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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:

NORVERGENCE, INC.,

Debtor.

Chapter 11

Case No. 04-32079 (RG)

**APPLICATION IN SUPPORT OF EMERGENCY MOTION
OF QWEST COMMUNICATIONS CORPORATION FOR
AN ORDER (I) GRANTING RELIEF FROM THE
AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d); (II)
ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. §
361; (III) RESTRICTION OF THE USE OF PROPERTY
PURSUANT TO 11 U.S.C. § 303(f) AND 363(e); AND (IV)
EXPEDITED DISCOVERY**

TO: THE HONORABLE ROSEMARY GAMBARDELLA,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

Qwest Communications Corporation (“Qwest”), by its undersigned counsel, files this motion (the “Motion¹”) pursuant to sections 303(f), 361, 362(d), and 363(e) of Title 11 of the United States Code (the “Bankruptcy Code”), and Rule 4001(a) of the Federal Rules Bankruptcy Procedure, for the issuance and entry of an order: (a) granting Qwest: immediate relief from the automatic stay to allow Qwest to terminate a certain Wholesale Services Agreement, dated June

¹ Notice of this Motion has been served upon the Debtor; the Debtor’s counsel; the United States Trustee; each of the petitioning creditors and their attorney; and any other parties requesting special notice. See, In Re E.D. Wilkins Grain Co., 235 B.R. 647, 651 (Bankr. S.D. Ca. 1999).

16, 2004 (the "Agreement"), between Qwest and NorVergence, Inc. (the "Debtor"); (b) adequate protection; (c) conditioning the use of property pursuant to sections 303(f) and 363(e); and (d) expedited discovery, and respectfully represents as follows:

PRELIMINARY STATEMENT

1. Between January and June of 2004, the Debtor's purchases of Qwest services quadrupled while payments became sporadic, thus causing the Debtor's obligations to Qwest to rise dramatically until the Debtor owed Qwest more than \$15,000,000. When Debtor provided no assurances to Qwest that payment of the would be forthcoming, Qwest terminated its contract with Debtor and disconnected services, at significant effort and expense of Qwest.

2. Notwithstanding the enormous sums owed, however, to give the Debtor one last chance to pay its debts and raise capital, and in an attempt to preserve services to Debtor's end users, which were significantly affected by the disconnection, the parties entered into a new written Agreement pursuant to which Qwest agreed to continue to provide telecommunication services to the Debtor whereby the Debtor obligated itself to (i) pre-pay the sum of one million dollars (\$1,000,000) on Wednesday of each week beginning on June 30, 2004, for services to be rendered the following week; and (ii) pay down a portion of the outstanding balance which was owed to Qwest in the sum of fifteen million dollars (\$15,000,000) in two (2) equal installments which were due on June 30, 2004 and August 30, 2004. Given the Debtor's history of defaults under prior agreements with Qwest, Qwest demanded and received the right to immediately terminate the Agreement if it was breached, and the Debtor agreed to waive any objections to a lift stay motion filed by Qwest in the event of a bankruptcy filing.

3. On June 30, 2004, Qwest and its counsel had a conference call with counsel for certain of the Debtor's alleged creditors² (the "Creditors") at which time the Creditors requested that Qwest forebear from exercising its contractual right to terminate the Agreement in anticipation of the Debtor failing to make the two (2) payments which were due that day, totaling \$8.5 million. Although Qwest was prepared to send the Debtor a written notice of termination that day if the payments which were due were not received, Qwest agreed to consider the Creditor's proposal in good faith.

4. Unbeknownst to Qwest, however, counsel for the Creditors had already prepared an involuntary Chapter 11 petition which he proceeded to file while Qwest was still considering whether to forebear. When the negotiations "broke down" (for apparent reasons), Qwest made its final decision to exercise its termination rights, and sent a written termination notice to the Debtor, unaware that the Creditors had already filed an involuntary petition. By then it was too late, and the Creditors had achieved their goal in initiating this bankruptcy case of preserving value for the Creditors own benefit by forcing Qwest to continue to provide services to the Debtor, notwithstanding the fact that the Debtor was and is unable to pay for those services. That is, this case was filed to protect the Creditors' contract rights and assets which require Qwest's services so that the Qwest, a nondebtor, is forced to protect the assets and rights of other nondebtor creditors.

