

Objection Deadline: October 3, 2003, 5:00 p.m. (prevailing Eastern Time)
Hearing Date: October 8, 2003, 10:00 a.m. (prevailing Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: :
: Chapter 11
:
ALLEGIANCE TELECOM, INC., et al., : Case No. 03-13057 (RDD)
:
Debtors. : Jointly Administered
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**OBJECTION OF COMMERCE SQUARE PARTNERS~PHILADELPHIA
PLAZA, L.P. TO DEBTORS' MOTION FOR AN ORDER PURSUANT TO
SECTION 365(a) OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS TO
REJECT CERTAIN UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY**

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

Commerce Square Partners~Philadelphia Plaza L.P. ("Commerce") hereby files this
Objection to the Debtors' Motion for an Order Pursuant to Section 365(a) of the Bankruptcy
Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real
Property, and in support thereof, states as follows:

BACKGROUND

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(a) and (b).
2. On or about July 1, 1987, Commerce and Realcom Communications Corporation ("Realcom") entered into a lease agreement (as amended, the "Lease") for certain office space

located at One Commerce Square, 2005 Market Street, Philadelphia, Pennsylvania 19103 (the “Premises”).¹

3. On or about July 16, 2002, Shared Technologies, Inc. (“Shared Technologies” or the “Debtor”) assumed the Lease pursuant to an assignment (the “Assignment”) from Realcom.²

4. Pursuant to the Assignment, Shared Technologies retained the keys and access cards to the Premises and began making rent payments to Commerce.

5. In October 2002 and again in January 2003, Shared Technologies contacted Commerce to negotiate an early termination of the Lease. These negotiations proved unsuccessful.

6. Shared Technologies continued making rent payments through May 2003.

7. On May 14, 2003, (the “Petition Date”) the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

8. Since the Petition Date, the Debtors have continued to operate as a debtor-in-possession of the Lease pursuant to Bankruptcy Code sections 1107 and 1108.

9. Indeed, on June 19, 2003, the Debtors filed a motion for an order pursuant to section 365(d)(4) of the Bankruptcy Code to extend the time within which to assume or reject certain unexpired leases, including the Lease.

10. By Order dated July 2, 2003, the Court granted the Debtors’ motion extending to January 14, 2003 the time in which the Debtors may assume or reject the unexpired leases. The Order is without prejudice to any lessor of an unexpired lease to move for an earlier date by

¹ A copy of the Lease was attached to Commerce’s August 4, 2003 Motion to Compel Assumption or Rejection of Lease and Request for Immediate Payment of Administrative Expense.

² A copy of the Assignment was attached to Commerce’s August 4, 2003 Motion to Compel Assumption or Rejection of Lease and Request for Immediate Payment of Administrative Expense.

which the Debtors must assume or reject an unexpired lease in accordance with section 365(d)(4) of the Bankruptcy Code.

11. On August 4, 2003, Commerce filed a motion, pursuant to section 365 of the Bankruptcy Code, for an order requiring the immediate assumption or rejection of the Lease and the immediate payment of administrative expense pursuant to section 503(a) of the Bankruptcy Code (“Motion to Compel”).

12. Two days later, the Debtors filed a motion for an order pursuant to section 365(a) of the Bankruptcy Code authorizing the Debtors to reject the Lease (“Rejection Motion”). The Debtors also moved to set the Petition Date as the Lease rejection date.

13. The Motion to Compel and the Rejection Motion were set for a hearing on August 19, 2003 (the “Hearing”), but the Hearing was subsequently postponed to October 8, 2003 by stipulation.

14. Since May 5, 2003, the Debtor has failed to make any of the following monthly rent payments that were due the first day of each respective month under the Lease:

- (a) June Rent \$5,582.50
- (b) June Additional Rent \$4,168.27
- (c) July Rent \$5,582.50
- (d) July Additional Rent \$4,168.27
- (e) August Rent \$5,582.50
- (f) August Additional Rent \$4,168.27
- (g) September Rent \$5,582.50
- (h) September Additional Rent \$4,168.27
- (i) October Rent \$5,582.50
- (j) October Additional Rent \$4,168.27

The total post-petition Rent and Additional Rent presently owed under the Lease is \$48,753.85.

15. The above-listed payments are also subject to late fees pursuant to Lease Section 27.2.

16. Accordingly, as of the date of this Objection, the Debtor has incurred post-petition obligations totaling \$48,753.85, plus late fees and attorneys' fees.

17. In addition, as of the date of this Objection, the Debtor has yet to return the keys or access cards to the Premises.

