

Hearing Date: April 20, 2004 @ 10:00a.m.

Objection Deadline: April 16, 2004, 2004 @ 4:00pm

SCARINCI & HOLLENBECK, LLC  
1100 Valley Brook Avenue  
P.O. Box 790  
Lyndhurst, NJ 07071-0790  
Telephone: (201) 896-4100  
Facsimile: (201) 896-8660  
Joel Glucksman (JG6443)

Attorneys for Philip Rothman and David B. Follender,  
d/b/a Philda Companies

**IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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<b>In re:</b>	: <b>Chapter 11</b>
	: :
<b>ALLEGIANCE TELECOM, INC., <u>et al.</u>,</b>	: <b>Case No. 03-13057 (RDD)</b>
	: :
<b>Debtors.</b>	: <b>(Jointly Administered)</b>
	: :
-----X	
<b>In re:</b>	: <b>Chapter 11</b>
	: :
<b>SHARED TECHNOLOGIES ALLEGIANCE, INC.,</b>	: <b>Case No. 03-13108 (RDD)</b>
	: :
<b>Debtor.</b>	: :
	: :
-----X	

**NOTICE OF HEARING ON MOTION OF PHILDA COMPANIES FOR THE ENTRY  
OF AN ORDER DIRECTING TURNOVER OF REAL PROPERTY OR,  
ALTERNATIVELY, GRANTING RELIEF FROM THE AUTOMATIC  
STAY PURSUANT TO 11 U.S.C. §§ 362(d)(1) AND (2)**

PLEASE TAKE NOTICE, that a hearing will be held on the annexed motion (the  
“Motion”), dated April 4, 2004, by Philip Rothman and David B. Follender, d/b/a Philda  
Companies (“Philda”) for entry of an order (a) compelling Debtor Shared Technologies  
{00152904.DOC}

Allegiance, Inc. (“Debtor”) to turn over and/or surrender to Philda by April 30, 2004 Philda’s real property located at 150 Louis Street, Hackensack, New Jersey (the “Property”), and presently leased by Philda to Debtor; or, alternatively, granting Philda relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1) and/or (d)(2) to possess the Property; such hearing to be held before the Honorable Robert D. Drain, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York, on April 20, 2004, at 10:00 a.m. Eastern Time, or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any response to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and shall be filed with the Bankruptcy Court electronically in accord with General Order M-242 (General Order M-242 and the User’s Manual for the Electronic Case Filing System can be found at <http://www.nysb.uscourts.gov>, the official website for the United States Bankruptcy Court for the Southern District of New York), 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 hard copy delivered directly to chambers) and served in accordance with General Order M-242 upon (i) Scarinci & Hollenbeck, LLC, attorneys for Philda, 1100 Valley Brook Avenue, P.O. Box 790, Lyndhurst, N.J. 07071-0790 (Attn: Joel R. Glucksman, Esq., [jglucksman@njlegalink.com](mailto:jglucksman@njlegalink.com)); (ii) Kirkland & Ellis LLP, attorneys for Debtor Shared Technologies Allegiance, Inc., Citigroup Center, 153 E. 53rd Street, New York, NY 10022-4675 (Attn: Jonathan S. Henes, Esq.); (iii) Togut, Segal & Segal LLP, attorneys for Debtor Allegiance Telecom, Inc., One Penn Plaza, Suite 3335, New York, NY 10119 (Attn: Albert Togut, Esq.); (iv) the Office of the United States Trustee, 33 Whitehall Street, 21<sup>st</sup> Floor, New York, New

York (Attn: Pamela Jean Lustrin, Esq.); (v) Akin, Gump, Strauss, Hauer & Feld, LLP, attorneys for the statutory committee of unsecured creditors, 590 Madison Avenue, New York, N.Y. 10022 (Attn: Ira S. Dizengoff, Esq.), (vi) those parties entitled to notice pursuant to the Bankruptcy Court's Order dated May 15, 2003; so as to be received no later than April 16, 2004, at 4:00pm (prevailing Eastern Time), pursuant to Local Bankruptcy Rule 9006-1(b).