5. The Creditors have compelled Qwest to become an unwilling captive lender whereby Qwest is providing millions of dollars of services which directly protect the stream of

^{2 2} As set forth below and upon information and belief, the Creditors who initiated this case have an interest in a stream of rental income due by the Debtor's customers for the use of equipment by those customers. In some instances, the Debtor apparently collects the rental income from its customers and remits those monies to the institutions, such as the Creditors. In other instances, the Creditors have direct rental agreements with Debtor's customers. In both instances, the equipment that is leased to the Debtor's customers is of no use without the service provided by Qwest. Qwest reserves all rights to contest the propriety of this filing and the status of the Creditors.

income apparently due to the Creditors when Creditors themselves refused to take the same credit risks as Qwest is forced to take. The bankruptcy process should not be abused to allow certain creditors to force service providers to take unreasonable credit risks and impair contractual remedies when such actions will primarily benefit the interests of those creditors. Such a result is anathema to the fairness and equality envisioned by the Bankruptcy Code.

6. Qwest is also forced to provide service when the Debtor's operations have apparently been shut down and most, if not all employees, were laid off on July 2, 2004. Compounding the Debtor's problems is the fact that the Debtor has apparently failed to pay its employees in the weeks preceding this case and is under investigation by the New Jersey Department of Labor.

7. It is against this backdrop that Qwest now moves this Court for relief from the stay to finally bring an end to its relationship with the Debtor and to minimize mounting debts with no prospect for repayment. As will be shown below, the law is clear that the Bankruptcy Code will not prevent the termination of a contract pursuant to its own terms and Qwest is entitled to relief from the stay to exercise its right to so terminate the Agreement.

BACKGROUND

The Debtor's Operations

8. Qwest is a leading provider of voice, video and data services for millions of customers which utilize its world-wide broadband network.

9. Qwest is the primary provider of telecommunications services which the Debtor utilizes to operate its business and the Debtor would be unable to service its customers without Qwest's services.

10. Prior to the commencement of this case, and based on its public disclosures, NorVergence was a \$200 million dollar business equipment and systems engineering company with 38 offices nationwide, over 1,200 employees and engineers from some of the top technology firms in the world including: Lucent, Cisco and IBM. The Debtor provided telecommunications services to small and medium size businesses.

11. Upon information and belief, in the course of its operations the Debtor sold the equipment necessary to provision telecommunications services to lending and leasing institutions, such as the Creditors. That equipment (which became the property of the lending and leasing institutions) was then leased to the Debtor's customers to enable those customers to receive the telecommunications services which was ultimately provided by Qwest. The Creditors have purchased, in effect, the income stream from the Debtor's customers for the rental of equipment that the Creditors have purchased and are leasing to the Debtor's customers, the value of which is dependent on Qwest's continuing to provide service to Debtor's customers. . Therefore, it appears that the Creditors are attempting to protect a stream of income due to them by the Debtor's customers, at Qwest's expense, and that the Debtor has little, if any, interest in that stream of income.³

12. The Debtor appears to no longer be a \$200 million dollar business. Upon information and belief, on July 2, 2004, the Debtor terminated the employment of more than a 1,000 of its employees, which represents virtually the entire workforce of the Debtor which caused certain dissention among such employees. Also, upon information and belief, the Debtor has failed to pay employee wages and was under investigation by the New Jersey Department of Labor. There are allegations that that the Debtor failed to pay employees for one month's wages

³ The precise mechanism by which the Debtor conducted business with the Creditors will await further discovery and fact investigation.

(amounts due in mid-June and end of June). The failure to pay wages and the immediate termination of those employees apparently necessitated that the Newark Police to come to the Debtor's offices because many of the employees were threatening to take computers and other office equipment. These assertions appears to be corroborated by an article on the websites thedigest.com⁴ and www.news12newjersey.com.⁵

13. As of June 30, 2004 the Debtor owes Qwest:\$18,442,550.53, which figure includes amounts due both prior and subsequent to the Petition Date.⁶ Each day, Qwest is forced to provide services which approximate \$166,000.

