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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
ALLEGIANCE TELCOM, INC., *et al.*	Case No. 03-13057 (RDD) (Jointly Administered)
Debtors.	

VERIFIED MOTION OF ARTHUR H. FIERMAN, JR. FOR AN ORDER, PURSUANT TO 11 U.S.C. § 362(d), (I) GRANTING RELIEF FROM THE AUTOMATIC STAY TO PERMIT THE COMMENCEMENT AND PROSECUTION, THROUGH JUDGMENT, OF AN EMPLOYMENT DISCRIMINATION ACTION AGAINST DEBTOR ALLEGIANCE TELECOM, INC., AND THE ENFORCEMENT OF ANY JUDGMENT ENTERED IN SUCH EMPLOYMENT DISCRIMINATION ACTION TO THE EXTENT SUCH JUDGMENT IS COVERED BY THE DEBTORS' INSURANCE POLICIES; AND (II) FOR OTHER RELATED RELIEF, AND INCORPORATED MEMORANDUM OF LAW

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

Arthur H. Fierman, Jr., **("Fierman")**, by and through his counsel, Reed Smith, LLP, hereby files this verified motion, and incorporated memorandum of law (the **"Motion"**) seeking the entry of an order, pursuant to 11 U.S.C. § 362(d), (a) granting Fierman relief from the automatic stay to permit him to (i) commence and prosecute through judgment, in the state or federal courts of Florida, or any other court of competent jurisdiction, an employment discrimination action (the **"Discrimination Action"**) against chapter 11 debtor and debtor-in-possession herein, Allegiance Telecom, Inc. (**"ATI"** or the **"Debtor"**), (ii) execute on any judgment entered in the Discrimination Action to the extent such judgment is covered by one or more of ATI's insurance policies (collectively, the **"Insurance Policies"**) and (iii) amend his Proof of Claim filed herein to reflect the amount of any judgment, plus fees, costs and interest, entered in the Discrimination Action, less all amounts paid under the Insurance Policies; and (b) authorizing and directing the insurors under the Insurance Policies (collectively, the **"Insurors"**) to pay the proceeds thereof to Fierman to satisfy any judgment obtained by him against ATI in the Discrimination Action, and in support thereof, states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

FACTUAL BACKGROUND[1]

2. On May 14, 2003 (the **"Petition Date"**), the Debtor and certain affiliates (collectively, the "**Debtors**") each 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.

3. Between February 5, 2001 and October, 2002, Fierman was employed by ATI as an Account Executive and as a Sales Manager. Fierman began his employment with ATI as an Account Executive on February 5, 2001. On December 26, 2001, Fierman was promoted to Sales Manager and held that position until he was terminated in October, 2002. Exhibit A, *Fierman Aff.*, ¶2.

4. In May 2002, Fierman's then supervisor, a male, resigned and was replaced by a female supervisor (the **"Supervisor"**). Exhibit A, *Fierman Aff.*, ¶3. Shortly after the Supervisor was hired, her statements and conduct reflected discriminatory tendencies against men. Specifically:

a. The Supervisor repeatedly stated that she believed that females are better managers than males, and that ATI needed more female employees;

b. Fierman's duties as Sales Manager included hiring new Account Executives. The Supervisor instructed Fierman to interview and hire more females; and

c. The Supervisor printed and distributed an article that discussed how women made better managers than men.

See Exhibit A, *Fierman Aff.,* ¶¶3-5.

[1] The facts set forth herein are set forth in greater detail in the Affidavit of Arthur H. Fierman, Jr. dated April 15, 2003 (the **"Fierman Aff."**), which is annexed to Fierman's Proof of Claim attached hereto as Exhibit A.

5. At the time the Supervisor became Fierman's supervisor, Fierman was one of three Sales Managers under her supervision. Exhibit A, *Fierman Aff.,* ¶¶7. The other two Sales Managers were women. *Ibid.* In or about August 2002, the Supervisor disbanded one of the sales teams headed by a female Sales Manager, but she gave that Sales Manager the opportunity to remain employed with ATI as an Account Executive. *Ibid.*

6. Beginning in June 2002, The Supervisor began to threaten Fierman with termination for his sales team's alleged failure to meet the minimum sales quota of 400 phone lines per month. Exhibit A, *Fierman Aff.,* ¶8. On June 28, 2002, the Supervisor advised Fierman in writing that he had failed to sell the minimum acceptable number of phone lines. *Ibid.* At that time, the sales teams of the other two Sales Managers, who were women, had sold fewer phone lines than Fierman's sales team. *Ibid.* In fact, up to that point, Fierman was the only ATI Sales Manager whose sales team had achieved the 400 phone line sales goal in 2002. Fierman's sales team sold 401 phone lines in January and 501 lines in April. *Ibid.*

