotiations for the potential resolution of such claims.

3. Providing testimony, if necessary, as requested by the IR Committee.

As set forth more fully in the proposed Engagement Letter and Scouler Affidavit, Scouler Andrews has agreed to preliminary cap its fees for items 1 and 2 above to $75,000. Any professional services provided under item 3 above are not included in the cap.

24. The IR Committee has also agreed to reimburse Scouler Andrews for all of its actual and necessary expenses incurred in providing its services to the IR Committee.

25. To the best of the IR Committee's knowledge, and except as otherwise disclosed herein or in the Affidavit of Daniel Scouler attached hereto as Exhibit B, Scouler Andrews has not represented the Debtors, their creditors, or any other party-in-interest in any matters relating to the Debtors or their estates.

26. To the best of the IR Committee's knowledge, and except as otherwise disclosed herein or in the Scouler Affidavit, Scouler Andrews (i) does not hold or represent any interest adverse to the IR Committee in the matters for which it is retained, (ii) is a "disinterested person" as that is defined in section 101(14) of the Bankruptcy Code (as modified by section 1107(b) of the Bankruptcy Code), and (iii) does not have any connection with the Debtors, their creditors or any other party in interest in these Cases.

WHEREFORE, the IR Committee respectfully requests that the Court enter an order (i) modifying the 12/9/04 Order to allow the IR Committee to retain a claims consultant nunc pro tunc to January 31, 2005, as set forth herein, (ii) authorizing the IR Committee to retain Scouler Andrews as a claims consultant as set forth in the proposed Engagement Letter, and (iii) granting such other and further relief as is just and proper.

Dated: February 1, 2005
Dallas, Texas

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-and-

By: /s/ Craig H. Averch
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ATTORNEYS FOR THE OFFICIAL COMMITTEE OF EXCEL INDEPENDENT REPRESENTATIVES

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of February 2005, he caused a true and correct copy of the foregoing document to be served on the parties and in the manner set forth in the Certificate of Service filed contemporaneously herewith.

/s/ Craig H. Averch
Craig H. Averch