The Debtor's Relationship with Qwest

14. On or about June 16, 2004, the Debtor and Qwest entered into a certain Wholesale Services Agreement (the "Agreement"), pursuant to which Qwest agreed to provide certain telecommunications services as defined therein (the "Services"), on the condition that the Debtor remit payment for said Services in advance. (A copy of the Agreement is annexed as Exhibit A to the accompanying affidavit of Pamela J. McCoy, sworn to on July 6, 2004.) In this regard, paragraph 6(a) of the Agreement provides in pertinent part as follows:

⁴ Thedigest.com article states: Operations at Norvergence have come to a halt. Employees at Norvergence's headquarters in Newark, NJ were reportedly told by the CEO on Thursday that the company's investors had abandoned them and that the company's assets had been frozen. They were also told that they would not be receiving their paychecks and that the company would be filing for bankruptcy.

⁵ The News12 New Jersey article is follows: Employees at Norvergence Telecommunications say they were told to leave their jobs and that they would not be getting paid. That message comes a few days after the state Labor Department began investigating the Newark-based start-up company. Employees tell **News 12 New Jersey** that the company has been forced into bankruptcy. They say they were told that they would have to leave the facility immediately and would be informed about the status of the current payroll. State officials originally began investigating Norvergence after workers complained that their paychecks were bouncing. Norvergence officials said the company has grown too fast and they have had a hard time keeping up with cash flow.

⁶ This amount is preliminary and subject to change.

For the Term of this Agreement, or until such time specified by Qwest, in its reasonable discretion, Customer agrees to remit to Qwest on a weekly basis every Wednesday beginning on June 30, 2004, an amount equal to one million dollars (\$1,000,000.00), or such other amount as may be specified by Qwest, representing prepayment for services to be provided

15. The Debtor further agreed to make two (2) payments to Qwest totaling \$15 million for past services. Here, paragraph 6(d) of the Agreement provides as follows:

[Debtor] agrees to remit to Qwest two (2) payments each in the amount of seven million, five hundred thousand dollars (\$7,500,000), representing past due amounts owed by Customer to Qwest under that certain Wholesale Services Agreement entered into by and between Qwest and Customer on or about August 28, 2003, as amended . . . on the earlier of (i) any date on which [Debtor] receives proceeds from any financial institution, including but not limited to, an asset sale, credit transaction, capital investment or any other transaction resulting in the acquisition of funds or (ii) close of business mountain standard time on June 30, 2004, and August 30, 2004, respectively.

16. Paragraph 6(e) of the Agreement provides that in the event that the Debtor breaches the Agreement, Qwest was (and is) entitled to immediately terminate said Agreement.

In this regard, the Agreement provides as follows:

Failure to Pay or Dispute: If Customer . . . fails to make any Former Past Due Payments or the Final Installment of the Initial Prepayment, or otherwise breaches this Agreement, Qwest may immediately, in its sole discretion, (i) terminate this Agreement; temporarily suspend any and all Services; and/or (iii) offset any unpaid balances from any amounts that Qwest owes to Customer under this Agreement or any other agreement(s) between the Parties.

17. Paragraph 8 of the Agreement confers Qwest with additional rights on termination, and the Debtor expressly agreed to waive its right to the protection of the automatic stay to allow Qwest to terminate the Agreement if it became necessary to do so. Paragraph 8 provides in pertinent part as follows:

Termination by Qwest: Qwest may immediately terminate this Agreement in whole or in part, for Cause, or pursuant to section 6.1 (e) hereof. In addition, Qwest may, immediately and without notice, terminate any or all Services provided pursuant to this Agreement to any foreign entity (i.e. not incorporated, formed or organized in the United States) that is or becomes insolvent. If Qwest terminates this Agreement for any of the aforementioned reasons, Customer shall be obligated to pay the following: (i) any early termination fees due under any Service Exhibit; and (ii) any charges accrued but unpaid as of the termination date. If necessary to the termination of this Agreement under this section. Customer agrees to waive any rights it may be afforded under applicable Bankruptcy law, including any automatic stay protection under 11 U.S.C. § 362.

