

UNITED STATES BANKRUPTCY COURT  
DISTRICT COURT OF NEW JERSEY

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In Re: :  
NORVERGENCE, INC. :  
 : Chapter 11  
Debtor, :  
 : Case No. 04-32079 (RG)  
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TO: HONORABLE ROSEMARY GAMBARDELLA  
CHIEF UNITED STATES BANKRUPTCY JUDGE

**OBJECTION OF PELAS CAPITAL MANAGEMENT, INC.  
D.B.A WALKER FOREST TO THE EMERGENCY MOTION BY  
QWEST FOR RELIEF FROM THE AUTOMATIC STAY**

Pelas Capital Management, Inc. d.b.a. Walker Forest ("Pelas"), a party in interest in the above captioned bankruptcy case, by and through its undersigned counsel, hereby submits this Objection to the Emergency Motion by Qwest for Relief from the Automatic Stay. No brief is necessary as the factual and legal basis for the relief requested is set forth in the Objection below. The hearing for Qwest's Motion is scheduled for July 14, 2004 at 10:00 a.m. In support its Objection thereto, Pelas respectfully represents as follows:

**BACKGROUND**

About Pelas

1. Pelas is a corporation, organized and existing under the laws of Pennsylvania, with a principal place of business at 997 Old Eagle School Road, Suite 209, Wayne, Pennsylvania, 19087.

2. Pelas is in the business of providing executive and management level staffing services to specialized technology related industries on a domestic and international level.

3. The type of services Pelas provides is entirely dependent on telecommunications services, with out which, Pelas would be paralyzed and unable to operate at any level.

Pelas' relationship with the debtor, Norvergence, Inc.

4. On or about February 3, 2003, Pelas entered into a contract (the "Contract") with Norvergence, Inc. (the "Putative Debtor"). A copy of the Contract is attached hereto as Exhibit "A".

5. The Contract is structured in such a way that the Putative Debtor was responsible for setting up an all encompassing telecommunications system for Pelas. The Putative Debtor would facilitate Pelas' leasing of certain equipment, which would be leased through GE Capital and by enlisting Qwest, who would act as a servicer for the telecommunications system.

6. Pelas pays GE Capital (or its assignee, Wells Fargo Financial Leasing, Inc. ("Wells Fargo")) directly for the equipment lease(s) and pays the Putative Debtor for Qwest's services.

7. Pelas has continued to remit payment to both Wells Fargo and the Putative Debtor. The Putative Debtor, upon information and belief, continuously fails to remit payment to Qwest.

8. Putative Debtor's creditors filed an involuntary Chapter 11 petition against the Putative Debtor.

9. Qwest now seeks relief from the automatic stay in order to terminate its contract with the Putative Debtor to furnish telecommunications service to the Putative Debtor's customers, including Pelas (the "Qwest Contract").

10. Termination of the Qwest Contract will have a catastrophic effect on Pelas and all similarly situated customers of Putative Debtor because it can not operate without this service, while making payments to the Putative Debtor for services that are not being rendered.

11. Moreover, Pelas has an unconditional and non-cancelable obligation to pay Wells Fargo for the leased equipment pursuant to the statutory finance lease(s) entered into between Pelas and Wells Fargo. Pelas must continue making payment to Wells Fargo even if Qwest's service is terminated. In that event, the equipment would be rendered unusable and obsolete even if Pelas could locate another servicer.

A. The Law And Principles Behind The Automatic Stay

12. The Automatic Stay arises by operation of law upon the filing of a petition for bankruptcy, and prevents creditors of the bankrupt debtor from seeking to enforce any lien on the property of the estate. See 11 U.S.C. § 362(a). See also In re Mellor, 734 F.2d 1396, 1398 (9<sup>th</sup> Cir. 1984); In re Medlin, 201

B.R. 188, 193 (Bankr. E.D. Tenn. 1996); In re Jug End in the Berkshires, Inc. 46 B.R. 892, 898 (Bankr. D. Mass. 1985).

13. The importance of the Automatic Stay in bankruptcy is made clear in the legislative history of § 362:

The automatic stay is the most fundamental debtor protection provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures. . . .

H.R. Rep. No. 595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 340-342 (1977); 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 53-55 (1978), reprinted in 1978 U.S. Code. See also Borman v. Raymark Industries Inc., 946 F.2d 1031, 1036 (3<sup>rd</sup> Cir.1991).

14. The importance of the automatic stay is particularly important in reorganization cases because "[w]ithout the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has the opportunity to put forward a plan for future operations." 3 COLLIER ON BANKRUPTCY ¶ 362.03[2]. The automatic stay gives the court an opportunity to harmonize the interests of all the parties while preserving the debtor's assets for the reorganization process. In Re Rosen, 208 B.R. 345,355 (D.N.J. 1997).

