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

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

**DEBTORS' RESPONSE TO MOTION OF COMMERCE SQUARE PARTNERS - PHILADELPHIA PLAZA, L.P., PURSUANT TO SECTION 365 OF THE BANKRUPTCY FOR AN ORDER REQUIRING IMMEDIATE ASSUMPTION OR REJECTION OF LEASE AND REQUEST FOR IMMEDIATE PAYMENT OF ADMINISTRATIVE EXPENSE PURSUANT TO SECTION 503(a) OF THE BANKRUPTCY CODE**

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

Allegiance Telecom, Inc. and its direct and indirect subsidiaries, as debtors and debtors in possession (the "Debtors"), as their response to the motion of Commerce Square Partners-Philadelphia Plaza L.P., successor in interest to Maguire/Thomas Partners-Philadelphia Plaza Associates (the "Philadelphia Plaza"), dated August 4, 2003 (the "Philadelphia Plaza Motion"), for an order requiring the immediate assumption or rejection of lease and request for immediate payment of administrative expense, in connection with that certain lease agreement, dated July 1, 1987, as amended, between Philadelphia Plaza, as landlord and RealCom

Communications Corporation (“RealCom”), as tenant, which governs the premises (the “Premises”) located at 2005 Market Street, Philadelphia, Pennsylvania 19103 (as amended, the “Philadelphia Lease”), a copy of which is annexed hereto as Exhibit “A,” respectfully represent:

### **Background**

1. On May 14, 2003 (the “Commencement Date”), the Debtors each commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”).

2. As of the Commencement Date, the Debtors were parties to approximately 126 unexpired leases of nonresidential real property. Since the Commencement Date, the Debtors have been engaged in the process of evaluating their unexpired leases to determine which are valuable to their estates and which are burdensome. To date, the Debtors have obtained Court approval to reject approximately [thirty-two (32)] of the Debtors’ unexpired leases of nonresidential real property pursuant to section 365(a) of the Bankruptcy Code.

### **The Philadelphia Lease**

3. Prior to the Commencement Date, Shared Technologies Allegiance, Inc. (“Shared Technologies”), a Debtor in these chapter 11 cases, acquired certain unexpired leases of nonresidential real property from RealCom, an affiliate of WorldCom, Inc., pursuant to that certain Asset Purchase Agreement, dated as of June 17, 2002. One of the unexpired leases of nonresidential property that Shared Technologies acquired from RealCom was the Philadelphia Lease.

4. Notably, the Philadelphia Lease expressly prohibits its assignment by RealCom to any party unrelated to RealCom without the express written consent of Philadelphia Plaza. Specifically, Section 20.1 of the Philadelphia Lease provides, in pertinent part, that “[e]xcept as expressly provided . . . Tenant shall not directly or indirectly, voluntarily or by operation of law,

sell, assign, encumber, pledge or otherwise transfer or hypothecate all or any part of the Premises . . . without Landlord’s prior written consent in each instance, which consent may be withheld in Landlord’s sole discretion.” Philadelphia Lease ¶ 20.1.

5. In connection with the acquisition of the Philadelphia Lease, Shared Technologies and RealCom entered into that certain Assignment and Assumption of Lease, dated July 16, 2002 (the “Assignment Agreement”), to assign the Philadelphia Lease to Shared Technologies, effective as of June 18, 2002. A copy of the Assignment Agreement is annexed hereto as Exhibit “B.” In accordance with the Philadelphia Lease, the Lease Assignment Agreement provided that the assignment of the Philadelphia Lease by RealCom to Shared Technologies was conditional upon the written consent of Philadelphia Plaza. Specifically, section 12 of the Assignment Agreement provides, in pertinent part, that “Assignor and Assignee hereby acknowledge and agree that this Assignment is *expressly conditioned upon the delivery of a written consent duly executed and delivered by Landlord . . .*” Assignment Agreement ¶ 12 (emphasis added).

6. In accordance with the Assignment Agreement, Shared Technology began occupying the Philadelphia Premises on June 18, 2002. However, despite repeated attempts by Shared Technologies to obtain written consent from Philadelphia Plaza with respect to the assignment of the Philadelphia Lease, no written consent was ever granted. On or prior to September 3, 2002, believing that its attempts to obtain the written consent would not be successful, Shared Technologies vacated the Premises. Inadvertently and notwithstanding

Shared Technologies' vacating the Premises, however, Shared Technologies, due to internal accounting errors, continued to pay rent under the Philadelphia Lease through May 31, 2003.<sup>1</sup>

7. On August 4, 2003, Philadelphia Plaza filed the Philadelphia Plaza Motion seeking, among other things, to compel the Debtors to assume or reject the Philadelphia Lease and pay rent under the Philadelphia Lease subsequent to May 31, 2003.

8. On August 6, 2003, the Debtors filed a motion pursuant to section 365(a) of the Bankruptcy Code authorizing the Debtors to reject certain unexpired leases of nonresidential real property (the "Rejection Motion"), including the Philadelphia Lease. Specifically and relevant to this Response, the Rejection Motion provided that (a) Philadelphia Plaza failed to provide written consent to the assignment of the Philadelphia Lease to Shared Technologies, (b) as a result thereof, the assignment of the Philadelphia Lease was ineffective and (c) accordingly, Shared Technologies is not -- and was not -- a party to the Philadelphia Lease. Nevertheless, out of an abundance of caution, the Debtors, by the Rejection Motion, requested that the Court approve, to the extent the Debtors had any interest in the Philadelphia Lease, the rejection thereof effective as of the Commencement Date. The justification for this relief was that the Debtors vacated and surrendered possession of the Premises on or prior to September 3, 2002, i.e., more that eight (8) months prior to the Commencement Date. On October 3, 2003, Philadelphia Plaza filed an objection (the "Philadelphia Plaza Objection") to the Rejection Motion.<sup>2</sup>

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<sup>1</sup> The Debtors reserve their right to pursue any and all claims that they may have against Philadelphia Plaza in connection with the Philadelphia Lease, including, claims to recover the inadvertently paid rent for the benefit of their estates under chapter 5 of the Bankruptcy Code.

