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Attorneys for Debtors and Debtors in Possession

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re	:	X
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Allegiance Telecom, Inc., <u>et al.</u> ,	:	Chapter 11 Case No.
	:	03-13057 (RDD)
	:	
Debtors.	:	Jointly Administered

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**MOTION FOR AN ORDER PURSUANT TO  
SECTION 365(a) OF THE BANKRUPTCY CODE  
APPROVING THE REJECTION OF CERTAIN UNEXPIRED LEASES**

TO THE HONORABLE ROBERT D. DRAIN,  
UNITED STATES BANKRUPTCY JUDGE:

Allegiance Telecom, Inc. and its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, “Allegiance” or the “Debtors”), respectfully represent:

**Introduction**

1. On May 14, 2003, each of the Debtors commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure.

3. No trustee or examiner has been appointed in these chapter 11 cases. On May 28, 2003, pursuant to section 1102 of the Bankruptcy Code, the United States Trustee for the Southern District of New York the ("U.S. Trustee") appointed a statutory committee of unsecured creditors (the "Committee") in these chapter 11 cases.

4. On February 20, 2004, this Court entered an Order approving the sale to XO Communications, Inc. ("XO") of (a) substantially all of the assets of ATI and Allegiance Telecom Company Worldwide ("ATCW"), a direct subsidiary of ATI and one of the Debtors in these chapter 11 cases, and (b) the stock of the reorganized subsidiaries of ATCW, other than Shared Technologies Allegiance, Inc. ("Shared Technologies").

5. On April 22, 2004, the Debtors filed the Debtors' Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code (as amended, the "Plan"). Relevant to this Motion, the Plan provides that Shared Technologies will emerge from chapter 11 as a reorganized stand-alone entity.

6. On May 4, 2004, Hosting.com, Inc., Allegiance Internet, Inc., Adgrafix Corporation, and Virtualis Systems, Inc., certain of the debtors in these chapter 11 cases (collectively, the "Hosting Debtors"), filed a motion seeking, among other things, authorization to sell certain assets of the Hosting Debtors to WebOnTap, Inc., subject to higher or better offers.

### **Jurisdiction**

7. This Court has subject matter jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

## Background

8. Allegiance is a facilities-based national local exchange carrier that provides integrated telecommunications products and services to small and medium-sized business customers, large businesses (i.e., national customers with multiple locations), governmental entities, wholesale customers and other institutional users. Allegiance offers its customers a variety of services, including:

- local and long distance voice services, including basic telephone services and advanced calling features;
- broadband and other Internet and data services, including high-speed Internet access, wide area network interconnection, domain name registration, web hosting, email and colocation services;
- integrated local long distance/Internet access offerings, which provide customers with integrated voice and Internet access over a single broadband line;
- wholesale services to other regional and national service providers, including equipment colocation, managed modem ports and Internet protocol traffic aggregation; and
- customer premise equipment sales and maintenance services.

9. As of the December 31, 2003, the Debtors served more than 100,000 business customers in major markets throughout the United States. As of December 31, 2003, the Debtors employed approximately 2,893 people, of which approximately 66 employees were covered by collective bargaining agreements.

10. As of December 31, 2003, the Debtors had approximately \$284.2 million of unrestricted cash on hand. As of December 31, 2003, the Debtors' consolidated books and records reflected assets totaling approximately \$1.136 billion and liabilities totaling approximately \$1.449 billion. For the 12 months ending December 31, 2003, the Debtors, on a

consolidated basis, reported revenues of approximately \$776.9 million and net losses of approximately \$360.0 million.

### **The Rejected Leases**

11. By this Motion, the Debtors request the entry of an order, pursuant to section 365(a) of the Bankruptcy Code, approving the rejection of certain unexpired personal property leases (the “Rejected Leases”). The Rejected Leases<sup>1</sup> consist of unexpired personal property leases for photocopiers and postage meters used by the Debtors. These photocopiers and postage meters are located at certain of the Debtors’ offices and were used by the Debtors in the ordinary course of their businesses. As a result of the transactions contemplated by the Plan, the Debtors (and XO) no longer need the photocopiers or postage meters. Accordingly, the Debtors have determined, in their sound business judgment, that it is in the best interests of their estates to reject the Rejected Leases effective as of the date hereof.

### **The Rejection of the Rejected Leases is Supported by the Debtors’ Sound Business Judgment**

12. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). The standard to be applied by a court to determine whether to authorize the rejection of an executory contract or an unexpired lease is the “business judgment” test, which is premised upon the debtor’s business judgment that rejection of the executory contract or unexpired lease would be beneficial to its estate. Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1098-99 (2d Cir. 1993). The business judgment standard requires that the court approve the debtor’s business

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<sup>1</sup> The Rejected Leases are listed on Exhibit “A,” which is annexed hereto.

decision unless that judgment is the product of bad faith, whim or caprice. Lubizol Enters. V. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.) 756 F.2d 1043, 1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986).