Dated: Lyndhurst, New Jersey  
April 4, 2004

**SCARINCI & HOLLENBECK, LLC**  
Attorneys for Philip Rothman and  
David B. Follender, d/b/a Philda Companies

By: /s/ Joel Glucksman  
Joel Glucksman (JG6443)  
1100 Valley Brook Avenue  
P.O. Box 790  
Lyndhurst, NJ 07071-0790  
Telephone: (201)896-4100  
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<b>ALLEGIANCE TELECOM,</b>	: <b>Case No. 03-13057 (RDD)</b>
<b>INC., <u>et al.</u>,</b>	:
	:
<b>Debtors.</b>	: <b>(Jointly Administered)</b>
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<b>In re:</b>	: <b>Chapter 11</b>
	:
<b>SHARED TECHNOLOGIES</b>	: <b>Case No. 03-13108 (RDD)</b>
<b>ALLEGIANCE, INC.,</b>	:
	:
<b>Debtor.</b>	:
	:

-----X

**MOTION OF PHILDA COMPANIES FOR THE ENTRY OF AN ORDER DIRECTING  
TURNOVER OF REAL PROPERTY OR, ALTERNATIVELY, GRANTING RELIEF  
FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. §§ 362(d)(1) AND (2)**

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

Philip Rothman and David B. Follender, d/b/a Philda Companies (“Philda”) request that  
this Court enter an order, allowable pursuant to 11 U.S.C. §362(b)(10), granting Philda

possession of its real property located at 150 Louis Street, Hackensack, New Jersey (the “Property”) and leased to Debtor Shared Technologies Allegiance, Inc. (“Debtor”). Alternatively, Philda moves for entry of an order granting Philda relief from the automatic stay pursuant to 11 U.S.C. §§362(d)(1) and/or (d)(2), to remove Debtor from the Property. In support thereof, Philda states as follows:

### **I. Jurisdiction**

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### **II. Introduction**

2. Philda is the owner and landlord of the Property. Debtor presently occupies the Property as a Debtor-in-Possession pursuant to a lease (“Lease,” as more fully defined herein), which expires on or about April 30, 2004 (the “Termination Date”). This Lease has never been assumed or rejected. The Lease contains no option to renew.

3. Debtor apparently intends to wrongly hold over its possession of the Property. Philda has communicated with Debtor regarding the impending Termination Date and Debtor’s required vacation from and restoration of the Property thereto. Debtor has been generally unresponsive. Rather, Debtor has provided no assurances that it intends to vacate the Property on or before the Termination Date. Moreover, Debtor has failed to commence extensive renovations it is contractually required to perform prior to returning the Property to Philda.

4. Therefore, for the reasons more fully set forth infra, Philda requests that this Honorable Court issue an Order allowing Philda to possess the Property as of the Termination Date, as same is warranted under the facts and the law, and since the automatic stay is

inapplicable pursuant to 11 U.S.C. §362(b)(10). Alternatively, and if the stay does apply, Philda requests that the Court issue an Order vacating the automatic stay pursuant to 11 U.S.C. §§362(d)(1) and (2) to allow Philda to exercise all applicable rights and to recover the Property. Philda notes, however, that all relief it seeks shall only become effective after the Termination Date.

### **III. Philda's Lease to Debtor**

5. On or about January 11, 1990, Philda leased the Property to Debtor's predecessor in title JWP, Inc. ("JWP"). A true and accurate copy of the Lease is annexed hereto as Exhibit "A." The Lease was for a term of seven (7) years.

6. JWP desired to substantially renovate and/or change the Property. Philda authorized these extensive renovations, but only on the express agreement that the Property would be returned to Philda in its original condition. Therefore, on or about November 22, 1991, the Lease was modified pursuant to a bond agreement ("Bond Agreement"), which specifically reserved to Philda the right to have the Property returned in its pre-lease condition. A true and accurate copy of the Bond Agreement is annexed as Exhibit "B."

7. The Bond Agreement was critical to Philda; but for JWP's execution of the Bond Agreement, and issuance of the performance bond, Philda would not have consented to allow the Property' condition to be altered in any way.

8. On or about November 23, 1994, JWP, with Philda's consent, assigned all of its rights and obligations under the Lease and Bond Agreement to Fairchild Communications Services Company ("Fairchild"). A true and accurate copy of the November 23, 1994 Assignment of Lease is annexed hereto as Exhibit "C."

9. On or about April 1, 1996 Fairchild in turn assigned, with Philda's consent, all of its rights and obligations under the Lease to Shared Technologies Fairchild, Inc. ("STF"), in connection with a merger of Fairchild into STF. A true and accurate copy of the April 1, 1996 Assignment of Lease is annexed hereto as Exhibit "D."

