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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

**MOTION OF THE DEBTORS FOR AN ORDER,
PURSUANT TO SECTION 365 OF THE BANKRUPTCY
CODE, AUTHORIZING THE ASSUMPTION BY SHARED
TECHNOLOGIES ALLEGIANCE, INC. OF AN UNEXPIRED LEASE OF
NONRESIDENTIAL PROPERTY, AS AMENDED, WITH PHILDA COMPANY**

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

Allegiance Telecom, Inc. (“ATI”) and its direct and indirect subsidiaries, including Shared Technologies Allegiance, Inc. (“Shared Technologies”), as debtors and debtors in possession (collectively, 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 Code (the “Bankruptcy Code”). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) 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 (the "U.S. Trustee") appointed a statutory committee of unsecured creditors (the "Creditors Committee") in these chapter 11 cases.

Jurisdiction

4. This Court has subject matter jurisdiction to consider and determine 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.

An Overview of the Debtors' Businesses

5. The Debtors are facilities-based national local exchange carriers that provide 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. The Debtors offer their 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 collocation 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 collocation, managed modem ports and Internet protocol traffic aggregation; and
- customer premise equipment sales and maintenance services.

6. As of 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.

7. 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 \$1.459 billion. For the twelve 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.

8. As set forth above, Shared Technologies is one of the Debtors in these chapter 11 cases. On June 17, 2002 (i.e., prior to the Commencement Date), ATI acquired (the "Shared Technologies Acquisition") certain assets from WorldCom Inc. and its affiliates ("WorldCom") related to the customer premise equipment ("CPE") business of Shared Technologies Fairchild Telecom, Inc., a wholly-owned subsidiary of WorldCom. As a result of the Shared Technologies Acquisition, Shared Technologies was formed as one of ATI's indirect subsidiaries.

9. Shared Technologies is one of the nation's largest providers of telecommunications CPE, including installation and maintenance services for CPE, with more than 5,000 business customers nationwide comprising of medium to large commercial

businesses, national equipment accounts, governmental agencies and hospitals. Shared Technologies sells, installs and maintains CPE, including key telephone systems and other telephone and data equipment.

10. On February 20, 2004, this Court entered an order approving the sale to XO Communications, Inc. 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*.

11. On March 18, 2004, the Debtors filed (a) the Debtors’ Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code and (b) the Debtors’ Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (the “Disclosure Statement”). On April 16, 2004, the Court held a hearing to consider the approval of the Disclosure Statement. On April 22, 2004, the Debtors filed (c) the Debtors’ Second Amended Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code (as amended, the “Amended Plan”) and (d) the Debtors’ Second Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code (as amended, the “Amended Disclosure Statement”). On April 22, 2004, the Court entered an order approving, among others, the Amended Disclosure Statement. The Amended Plan provides for Shared Technologies to emerge from chapter 11 as a reorganized stand-alone entity.

The Hackensack Warehouse

12. Shared Technologies leases approximately 21,000 square feet of warehouse space in a building located at 150 Louis Street, South Hackensack, New Jersey (the “Hackensack Warehouse”). The Hackensack Warehouse provides warehouse, storage, shipping and technical support for Shared Technologies.

13. Shared Technologies occupies the Hackensack Warehouse pursuant to that certain lease agreement, dated January 11, 1990 (as amended, the “Lease Agreement”), between Shared Technologies, as successor-in-interest to Shared Technologies Fairchild Telecom, Inc., and Philip Rothman, Muriel Rothman and David B. Follender d/b/a Philda Company (collectively, “Philda”). The term of the Lease Agreement was set to expire on April 30, 2004.

14. The Lease Agreement was executed by and between Philda and JWP, Inc. (“JWP”), a predecessor in interest to Shared Technologies Fairchild Telecom, Inc., on January 11, 1990. In 1991, the Hackensack Warehouse was renovated and remodeled by JWP specifically to serve the needs of the telecommunications CPE business. In that regard, on November 22, 1991, JWP and Philda entered into that certain agreement (the “Bond Agreement”) amending the Lease Agreement. Pursuant to the Bond Agreement, JWP was required to post (a) a surety bond in the amount of \$89,000 to secure JWP’s obligation to return the premises to Philda in the pre-lease condition upon the expiration of the Lease Agreement and (b) an additional security deposit in the amount of approximately \$20,000. On July 16, 2002, in connection with the Shared Technologies Acquisition, the Lease Agreement and the Bond Agreement were assigned by Shared Technologies Fairchild Telecom, Inc., a successor in interest to JWP, to Shared Technologies.¹

