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7 *Proposed Counsel for the Debtors*
 8 *and Debtors in Possession*

10 **UNITED STATES BANKRUPTCY COURT**
 11 **FOR THE DISTRICT OF NEVADA**

11 In re:

12 TELEXFREE, LLC,

13 Affects this Debtor

14 Affects all Debtors

15 Affects TELEXFREE, INC.

16 Affects TELEXFREE FINANCIAL, INC

Case No.: BK-S-14-12524-abl
 Chapter 11

[PROPOSED]

Jointly Administered with:

14-12525 TelexFree, Inc.
 14-12526 TelexFree Financial, Inc

Date:
 Time:

19 **MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER**
 20 **AUTHORIZING THE DEBTORS TO REJECT CERTAIN**
 21 **EXECUTORY CONTRACTS NUNC PRO TUNC AS OF THE PETITION DATE**

21 The above-captioned debtors and debtors-in-possession (collectively, the “**Debtors**”)¹
 22 hereby move the Court (the “**Motion**”) pursuant to section 365(a) of title 11 of the United States
 23 Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”) and Rule 6006 of the Federal Rules of
 24 Bankruptcy Procedure (the “**Bankruptcy Rules**”) for entry of an order authorizing the Debtors

25
 26
 27 ¹ The Debtors in these Chapter 11 Cases, along with the last four (4) digits of each Debtor’s federal tax
 28 identification number, are: TelexFree, LLC (0853), TelexFree, Inc. (1309) and Telexfree Financial, Inc
 (7555). The Debtors’ business address is 225 Cedar Hill Street, Suite 200, Marlborough, Massachusetts
 01752.



1 to reject certain executory contracts *nunc pro tunc* as of the Petition Date (as defined herein). In
2 support of this Motion, the Debtors respectfully state as follows:

3 **Status of the Case**

4 1. On the date hereof (the “**Petition Date**”), the Debtors commenced these cases by
5 filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11**
6 **Cases**”).

7 2. The Debtors have continued in possession of their properties and are operating
8 and managing their business as debtors-in-possession pursuant to sections 1107(a) and 1108 of
9 the Bankruptcy Code.

10 3. No request has been made for the appointment of a trustee or examiner, and a
11 creditors’ committee has not yet been appointed in these cases.

12 **Jurisdiction, Venue, and Statutory Predicates**

13 4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and
14 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This matter is core within
15 the meaning of 28 U.S.C. § 157(b)(2).

16 5. The statutory predicates for the relief sought herein are section 365(a) of the
17 Bankruptcy Code and Bankruptcy Rule 6006.

18 6. Pursuant to LR 9014.2, Debtors consent to entry of final order(s) or judgment(s)
19 by the bankruptcy judge if it is determined that the bankruptcy judge, absent consent of the
20 parties, cannot enter final orders or judgments consistent with Article III of the United States
21 Constitution

22 **Background**

23 7. TelexFree, LLC, a Nevada limited liability company (“**TelexFree Nevada**”),
24 TelexFree, Inc., a Massachusetts corporation (“**TelexFree Massachusetts**”) and TelexFree
25 Financial, Inc, a Florida corporation (“**TelexFree Florida**” and together with TelexFree
26 Massachusetts and TelexFree Nevada, “**TelexFree**,” the “**Debtors**” or the “**Company**”) are a
27 telecommunications business that uses multi-level marketing to assist in the distribution of voice
28 over internet protocol (“**VoIP**”) telephone services. TelexFree’s retail VoIP product,

1 99TelexFree, allows for unlimited international calling to approximately seventy countries for a
2 flat monthly rate of \$49.90. Customers of the Debtors' VoIP product ("**Customers**") used
3 approximately 11 million minutes of the 99TelexFree VoIP service in February 2014. Since
4 99TelexFree was introduced in 2012, Customer usage increased on a monthly basis until March
5 2014.

6 8. TelexFree is operated as a multi-level marketing company, and currently has over
7 700,000 associates or promoters (the "**Promoters**") worldwide. Prior to the filing of these
8 Chapter 11 Cases, TelexFree compensated Promoters for the sales of the VoIP product, the
9 placing of advertisements and the recruitment of other Promoters down line. Because questions
10 were raised about its compensation plan, the Company on March 9, 2014, discontinued its
11 original compensation plan (the "**Original Comp Plan**") and replaced the Original Comp Plan
12 with a revised compensation plan (the "**Revised Comp Plan**" and together with the Original
13 Comp Plan, the "**Pre-Petition Comp Plans**"). At the time of the roll-out of the Revised Comp
14 Plan, the Company decided to honor certain discretionary payments to Promoters under the
15 Original Comp Plan. These discretionary payments quickly became a substantial drain on the
16 Company's liquidity. The Company discontinued the Pre-Petition Comp Plans and ceased
17 making discretionary payments under the Original Comp Plan prior to Petition Date.