10. On or about December 23, 1996, Philda and STF entered into an Extension and Modification to Lease Agreement ("Extension"). This Extension extended the Lease term until the Termination Date. A true and accurate copy of the Extension is annexed hereto as Exhibit "E."

11. On or about July 16, 2002, STF assigned all of its rights and obligations under the Lease, Bond Agreement, and amendments thereto, to Debtor. Debtor is a wholly-owned subsidiary of the related debtor Allegiance Telecom, Inc. A true and accurate copy of the July 16, 2002 Assignment and Assumption of Lease is annexed as Exhibit "F."

12. The Lease, Bond Agreement, and all subsequent modifications and extensions which have been incorporated are collectively referenced henceforth as the "Lease."

#### **IV. Philda's Efforts to Recover the Property**

13. For several months, Philda has sought to resolve Debtor's tenancy, either through vacating the Property or extension of the Lease. Debtor is obligated to restore the Property to its prior condition pursuant to the Lease and Bond Agreement, but Debtor has sought to avoid that obligation.

14. On or about August 28, 2003, Philda write to Debtor, noting the coming Termination Date and inviting a resolution. A true copy of that letter is annexed as Exhibit "G." No response was forthcoming.

15. On or about September 29, 2003, Philda again wrote to Debtor and reminded it of Debtor's obligation to restore the Property, and thereafter vacate, prior to the Termination Date. A true and accurate copy of that letter is annexed as Exhibit "H." This letter went unanswered, as did Philda's subsequent telephone calls.

16. On or about February 13, 2004 Philda wrote to Debtor's counsel and documented Debtor's unresponsiveness. Philda also estimated that two months were required to renovate the Property, and that Debtor should therefore vacate the Property by February 29, 2004. Finally, Philda noted Debtor's failure to commence renovations and Philda's concomitant intent to seek Bankruptcy Court intervention. A true and accurate copy of this letter is annexed as Exhibit "I." As Philda therein noted:

"[A]s of this date, phone calls have gone unreturned and we have absolutely no knowledge as to the future intentions of Allegiance with respect to this property. The only knowledge we do have is that apparently Allegiance has done absolutely nothing with respect to removing from the premises in order to make the premises vacant for the purpose of commencing the necessary restoration and repairs...Based on our experience, the time needed to properly renovate the premises will consume at least two months. This would require Allegiance's removal from the premises no later than February 29, 2004 to allow Allegiance the full time period necessary to properly perform its obligations under the Lease."

17. To date, Debtor has apparently taken no steps to vacate the Property or to restore the Property to its pre-lease condition.

18. At this point Debtor and/or its predecessors have occupied the Property nearly 14 years, and vacating would likely take some time. Moreover, no renovations can even be commenced until Debtor vacates. Those renovations are extensive and would likely take several months to complete. The Lease ends in less than 30 days. Therefore it is appropriate and



necessary to move for relief at this time; Philda should not be required to wait until Debtor actually holds over possession, since same is manifestly likely at this time.

19. Moreover, this particular time of the year is critical to re-letting the Property, since the commercial real estate market is usually active in the spring and this year is no exception. If Philda is required to wait until after the Termination Date to act, it will be damaged as a result of Debtor's holding over and will be presently unable even to renovate the Property, let alone re-let it. Conversely, if the Court awards Philda possession, same will only become effective after the Termination Date. In short, Philda proposes to allow Debtor's tenancy to last exactly as long as Debtor contracted to receive.

20. During the pendency of the bankruptcy, Debtor has never moved to assume or reject the Lease.

## V. Argument

21. Philda respectfully requests that this Honorable Court award it possession of the property after the Termination Date. Alternatively, Philda requests that this Court vacate the automatic stay pursuant to 11 U.S.C. §§362(d)(1) and/or (d)(2), to allow Philda to recover the Property at that time.

### **a. The Court Should Award Possession to Philda as of the Termination Date, Since the Automatic Stay is Inapplicable, and Since Debtor Clearly Intends to Wrongfully Hold Over Possession**

22. Pursuant to 11 U.S.C. §362(b)(10), the filing of a bankruptcy does not operate as a stay:

“of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.”

23. In short, the automatic stay does not preclude any act to recover possession of the Property after the expiration of a commercial lease like the one at issue. See, e.g., In re Neville, 118 B.R. 14, 18 (Bkrcty.E.D.N.Y. 1990), (stating “the language of Section 362(b)(10) clearly indicates that it is not necessary for a landlord to move in the Bankruptcy Court to vacate the automatic stay when the Debtor is operating under a lease of non-residential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title. The landlord may do whatever is necessary and appropriate under state law to obtain possession of such property.”).