18. On June 30, 2004 at 5:26 p.m., three (3) of the Debtor's creditors filed an involuntary Chapter 11 petition against the Debtor.

19. On June 30, 2004 at 5:50 p.m., Qwest sent a written notice of termination to the Debtors without knowledge that an involuntary petition had been filed minutes earlier. A copy of the notice of termination is attached as Exhibit B to the McCoy Affidavit. The Debtor failed to make either of the payments which were due on that date totaling \$8.5 million.

RELIEF REQUESTED

A. This Court Should Lift the Automatic Stay to Allow Qwest to Terminate the Agreement

20. Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays "any act to obtain possession of property of the estate . . ." 11 U.S.C. §362(a)(3). This provision has been held to prohibit a party to an executory contract with a debtor from unilaterally terminating the contract without first obtaining an order granting stay relief pursuant to 11 U.S.C. §362(d), on the theory that rights under a contract constitute property of a debtor's estate.

21. The mere fact that an agreement may be considered to be property of a debtor's estate does not, however, expand the rights enjoyed by a debtor thereunder. It is well settled that "[t]he Bankruptcy Code neither enlarges the rights of a debtor under a contract, nor prevents the termination of a contract by its own terms." Richard J. Carroll v. Tri-Growth Centre City (In re Carroll), 903 F. 2d 1266, 1271 (9th Cir. 1990), citing, In re Advent Corp., 24 B.R. 612, 614 (BAP 1st Cir. 1982). See also, In re Redpath Computer Services, Inc., 181 B.R. 975, 979 (Bankr. D Ariz. 1995); Moody v. Amoco Oil Co. (In re Moody), 734 F.2d 1200, 1213 (7th Cir.), cert. denied, 469 U.S. 982 (1984). Indeed, contractual provisions in insurance contracts which give insurance companies the right to terminate at any time are routinely enforced. See, In re Heaven Sent Ltd., 50 B.R. 636, 638 (Bankr. E.O. Pa. 1985) ("the Code does not augment the rights of a debtor under a contract nor prevent termination of a contract by its own terms"); In re Douglas, 18 B.R. 813, 815 (Bankr W.D. Tenn. 1982). ("[t]he Bankruptcy Code generally does not grant the debtor in possession or bankruptcy trustee greater right and powers under a contract than the debtor in possession or bankruptcy trustee had outside of bankruptcy").

22. Section 362(d) of the Bankruptcy Code provides a mechanism for obtaining relief from the automatic stay to enable a party to a contract which the debtor has breached to exercise its rights thereunder. Section 362 provides that "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest

23. In this case, there is sufficient "cause" for lifting the automatic stay because the Agreement provides Qwest with a contractual remedy (termination) for the Debtor's breach of

contract which Qwest is fully entitled to exercise. Accordingly, this Court should vacate the stay in order to allow Qwest to terminate the Agreement, and cease providing services to the Debtor.

24. It is undisputed that the Debtor failed to make a payment of \$1 million dollars on June 30, 2004, as required under Section 6(b) of the Agreement in consideration for Qwest's provision of services, and failed to make a payment \$7.5 million dollars as required under Section 6(d) of the Agreement representing past due amounts. Under the terms of Sections 6(e) and 8.1 of the Agreement, Qwest is now entitled to terminate the Agreement, and suspend any and all Services which Qwest is providing.

25. Accordingly, this Court should grant Qwest relief from the automatic stay to allow Qwest to exercise its rights to immediately terminate the Agreement, and cease providing any further services to the Debtor.