18 9. The Company believes the sales of the 99TelexFree product, the TelexFree "app,"
19 and other new products will ultimately prove successful and profitable. The Company is
20 struggling, however, with several factors that required it to seek chapter 11 protection by filing
21 these Cases. First, the Company experienced exponential growth in revenue between 2012 and
22 2013 (from de minimus amounts to over \$1 billion), which put tremendous pressure on the
23 Company's financial, operational and management systems. Second, although the Company
24 revised its Original Comp Plan in order to address certain questions that were raised regarding
25 such plan, the Company believes that the Pre-Petition Comp Plans need to be further revised.
26 Finally, the trailing liabilities arising from the Original Comp Plan are difficult to quantify and
27 have resulted in substantial asserted liabilities against the Company, a number of which may not
28 be valid.

1 going obligations pursuant to the Rejected Contracts, including, among other things, (i)
2 maintaining the virtual environment utilized by the Promoters and (ii) paying certain
3 compensation, bonuses and incentives to the Promoters for certain actions taken by the
4 Promoters which are authorized by the Agreements.

5 14. In the exercise of their business judgment, the Debtors have determined that the
6 Rejected Contracts and the obligations thereunder are burdensome to their estates and as such the
7 agreements should be rejected. To the extent notice of intention to reject has not been previously
8 provided, the filing and service of this Motion shall serve as notice to each non-Debtor party to
9 the Rejected Contracts of the Debtors' intention to reject the Rejected Contracts.

10 **Basis for Relief Requested**

11 **A. Rejection of the Rejected Contracts is an Exercise of the Debtors' Sound Business
12 Judgment**

13 15. Section 365(a) of the Bankruptcy Code provides in pertinent part:

14 (a) Except as provided in section 765 and 766 of this title and
15 in subsections (b), (c) and (d) of this section, the trustee,
16 subject to the court's approval, may assume or reject any
executory contract or unexpired lease of the debtor.

17 11 U.S.C. § 365(a).

18 16. Rejection of an executory contract is appropriate where, in the exercise of the
19 debtor's sound business judgment, the debtor determines that rejection of the contract would
20 benefit the estate. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp. (In re Sharon*
21 *Steel Corp.)*, 872 F.2d 36, 40 (3d Cir. 1989). The decision to assume or reject an executory
22 contract is a matter within the business judgment of the debtor. *See, e.g., Nat'l Labor Relations*
23 *Bd. v. Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982); *see also Jr. Food Mart of*
24 *Arkansas, Inc. v. Attebury (In re Jr. Food Mart of Arkansas, Inc.)*, 131 B.R. 116, 120 (Bankr.
25 E.D. Ark. 1991) (approving the debtor's decision in its business judgment to reject an
26 employment contract). The business judgment standard mandates that a court approve a trustee's
27 business decision unless the decision is the product of bad faith, whim or caprice. *See In re*
28 *Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001); *see also Summit Land Co.*

1 v. *Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary
2 circumstances, court approval of a debtor's decision to assume or reject an executory contract
3 "should be granted as a matter of course").

4 17. Rejection of an executory contract is appropriate where rejection of the contract
5 would benefit the estate. See *Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp. (In re*
6 *Sharon Steel Corp.)*, 872 F.2d 36, 40 (3d Cir. 1989). The standard for rejection is satisfied when
7 a trustee or debtor has made a business determination that rejection will benefit the estate. See
8 *Commercial Fin. Ltd v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.)*, 47 B.R. 425,
9 427 (D. Haw. 1985) ("under the business judgment test, a court should approve a debtor's
10 proposed rejection if such rejection with benefit the estate."). If the trustee's or debtor's business
11 judgment has been reasonably exercised, a court should approve the assumption or rejection of
12 an unexpired lease or executory contract. See, e.g., *NLRB v. Bildisco & Bildisco*, 462 U.S. at 523
13 (1984); *In re Federal Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003).

14 18. In applying the business judgment standard, courts show great deference to the
15 trustee's or debtor's decisions to reject. See e.g. *RLRB v. Bildisco*, 262 U.S. at 524 (1984); *In re*
16 *Federal Mogul Global, Inc.*, 293 B.R. at 126 (D. Del. 2003) (court should approve a debtor's
17 decision to reject a contract unless that decision is the product of bad faith or a gross abuse of
18 discretion); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D.
19 Utah 1981) (absent extraordinary circumstances, court approval of a debtor's decision to assume
20 or reject an executory contract "should be granted as a matter of course").

