

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

In re:	) Chapter 11
ALLEGIANCE TELECOM, INC. <i>et al.</i>	) Case No.: 03-13057 (RDD)
Debtor.	) (Jointly Administered)
	)
	) Objection Deadline: June 2, 2004 at 4:00 p.m.
	) Hearing Date: June 7, 2004 at 10:00 a.m.

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**OBJECTION OF VERITAS SOFTWARE CORPORATION TO DEBTORS' NOTICE OF  
INTENT TO ASSUME, ASSUME AND ASSIGN, OR ASSIGN CERTAIN EXECUTORY  
CONTRACTS AND UNEXPIRED LEASES**

VERITAS SOFTWARE CORPORATION, a Delaware Corporation (“Veritas”), hereby objects (the “Objection”) to the request of Allegiance Telecom, Inc. and certain related entities (collectively, the “Debtors”), each of whom is a debtor and debtor-in-possession in the above-captioned cases, to assume, assume and assign, or assign certain executory contracts by and between Veritas and the Debtors as set forth in the *Notice of Debtors’ Intent To Assume, Assume And Assign, Or Assign Certain Executory Contracts and Unexpired Leases* (the “Assumption Notice”).

**SUMMARY OF RELIEF SOUGHT BY VERITAS**

Veritas is informed that on February 20, 2004, the above-referenced bankruptcy court (the “Court”) entered an order (the “Sale Order”) authorizing the sale of certain assets to XO Communications, Inc. (“XO”) or its designee and, further, and authorizing the assumption and assignment of certain executory contracts and unexpired leases (the “Assumed Contracts”) to XO. Pursuant to the Sale Order, however, the Debtors’ authority to assume and/or assign any of the Assumed Contracts specifically is conditioned upon its first providing notice to the non-debtor parties to such Assumed Contracts of the Debtors’ intent to assume such contracts and

assign them to XO and the amount (if any) necessary to cure any monetary defaults under such contract, and permitting such non-debtor parties an opportunity to object to the proposed assumption and/or assignment of such contract. *See* Assumption Notice at ¶1 and ¶2. As set forth above, the Debtors assert that the Noticed Contract is included within the set of Assumed Contracts.

On several occasions prior to service of the Assumption Notice, Veritas notified counsel for the Debtor that it is a licensor of certain software (the “Licensed Software”) and that its licenses (“Licenses”) of such Licensed Software do not permit a licensee (such as the Debtors) to assign or otherwise transfer the Licenses without consent of Veritas. Further, Veritas has advised the Debtors’ counsel that it does not consent to assumption or assignment of its License or it’s Licensed Software, or the assignment of such License or Licensed Software, without its consent. To date, Veritas has not consented to the assumption or assignment of any License, Licensed Software or any other Veritas Contracts (as hereinafter defined).

The Assumption Notice advises that the Debtors intend to assume and assign an executory contract identified only as a “Software License and Service Agreement” (the “Noticed Contract”) and that no monetary default must be cured. *See* Assumption Notice at ¶2 and ¶3, and Exhibit “A” attached thereto. The Assumption Notice, however, utterly fails to provide adequate notice of the actual executory contract(s) that the Debtors seek to assume and assign because it fails to identify either the proper title of such contract or the date it was executed (or became effective) or provide any other information identifying the contract with particularity. Simply put: Veritas cannot determine which executory contracts the Debtors would like to assume and assign to XO.

Pursuant to 11 U.S.C. §365 (c) and Rules 6006(a) and (c), and 9014 of the Federal Rules of Bankruptcy Procedure, Veritas seeks entry of an order denying the assumption and assignment by the Debtors of any executory contracts, including but not limited to the Noticed Contract and any and all other software license and support agreements (the “SLSAs” as

hereinafter identified and defined) and maintenance and service agreements (the “Maintenance Agreements”) that may have been entered into by and between Veritas and any of the above-named Debtors. (Hereinafter, the Noticed Contract, the SLSAs and the Maintenance Agreements are referred to collectively as the “Veritas Contracts”.)

