Hearing Date and Time: November 19, 2003 at 10:00 a.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' OBJECTION TO MOTION OF DALEEN SOLUTIONS, INC. FOR RELIEF FROM THE AUTOMATIC STAY UNDER SECTION 362 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 (collectively, the "Debtors"), as their objection to the Motion of Daleen Solutions, Inc. for Relief from the Automatic Stay Under Section 362 of the Bankruptcy Code, dated October 31, 2003 (the "Lift Stay Motion"), respectfully represent:

Preliminary Statement

1. The Debtors are at a critical juncture of their chapter 11 cases. In that regard, the Debtors – with the support of their prepetition lenders and the statutory committee of unsecured creditors appointed in these chapter 11 cases – have made extraordinary progress in negotiating an agreement with a "stalking horse" bidder to sell substantially all of the Debtors' businesses and establishing an auction process.

2. Daleen Solutions, Inc. ("Daleen") is one of the Debtors' key vendors. Specifically, approximately fifty percent (50%) of the Debtors' retail revenue is billed utilizing billing services provided by Daleen. Daleen seeks relief from the automatic stay to provide the Debtors with the Non-Renewal Notice (as defined below), which would enable Daleen to terminate the Billing Agreement (as defined below) as of December 31, 2003. The termination of the services under the Billing Agreement would have a materially adverse impact on the Debtors – substantially impairing their ability to bill and collect fifty percent (50%) of their retail revenue – and derail the Debtors' potential sale process.

3. Daleen should not be permitted to terminate its services. Prior to filing the Lift Stay Motion, Daleen violated the automatic stay by sending the Non-Renewal Notice to the Debtors. It is black letter law that an action taken in violation of the automatic stay is void *ab initio*. Thus, the Non-Renewal Notice, which, to be effective, needed to be provided to the Debtors by October 31, 2003, has not yet been given. As a result, if the Court were to grant the relief requested in the Lift Stay Motion, such relief would be illusory because the Non-Renewal Notice would not be provided to the Debtors until after October 31, 2003. Consequently, Daleen cannot terminate its services.

4. Even if the Court determines that Daleen did not violate the automatic stay, based on the facts, it is abundantly clear that cause does not exist to lift the automatic stay. At the inception of these chapter 11 cases, the Debtors designated Daleen as a critical vendor, which enabled it to be paid 87% of its prepetition claims. Since the Commencement Date, the Debtors are current under the Billing Agreement and Daleen is not at risk of non-payment for services to be provided in the future. Moreover, Daleen's public filings with the Securities and Exchange Commission (the "SEC") provide that the termination of the Billing Agreement may

have a material adverse effect on its business. Finally, as noted above, the termination of the Billing Agreement would have a materially adverse impact on the Debtors' business. As a result, approval of the Lift Stay Motion would cause substantial harm to both Daleen and the Debtors. However, denying the Lift Stay Motion would benefit Daleen by enabling it to continue to be paid for its services and permit the Debtors to proceed with their potential sale process, which is in the best interests of the Debtors' estates.

The Debtors' Agreements with Daleen

5. Allegiance Telecom Company Worldwide ("ATCW"), one of the Debtors in these chapter 11 cases, is a party to (a) that certain Master Agreement (the "Master Agreement") with Daleen (as successor in interest to Ability Solutions, Inc.), effective as of May 1, 2001, and (b) certain Schedules to the Master Agreement.

6. Schedule A to the Master Agreement is that certain Software Site License Agreement (the "License Agreement"). Schedule B-2 to the Master Agreement is that certain BillingCentral Renewal Agreement (the "Billing Agreement").

7. Pursuant to the Master Agreement and applicable Schedules thereto, Daleen (a) has granted ATCW a perpetual non-exclusive license (the "License") to use a copy of Daleen's billing and information management software (the "Software"), see License Agreement, §1.1 and §2.1, and (b) provides the Debtors, among other things, with billing, processing and other related services using the Software and certain of Daleen's billing management products, see Billing Agreement, §5.3.

8. The Master Agreement provides that its term shall be "through the later of (a) December 31, 2003, or (b) the date upon which the License Term and all agreements that are Schedules hereto have been terminated." See Master Agreement, §2.1.