24. Since Philda only seeks recovery of the Property after the Termination Date, Philda respectfully submits that it does not require this Court’s approval to recover the Property after that date.

25. However, Philda also requests that this Court award possession, effective as of the Termination Date. Debtor’s acts require same. If Philda is required to wait until after the Termination Date to commence an action for possession, Debtor will enjoy the benefit of its wrongfully holding over – particularly since extensive renovations must be carried out before re-letting is possible. Unfortunately, Debtor’s failure to perform the required renovations, or to take any steps to vacate the Property, amply indicate Philda’s need for relief.

26. Moreover, there is basis for this Court to award possession of the Property to Philda. See, e.g., In re JAS Enterprises, 180 B.R. 210, 216 (Bkrcty.D.Neb. 1995) (in a §365 context); see also In re Microvideo Learning Systems, 254 B.R. 90, 93 (S.D.N.Y. 1999), aff’d 272 F.3d 474 (2d. Cir. 1999) (stating that a landlord may generally “move for an order requiring debtor to surrender the premises”).

27. Therefore, Philda respectfully requests that this Honorable Court award it possession of the Property effective on the Termination Date.

**b. Alternatively, the Court Should Vacate the Automatic Stay and Allow Philda to Obtain Possession of the Property**

28. To the extent that the automatic stay may apply, Philda requests that the Court vacate the stay. The Court may vacate the stay either a) for cause, including a lack of adequate protection of an interest in property by a party in interest, pursuant to 11 U.S.C. 362(d)(1); or b) if the Debtor does not have equity in the property, and the property is not needed for an effective reorganization. 11 U.S.C. 362(d)(2).

i. The Court Should vacate the Stay For Cause Pursuant to 11 U.S.C. §362(d)(1)

29. For purposes of vacating the automatic stay for cause pursuant to 11 U.S.C. 362(d)(1), “cause” is not defined by the Bankruptcy Code. Therefore, courts have decided the question of what constitutes cause for lifting the automatic stay on a discretionary case-by-case basis. See MacDonald v. MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th Cir. 1985); see also In re Curtis, 40 B.R. 795, 799 (D. Utah 1984) (citing In re Olmstead, 608 F.2d 1365 (10th Cir. 1979)). In determining what constitutes "cause" for lifting the automatic stay bankruptcy courts are to be guided by “the particular circumstances of the case and . . . considerations that under the law make for the ascertainment of what is just to the claimants, the debtor, and the estate.” Foust v. Munson Steamship Lines, 299 U.S. 77, 83 (1936), quoted in In re Curtis, 40 B.R. at 799.

30. The debtor has the ultimate burden to prove that cause does not exist to lift the automatic stay. See 11 U.S.C. §362(g); see also In re Park Timbers, Inc., 58 B.R. 647, 650 (Bkrcty. D. Del. 1985).

31. A debtor's failure to honor obligations pursuant to a real property lease may constitute cause to lift the stay pursuant to 11 U.S.C. §362(d)(1). See, e.g., In re JAS Enterprises, 180 B.R. 210, 216 (Bkrtcy.D.Neb. 1995) (in a §365); see also In re Microvideo Learning Systems, 254 B.R. 90, 93 (S.D.N.Y. 1999), aff'd 272 F.3d 474 (2d. Cir. 1999). Courts have also been apt to find cause to vacate the stay where a debtor does not intend to operate its business from the leased premises in the future. See, e.g., In re 3220 Erie Blvd. East, Inc., 121 B.R. 684, 688 (Bkrtcy.N.D.N.Y. 1990). In that context, Bankruptcy Courts may order debtors to surrender their premises or face eviction. See, e.g., In re Microvideo Learning Systems, supra at 93; In re J.T. Rapps, Inc., 225 B.R. 257, 263 (Bkrtcy.D.Mass.1998) (in a §365 context).

32. Debtor has made no effort to vacate the Property or to return the Property to its original condition.

33. Moreover, Debtor has not made its required payment toward insurance of the Property. Lack of insurance, standing alone, provides grounds for stay relief; see, e.g., In re Heinzeroth, 40 B.R. 518, 520 (Bkrtcy.E.D.Pa. 1984) (finding cause for stay relief where the collateral was uninsured).