7. On August 2, 2002 and August 12, 2002, Fierman received from the Supervisor "final written warnings" for his sales team's failure to sell 400 phone lines per month. By the end of August 2002, however, Fierman's sales team had sold 435 phone lines. Exhibit A, *Fierman Aff.,* ¶9

8. In September 2002, Fierman's team sold 370 phone lines, and the other Sales Manager's team sold 379 phone lines. Exhibit A, *Fierman Aff.,* ¶10. The Supervisor fired Fierman in early October 2002, but she did not fire the other Sales Manager, who is female. *Ibid.* Also, the Supervisor did not give Fierman the option of remaining with ATI as an Account Executive or another position, as she had done with the other terminated Sales Manager, who is female. *Ibid.* After Fierman was terminated, he was replaced by a woman. *Id.*, ¶11.

9. While Fierman was employed as a Sales Manager with ATI, his sales team sold more total telephone lines than any other team in the office. Fierman's sales team was the top producing team five out of nine months. Exhibit A, *Fierman Aff.,* ¶12. In short, Fierman outperformed his female counterparts, yet he was terminated for supposed poor performance and they were not. *Ibid.*

10. As a result of the circumstances surrounding his termination by ATI, on April 15, 2003, Fierman filed with the U.S. Equal Employment Opportunity Commission (the **"EEOC"**) a Charge of Discrimination under Title VII and the Florida Civil Rights Act, Chapter 760, Florida Statutes (the **"Civil Rights Charge"** and the **"Florida Civil Rights Act"**, respectively).

11. On September 8, 2003, the EEOC entered a Dismissal and Notice of Rights with respect to the Civil Rights Charge (the **"Dismissal and Notice"**), which closed the EEOC's file as to the Civil Rights Charge and notified Fierman of his right to bring suit against ATI on the employment discrimination claim underlying the Civil Rights Charge (the **"Employment Discrimination Claim"**) in federal or state court.

12. On November 20, 2003, Fierman filed a Proof of Claim in the instant bankruptcy case (the **"Proof of Claim"**) based on the Employment Discrimination Claim. A copy of the Proof of Claim, which in turn attaches copies of the Civil Rights Charge, the Dismissal and Notice and the Fierman Affidavit, is attached hereto as Exhibit A.

13. Upon information and belief, ATI is insured against the Employment Discrimination Claim under one or more of the Insurance Policies.

RELIEF REQUESTED

14. By this Motion, Fierman seeks the entry of an order granting him relief from the automatic stay pursuant to section 362(d) of the Bankruptcy Code, to the extent such relief is necessary, to prosecute the Discrimination Action against ATI, and to pursue collection of a

judgment, plus fees, costs and interest, from the insurance carriers which issued the Insurance Policies to ATI.

BASIS FOR RELIEF

15. Section 362(d) of the Bankruptcy Code contains several bases upon which relief from the automatic stay shall be granted.[2] Under section 362(d)(1), stay relief shall be granted upon a movant's demonstration of "cause." 11 U.S.C. § 362(d)(1). Alternatively, under section 362(d)(2), lifting of the automatic stay shall be granted if the moving party establishes that: (a) "the debtor does not have equity in the property"; and (b) "such property is not necessary to an effective reorganization." *Id.*

16. It is universally accepted that "Sections 362(d)(1) and 362(d)(2) are disjunctive; the Court must lift the stay if the movant prevails under either of the two grounds." *In re Kaplan Breslaw Ash*, 264 B.R. 309, 321 (Bankr. S.D.N.Y. 2001) (emphasis added); *see also In re Indian Palms Assocs.,* 61 F.3d 197, 208 (3d Cir. 1995) (relief is "mandatory" where requirements of § 362(d) are satisfied). In fact, "Congress has provided that 'the Court shall grant relief from the stay' (emphasis supplied) for any of the reasons stated in the [two] subsections." *In re Zeoli*, 249 B.R. 61, 63 (Bankr. S.D.N.Y. 2000); *see also In re Elmira Litho, Inc.*, 174 B.R. 892, 900 (Bankr. S.D.N.Y. 1994); *In re Touloumis*, 170 B.R. 825, 827 (Bankr.

[2] Section 362(d) provides, in relevant part:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under section (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;
> (2) with respect to a stay of an act against property under subsection (a) of this section, if-
> (A) the debtor does not have equity in such property; and
> (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d) (emphasis added).

S.D.N.Y. 1994); *In re de Kleinman*, 156 B.R. 131, 136 (Bankr. S.D.N.Y. 1993); *In re Diplomat Electronics Corp.,* 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988).