9. The Billing Agreement provides that it "shall remain in effect through December 31, 2003 [and] ... [t]hereafter this Agreement shall automatically renew for successive periods of twelve (12) months each, unless either party gives written notice to the other at least sixty (60) days prior to the end of the then current Term of its election not to renew this Agreement." See Billing Agreement, §1.1.

10. In exchange for the services provided by Daleen, the Debtors pay monthly processing fees to Daleen based on a percentage of monthly revenue billed through the Software and Daleen's billing management products.[1]

11. After the Commencement Date (as defined below) and pursuant to this Court's Order Pursuant to Section 105(a) of the Bankruptcy Code Authorizing Payment of Prepetition Claims of Critical Vendors, dated May 15, 2003, the Debtors made payments to Daleen for the undisputed portion of Daleen's prepetition claims in the amount of approximately $1.21 million, which constitutes approximately 87% of the total amount of Daleen's prepetition claims. In addition, the Debtors - are and fully intend to remain - current with respect to all postpetition obligations under the Master Agreement and Schedules thereto.

The Debtors' Negotiations with Daleen and Notice of Non-Renewal

12. On May 14, 2003 (the "Commencement Date"), each of the Debtors commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

13. Prior to the Commencement Date, the Debtors commenced negotiations with Daleen regarding the early renewal of the Billing Agreement for a term through the end of June 2004. Unfortunately, the parties were not able to reach a resolution regarding such renewal.

[1] Prior to January 1, 2003, the Debtors were obligated to pay certain minimum monthly processing charges. However, as of January 1, 2003, there is no obligation to pay any minimum monthly processing charges.

14. On October 24, 2003, Daleen sent ATCW a letter (the "October 24 Letter"), proposing modifications to the Master Agreement and enclosed that certain amendment to the Master Agreement (the "Master Agreement Amendment") for the Debtors' execution. The Master Agreement Amendment provided, among other things, that the new term of the Billing Agreement shall be through December 31, 2006 and that the Billing Agreement shall be amended to provide that the Debtors are obligated to pay minimum commitment fees for invoice processing, regardless of actual usage, during 2004 and 2005 for the billing services provided by Daleen.

15. In addition, in the October 24 Letter, Daleen stated that if ATCW does not sign the Master Agreement Amendment or the parties do not reach an alternative resolution regarding the existing terms of the Master Agreement by October 30, 2003, Daleen would send a notice of intent not to renew the Billing Agreement.

16. In response to the October 24 Letter and prior to receiving the Non-Renewal Notice (as defined below), on October 30, 2003, the Debtors sent a letter (the "October 30 Letter") informing Daleen of their intent to continue receiving services under the Billing Agreement, which was scheduled for automatic renewal, in accordance with its existing terms. The Debtors also warned Daleen that sending a notice of non-renewal will be in violation of the automatic stay imposed pursuant to section 362 of the Bankruptcy Code.

17. On October 30, 2003, Daleen sent a notice of non-renewal of the Billing Agreement (the "Non-Renewal Notice"). In response to the Non-Renewal Notice, on October 31, 2003, the Debtors sent Daleen another letter, in which the Debtors requested, among other things, that Daleen (a) rescind the Non-Renewal Notice and (b) immediately cease and desist from any future violations of the automatic stay.

18. On October 31, 2003, Daleen filed the Lift Stay Motion seeking relief from the automatic stay to allow Daleen to exercise its right not to renew the Billing Agreement.

19. On November 3, 2003, Daleen sent a letter to the Debtors reiterating the arguments set forth in the Lift Stay Motion.

Daleen's Filings with the SEC

20. On March 28, 2003, Daleen's parent company, Daleen Technologies, Inc. ("DTI") filed its Annual Report for the year ending December 31, 2003 on Form 10K (the "10K") with the SEC, in which it disclosed that Daleen's auditors, KPMG LLP, had issued an Independent Auditors' Report, dated January 30, 2003, covering Daleen's December 31, 2003 consolidated financial statements, that contained a statement that Daleen's recurring losses from operations and accumulated deficit raised substantial doubt about Daleen's ability to continue to operate as a "going concern."