34. Since Debtor is apparently dishonoring its obligations under the Lease, this Court should vacate the stay pursuant to 11 U.S.C. §362(d)(1). To the extent the Debtor may honor its obligations during the pendency of this Motion, Philda only seeks relief effective after the Termination Date.

ii. The Automatic Stay Should be Vacated Pursuant to 11 U.S.C. 362(d)(2)

35. 11 U.S.C. 362(d)(2) also authorizes vacation of the stay with respect to “an act against property” if the debtor a) does not have an equity in the property; and b) if the property is not necessary to an effective reorganization.

36. A bankruptcy debtor has no equity in leased property. See, e.g., In re Paz, 179 B.R. 743, 744 (Bkrcty.S.D.Ga.1995). Debtor leases the Property from Philda. The Lease specifically states that it is not a lien against the Property. Lease, ¶12. Therefore, Debtor has no equity in the Property.

37. Moreover, Debtor clearly does not view the Property as necessary for an effective reorganization. Debtor has made no effort to assume the Lease, or to extend its term. Debtor has also made no effort to enter into a new lease. Debtor's proposed Plan does not apparently indicate a need or desire to retain the Property.

38. Even if Debtor viewed the Property as necessary to an effective reorganization, same is not dispositive, since alternate properties are available. Debtor has absolutely no need to occupy the Property as opposed to any other location. "Necessity" in a stay-relief context connotes that property is "essential" or "indispensable" and the term must be given its ordinary meaning in the absence of contrary legislative intention. United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981), cited in In re Gregory, 39 B.R. 405, 411 (Bkrcty.D.Tenn.1984).<sup>1</sup> Since there is absolutely no need for Debtor to occupy this Property, same is not necessary for an effective reorganization even if Debtor claims otherwise.

39. In short, Debtor has not acted consistently with any present or future need for the Property. The stay should be vacated accordingly.

## **VI. Waiver of Memorandum of Law**

40. This Motion does not raise any novel issue of law and, accordingly, Philda respectfully request that the Court waive the requirement contained in Rule 9013-1(b) of the

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<sup>1</sup> Admittedly Gregory indicated that leased property usually is necessary in a commercial context; in this case, however, Debtor's own acts indicate otherwise.  
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Local Bankruptcy Rules for the Southern District of New York that a separate memorandum of law be submitted in support of the Motion.

**VII. No Prior Request**

41. No previous motion for the relief sought herein has been made to this Court.

**VIII. Notice**

42. Philda has served notice of this Motion upon the following parties: (a) counsel to the Debtor Shared Technologies Allegiance, Inc.; (b) counsel to the Debtor Allegiance Telecom, Inc.; (c) the Office of the United States Trustee; (d) counsel to the statutory committee of unsecured creditors; and (e) all parties identified for electronic service. Philda respectfully submits that no other or further notice need be provided.

**IX. Conclusion**

43. As a result of the foregoing, Philda respectfully requests that this Court enter an Order directing that:

- a. The Debtor surrender possession of the Property to Philda as of the Termination Date, since the automatic stay does not apply pursuant to 11 U.S.C. §362(b)(10), or, alternatively,
- b. Pursuant to 11 U.S.C. § 362(d)(1), the automatic stay, the provisions of 11 U.S.C. § 524 (the stays effective upon discharge), and any and all other stays or injunctions which are or may be in effect, are ANNULLED, LIFTED and TERMINATED for cause as of May 1, 2004, and directing the Sheriff of the County of Bergen, New Jersey, where the Property is situated, to evict and/or eject Debtor from the Property if Debtor fails to surrender the Property by April 30, 2004, and/or
- c. Pursuant to 11 U.S.C. § 362(d)(2), the automatic stay, the provisions of 11 U.S.C. § 524 (the stays effective upon discharge), and any and all other stays or injunctions which are or may be in effect, are ANNULLED, LIFTED and TERMINATED, with respect to the Property, as of May 1, 2004, and directing the Sheriff of the County of Bergen, New Jersey, where the Property is situated, to evict and/or eject Debtor from the Property if Debtor fails to surrender the Property by April 30, 2004, the Court having concluded that:
  - i. Debtor has no equity in the Property; and

- ii. The Property not being necessary for an effective reorganization; and
- d. Granting such further and other relief as this Court deems just and proper.

Dated: Lyndhurst, New Jersey  
April 4, 2004

**SCARINCI & HOLLENBECK, LLC**  
Attorneys for Philip Rothman and David B.  
Follender, d/b/a Philda Companies

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1100 Valley Brook Avenue  
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