B. The Debtor has Waived its Right to Object to Stay Relief

26. Court's are divided concerning the enforceability of pre-petition agreements which waive a debtor's right to object to a lift stay motion, or, as in this case, expressly consent to relief from the stay. See e.g., In re Excelsior Henderson Motorcycle Manufacturing Co., Inc., 273 B.R. 920, 923-4 (Bankr. S.D. Fl. 2002); In re Trans World Airlines, Inc., 261 B.R. 103, 114 (D. Del. 2001). The soundest position may lie with those cases which consider such an agreement to be a factor in determining whether cause exists for relief from stay. In re Shady Grove Tech Center Associates Ltd. Partnership, 216 B.R. 386, 390 (Bankr. D. Md. 1998).

27. In the case of In re Shady Grove, the Court adopted and considered the a series of factors which included the sophistication of the Debtor, the proximity in time between the waiver

and the filing of the bankruptcy case, the consideration for the waiver, the feasibility of Debtor's plan, and the potential effects upon other creditors.

28. In this case, the Debtor is a national telecommunications company which is engaged in a highly technical and sophisticated business. It is beyond dispute that the Debtor and its representatives are sophisticated enough to recognize and appreciate the impact of the lift stay provision contained in the Agreement.

29. The proximity in time between the waiver and the filing of the case, and the consideration for the waiver are logically interconnected in this case. Here, the Agreement was executed just two (2) weeks prior to the bankruptcy filing, and the provision was bargained for as consideration for Qwest's continued provision of telecommunications services. Once again, the magnitude of the Debtor's obligation to Qwest (more than \$18,000,000), coupled with the Debtor's expressed need for financing in order to meet its obligations under the Agreement, are obvious indications that the parties to the Agreement were aware of the possibility of a bankruptcy filing by the Debtor, and considered how to simplify Qwest's exercise of its termination rights in such an event.

30. The final two (2) factors relating to feasibility and the effect which lifting the stay will have upon the Debtor's creditors can also be viewed together because they are interrelated. The feasibility of any plan which the Debtor proposes will, by necessity, be independent of the Agreement. The reason for this is that it is a virtual certainty that the Debtor will be unable to assume the Agreement because of the substantial arrearages which have accumulated thereunder, and continue to accumulate. As result, lifting the stay to allow the Debtor to terminate the Agreement will not alter the feasibility of any plan that the Debtor might propose.

31. With respect to the effect which lifting the stay will have upon the Debtor's creditors, it is clear that the short term interests of the creditors cannot come at the expense of Qwest, and it is incumbent upon the Debtor to find an alternate source for the Services which Qwest provides.

C. Balancing the Harms Requires the Lifting of the Automatic Stay

32. Generally, the decision whether to modify, condition, or annul the bankruptcy stay under section 362(d) of the Bankruptcy Code is within the discretion of the bankruptcy court. See, Matter of Holtkamp, 669 F.2d 505 (7th Cir.1982); In re Shariyf, 68 B.R. 604 (E.D.Pa.1986); In re Colonial Center, Inc., 156 B.R. 452, 459 (Bankr.E.D.Pa.1993). The determination is made by examining the totality of the circumstances. Matter of Baptist Medical Center of New York, Inc., 52 B.R. 417, 425 (E.D.N.Y.1985), affd., 781 F.2d 973 (2d Cir.1986);

33. Section 362(d) allows a creditor to attempt to strike a balance between its rights and the debtor's need for breathing room in order to rehabilitate or liquidate in an orderly manner. See generally, Community Federal Savings and Loan Association v. Craghead (In re Craghead), 57 B.R. 366, 369 (W.D.Mo.1985).

34. Here, there could not be a clearer case for immediate stay relief as the balance of the harms weights disproportionately in favor of Qwest. As demonstrated by the McCoy Affidavit, the Debtor has breached its payment obligations to Qwest on various occasions and Qwest gave the Debtor one last chance through the Agreement. The Debtor breached that Agreement and the Creditors had a chance to lend the Debtor money to cure that breach. The parties knowingly chose not to act or take any actions to remediate those breaches.