21. On May 21, 2003, DTI filed its Current Report on Form 8K with the SEC (the "May 21 8K"), which is annexed hereto as Exhibit "A," stating that Daleen's "*largest outsourcing service customer*, Allegiance Telecom, Inc. and its affiliates ..., announced that it had filed for relief under Chapter 11 of the U.S. Bankruptcy Code." See May 21 8K, Item 5 (emphasis added). The May 21 8K further provided that Daleen "believe[s] that [Daleen] provides services that are critical to the operations of [the Debtors] and that [Daleen] is a "critical vendor" to [the Debtors]." See id. In addition, in the May 21 8K, Daleen stated, among other things, that (a) Daleen was discussing with the Debtors confirmation of Daleen's "critical vendor" status and Daleen's continuing provision of services to the Debtors and receiving payments for such services and (b) if the Debtors ceased to do business with Daleen and Daleen failed to obtain additional financing or failed to engage in other strategic alternatives, "it may

have a material adverse effect on the Company's ability to continue to operate as a going concern." See id.

22. On October 31, 2003, DTI filed its Current Report on Form 8K with the SEC (the "October 31 8K"), which is annexed hereto as Exhibit "B," disclosing, among other things, that Daleen sent the Non-Renewal Notice to the Debtors and received the October 30 Letter from the Debtors stating the Debtors' position that the Non-Renewal Notice violates the automatic stay. The October 31 8K further discloses that, although Daleen did not believe it was necessary, Daleen filed the Lift Stay Motion and subsequently delivered to the Debtors a second notice of non-renewal of the Billing Agreement.[2] In addition, Daleen stated that there was no assurance that the business relationship between the Debtors and Daleen would continue after December 31, 2003, and, as a result, if the Debtors ceased to do business with Daleen and Daleen failed to obtain additional financing or failed to engage in other strategic alternatives, "it may have a material adverse effect on the Company's ability to continue to operate as a going concern." See October 31 8K, Item 5.

23. On November 12, 2003, DTI filed its Quarterly Report on Form 10Q with the SEC (the "November 12 10Q"), which is annexed hereto as Exhibit "C," reiterating the disclosure made in the 10K regarding the "going concern" opinion issued by Daleen's auditors. The November 12 10Q also stated that if the Debtors, Daleen's "largest customer in 2003," cease

[2] The Debtors do not have a record of receiving such second notice of non-renewal.

doing business with Daleen for any reason, Daleen "may be required to reduce operations" and/or seek additional financing or "consider other strategic alternatives, including a possible merger, sale of assets, or other business combination or restructuring transactions," and that failure to do so may have a material adverse effect on Daleen's ability to continue to operate as a going concern. See November 12 10Q, at 26.

Daleen's Lift Stay Motion

24. In the Lift Stay Motion, Daleen disputes that the Non-Renewal Notice violates the automatic stay "since such notice does not have any impact on the Debtor[s'] property until at least December 31, 2003." See Lift Stay Motion, at ¶10. In that regard, Daleen states that "from a business perspective, it would have been impractical for Daleen to have filed a motion prior to serving [the Non-Renewal Notice] since Daleen was hoping to successfully resolve any differences with the Debtor[s] and did not make its determination not to renew the Billing Agreement until the last moment possible." Id.

25. In the Lift Stay Motion, Daleen also argues that "cause exists to terminate the automatic stay to allow Daleen to exercise its right not to renew the Billing Agreement since the initial term of the Billing Agreement expires on December 31, 2003 and the option not to renew is exercisable by either party, without cause, so long as sixty days' notice is given." See Lift Stay Motion, at ¶16. Daleen further asserts that because "the Billing Agreement is, in essence, terminable at will" cause exists to grant Daleen relief from the automatic stay "to exercise its option not to renew the Billing Agreement." See Lift Stay Motion, at ¶18.

Applicable Law

26. Section 362(a)(3) of the Bankruptcy Code provides, in pertinent part, that:

> (a) ... [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of --

> (3) any act to obtain possession of property of the estate or the property from the estate or to exercise control over property of the estate.