As set forth in more detail hereinafter, Veritas hereby objects to entry of any order authorizing and/or approving the assumption or assignment of any of the Veritas Contracts on the following grounds. First, after reviewing its records, Veritas is unable to identify the particular executory contract(s) with any of the Debtors based on the generalized identification of the executory contract that is listed on the Assumption Notice. The Debtors have failed to accord Veritas notice reasonably calculated to permit it an opportunity to protect its interests in the Veritas Contracts and/or any other executory contracts that the Debtors reportedly seek to assume and assign to XO. In short, the Assumption Notice fails to satisfy due process requirements imposed by the mandates of 11 U.S.C. §365 (c) and Rules 6006(a) and (c), and 9014 of the Federal Rules of Bankruptcy Procedure. Accordingly, Veritas submits that the Court should deny the Debtors’ request for entry of an order authorizing it to assume and assign any of the Veritas Contracts.

Second, Veritas is the owner of certain computer software used to back-up business records and such software (the “Software”) is subject to copyright protection pursuant to Title 17 of the United States Code (the “Copyright Act”). Because the Software is subject to copyright protection under the Copyright Act, 11 U.S.C. §365(c)(1) requires Veritas’ consent as a condition precedent to either the assumption or assignment of any License of the Licensed Software. Because Veritas has not and does not consent to any such assumption or assignment, Veritas submits that the Debtors’ request to assume and assign the Veritas Contracts must be denied.

Alternatively, Veritas requests that the Court enter its order directing the Debtors to file and serve (1) an amended schedule to the Assumption Notice identifying the specific

executory contracts that Debtors desire to assume and assign, including thereon the correct date of all such contracts and the correct name of the specific Debtor who is a party to such contract, (2) copies of each and every executory contract that Debtors believe are described by both the original Assumption Notice and the amended schedule requested herein, and (3) additional pleadings setting forth its authority to assume and assign the Veritas Contracts, including any License of any of Veritas' Licensed Software, without the express consent of Veritas and the payment of a transfer fee agreed upon by Veritas.

Further, to the extent that the SLSAs, License or other Veritas Contracts are not assumed and assigned with Veritas' consent, Veritas seeks entry of an order (1) directing that the Debtors certify that all of Veritas Licensed Software and any other intellectual property subject to the Veritas Contracts has been deleted from any and all assets sold, transferred or abandoned to any third party (the "Transferred Assets") pursuant to the Plan or otherwise or that may be acquired pursuant to any further sales contemplated by the Plan and (2) granting such further and additional relief as may be necessary to assure that the none of Veritas' Licensed Software or copies thereof are transferred as part of any Transferred Assets and that the Debtor has taken all actions necessary to delete all copies of the Licensed Software or other intellectual property subject to the Licenses from any Transferred Assets.

The Objection is based on the matters set forth herein, the files and records in this case and such other and further evidence that may be adduced at the trial on this matter.

## **BACKGROUND**

### **Veritas Software License And Support Agreements**

1. Veritas licenses certain storage-management software (the "Licensed Software") that protects against data loss and file corruption, allows rapid recovery after disk or computer system failure, enables Information Technology managers to work efficiently with large numbers of files, and makes it possible to manage data distributed on large networks of computer systems without harming productivity or interrupting users. The Licensed Software is

protected by various copyrights pursuant to the laws of the United States of America and its political subdivisions, as well as the laws of other countries. Additionally, Veritas provides certain services to users of the Licensed Software including, but not limited to, support/maintenance, training, installation, professional and consulting services (the “Services”).