35. This case was not initiated by the Debtor to protect its assets; rather, the case was initiated by the Creditors to protect their rights. The Debtor apparently did not have the financial

resources to file and maintain a chapter 11 case, so the Creditors filed this case to vest the Debtor with the protections of the automatic stay to preserve any value in the income stream due to such parties. The Creditors have purposely and intentionally forced Qwest to fund the services to be provided by to the Debtor by operation of section 362. The automatic stay should not be transformed into a protection for non-debtor parties at the expense of other creditors.

36. "The automatic stay has dual purposes. It protects the debtor from its pre-petition creditors by stopping 'all collection efforts, all harassment, and all foreclosure actions'" It similarly "protects all creditors by ensuring that the estate will be preserved against attempts by other creditors to gain an unfair advantage with respect to the payment of claims." Martino v. First National Bank of Harvey (In re Garofalo's Finer Foods, Inc.), 186 B.R. 414, 435 (N.D.Ill.1995).

37. The automatic stay is not a tool compel creditors to take unreasonable credit risks and finance a chapter 11 case. This fact is particularly true in this matter when the Debtor has already laid off more than 1,000 employees, failed to pay employee wages and appears to have no true prospect of reorganization.

38. This bankruptcy case was filed to protect the stream of income apparently due to the Creditors when such Creditors were unwilling to finance the Debtor's operations to pay Qwest. The automatic stay should not continue to protect that stream of income at Qwest's expense.

D. The Debtor is Unable to Assume the Agreement

39. The law is clear that where a debtor cannot cure its defaults under an executory contract, and therefore cannot assume said contract, courts will lift the automatic stay to allow for its termination. See, e.g., Matter of West Electronics Inc., 852 F.2d 79 (3d Cir.1988); In re

Hutchins, 216 B.R. 1 (Bankr.E.D.Ark. 1997); Bell v. Alden Owners, Inc., 199 B.R. 451, 462 (S.D.N.Y. 1996); In re King, 41 B.R. 797, 798 (Bankr. M.D. Pa. 1984) (lifting the stay because of inability to pay arrearage without likely change in that situation “does not provide the [creditor] with adequate assurance of a prompt cure of the debtors’ default”); In re GSVC Restaurant Corp., 10 B.R. 300 (S.D.N.Y.1980); In re Acorn Investments, 8 B.R. 506 (Bankr.S.D.Cal.1981); In re Andorra Meat Market, Inc., 7 B.R. 744 (Bankr.E.D.Pa.1980); In re R.R.S., Inc., 7 B.R. 870 (Bankr.M.D.Fla.1980).

40. For example, the United States Court of Appeals for the Third Circuit found that the inability to assume a non-assignable contract was grounds to lift the automatic stay. In the case of Matter of West Electronics, Inc., 852 F.2d 79 (3d Cir.1988), the Third Circuit considered whether the automatic stay should have been lifted to allow the United States government to terminate a pre-petition contract (the “Contract”) with a defense contractor that had filed for relief under Chapter 11. (Id. at 80.) The government asserted that the Non-assignment Act, 41 U.S.C. §15, barred the debtor from assuming the Contract without the government’s consent, and that as a matter of Contract and administrative regulation, the government had the right to terminate the contract for its convenience. (Id. at 82.)

41. The Third Circuit granted the government’s motion for relief from the automatic stay because the Court found that the Debtor could never assume the contract. In this regard, the Third Circuit held as follows:

The bankruptcy court was, therefore, confronted with a situation in which the debtor in possession was not entitled to assume the contract without the government's consent and the government was unwilling to give that consent. In that situation, the debtor in possession did not have a legally cognizable interest in the contract and it was an abuse of discretion for the court to decline to lift the stay.

Id. at 83-4.

42. As noted above, given the magnitude of the Debtor's obligation to Qwest (currently in excess of \$18 million), it is highly doubtful that the Debtor will have the ability to cure its defaults and assume the Agreement especially in light of the fact that most, if not all, employees have been terminated. As a result, the Court can and should conclude, even at this early stage of the Debtor's Chapter 11 case, that there is simply no realistic prospect that the Debtor can cure its defaults and assume its contract with Qwest.