11 U.S.C. § 362(a)(3).

27. Section 362 of the Bankruptcy Code "is exceedingly broad in scope and should apply to almost any type of formal action against the debtor or property of the estate." See In re NextWave Personal Communications Inc, 244 B.R. 253, 271 (Bankr. S.D.N.Y. 2000) (citations omitted).

28. Section 541(a)(1) of the Bankruptcy Code broadly defines property of the estate to include, "[a]ll legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. "Courts have consistently held that contract rights are property of the estate, and that therefore those rights are protected by the automatic stay." In re Enron Corp., 300 B.R. 201, 212 (Bankr. S.D.N.Y. 2003) (citation omitted); see also In re Drexel Burnham Lambert Group, Inc., 138 B.R. 687, 702 (Bankr. S.D.N.Y. 1992) (holding that executory contracts are property of the estate within the meaning of section 541 of the Bankruptcy Code).

29. A non-debtor party cannot enforce its contractual right to terminate an agreement with a debtor without first seeking relief from the automatic stay. See In re Enron Corp., 300 B.R. at 212 (holding that in attempting to enforce an employment agreement by sending a notice of termination of such agreement, the non-debtor party acted to obtain possession of property of the estate, and, thus violated the automatic stay); In re Computer Communications, Inc. v. Codex Corp. (In re Computer Communications, Inc.) 824 F.2d 725, 729 (9th Cir. 1987) ("[e]ven if [defendant] had a valid reason for terminating the Agreement, it still was required to petition the court for relief from the automatic stay under § 362(d)"). "Nothing

in the [Bankruptcy] Code suggests that a party is entitled to engage in 'self-help' in derogation of the automatic stay." In re Enron Corp., 300 B.R. at 213 (citations omitted).

30. The Second Circuit and the courts in this district have held repeatedly that actions taken in violation of the automatic stay are void and without effect. See, e.g., 48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th Street Steakhouse, Inc.), 835 F.2d at 427, 430 (2d Cir. 1987); In re Enron Corp., 300 B.R. at 212 (citations omitted); see also Federal Ins. Co. v. Sheldon, 150 B.R. 314 (Bankr. S.D.N.Y. 1993); In re O.P.M. Leasing Services, Inc., 40 B.R. 380, 402 (Bankr. S.D.N.Y. 1984) ("[a]ctions taken in violation of the stay will be void even where there was no actual notice of the existence of the stay")(citations omitted). This Court has held on several occasions that actions taken in violation of the automatic stay are void and without vitality if they occur after the automatic stay takes effect. See In re Berkelhammer, 279 B.R. 660, 666 (Bankr. S.D.N.Y. 2002) (holding that New York State Department's unilateral act of calling a default under a reinstatement agreement that debtor-physician had negotiated prepetition was void because the agency did not obtain prior relief from the automatic stay); see also In re Cenargo Int'l, PLC, 294 B.R. 571, 597 (Bankr. S.D.N.Y. 2003) ("actions in violation of the automatic stay are void *ab initio*").

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

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay ...
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if --
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d).

32. A party seeking relief from the automatic stay has the initial burden of proof to establish cause under section 362(d)(1) of the Bankruptcy Code. If the movant fails to make an initial showing of cause, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection. See In re Sonnax Indus., Inc., 907 F.2d 1280, 1285 (2d. Cir. 1990).

33. Although neither the Bankruptcy Code nor the legislative history defines "cause" sufficient to sustain a section 362(d)(1) motion, it is viewed as a broad and flexible concept. See, e.g. In re Sonnax Indus., Inc., 907 F.2d at 1285; Sumitomo Trust & Banking Co. v. Holly's Inc. (In re Holly's Inc.), 140 B.R. 643, 687 (Bankr. W.D. Mich. 1992). Accordingly, the determination of whether sufficient cause exists to grant stay relief must be addressed on a case-by-case basis. See In re Holly's Inc., 140 B.R. at 687. However, the final decision as to whether "cause" exists to lift the automatic stay is within the discretion of the bankruptcy judge. See, In re Sonnax Indus., Inc., 907 F.2d at 1286 (2d Cir. 1990); Holtkamp v. Littlefield (In re Holtkamp), 669 F.2d 505, 507 (7th Cir. 1982).