2. Veritas’ standard business practice is to enter into a series of related contracts including, without limitation, a standard *Software License and Support Agreements* (the so-called “SLSAs”) and related maintenance and service agreements (the so-called “Support Agreements”). As a regular part of its business, Veritas also maintains a permanent record of all documents reflecting Veritas’ agreements and contracts with its customers. All agreements or contracts maintained by Veritas are compiled at the time, or near the time, that the information was received or the events or transactions actually occurred.<sup>1</sup>

3. Pursuant to the standard SLSA, Veritas grants a perpetual, non-exclusive, and non-transferable license to use the Licensed Software on “Designated Computers” (the “License”) worldwide, for licensee’s internal business purposes only for the term of the SLSA and subject to the use restrictions. The SLSA also provides, in pertinent part that the License remains in force and effect only until it is terminated as provided in the SLSA. Upon termination of the License, the Debtors are obligated to discontinue use of the Licensed Software and to destroy all copies in its possession or control and to certify that all such copies have been destroyed. The Debtors’ rights to use the Licensed Software are expressly limited to those set forth in the SLSA, and it is expressly prohibited from using, copying, modifying, renting, leasing or transferring the Licensed Software except as set forth in the SLSA. Generally, neither the SLSA nor the Licensed Software may be assigned without the prior written consent of VERITAS (except in certain limited circumstances).

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<sup>1</sup> As set forth in this Objection, the Debtors have failed to identify the specific executory contracts it desires to assume and assign by date or to provide any other information that permits Veritas to identify the contracts at issue. Therefore, for purposes of this Objection, Veritas assumes that such contracts include, *inter alia*, the standard SLSAs described herein.

4. To date, Veritas has not been provided a copy of the Veritas Contracts by the Debtors. Further, because the name of the Veritas Contract as set forth on the Notice is so general, Veritas cannot identify the contract at issue but it is continuing its efforts to identify the possible executory contracts that the Debtors may wish to assume.

5. The Licensed Software is subject to various copyrights pursuant to Title 17 of the United States Code, as amended (the "Copyright Act"), and the laws of various other countries, and Veritas is the owner of such copyrights.

6. Veritas has not consented to the assumption or assignment (or any other transfer) of Veritas Contracts and it has reserved all rights, claims and interests arising from or related to any such contracts.

#### **GROUND FOR THE RELIEF REQUESTED BY VERITAS**

7. Approval of the Sale Motion Would Violate Veritas' Due Process Rights. Before a creditor's interests may be adversely affected by judicial action, the due process clause of the Fifth Amendment to the United States Constitution requires "notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action . . ." and to afford them an opportunity to present their objections. *See City of N.Y. v. New York, N.H. & H. R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953) (a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights); *U.S. v. Security Indus. Bank*, 459 U.S. 70, 75, 103 S.Ct. 407, 410, 74 L.Ed2d 235 (1982) (Bankruptcy proceedings are subject to the fifth amendment); *Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985) *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). *Accord, In re Golden Books*, 269 B.R. 300, 305 (Bankr. D. Del. 2001) (Notice of a motion seeking authority to assume and assign executory contracts, including licenses of intellectual property, is governed by Federal Rule of Bankruptcy Procedure 6006(a)).

8. In the matter before this Court, neither the Sale Order nor the Assumption

Motion, nor any other pleadings served on Veritas, adequately identifies the executory contracts to which Veritas is a party and which are sought to be assumed and assigned by the Debtors. Absent the provision of such fundamental information, Veritas cannot determine all of the grounds (if any) barring assumption and assignment of such contracts, or whether the Debtor has complied with the mandates governing assumption and assignment of executory contracts as set forth in Section 365(b), (c) and (f) of the Bankruptcy Code. Veritas submits that entry of an order authorizing and approving the assumption and assignment of any of the Veritas Contracts, without first requiring the Debtors to specify the precise contracts at issue, will deny Veritas a meaningful opportunity to be heard on the issue whether any executory contracts to which it is a party may be assumed and assigned by the Debtors. Therefore, approval of the assumption or assignment of such executory contracts based on the record before this Court would constitute denial of Veritas' due process rights.