21 19. The rejection of the Rejected Contracts constitutes a valid exercise of the Debtors'
22 business judgment as the Rejected Contracts represent a significant burden to the Debtors'
23 estates. Under the Original Comp Plan, Promoters have and are continuing to assert substantial
24 claims against the Debtors. While the Debtors believe that many of those claims are invalid, the
25 Debtors continue to be burdened by the demands made under the Original Comp Plan. In
26 addition, questions were raised as to whether the Original Comp Plan is compliant with law,
27 which jeopardized the Debtors' business. Although the financial demands are less under the
28

1 Revised Comp Plan, the Revised Comp Plan does not generate sufficient revenues for the
2 Debtors to continue operating their business.

3 20. Because neither of the Pre-Petition Comp Plans meets the needs of the Debtors'
4 businesses, the Debtors intend to discontinue and reject the Pre-Petition Comp Plans and
5 quantify the legitimate claims under those Plans. Once the legitimate claims have been
6 quantified and the Company has developed a new compensation program, the Debtors hope to
7 reorganize and satisfy the claims against them.

8 **B. Rejection of the Rejected Contracts as of the Petition Date is Warranted**

9 21. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors seek to reject the
10 Rejected Contracts effective as of the filing date of this Motion, in order to avoid the possibility
11 of incurring any additional expenses and costs related to the Rejected Contracts. *See NLRB v.*
12 *Bildisco*, 465 U.S. 530 (1984) (stating that rejection relates back to the petition date).
13 Furthermore, a court may permit retrospective rejection to avoid unduly exposing a debtor's
14 estate to unwarranted postpetition administrative or other expenses. *See In re Amber's Stores,*
15 *Inc.*, 193 B.R. 819, 827 (N.D. Tex. 1996). *See also In re Thinking Mach. Corp.*, 67 F.3d 1021,
16 1028 (1st Cir. 1995) ("bankruptcy courts may enter retroactive orders of approval, and should do
17 so when the balance of equalities preponderates in favor of such remediation."); *In re Jamesway*
18 *Corp.*, 179 B.R. 33, 37-38 (S.D.N.Y. 1995) (affirming bankruptcy court's retroactive approval of
19 lease rejection). *See also In re CCI Wireless, LLC*, 297 B.R. 133, 140 (D. Col. 2003) (holding
20 that a bankruptcy court "has authority under section 365(d)(3) to set the effective date of
21 rejection at least as early as the filing date of the motion to reject").

22 22. As a result of the circumstances that led to the filing of these Chapter 11 Cases, as
23 set forth in the First Day Declaration, the Debtors have determined that it is imperative that they
24 reject the Rejected Contracts as of the Petition Date so as to quantify claims thereunder and work
25 on putting a new program in place. The Debtors believe that continuing to accrue claims under
26 the Rejected Contracts will not offer additional value to their estates but would instead result in
27 the further degradation of the Debtors' cash reserves. Therefore, the Rejected Contracts are
28 appropriate for immediate rejection.

1 **C. Deadline to File Rejection Damages Claims**

2 23. The Debtors anticipate that certain creditors may assert claims in connection with
3 the Debtors' rejection of the Rejected Contracts pursuant to section 365 of the Bankruptcy Code.
4 The Debtors propose that a counterparty to the Rejected Contract must file a proof of claim with
5 respect to any claim relating to the Rejected Contracts on or before the later of (a) any bar date
6 established by this Court or (b) thirty (30) days after the entry of an order by the Court
7 authorizing the rejection of the Rejected Contracts

8 **Request for Waiver of Stay**

9 24. The Debtors seek a waiver of any stay of the effectiveness of the order approving
10 this Motion. Pursuant to FED. R. BANKR. P. 6004(h), "[an] order authorizing the use, sale, or
11 lease of property other than cash collateral is stayed until the expiration of ten (10) days after
12 entry of the order, unless the court orders otherwise." As set forth above, the relief requested
13 herein is essential to prevent irreparable damage to the Debtors' operations, going-concern value,
14 and their efforts to pursue a sale or restructuring of their assets and liabilities.

15 25. Accordingly, the relief requested herein is appropriate under the circumstances
16 and under FED. R. BANKR. P. 6004(h).