17. Section 362(d)(1) provides for lifting of the automatic stay "for cause," and the movant bears the initial burden to demonstrate that "cause exists." 11 U.S.C. §§ 362(d)(1) and 362(g). As explained by the various bankruptcy courts, upon a motion to lift or modify the automatic stay, the burden of proof is a shifting one, with the movant having the burden of making an initial showing of 'cause,' and the debtor having the ultimate burden of proof on all issues other than the debtor's equity in property. *In re Elmira*, 174 B.R. at 892; *see also In re Telegroup, Inc*., 237 B.R. 87, 91 (Bankr. D.N.J. 1999).

A. Cause Exists to Lift the Stay Pursuant to the Relevant *Sonnax* Factors.

18. The existence of "cause" for the purposes of Section 362(d)(1) is committed to the discretion of the bankruptcy judge. *See Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.),* 907 F.2d 1280, 1286 (2d Cir. 1990). "Courts of the Second Circuit exercise their discretion in accordance with factors articulated by the Second Circuit Court of Appeals in *Sonnax*, a decision of particular relevance to requests for relief from the stay to proceed with plenary litigation." *Adelphia Communications Corp. v. Associated Electric & Gas Insurance Services, Ltd., (In re Adelphia Communications Corp.)*, 285 B.R. 580, 593 (Bankr. S.D.N.Y. 2002).

19. In *Sonnax*, the Second Circuit Court of Appeals, drawing on the analysis set forth in *In re Curtis*, 40 B.R. 795 (Bankr. D. Utah 1984), identified twelve factors to be weighed in deciding whether litigation should be permitted to continue in another forum. The factors are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary

expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) the impact of the stay on the parties and the balance of harms. *Sonnax*, 907 F.2d at 1286.

20. In making its determination, a court should consider only those *Sonnax* factors which are relevant and assign the appropriate weight to each factor considered. *In re Burger Boys*, 183 B.R. 682, 688 (S.D.N.Y. 1994); *see also Mazzeo v. Lenhart (In re Mezzeo)*, 167 F.3d 139, 143 (2d Cir. 1999)(all twelve factors will not be relevant in every case).

21. In this case, all of the relevant *Sonnax* factors militate in favor of granting Fierman the relief requested herein.

22. First, allowing the Discrimination Action to proceed will afford "complete resolution" of a complex, specialized legal issue involving Fierman's Discrimination Claim against ATI.

23. Second, granting the relief requested herein will not interfere with the reorganization proceeding before this Court. In fact, ATI has sold substantially all of its assets, so it is apparent that ATI is liquidating, as opposed to reorganizing its business. Further, the factual issues implicated in the Discrimination Action are limited in scope, and appear to involve only Fierman, Fierman's Supervisor at ATI, and perhaps one or more current or former employees of ATI that are or were under the Supervisor's supervision in ATI's Sales

Department. Thus, there will be no interference with ATI's overall "business", or with ATI's "reorganization," since ATI has sold substantially all of its assets, as opposed to reorganizing its business, there is a narrow universe of factual issues and witnesses implicated in the Discrimination Action, and there is a limited number of ATI personnel (or more likely, ex-ATI personnel) who may be required to provide testimony.

24. Third, the Discrimination Action does not involve ATI as a fiduciary.

25. Fourth, it is anticipated that the Insurors will assume full responsibility for defending the Discrimination Action, as well as payment of any judgment obtained therein.

26. Fifth, the Discrimination Action primarily involves third parties as to the issues of responsibility for ATI's defense and the ultimate issue of satisfaction of any judgment obtained by Fierman. As set forth above, it is anticipated that the Insurors will defend ATI in the Discrimination Action, and in the event Fierman obtains a judgment against ATI, such judgment will be paid, at least in part, by the Insurors and not ATI.

27. Sixth, litigation of the Discrimination Action in the Florida courts will not prejudice the interests of other creditors, and in fact, permitting Fierman to prosecute the Discrimination Action likely will benefit other creditors. Specifically, Fierman believes that the Insurors, not ATI, will pay any judgment obtained by Fierman. Thus, Fierman's claim against ATI will be satisfied with non-estate assets. Accordingly, ATI and its creditors would directly benefit from the Court permitting Fierman to liquidate his Discrimination Claim in a non-bankruptcy forum, and to obtain payment from the Insurors on any judgment thereon, because the amount of Fierman's Claim against ATI will be reduced, dollar-for-dollar, by every dollar paid to Fierman by the Insurors. Indeed, it is hoped that Fierman's claim against ATI will be satisfied in full by the Insurors.