ARGUMENT

18. It is beyond dispute that a lessor is entitled to an administrative expense claim for the post-petition rent and expenses relating to an unexpired lease that has not been rejected. 11 U.S.C. § 365(d)(3).

19. Pursuant to section 365(d)(3), a debtor must perform all of its obligations under an unexpired lease until the lease is either effectively assumed or rejected.³ *See, e.g., In re Atlantic Container Corp.*, 133 B.R. 980, 981 (Bankr. N.D. Ill. 1991).

20. Accordingly, pursuant to 11 U.S.C. § 365(d)(3), the Debtors are obligated to pay rent in the amount dictated by the Lease until the Lease is assumed or rejected. Moreover, if the Lease is deemed rejected after the date upon which the rent became due, the entire month's rent is deemed due and owing. *See, In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 989-90 (6th Cir.

³ Section 365(d)(3) provides, in part:

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 expired lease of non-residential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title...

2000); *see also*, Centerpoint Properties v. Montgomery Ward Holding Corp., 268 F.3d 205 (3rd Cir. 2001).

21. Moreover, section 503(b) of the Bankruptcy Code, provides, in part, that “after notice and a hearing, there shall be allowed administrative expenses, ...including –actual, necessary costs and expenses of preserving the estate...” 11 U.S.C. § 503(b)(1)(A). Administrative expenses which arise under 11 U.S.C. § 503(b) are entitled to first priority pursuant to 11 U.S.C. § 507(a)(1).

22. The Debtors have not yet effectively rejected the Lease. In June 2003, the Debtors moved for additional time in which to consider whether to assume or reject the Lease, and the Court granted this extension by Order dated July 2, 2003.⁴

23. In addition, the Debtors continue to retain the keys and access cards to the Premises. See In re Four Star Pizza, Inc., 135 B.R. 498, 501 (Bankr. W.D. Pa. 1992) (holding debtor who retained keys to the premises was liable for postpetition rents until court approved rejection of lease).

24. Moreover, the majority view is that court approval is a condition precedent to the effectiveness of rejection of a lease. *See New Valley Corp. v. Corporate Property Assoc.*, Ch. 11 Case No. 98-982 (D. N.J. Aug. 31, 2000) (citing Thinking Machines Corp. v. Mellon Financial Services Corp., 67 F.3d 1021, 1025 (1st Cir. 1995)). Therefore, at a minimum, the effective date of rejection must be no earlier than the date the Court approves the rejection of the Lease.

⁴ To the extent the Debtors contend that the Assignment was ineffective because Commerce did not provide written consent to the Assignment, Debtor’s contention is without merit. As a matter of Pennsylvania law (which governs the Lease), where an assignee makes rent payments and the lessor accepts the same, the consent provision is deemed waived. *See, e.g., Cohen v. Bernard*, 1949 WL 2905 (Pa. Com. Pl. 1948). In the current action, Shared Technologies made and Commerce accepted rent payments for nearly a full year. Accordingly, any failure to obtain Commerce’s formal consent does not render the Assignment ineffective.

25. This requirement of court approval was intended in part to remedy the problems inherent when a landlord does not receive clear notice as to when it can safely redeem *and relet* the property. Thinking Machines, 67 F.3d at 1027 (emphasis added).

26. Since the Debtors have not effectively rejected the Lease, Commerce is entitled to an administrative expense claim for unpaid post-petition rent and expenses accrued as of the effective date of rejection, which as of the date of this Objection, amounts to \$48,753.85 for rent and expenses for the period June 2003 through October 2003, plus late fees and attorneys' fees.

27. In addition, since the Premises have not been clearly and unequivocally surrendered, rent and expenses continue to accrue on a daily basis. The effective date of rejection should be the later of the entry of a Court Order or the date when the Debtors surrender full possession to Commerce.

28. Accordingly, Commerce seeks allowance of an administrative expense claim in the amount of \$48,753.85 plus late fees and attorneys' fees, to be paid immediately, plus an administrative expense claim for any and all rent and expenses accruing up through the effective date of rejection.

WHEREFORE, Commerce respectfully requests that this Court (1) deny the Debtors' Motion for an Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property; and (2) enter an Order (i) compelling Debtors to comply with section 365(d)(3) and directing them to make immediate payment of all post-petition rent, late fees and attorneys' fees accrued; (ii) granting Commerce an administrative expense claim in the amount of any additional post-petition rent and expenses accrued as of the later of either (a) date of the Court's Order authorizing rejection or (b) the date that the Debtors fully surrender the Premises to Commerce, including the return of the keys and

access cards to the Premises; and (3) granting such other and further relief as deemed just and proper.

Respectfully submitted this 3rd day of October 2003.

HANGLEY ARONCHICK SEGAL & PUDLIN

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