13. Upon finding that a debtor has exercised its sound business judgment in determining that the rejection of a contract or lease is in the best interests of the debtor, its creditors, and all parties in interest, the court should approve the rejection under section 365(a) of the Bankruptcy Code. See, e.g., In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997); In re Bradlees Stores, Inc., 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996); In re G Survivor Corp., 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994); In re Child World, Inc., 142 B.R. 87, 89 (Bankr. S.D.N.Y. 1992); In re Ionosphere Clubs, Inc., 100 B.R. 670, 673 (Bankr. S.D.N.Y. 1989).

14. In an effort to maximize the value of their estates, the Debtors, in conjunction with XO, the management of Shared Technologies and the potential acquirer of the Hosting Debtors, have been evaluating all of the Debtors' unexpired leases to determine which leases should be assumed and/or assigned by the Debtors and which should be rejected. The Debtors have determined that the Rejected Leases are of no value to their estates as XO, Shared Technologies and the Hosting Debtors do not need them and the Debtors believe that there is no value to be gained by attempting to assign them to third parties. Consequently, the Rejected Leases only will act as a cash drain on the Debtors' estates, as the Debtors are required to remain current under the terms of the Rejected Leases until the effective date of their rejection. On the other hand, the rejection of the Rejected Leases will relieve the Debtors' estates of approximately \$25,300 in the aggregate, which is the total amount of lease payments due under the Rejected Leases through the end of their respective terms. Accordingly, the Debtors'

decision to reject the Rejected Leases is a product of the Debtors' sound business judgment and the rejection of the Rejected Leases effective as of the date hereof should be approved.

**Waiver of Memorandum of Law**

15. Because there are no novel issues of law presented herein, the Debtors respectfully request that the Court waive the requirement that the Debtors file a memorandum of law in support of this Motion pursuant to rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York.

**Notice**

16. Notice of this Motion has been provided to: (a) the U.S. Trustee; (b) attorneys for the Committee; (c) attorneys for the Debtors' prepetition secured lenders; (d) the counter-parties to the Rejected Leases; and (e) all the other parties on the Master Service List maintained in these chapter 11 cases. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

**No Prior Request**

17. No prior Motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an order (i) authorizing the Debtors to reject the Rejected Leases, effective as of the date hereof; and (ii) granting such other relief as is just and proper.

Dated: New York, New York  
May 20, 2004

Respectfully submitted,

/s/ Jonathan S. Henes  
Matthew A. Cantor (MC-7727)  
Jonathan S. Henes (JH-1979)  
KIRKLAND & ELLIS LLP  
Citigroup Center  
153 East 53rd Street  
New York, New York 10022-4675  
Telephone: (212) 446-4800  
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Attorneys for Debtors and Debtors in Possession

**Exhibit A**

**List of Leases to be Rejected**

<b>Debtor Entity</b>	<b>Counter Party and Mailing Address</b>	<b>Description of Lease</b>	<b>Effective Date of Lease</b>
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-010	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5742102-001	02-May-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-040	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-035	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-044	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-009	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-034	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-046	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-045	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-042	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-002	07-Nov-00
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-003	03-July-01
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-024	03-July-01



<b>Debtor Entity</b>	<b>Counter Party and Mailing Address</b>	<b>Description of Lease</b>	<b>Effective Date of Lease</b>
Allegiance Telecom Inc.	GE Capital Attn.: Legal Department 260 Long Ridge Road Stamford, CT 06927	6957626-006	20-June-01
Allegiance Telecom Inc.	GE Capital Equipment Financing Attn.: Legal Department 44 Old Ridgebury Road Danbury, CT 06810	6957626-002	28-June-01
Allegiance Telecom Inc.	GE Capital Attn.: Legal Department 260 Long Ridge Road Stamford, CT 06927	6957626-003	28-July-01
Allegiance Telecom Inc.	Wells Fargo Financial Leasing Inc. PO Box 98789 Las Vegas, NV 89193	42455081	01-Dec-01
Allegiance Telecom Inc.	Wells Fargo Financial Leasing Inc. PO Box 98789 Las Vegas, NV 89193	42455047	01-Dec-01
Allegiance Telecom Inc.	Wells Fargo Financial Leasing Inc. PO Box 98789 Las Vegas, NV 89193	42461460	01-Dec-01
Allegiance Telecom Inc.	Wells Fargo Financial Leasing Inc. PO Box 98789 Las Vegas, NV 89193	42461478	01-Dec-01
Allegiance Telecom Inc.	IOS Capital PO Box 9115 Macon, GA 31208	95546A	24-April-05
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-005	unknown
Allegiance Telecom Inc.	Pitney Bowes Credit Corp PO Box 856460 Louisville, KY 40285	5308342-032	unknown
Allegiance Telecom Inc.	GE Capital Equipment Financing Attn: Legal Department 44 Old Ridgebury Road Danbury, CT 06810	6957626-009	20-June-01