43. Moreover, as set forth above, based on its pre-petition activity levels, the Debtor will continue to incur millions of dollars per month in gap claims and administrative expense obligations with no apparent ability to pay these obligations. Qwest should not be forced to continue to honor the terms of the Agreement and involuntarily advance millions of dollars per month in services to the Debtor, with no assurance of when or if it will be paid. Qwest should not be compelled to function as the Debtor's "captive lender", especially when the prospect for repayment is unlikely, at best.

44. Given all of the circumstances set forth above, Qwest is entitled to stay relief pursuant to Section 362(d)(1) for cause because, as shown above, the Debtor cannot provide Qwest with adequate protection to insure that it will not be forced to absorb millions of dollars in unpaid administrative claims.

E. The Need For Relief From the Stay is Particularly Acute During the "Gap" Period

45. The rights of creditors who provide services to a debtor during the so-called "gap" period following the commencement of an involuntary chapter 11 case are more limited than those enjoyed by creditors doing business with a debtor after an order for relief has been entered. See e.g., In re Advanced Electronics, Inc., 107 B.R. 503, 504-5 (M.D. Pa. 1989). This disparity

in treatment results from the fact that Section 503 of the Bankruptcy Code excepts gap creditors from administrative status, and accords them a second priority status under Section 502(f):

In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S. 502(f) (2004).

46. Section 502(f) is intended to protect creditors who deal with an involuntary debtor during the gap period, such as lessors, trade creditors and similar parties, consistent with Section 303(f)'s specific authority allowing an involuntary debtor to conduct its business in an ordinary manner while its ultimate status is adjudicated. See, S. Rep. No. 95-989, 95th Cong. 2d. Sess. 65, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5851. Section 507(a)(2) of the Bankruptcy Code provides a second priority status to 502(f) gap creditors. See, 11 U.S.C. 507(a)(2)(2004).

47. In this case, Qwest has projected that the Debtor may continue to use Services having a value as high as \$1,000,000 per week. Given the fact that Qwest is presently owed in excess of \$18,000,000, Qwest should not be forced to continue to provide services to the Debtor without assurance of payment, and the consumption of those Services during the gap period only gives rise to an unsecured claim. Moreover there is no way to be sure when the Court will adjudicate the gap Debtor's status. The gap period could be as short as a month, or as long as six months depending upon a range of factors outside of Qwest's control.

F. Qwest is Entitled to Adequate Protection

48. In the event that the Debtor consents to the entry of an order for relief, Qwest is also entitled to adequate protection under Section 363(e) of the Bankruptcy Code. Section 363(e) provides in pertinent part as follows:

[n]otwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e) (2004).

49. Section 363(e) is not permissive or discretionary--it states that the court "shall" grant the relief specified, at any time, on request of the entity. See, In re Heatron, Inc., 6 B.R. 493, 494 (Bankr.W.D.Mo.1980) ("Section 363(e) of Title 11, U.S.C. requires the Court, upon 'request of an entity that has an interest in property used' to condition such use so as to provide adequate protection of such interest. Providing adequate protection is mandatory." [citation omitted]); 3 Collier On Bankruptcy, ¶ 363.05[3], at 363-39 (Lawrence P. King et al. eds., 15th ed. rev.) ("[T]he requirement of adequate protection in section 363(e) is mandatory." [footnote omitted]).

50. When faced with a request for relief under section 363(e), the court should either prohibit the use, sale, or lease of the property by the trustee or debtor in possession, or condition such use, sale, or lease upon the condition that the trustee or debtor in possession provide adequate protection which is compatible with one of the mandates of Section 361 of the Bankruptcy Code. To wit, the relief which must be provided is "adequate protection" for the entity's interest in the property, and the Court "shall prohibit" the debtor from using, selling or

leasing the property if necessary to provide adequate protection. See, 11 U.S.C. § 363(e); 3 Collier On Bankruptcy, ¶ 363.05[3], at 363-39 (Lawrence P. King et al. eds., 15th ed. rev.) ("If adequate protection cannot be offered, such use, sale or lease of the collateral must be prohibited." [footnote omitted]).