28. Seventh, the award and subsequent judgment which Mr. Fierman seeks will not be subject to equitable subordination.

29. Eighth, allowing Fierman to liquidate the Employment Discrimination Claim in the Florida courts would further the interests of judicial economy and the expeditious and economical resolution of the Employment Discrimination Claim. The Employment Discrimination Claim is based on the Florida Civil Rights Act. Without doubt, the Florida courts are the logical forum to litigate claims based on Florida state statutes, because of the Florida courts' familiarity with, and experience in presiding over and determining, such matters. Thus, allowing Fierman to litigate his Employment Discrimination Claim in the Florida courts, and thereby relieving this Court of the burden of familiarizing itself with the Florida Civil Rights Act and related bodies of case law and administrative decisions, and presiding over the litigation, would further the interests of judicial economy and the expeditious and economical resolution of the Employment Discrimination Claim.

30. Ninth, granting Fierman the relief requested herein would not adversely impact ATI, yet would benefit Fierman in that it would lead to the most expeditious and efficient liquidation, and hopefully payment, of the Employment Discrimination Claim. Accordingly, the "balance of the hardships" clearly tips in favor of granting the requested relief.

B. Cause Exists to Lift the Stay, Because Fierman Seeks to Pursue an Insured Claim Against the Insurors.

31. In addition to the above factors, it is common to grant relief from the automatic stay when the movant is seeking to pursue claims against a debtor's insurers. *International Business Machines v. Fernstrom* Storage *and Van Company (In re Fernstrom Storage and Van Company),* 938 F.2d 731, 737 (7th Cir. 1991) (creditor was entitled to relief from the automatic stay to proceed with action against debtor to obtain declaration of liability that could serve as a predicate for creditor's recovery under the debtor's insurance policies); *In re Miller*, 228 B.R.

203, 206 (Bankr. N.D. Ill. 1999) (cases considering modification of the automatic stay with respect to actions on insured claims recognize the equity of permitting a civil suit to proceed where the bankruptcy estate is in no way harmed); *see also In re Keene Corp.*, 171 B.R. 180, 184 (Bankr. S.D.N.Y. 1994) (where the continuation of the stay deprives the judgment creditor of the opportunity to collect the judgment from a third party and no other sources of collection exist, a court will generally lift the stay to permit the litigation to continue).

32. At this time, Fierman is seeking to obtain payment of any judgment he obtains in the Discrimination Action from the proceeds of the Insurance Policies. Further, ATI has no interest in such proceeds, because, upon information and belief, the proceeds are available only to pay Fierman (and any other similarly situated employment discrimination claimants) in the event Fierman prevails on his employment discrimination claims against the Debtor, as well as ATI's defense counsel. Under no circumstances would the proceeds be available to the Debtor or the Debtor's estate generally.

33. Because at this time Fierman is seeking to collect any recovery against the Debtor in the Discrimination Action only from the available proceeds of the Insurance Policies, and because the Debtor has no interest in such proceeds, the Court should grant Fierman relief from the automatic stay to proceed in a non-bankruptcy forum with his Employment Discrimination Claim.

34. Based on the foregoing, (a) cause exists under Bankruptcy Code Section 362(d) to grant relief from the automatic stay to permit Fierman to (i) commence and prosecute the Discrimination Action through judgment in the Florida courts, or any other court of competent jurisdiction, (ii) execute on any judgment entered in the Discrimination Action to the extent such judgment is covered by the Insurance Policies and (iii) amend his Proof of Claim filed herein to reflect the amount of any judgment entered in the Discrimination Action, less all

amounts paid under the Insurance Policies; and (b) the Court should authorize and direct the Insurors to pay the proceeds of the Insurance Policies to Fierman in an amount and to the extent necessary to satisfy any judgment, fees and costs obtained by Fierman against ATI in the Discrimination Action.

WAIVER OF MEMORANDUM OF LAW

35. This Motion does not raise any novel issues of law and, accordingly, Fierman respectfully requests that the Court waive the requirement contained in Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York that a separate memorandum of law be submitted.

NO PREVIOUS REQUEST

36. No previous request for the relief sought herein has been made to this Court or any other Court.

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CONCLUSION

WHEREFORE, Fierman requests that the Court enter an order granting the relief requested herein, and granting such further or different relief as the Court deems just and proper.

Dated: New York, New York
March 11, 2004

REED SMITH LLP
Attorneys for Arthur H. Fierman, Jr.

By: */s/ Deborah A. Reperowitz*

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VERIFICATION

I, Arthur H. Fierman, Jr., hereby certify as follows:

I have reviewed the within Verified Motion, and Incorporated Memorandum of Law, and all factual assertions made therein are, to the best of my knowledge, true and accurate.

Executed on March 10, 2004

/s/ Arthur H. Fierman, Jr.
Arthur H. Fierman, Jr.