**HEARING DATE AND TIME: June 2, 2004 at 10:00 a.m.**  
**OBJECTION DEADLINE: May 28, 2004 at 4:00 p.m.**

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UNITED STATES BANKRUPTCY COURT  
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	:	03-13057 (RDD)
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Debtors.	:	Jointly Administered

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**NOTICE OF HEARING ON MOTION FOR  
AN ORDER PURSUANT TO SECTION 365(a)  
OF THE BANKRUPTCY CODE APPROVING THE  
REJECTION OF CERTAIN UNEXPIRED LEASES**

PLEASE TAKE NOTICE that upon the annexed motion (the “Motion”), dated May 20, 2004, of Allegiance Telecom, Inc. and its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the “Debtors”), requesting an order approving the rejection of certain unexpired leases, pursuant to section 365(a) of title 11 of the United States Code, as more fully set forth in the Motion, a hearing will be held before the Hon. Robert D. Drain, United States Bankruptcy Judge, in Room 610 of the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”), Alexander Hamilton Custom House, One Bowling Green, New York, New York, 10004-1408, on June 2, 2004, at 10:00 a.m. (prevailing Eastern Time), or as soon thereafter as the Debtors are heard.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules of the Southern District of New York, shall set forth the name of the objectant, the nature and amount of claims or interests held or asserted by the objectant against the Debtors' estates or property, the basis for the objection, and the specific grounds therefor, and shall be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (which can be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov)) by registered users of the Bankruptcy Court's case filing system and, by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and served in accordance with General Order M-242, and shall further be served upon (a) Kirkland & Ellis LLP, Citigroup Center, 153 East 53rd Street, New York, New York 10022 (Attn. Michael J. Frishberg, Esq.); (b) the Office of the United States Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn. Pamela J. Lustrin, Esq.); (c) Paul, Hastings, Janofsky & Walker LLP, 600 Peachtree Street, N.E., 24<sup>th</sup> Floor, Atlanta, Georgia 30308 (Attn. Jesse Austin, III, Esq.); and (d) Akin

Gump Strauss Hauer Feld LLP, 590 Madison Avenue, New York, New York 10022 (Attn. Ira S. Dizengoff, Esq.), so as to be actually received no later than May 28, 2004, at 4:00 p.m. (prevailing Eastern Time).

Dated: New York, New York  
May 20, 2004

Respectfully submitted,

/s/ Jonathan S. Henes  
Matthew A. Cantor (MC-7727)  
Jonathan S. Henes (JH-1979)  
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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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Allegiance Telecom, Inc., <u>et al.</u> ,	:	03-13057 (RDD)
	:	
Debtors.	:	Jointly Administered
<hr/>		X

**ORDER PURSUANT TO SECTION 365(a)  
OF THE BANKRUPTCY CODE APPROVING  
THE REJECTION OF A CERTAIN UNEXPIRED LEASES**

Upon consideration of the motion (the “Motion”), dated May 20, 2004, of Allegiance Telecom, Inc. and its direct and indirect subsidiaries, debtors in possession (collectively, the “Debtors”), seeking entry of an order, pursuant to section 365(a) of the Bankruptcy Code,<sup>1</sup> approving the rejection of the Rejected Leases, as more fully set forth in the Motion; and it appearing that this Court has jurisdiction to consider and determine the Motion as a core proceeding pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that the relief requested in the Motion is in the best interests of the Debtors’ estates and creditors; and due and proper notice of the Motion having been given; and good and sufficient cause appearing therefor; it is

ORDERED that the Motion is granted; and it is further

ORDERED that the Rejected Leases shall be deemed rejected effective as of the date of the Motion; and it is further

ORDERED that any proof of claim for damages arising from the rejection of the Rejected Leases must be filed on or before forty-five (45) days after the date of this Order, and any claims resulting from the rejection of the Rejected Leases not so filed shall be forever barred

<sup>1</sup> Unless otherwise defined herein, capitalized terms shall have the meaning ascribed to them in the Motion.

from participating in the Debtors' chapter 11 cases and receiving any dividend or distribution thereon; and it is further

ORDERED that the Debtors do not waive or release any rights, claims, causes of action, or defenses, including rights of set-off or recoupment with respect to such Rejected Leases; and it is further

ORDERED that the Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: New York, New York  
\_\_\_\_\_, 2004

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UNITED STATES BANKRUPTCY JUDGE