15. Prior to the expiration of the Lease Agreement, the Debtors began analyzing Shared Technologies’ operational structure and determined that it needed to maintain the Hackensack Warehouse after its emergence from chapter 11. As a result, the Debtors

¹ After the assignment of the Lease Agreement and the Bond Agreement to Shared Technologies, the Debtors delivered to Philda the cash sum of \$89,000 in lieu of and in substitution for Shared Technologies’ obligation to deliver the annual surety bond.

commenced negotiations with Philda regarding an extension of the term of the Lease Agreement and the assumption thereof, pursuant to section 365 of the Bankruptcy Code.

Second Extension and Modification to the Lease Agreement

16. As a result of extensive negotiations, Shared Technologies and Philda agreed to make certain modifications to the Lease Agreement, which are set forth below.² Specifically, subject to Court approval, Shared Technologies and Philda entered into that certain Second Extension and Modification to Lease Agreement, dated as of April 21, 2004 (the “Second Amendment”). A copy of the Second Amendment is annexed hereto as Exhibit “A.” Shared Technologies has agreed to assume the Lease Agreement, as amended by the Second Amendment, pursuant to section 365 of the Bankruptcy Code.

17. The Second Amendment provides for, among other things, (a) an extension of the term of the Lease Agreement from April 30, 2004 to June 30, 2009 and (b) an insignificant increase in the amount of monthly rent payable by Shared Technologies. As set forth below, the increased monthly rent under the Lease Agreement, as amended by the Second Amendment, is still below the market rental rates for comparable warehouse space in the South Hackensack area.

18. Specifically, the Second Amendment provides for the increase of monthly rent from \$5.50 per square foot to (a) \$7.15 per square foot for the first month under the Second Amendment, (b) \$6.25 per square foot for the twenty-five (25) months thereafter and (c) a range

² On April 4, 2004, Philda filed a motion seeking relief from the automatic stay (the “Lift Stay Motion”) to allow Philda to take possession of the Hackensack Warehouse upon the expiration of the term of the Lease Agreement. On April 20, 2004, after Shared Technologies and Philda reached an agreement regarding the assumption of the Lease Agreement and the extension of the term thereof, Philda agreed to withdraw the Lift Stay Motion. In that regard, on April 29, 2004, Philda filed a Notice of Withdrawal of the Lift Stay Motion with the Court.

from \$7.25 to \$8.25 per square foot for the period from July 1, 2006 to June 30, 2009. This increase represents an adjustment of a significantly below market monthly rental rate under the Lease Agreement, which Shared Technologies and its immediate predecessor in interest have enjoyed for the last two years, to a current monthly rental rate that is closer to - but still lower than - the market rates for comparable warehouse space in the South Hackensack area. Notably, prior to making its determination regarding the assumption of the Lease Agreement, as amended by the Second Amendment, Shared Technologies' representatives visited two (2) alternative locations in the South Hackensack area. The rent offered by potential landlords at those locations was in the range of approximately \$8.25-\$8.50 per square foot with escalation during the term of the lease, which is higher than the rental rate offered by Philda under the Second Amendment.

19. Set forth below is a summary of the salient provisions of the Second Amendment, which summary is qualified entirely by reference to the Second Amendment:³

- | | |
|------------------------------|---|
| a. Space: | 21,000 square feet |
| b. Term: | May 1, 2004 - June 30, 2009 |
| c. New Base Rent Start Date: | May 1, 2004 |
| d. Monthly Rental Rate: | May 1, 2004 - May 31, 2004 -- \$12,512.50
June 1, 2004 - June 30, 2006 -- \$10,937.50
July 1, 2006 - June 30, 2007 -- \$12,687.50
July 1, 2007 - June 30, 2008 -- \$13,562.50
July 1, 2008 - June 30, 2009 -- \$14,437.50 |

³ To the extent there are any inconsistencies or omissions between the summary description of the Second Amendment contained herein and the terms and conditions of the Second Amendment, the terms and conditions of the Second Amendment shall control.