#### **Veritas Contracts Cannot Be Assumed Or Assigned Without Consent**

9. The Veritas SLSA Is an Executory Contract. Generally, courts find that “intellectual property licenses [are] ‘executory’ within the meaning of section 365(c) because each party to the license had the material duty of ‘refraining from suing the other for infringement of any of the [intellectual property] covered by the license . . .’” *In re Golden Books*, 269 B.R. 300, 309 (Bankr. D. Del. 2001) quoting *In re Access Beyond Tech., Inc.*, 237 B.R. 32 (Bankr. D. Del. 1999). Accordingly, a debtor in possession cannot assume such contracts except if the debtor complies with the assumption requirements set forth in 11 U.S.C. §365. See *Perlman v. Catapult Entertainment, Inc.* (*In re Catapult Entertainment, Inc.*, 165 F.3d 199, cert. denied, 120 S.Ct. 369 (1999)); *Everex Systems, Inc. V. Cadtrak Corp.* (*In re CFLC, Inc.*, 89 F.3d 673, 677 (9th Cir. 1996) (nonexclusive license is an executory contract); *Fenix Cattle Co. v. Silver* (*In re Select-A-Seed Corp.*), 625 F.2d 290, 292, (9th Cir. 1990) (copyright license for use of computer software is an executory contract); *In re Patient Education Media, Inc.*, 210 B.R. 237, 241 (Bankr. S.D.N.Y. 1997); *In re Golden Books, supra*; *In re Access Beyond Tech.*,

*Inc., supra.*

10. In this case, assuming the executory contracts sought to be assumed and assigned by the Debtors (as set forth in the Assumption Notice) includes a SLSA, the License at issue is executory because it imposes on-going obligations on the parts of both parties to the agreement. Veritas, for its part, must permit the continued use of the Licensed Software according to the terms of the License and the Debtor must limit its use to the restrictions set forth and permit Veritas to monitor or audit such use throughout the term of the Licenses. Therefore, assuming the Executory Agreements include a License, these contracts constitute executory contracts within the meaning of 11 U.S.C. §365 and the Debtor is not permitted to assume or assign the SLSA (including the License) unless complies with the mandatory requirements imposed by 11 U.S.C. §365(b) and (c)(1).

11. Federal Law Requires Consent of a Copyright Owner To Transfer or Assign A Copyright. Under applicable federal law, the holder of a non-exclusive license of a copyright does not obtain the rights of ownership, but acquires only a personal interest in a copyright. *See In re CFLC, Inc., supra; In re Patient Education Media, Inc., supra; In re Golden Books, supra; In re Access Beyond Tech., Inc., supra.* Further, a nonexclusive license of a copyright is personal to the transferee and cannot be assigned without the consent of the licensor. *Id.* *See also Unarco Industries, Inc. v. Kelley Co.*, 465 F.2d 1303, 1306 (7th Cir.1972); *In re Valley Media, Inc.*, 279 B.R. 105, 135-136 (Bankr.D.Del.2002); *In re Patient Education Media, Inc., supra; In re Golden Books, supra; In re Access Beyond Tech., Inc., supra.*

12. Under Title 17 of the United States Code (the “Copyright Act”) and federal common law pertaining to copyrights, a copyright owner (such as Veritas in this instance) does not have to consent to the assignment of any license of that copyrighted material to any third party (such as the License or the Licensed Software in this instance). *See In re Patient Education Media, Inc.*, 210 B.R. at 241 (copyright license) *citing In re CFLC, Inc.*, 89



F.3d at 679. *See also Harris v. Enus Records Corp.*, 734 F.2d 1329, 1333-34 (9<sup>th</sup> Cir. 1984) (copyright licenses are not transferable without the licensor's consent); *Sol Solutions, Inc. v. Oracle Corp.*, 1991 WL 626458 at 5 (N.D. Cal., December 18, 1991) (*quoting* 17 U.S.C. §102) (software license that explicitly reserves all copyrights and other ownership rights to the licensor cannot to any such request).