<sup>2</sup> The Debtors reserve the right to file a response to the Philadelphia Plaza Objection.

**Philadelphia Plaza's Request to Compel the Debtors to Assume or Reject the Philadelphia Lease is Moot**

9. As stated above, on August 6, 2003, the Debtors filed the Rejection Motion to reject the Philadelphia Lease, effective as of the Commencement Date. Thus, Philadelphia Plaza's request in the Motion to compel the Debtors to assume or reject the Philadelphia Lease is moot. The only issue before the Court, therefore, is whether the Debtors are required to pay rent arising under the Philadelphia Lease. subsequent to May 31, 2003.

**Shared Technologies Does Not Owe Rent Under the Philadelphia Lease**

Shared Technologies is Not a Party to the Philadelphia Lease

10. As noted above, the Philadelphia Lease expressly prohibits its assignment by RealCom to any party unrelated to RealCom without the express written consent of Philadelphia Plaza. Moreover, the Assignment Agreement explicitly conditions the assignment of the Philadelphia Lease on the express written consent of Philadelphia Plaza. Despite repeated attempts by Shared Technologies to obtain written consent, Philadelphia Plaza never delivered a written consent to Shared Technologies.

11. As a result, Shared Technologies is not -- and was not -- a party to the Philadelphia Lease. In that regard, Shared Technologies vacated the Premises within two months of occupying it, but inadvertently continued paying rent under the Philadelphia Lease until May of 2003. Consequently, Shared Technologies has no obligations whatsoever under the Philadelphia Lease.

Rejection of the Philadelphia Lease as of the Commencement Date is Warranted

12. Assuming that the Philadelphia Lease was effectively assigned to Shared Technologies - - which it was not - - the Debtors' rejection of the Philadelphia Lease should be effective as of the Commencement Date. In that regard, it is well established in this district and

others that a bankruptcy court may order the retroactive rejection of an unexpired lease of nonresidential real property under section 365(a) of the Bankruptcy Code. *See Constant L.P. v. Jamesway Corp. (In re Jamesway Corp.)*, 179 B.R. 33, 37 (Bankr. S.D.N.Y. 1995) (“[t]his Court cannot conclude, from the language of § 365(a) that, as a matter of law the bankruptcy Court is absolutely prohibited from selecting a retroactive date from the effective rejection of the Lease.”); *BP Energy Co. v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)* No. 02 Civ. 6419, 2002 WL 31548723 (S.D.N.Y. Nov 15, 2002) (holding that a bankruptcy court may approve a retroactive rejection date under section 365(a) of the Bankruptcy Code); *see also Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995); *In re CCI Wireless, LLC*, 279 B.R. 590 (Bankr. D. Col. 2002); *In re Amber’s Stores, Inc.*, 193 B.R. 819 (Bankr. N.D. Tex. 1996).

13. Retroactive rejection dates are warranted and should be approved by a bankruptcy court when it promotes the purposes of section 365(a) and principles of equity so dictate. *Thinking Machines Corp. v. Mellon Financial Servs. Corp. #1*, 67 F.3d at 1028; *see also In re CCI Wireless, LLC*, 279 B.R. at 595 (approving a retroactive rejection date when principles of equity dictate). In the instant case, the equities weigh clearly in favor of a retroactive rejection date. As stated above, Shared Technologies vacated and surrendered possession of the Premises almost eight (8) months prior to the Commencement Date. As such, the Premises has been vacated and the Debtors have received no benefit therefrom. Accordingly, because they have no interest in and have received no benefit from the Philadelphia Lease, the Debtors submit that the equities favor the effective date of rejection of the Philadelphia Lease to be the Commencement Date.

Philadelphia Plaza is Not Entitled to Attorney's Fees

14. Philadelphia Plaza seeks to compel the Debtors to immediately pay attorney's fees in connection with the Philadelphia Lease under section 503 of the Bankruptcy Code. In the instant case, Philadelphia Plaza is not entitled to attorney's fees.

15. Section 503(b)(1)(A) of the Bankruptcy Code provides in pertinent part that to establish entitlement to any postpetition expenses, a creditor in bankruptcy must demonstrate that such costs are "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). Philadelphia Plaza has failed to meet their burden in demonstrating that the attorney's fees were actual, necessary costs and expenses of preserving the estate. In fact, such attorney's fees clearly not necessary costs in preserving the estates, as Shared Technologies vacated and surrendered possession of the Premises almost eight (8) months prior to the Commencement Date.

16. Moreover, in bankruptcy, attorney's fees in connection with an unexpired lease of nonresidential real property are compensable only if such lease provides for recovery of attorney's fees. *See Urban Retail Props. V. Lowes Cineplex Entm't Corp.*, No. 01 Civ. 8946, 2002 WL 535479 (S.D.N.Y. Apr. 9, 2002) (attorneys fees awarded where lease provided for such recovery). Shared Technologies is not a party to the Philadelphia Lease, and, as such, has no obligations thereunder. Thus, there is no lease by which Philadelphia Plaza may claim reimbursement for attorney's fees incurred. Consequently, Philadelphia Plaza's request for attorneys fees should be denied.

WHEREFORE the Debtors request that the Court deny the Philadelphia Plaza Motion in its entirety and grant the Debtors such other and further relief as is just.

Dated: New York, New York

October 3, 2003

Respectfully submitted,

/s/ Jonathan S. Henes

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