34. Additionally, in Sonnax, the United States Court of Appeals for the Second Circuit adopted the "Curtis factors"[3] in determining whether cause exists to grant relief from the automatic stay. Notably, Sonnax does not require consideration of each of the Curtis Factors in determining whether cause exists to lift the automatic stay, but only those factors relevant to the particular facts may be considered. See, e.g., Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 142 (2d Cir. 1999).

35. Although the Curtis factors were originally enunciated to guide a court in determining if cause existed to grant leave from the automatic stay to pursue litigation in a non-bankruptcy forum, one of the most important Curtis factors - the impact of the stay on the parties and the balance of harms - has been employed by bankruptcy courts in determining whether "cause" exists in non-litigation situations under section 362(d)(1) of the Bankruptcy Code. See, e.g., In re M.J. & K. Co., Inc., 161 B.R. 586, 590 (Bankr. S.D.N.Y. 1993) (the court stated that when deciding whether to modify the automatic stay, "the court must consider the particular circumstances of the case and ascertain what is just to the claimants, the debtor, and the estate"); In re Cardinal Indus., Inc., 116 B.R. 964, 983 (Bankr. S.D. Ohio 1990) (although not citing to Curtis or Sonnax, the court held that "[t]he determination of whether "cause" exists under § 362(d)(1) is essentially a balancing test. In determining whether or not cause exists, the bankruptcy court must balance the inherent hardships on all parties and base its decision on the degree of hardship and the overall goals of the Bankruptcy Code").

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[3] The "Curtis factors" originally stated by the bankruptcy court in In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984) are as follows: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the

Argument

Daleen Violated the Automatic Stay by Sending the Non-Renewal Notice

36. Pursuant to section 362 of the Bankruptcy Code, the commencement of these chapter 11 cases invoked the application of the automatic stay, which precludes any party from taking any act to exercise control over the property of the Debtors' estates. As a result, a party desirous of exercising control over the property of the Debtors' estates must first request relief from the Court to lift the automatic stay to exercise such control.

37. All of the Debtors' unexpired executory contracts constitute property of their estates. On October 30, 2003, the date on which Daleen sent the Debtors the Non-Renewal Notice, the Billing Agreement was - as it is currently - an unexpired executory contract. As such, the Billing Agreement was property of the Debtors' estates.

38. Consequently, Daleen is prohibited by the automatic stay from sending the Debtors the Non-Renewal Notice. Daleen failed to comply with the Bankruptcy Code. Instead of seeking and obtaining appropriate relief from the Court prior to sending the Non-Renewal Notice, Daleen engaged in "self-help" in an attempt to terminate the Billing Agreement.

39. As stated in the May 21 8K, Daleen was aware of the commencement of these chapter 11 cases. In addition, since the Commencement Date, Daleen has been represented by counsel in connection with these chapter 11 cases. As a result, Daleen should have been well aware of the imposition of the automatic stay by these chapter 11 cases.

40. In the Lift Stay Motion, Daleen disputes that service of the Non-Renewal Notice violates the automatic stay because it "does not have any impact on the Debtors' property until at least December 31, 2003, which is more than sixty days from the date of [the Lift Stay

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interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties

Motion]". See Lift Stay Motion, at ¶10. This argument is without merit. As set forth above, *any act to exercise control* over property of the Debtors' estates violates the automatic stay regardless of the timing of the actual effect of such act on the estates' property.

41. Accordingly, by seeking to terminate the Billing Agreement, without first obtaining appropriate relief from this Court, Daleen willfully violated the automatic stay.

The Non-Renewal Notice is Void and Without Effect

42. As stated above, it is well established that actions taken in violation of the automatic stay are void and without effect. Daleen was well aware of the commencement of the Debtors' chapter 11 cases. Moreover, in the October 30 Letter, the Debtors informed Daleen about the existence of the automatic stay and warned that the sending of the Non-Renewal Notice would constitute a violation thereof.

43. As set forth in detail above, Daleen willfully violated the automatic stay by sending the Non-Renewal Notice to the Debtors. Accordingly, the sending of the Non-Renewal Notice is without effect and void *ab initio*.

