

Hearing Date: July 29, 2003
Time: 10.00 a.m.

Brent C. Strickland (BS 7811)
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)
)
Allegiance Telecom, Inc., *et al.*,) Chapter 11 Case No. 03-13057 (RDD)
)
) (Jointly Administered)
Debtors.)
)
)
_____)

**AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY TO EXERCISE
SETOFF RIGHTS AGAINST SECURITY DEPOSIT AND TO COMPEL
PAYMENT OF POST-PETITION RENT**

BP Commerce, LLC, by its undersigned counsel, requests the entry of an Order granting relief from the automatic stay to exercise setoff rights against a security deposit posted by Allegiance Telecom, Inc., *et al.* (the “Debtors”), and for the entry of an Order directing the Debtors to pay post-petition rent due and owing to BP Commerce LLC (the “Motion”), and respectfully represents:

I. INTRODUCTION

1. BP Commerce, LLC (“Landlord”) is the landlord with respect to the Debtors’ business premises located at 7601 Ora Glen Drive, Greenbelt, Maryland (the “Property”). The Debtors have filed a motion to reject their lease for the Property. By this Motion, the Landlord seeks the entry of an Order, pursuant to sections 362(d)(1) and 553 of the Bankruptcy Code,

granting relief from the automatic stay so as to permit the Landlord to exercise its right of setoff and reduce its lease rejection damages by application of the security deposit posted by the Debtors pursuant to the lease. In addition, the Landlord seeks entry of an Order directing the Debtor to pay post-petition rent due under the Lease pursuant to sections 365(d)(3) and 503 of the Bankruptcy Code.

II. BACKGROUND

A. The Lease

2. The Debtors leased the Property pursuant to a written Lease Agreement (the "Lease) dated June 22, 2000, between Intermedia Communications, Inc. ("Intermedia"), as original tenant, and CC II Realty, Inc. as original landlord. Landlord is the successor in interest to CCII Realty, Inc.

3. The Lease was assigned to the Debtors pursuant to an assignment dated December 20, 2001, by Intermedia as assignor and ALGX Business Internet, Inc., as assignee. At the time of the assignment, Allegiance Telecom signed a guaranty of all obligations under the Lease.

4. Pursuant to the terms of the Lease, the Landlord currently holds a cash security deposit posted by the Debtors in the amount of \$1,158,000.10 (the "Security Deposit").

B. The Bankruptcy Filing

5. On or about May 14, 2003 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in this Court.

6. Since the Petition Date, the Debtors have remained in possession of the Premises and continue to enjoy the benefits of the use and occupation of the Premises. Post-petition rent has not been paid for the month of June.

7. By motion filed with this Court on or about June 9, 2003, the Debtors seek to reject the Lease pursuant to section 365 of the Bankruptcy Code and to establish the effective date of rejection as the date upon which the Debtors provide the Landlord notice that they have surrendered the premises, but no later than June 30, 2003. On June 23, 2003, the Landlord filed a limited objection to the motion, objecting to the *nunc pro tunc* relief sought by the Debtors.

III. DISCUSSION

A. The Landlord is entitled to relief from the automatic stay pursuant to §362(d)(1).

8. Section 362(d) of the Bankruptcy Code provides, in relevant part, that:

(d) On request of a party in interest after notice and a hearing, the court shall grant relief from the stay provided under subsection (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 interest[.]

11 U.S.C. § 362(d)(1).

9. The Debtors seek, and will likely be permitted, to reject the Lease pursuant to section 365 of the Bankruptcy Code. Upon rejection, the Landlord will be entitled to an allowed pre-petition claim arising from rejection of the Lease in an amount not less than \$1,500,000 (the “Rejection Damages”) in accordance with section 502(b)(6) of the Bankruptcy Code. The Rejection Damages exceed the amount of the Security Deposit held by Landlord.

10. Cause exists for granting the Landlord relief from the automatic stay under section 362(d)(1) of the Bankruptcy Code because the Landlord holds a valid right of setoff. The amount of the Rejection Damages exceeds the amount of the Security Deposit. As a result, the entire

amount of the Security Deposit represents an allowed secured claim held by the Landlord pursuant to section 506 of the Bankruptcy Code.

11. The Landlord will not acquire any greater rights against the Debtors, the property in their estates, or other creditors by exercising its right of setoff. Accordingly, the Landlord requests that this Court permit the Landlord to exercise its setoff rights by applying the Security Deposit against the Rejection Damages.

B. The Landlord is entitled to post-petition lease payments with respect to the Premises.

12. In addition, the Landlord is entitled to an Order directing the Debtor to pay post-petition rent reserved under the Lease as required by § 365(d)(3).

13. Section 365(d)(3) of the Bankruptcy Code provides the following:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b) (1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provision of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C. § 365(d)(3). In enacting section 365(d)(3), Congress determined that in exchange for the time afforded debtors to determine whether to assume or reject their personal property leases, debtors must keep current on their obligations under such leases until their decision is made. See In re Leisure Time Sports, Inc., 189 B.R. 511 (S.D. Cal. 1995) ("§ 365(d)(3) and 365(d)(10) are the only Code provisions requiring the estate to 'timely' perform the debtor's obligations").

14. In order for the Debtors to remain in the Premises pending a determination by the Court authorizing the Debtors to reject the Lease, the Debtors are required to make payment of all post-petition rent and other charges as they become due pursuant to the terms of the Lease. See Caldor Corp. v. S Plaza Assocs. (In re Caldor, Inc.), 217 B.R. 116, 120 (Bankr S.D.N.Y. 1998).

15. Accordingly, this Court should compel the Debtors to meet the obligations under section 365(d)(3) of the Bankruptcy Code by curing all arrearages of post-petition rent immediately and making timely post-petition lease payments to the Landlord through and including the date of any Order authorizing the Debtors to reject the Lease.

IV. CONCLUSION

16. For the foregoing reasons, this Court should enter an Order (i) granting the Landlord relief from the automatic stay so as to permit it to pursue its setoff rights against the Security Deposit pursuant to section 362(d)(1) of the Bankruptcy Code, (ii) compelling the Debtor to pay post-petition Lease payments pursuant to sections 365(d)(3) and 503 of the Bankruptcy Code, and (iii) granting the Landlord such other and further relief as the Court deems just and proper.

Dated: June 25, 2003

/s/ Brent Strickland
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