15. § 362(d) states in pertinent part:

On request of a party in interest and after notice and 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 lack of adequate protection of an interest in property of such party in interest;

16. Granting relief from the Automatic Stay is entirely within the discretion of the Court. Furthermore, as set forth in the language of § 362(d), the Court has the power to fashion relief according to the particular circumstances of the case. See Matter of Holtkamp, 669 F.2d 505 (7<sup>th</sup> Cir. 1982); In re Shariyf, 68 B.R. 604 (Bankr.E.D. Pa. 1986); 3 COLLIER ON BANKRUPTCY ¶ 362.07[1].

17. The final determination is based on the totality of the circumstances. Matter of Baptist Medical Center of New York, Inc. 52 B.R. 417, 425 (E.D.N.Y.1985), aff'd, 781 F.2d 973 (2d. Cir. 1986).

B. The Balance of Harm Weighs Heavily Against the Parties In Interest And Therefore the Stay Should Not be Lifted.

18. One of the factors a court must look at in deciding whether to lift the stay is the impact on the parties and the balance of harms. In Re Mid-Atlantic Handling Systems, LLC, 304 B.R. 111, 130 (D.N.J. 2003). Here, there are several factors to consider when determining how lifting the automatic stay would impact the parties. The factors are as follows: (1) The bulk of Debtor's business is the brokering of Qwest's telecommunications

services to numerous companies<sup>1</sup>, including Pelas (the "Companies"); (2) the very existence of the Companies is dependent on the services supplied by Qwest; (3) the Companies pay the Putative Debtor for the services and Putative Debtor then funnels the payments to Qwest after taking a fee; (4) the payments taken by the Putative Debtor will contribute greatly to Putative Debtor's health in the rehabilitation process; (5) termination of the Qwest Contract will shut down the Companies; (6) the Companies will still have to make payment to the Putative Debtor during the bankruptcy proceeding, but eventually the Companies will be unable to honor its obligations for the equipment leases and its obligations to the Putative Debtor.

19. After considering the totality of the circumstances, granting Qwest relief from the automatic stay would eliminate any balance and would effectively extinguish any hope of the Putative Debtor's Rehabilitation because the rehabilitation will be over before it starts.

C. There Is No Cause to Lift the Automatic Stay

20. The Movant has the initial burden of showing a legally sufficient basis or cause for lifting the stay" In Re The Score Board, Inc. 238 B.R. 585,594 (D.N.J. 1999).

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<sup>1</sup> Qwest, in paragraph 3 the Affidavit of Pamela J. McCoy, which supports Qwest's Motion states "Upon information and belief, Qwest is the primary provider of telecommunications services which the debtor utilizes to operate its business"

21. Qwest claims that the relief from the stay should be granted for cause because the Qwest Contract provides that Qwest can terminate the Qwest Contract upon the failure of the Putative Debtor to make certain payments.

22. The Qwest Contract is an executory contract. If an executory contract has not been terminated prior to the petition, it is part of the property of the estate. In re Cohoes Indus. Terminal, Inc. 70 B.R. 214 (S.D.N.Y. 1986) Here, despite the circumstances that Qwest claims to be dubious surrounding the filing of the petition<sup>2</sup>, it is a fact that Qwest did not terminate the Qwest Contract prior the filing of the petition. Therefore, Qwest's argument that it was prepared to terminate the Qwest Contract is of no consequence and there is no legal basis to lift the stay.

D. Qwest Will Receive Adequate Protection If the Automatic Stay Remains In Place

23. Qwest also claims relief from the stay on the basis that it is not adequately protected. Generally, a creditor is entitled to relief from the automatic stay if there is no adequate protection. In re Carson, 34 B.R. 502, 505(D.C. Kan. 1983); In re Dupell, 235 B.R. 783, 788 (Bank. E.D. Pa.1999).

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<sup>2</sup> Qwest essentially alleges that the creditors who initiated the involuntary petition tricked Qwest from exercising its' right to terminate the Qwest Contract so that they could secretly file the petition. See p. 3 of Qwest's Application.

Section 361 sets forth certain examples of how a creditor can be adequately protected. For example, the trustee can make periodic cash payments. See In Re Bermec Corp, 445 F.2d 367 (2d Cir. 1971.) Importantly, Qwest recently received an adequate assurance payment. Qwest fails to mention that many of the Putative Debtor's customers requiring telecommunication service, including Pelas, are faithfully making payments to retain Qwest's said services. Undoubtedly, this infusion of cash will contribute to the estate and the operation of the Putative Debtor, and also serve as a basis for future periodic adequate protection payments.

24. Pursuant to Bankruptcy Code § 303(f), this Court can direct that the Debtor segregate all payments by Pelas in a separate account and to pay monies payable to Qwest as and when due, thereby providing Qwest with adequate protection.

25. Based on the foregoing, the Qwest Motion seeking relief from the Automatic Stay in order to terminate the Qwest Contract must be denied.

26. WHEREFORE, Pelas respectfully requests that the Qwest Motion seeking relief from the Automatic Stay in order to terminate the Qwest Contract be denied.

WEIR & PARTNERS LLP

Dated: July 12, 2004

BY: /s/ Sigmund J. Fleck  
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