13. A Debtor In Possession Cannot Assume or Assign A Non-Exclusive License of A Copyright Over The Objection Of the Owner of the Copyright. Pursuant to 11 U.S.C. §365(c)(1), a debtor in possession may not assign a non-exclusive license in a copyright absent the consent of the owner of that patent or copyright. *See In re Patient Education Media, Inc., supra; In re Golden Books, supra; In re Access Beyond Tech., Inc., supra.* As previously stated, Veritas has not and does not hereby consent to the assignment of the License or the Licensed Software to any third party purchaser. Moreover, a Chapter 11 debtor cannot assign its nonexclusive license to use copyrighted or patented materials without the licensor/owner's consent, even though such assignment would maximize assets available to creditors. *In re Patient Education Media, Inc., supra* (held: debtor could not assign its nonexclusive license without copyright owner's consent) (citing 11 U.S.C.A. § 365(c); 17 U.S.C.A. § 106); *accord, In re Access Beyond Tech., Inc., supra.*

14. Accordingly, to the extent that any of the Veritas Contracts which the Debtors seek to assume and assign include therein a License or are, in fact, a SLSA, Veritas such contract(s) cannot be assumed and assigned because Veritas has not and does not consent to its assignment to any third party.

**SLSA Should Be Rejected If the Debtor Cannot Satisfy §365**

15. If any of the Veritas Contracts include a License (or is, in fact, a SLSA) and Veritas ultimately does not consent to its assumption and/or assignment (and payment of a transfer fee), Veritas contends that such executory contracts (including any License or a SLSA) should be rejected no later than twenty (20) days after entry of the order denying the assumption

or assignment (or such period of time as Veritas may otherwise agree is appropriate). Veritas seeks this relief because it is concerned that if a SLSA or other License is not promptly rejected, the assets sold pursuant to XO may include the Licensed Software and their transfer to XO may effect a *de facto* assignment of the Licensed Software in derogation of the License. That is, the Debtors, without any assumption of the Licenses, will continue to reap the benefits under these agreements (*i.e.*, use of the Licensed Software) and pass such benefits through to XO in derogation of Veritas' right to control the parties that utilize its Licensed Software and to receive payment for such Licenses. This *de facto* assignment would circumvent all the requirements of §365 by permitting XO (or its designee) to receive all of the benefits of the SLSA (including the License) for as long as it chooses without ever having to become liable on the contract.

WHEREFORE, pursuant to 11 U.S.C. §365(b), (c) and §365(f) and Fed. R. Bankr. P. 6006(a) 9014, Veritas seeks entry of an order denying the assumption and assignment of any Veritas Contracts, including without limitation the Noticed Contract, any Licenses, SLSAs or Maintenance Agreements, unless Veritas expressly consents to assumption and assignment of the Veritas Contracts as mandated by applicable non-bankruptcy law and 11 U.S.C. §365(c)(1) and upon such terms as Veritas deems necessary and appropriate (such as payment of a transfer fee). Alternatively, if the Court deems it appropriate, Veritas requests that the Court enter an order directing the Debtors to file and serve (1) an amended schedule to the Assumption Notice identifying the specific executory contracts that Debtors desire to assume and assign, including thereon the correct date of such contracts and the correct name of individual Debtor who is a party to such contract, (2) copies of each and every executory contract that Debtors believe are described by both the original Assumption Notice and the amended schedule requested herein, and (3) additional pleadings setting forth its authority to assume and assign the Noticed Contract, any SLSAs, including any License of any of Veritas' Licensed Software, or Service Agreements, without the express consent of Veritas

and the payment of a transfer fee agreed upon by Veritas.

Further, to the extent that the SLSAs, License or other Veritas Contracts are not assumed and assigned with Veritas' consent, Veritas seeks entry of an order (1) directing that the Debtors certify that all of Veritas Licensed Software and any other intellectual property subject to the Veritas Contracts has been deleted from any and all assets sold, transferred or abandoned to any third party or that may be acquired pursuant to any further sales and (2) granting such further and additional relief as may be necessary to assure that the none of Veritas' Licensed Software or copies thereof are transferred as part of any assets and that the Debtor has taken all actions necessary to delete all copies of the Licensed Software or other intellectual property subject to the Licenses from any assets.

Further, Veritas requests such other and further relief as may be permitted by law or equity.

Dated: June 1, 2004

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Dated: June 1, 2004

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