51. The Bankruptcy Code does not define the term "adequate protection". Instead, Section 361 provides a series of non-exclusive examples of adequate protection. Under the circumstances present here, Qwest submits that the terms of the Agreement provide adequate protection to Qwest since the weekly pre-payments which were agreed to were based upon historical averages, which were deemed reasonable, appropriate and absolutely necessary to Qwest at the time the Agreement was executed in mid-June. As set forth above, without this protection, Qwest will be compelled to provide the Debtor with millions of dollars in post-petition services and will most likely find itself faced with an administratively insolvent Debtor with no ability to pay these amounts.

52. Should this Court decide that Qwest is not entitled to stay relief in order to terminate its Agreement with the Debtor, then the Debtor should not be allowed to use Qwest's property, including its telephone services, telephone lines, switches, circuits or facilities, unless and until Qwest is adequately protected. Under the circumstances of this case, it is respectfully suggested that the only form of adequate protection that can protect Qwest is the requirement that the Debtor make the weekly payments to Qwest which are required under the Agreement. In addition, the Court should require the Debtor, at the earliest possible date, to demonstrate that it has the ability to pay its administrative expenses. In this regard, Qwest requests expedited discovery concerning the Debtor's financial condition to enable Qwest to confirm the Debtor's ability to meet any obligations this Court deems appropriate.

G. Use of Any Loan Obtained by Debtor During Gap Period Should be Restricted

53. Section 303(f) of the Bankruptcy Code provides:

Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

11 U.S.C §303(f).

54. Pursuant to section 303(f), *unless the court orders otherwise*, the alleged debtor is free to continue to operate his business and use, acquire and dispose of his property free from the constraints imposed by section 363, as if the involuntary petition was not filed. In re DiLorenzo, 161 B.R. 752, 754 (Bankr.S.D.N.Y. 1993) (emphasis added). The statute does not specify either the cause sufficient to give rise to relief thereunder, or the nature of the relief available to an aggrieved party. Id. However, the legislative history instructs that an alleged debtor should remain in control of his assets unless it is shown that he "may attempt to abscond with assets, dispose of them at less than their fair market value, or dismantle his business, all to the detriment of [his] creditors." Id. (quoting H.R .Rep. 95-595, 95th Cong., 1st Sess. 323 (1977); Senate Rep. No. 95-989, 95th Cong., 2d Sess. 33 (1978), U.S.Code Cong. & Admin.News 1978, 5787, 6279, 5819).

55. The Debtor's counsel has advised Qwest's counsel that the Debtor has negotiated, or is negotiating, a post-petition loan facility in the amount of \$2.8 million (the "Loan"). Upon information and belief, the closing of the loan has not occurred as of the date hereof. Qwest submits that under the circumstances of this case, cause exists for the Court to subject the Debtor's use of the proceeds of the Loan and the use of the assets of the estate in which Qwest

has an interest to repay such Loan to the notice, hearing and adequate protection requirements of section 363 of the Bankruptcy Code.

56. Apparently, the Debtor is currently the subject of an investigation by the New Jersey Department of Labor for failure to pay wages to its employees for approximately one month. Given this background, the Debtor's use of the proceeds of the Loan should be subject to the Court's approval and a budget to ensure that the Debtor does not misappropriate the proceeds of the Loan. The proceeds of the Loan should be applied in accordance with the Debtor's fiduciary obligation to ensure fairness to all of the Debtor's creditors.

H. Request for Expedited Discovery

57. Based on the foregoing, Qwest further requests that this Court shorten time periods for discovery to five (5) days for depositions, examinations pursuant to Rule 2004 of the Bankruptcy Rules and for the production of documents. Since Qwest's exposure grows each day, Qwest requests that the time periods be shortened to allow the fact investigation to move quickly and expeditiously.

CONCLUSION

58. For all the foregoing reasons, Qwest respectfully requests that this Court enter an order granting Qwest relief from the automatic stay to allow Qwest to terminate the Agreement, granting Qwest adequate protection, restricting the use of property of the estate and expedited discovery, together with such other relief as this Court deems just and proper.

Respectfully submitted,

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Dated: July 6, 2004