- e. Insurance Premium Due: \$6,225.76 payable to Philda as reimbursement for the annual insurance premium due for the period ending October 5, 2004
- f. Security Deposit: Will be increased by \$5,750.00 payable to Philda within 15 business days from the date of execution of the Lease Agreement⁴
- g. Loading Dock Repair: \$3,500.00 payable to Philda as a consulting fee relating to the repair of the loading dock, which was accidentally damaged by Shared Technologies

Relief Requested

20. By this Motion, the Debtors seek entry of an order, pursuant to section 365 of the Bankruptcy Code, authorizing and approving the assumption by Shared Technologies of the Lease Agreement, as amended by the Second Amendment.

Basis for Relief Requested

21. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, “subject to the court’s approval, may . . . assume any . . . unexpired lease of the debtor.” 11 U.S.C. § 365(a). Section 365(b)(1) of the Bankruptcy Code provides, in pertinent part, that a debtor may not assume an executory contract or unexpired lease if there has been a default under such contract or unexpired lease unless, at the time of assumption, the debtor cures such default. 11 U.S.C. § 365(b)(1).

22. The standard to be applied by a court in determining whether the assumption or rejection of an executory contract or unexpired lease pursuant to section 365(a) should be approved is the “business judgment” test, which requires that the debtor have

⁴ Philda is currently holding the sum of \$19,250.00 as security deposit under the Lease Agreement and will continue to hold such security deposit in the increased amount in accordance with the terms of the Lease Agreement.

determined that the requested assumption or rejection would be beneficial to its estate. See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993); In re Gucci, 193 B.R. 411, 415 (S.D.N.Y. 1996).

23. Some courts have defined the elements of the business judgment standard in the context of an assumption of an executory contract or unexpired lease as (a) whether the contract or lease is profitable or advantageous to the debtor, and (b) whether the estate will be able to perform its contractual obligations under the contract or lease. See In re National Sugar Refining Co., 26 B.R. 765, 767 (Bankr. S.D.N.Y. 1983); In re Del Grosso, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990).

24. Upon finding that the debtor has exercised its sound business judgment in determining that the assumption or rejection of an executory contract or unexpired lease is in the best interests of the debtors, its creditors and all parties in interest, the court should approve such assumption or 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 Ionosphere Clubs, Inc., 100 B.R. 670, 673 (Bankr. S.D.N.Y. 1989).

Assumption of the Lease Agreement, as Amended, is Supported by the Debtors' Business Judgment and Should be Approved by the Court

25. The Debtors submit that the assumption of the Lease Agreement, as amended by the Second Amendment, is in the best interests of the Debtors' estates for the following reasons. First, it allows Shared Technologies to continue renting the needed storage, shipping and warehouse space at below market rental rates. Notably, as set forth above, the Hackensack Warehouse has been remodeled specifically to meet the needs of a CPE distributor, such as Shared Technologies.

26. Second, if the Lease Agreement were not assumed as amended, then the Debtors would in all likelihood reject the Lease Agreement. Accordingly, the Debtors would be required to find alternative warehouse space and move the equipment stored at the Hackensack Warehouse to a new location. As a result, the Debtors would incur moving expenses and other administrative costs. In addition, the physical relocation from the Hackensack Warehouse to another location could result in a disruption of Shared Technologies' business operations. Moreover, any new warehouse space would need to be remodeled to customize the premises to meet the needs of Shared Technologies' business.

Cure of Defaults under the Lease Agreement

27. As set forth above, prior to the assumption of an unexpired lease, a debtor must cure outstanding defaults under such lease. The Debtors and Philda have agreed that there are no defaults that need to be cured by Shared Technologies under the Lease Agreement.

28. For the foregoing reasons, the Debtors submit that the assumption of the Lease Agreement, as amended by the Second Amendment, pursuant to section 365 of the Bankruptcy Code, is in the best interest of their estates and creditors and should be approved.

Waiver of Memorandum of Law

29. This Motion includes citations to the applicable authorities and does not raise any novel issues of law. Accordingly, the Debtors respectfully request 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.

Notice

30. Notice of this Motion has been provided to: (a) the U.S. Trustee; (b) attorneys for Philda; (c) attorneys for the Creditors Committee; (d) attorneys for the Debtors' prepetition senior secured lenders; and (e) all the parties set forth on the Debtors' 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.

31. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court (a) grant the Motion, (b) enter an order authorizing Shared Technologies to assume the Lease Agreement, as amended by the Second Amendment, and (c) grant the Debtors such other and further relief as it deems just and proper.

Dated: New York, New York
May 5, 2004

Respectfully submitted,

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