17 **Notice**

18 26. Notice of this Motion will be provided in accordance with the notice procedures
19 established pursuant to the *Emergency Motion of the Debtors for Entry of an Order Designating*
20 *and Approving the Form and Manner of Notice of the Motion of the Debtors for Entry of an*
21 *Order Authorizing the Debtors to Reject Certain Executory Contracts Nunc Pro Tunc as of the*
22 *Petition Date*. Notice will also be given to the following parties or, in lieu thereof, to their
23 counsel, if known: (a) the Office of the United States Trustee for the District of Nevada; (b)
24 creditors holding the thirty (30) largest unsecured claims as set forth in the consolidated list filed
25 with the Debtors' petitions; (c) those parties requesting notice pursuant to Rule 2002; (d) the
26 Office of the United States Attorney General for the District of Nevada; (e) the Massachusetts
27 Securities Division; (f) the Internal Revenue Service; (g) the Securities and Exchange
28 Commission; (h) the Nevada Department of Employment, Training & Rehab, Employment

1 Security Division; (i) the Nevada Department of Taxation, Bankruptcy Section; and (j) the
2 counterparty to each Rejected Contract in accordance with the procedures requested by the
3 *Motion of the Debtors Pursuant to Section 105(a) of the Bankruptcy Code, Bankruptcy Rules*
4 *1007, 2002(I), 2002(I), 2002(m) and 9007, Local Rule 2002 for Entry of an Order Approving*
5 *Notice Procedures*. The Debtors submit that, in light of the nature of the relief requested, no
6 other or further notice need be given.

7 **No Prior Request**

8 27. No previous application for the relief sought herein has been made to this or any
9 other court.

10 **Conclusion**

11 WHEREFORE, the Debtors respectfully request that this Court enter an order
12 substantially in the form of the proposed order attached hereto as **Exhibit 1** granting the relief
13 requested herein and that it grant the Debtors such other and further relief as is just and proper.

14 DATED this 13 day of April, 2014.

15 GORDON SILVER

16
17 By: 

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21 AND

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26 *Proposed Counsel for the Debtors*
27 *and Debtors in Possession*
28

Exhibit 1

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*Proposed Counsel for the Debtors
and Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:
TELEXFREE, LLC,
 Affects this Debtor
 Affects all Debtors
 Affects TELEXFREE, INC.
 Affects TELEXFREE FINANCIAL, INC

Case No.: BK-S-14-12524-abl
Chapter 11
[PROPOSED]
Jointly Administered with:
14-12525 TelexFree, Inc.
14-12526 TelexFree Financial, Inc
Date:
Time:

**ORDER (A) AUTHORIZING THE DEBTORS TO REJECT CERTAIN
EXECUTORY CONTRACTS NUNC PRO TUNC AS OF THE PETITION DATE**

1 Upon the motion (the “**Motion**”)¹, filed by the above-captioned debtors and debtors-in-
2 possession (collectively, the “**Debtors**”) pursuant to section 365(a) of title 11 of the United
3 States Code, 11 U.S.C. §§ 101-1532 (the “**Bankruptcy Code**”) and Rule 6006 of the Federal
4 Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) for entry of an order: authorizing the
5 Debtors to reject certain executory contracts and unexpired leases, *nunc pro tunc* as of the
6 Petition Date (as defined herein), and upon the *Declaration of William H. Runge III in Support of*
7 *the Debtors’ Chapter 11 Petitions and Requests for First Day Relief* (the “**First Day**
8 **Declaration**”); and it appearing that this Court has jurisdiction to consider the Motion pursuant
9 to 28 U.S.C. §§ 157 and 1334; and it appearing that venue of these cases and the Motion in this
10 district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that this matter is a
11 core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having determined that the relief
12 requested in the Motion is in the best interests of the Debtors, their estates, their creditors and
13 other parties in interest; and it appearing that proper and adequate notice of the Motion has been
14 given and that no other or further notice is necessary; and after due deliberation thereon; and
15 good and sufficient cause appearing therefor,

16 IT IS HEREBY ORDERED THAT:

- 17 1. For the reasons set forth on the record, the Motion is GRANTED.
- 18 2. The Rejected Contracts are hereby rejected, effective *nunc pro tunc* as of the
19 Petition Date.
- 20 3. Any counterparty to the Rejected Contracts must file a proof of claim with respect
21 to any claim relating to the Rejected Contracts on or before the later of (a) the date that is ninety
22 (90) days after the Petition Date or (b) thirty (30) days after the entry of this Order.
- 23 4. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and
24 conditions of this Order shall be immediately effective and enforceable upon its entry.

25 ...

26 ...

27
28 ¹ Capitalized terms not defined herein have meanings ascribed to them in the Motion.

1 5. This Court shall, and hereby does, retain jurisdiction with respect to all matters
2 arising from or related to the implementation and interpretation of this Order.

3 Submitted by:

4 GORDON SILVER

5
6 By: _____
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