Even If the Court Lifts the Automatic Stay, Daleen Cannot Exercise Its Right to Terminate the Billing Agreement

44. If the Court determines that the Non-Renewal Notice was sent in violation of the automatic stay, and, therefore, is void *ab initio*, Daleen will not be able to terminate the Billing Agreement even if the Court grants the Lift Stay Motion.

45. As stated above, on December 31, 2003, the Billing Agreement will be automatically renewed "unless either party gives written notice to the other *at least sixty (60) days prior to* [December 31, 2003]." As a result, unless Daleen obtains relief from the Court to send the Non-Renewal Notice ***and*** sends such Non-Renewal Notice on or before October 31,

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are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

2003, the Billing Agreement will renew automatically. As this Court is aware, the hearing on the Lift Stay Motion is scheduled for November 19, 2003. In that regard, the earliest Daleen could obtain relief from the automatic stay to send the Non-Renewal Notice is November 19, 2003. Thus, Daleen cannot send a timely Non-Renewal Notice to the Debtors and the Billing Agreement will renew automatically in accordance with its terms.

Daleen Has Failed to Make an Initial Showing of Cause to Grant Relief from the Automatic Stay

46. As stated above, Daleen asserts that cause exists to terminate the Billing Agreement because it is terminable at will. Daleen cites In re M.J. & K. Co., Inc., 161 B.R. 586, 593 (Bankr. S.D.N.Y. 1993), for the proposition that because the Billing Agreement is "terminable at will, cause exists to grant Daleen relief from the automatic stay under section 362(d)(1) to exercise its option not to renew." See Motion, at ¶18. Daleen's reliance on In re M.J. & K is baseless and wholly disingenuous.

47. In In re M.J. & K., the Court held that Brooklyn Law School ("BLS") was entitled to relief from the automatic stay to serve notice on M.J. & K Co. Inc. ("M.J. & K"), a chapter 11 debtor, to quit pursuant to Article 7 of the New York Real Property Actions and Proceedings Law, with respect to certain space located at BLS. In analyzing the agreement between BLS and M.J. & K, the Court determined that the agreement was a license in real property and, that under the Statute of Frauds in New York, the agreement had lapsed almost 10 years before M.J. & K filed for bankruptcy. Nonetheless, M.J. & K continued to operate a bookstore on BLS's premises after the expiration of the license. Thus, the Court concluded that, although any right created in M.J. & K's estate by the agreement was protected by the automatic stay, it cannot be construed as vesting M.J. & K with the right to operate the bookstore beyond the expiration of the term of the license. Id. at 593 ("[t]hus whatever rights a debtor has in

property at the commencement of the case continue in bankruptcy-no more no less"). Therefore, the issue before the Court was whether BLS was able to terminate the license agreement. In that regard, the Court decided that under New York law a license that has lapsed is terminable at will by either party and that the only limitation is whether a party acts in good faith in terminating such license. Id. at 594.

48. Notably, at no point in In re M.J.& K did the Court determine that cause existed to grant a non-debtor party to an executory contract relief from the automatic stay because the contract may be terminable at will. It is clear that in In re M.J. & K the Court granted BLS relief from the automatic stay because the debtor's property in the agreement terminated before the commencement of M.J. & K's chapter 11 case, not because it was terminable at will.

49. Numerous courts have held that the existence of a terminable-at-will provision in a contract is not a sufficient reason to grant relief from the automatic stay. See, e.g., In re National Hydro-Vac Industrial Services, L.L.C., 262 B.R. 781, 786-7 (Bankr. E.D. Ark. 2001) (discrediting bank's argument that it has cause for relief of stay to terminate credit card agreement with debtor as a result of "termination-at-will" clause); In re Elder-Beerman Stores Corp., 195 B.R. 1012, 1018-19 (Bankr. S.D. Ohio 1996) (holding terminable-at-will provision was not sufficient reason to grant relief from stay to party wishing to terminate the contract).

50. Accordingly, Daleen has failed to demonstrate that cause exists to obtain the requested relief from the automatic stay. Therefore, the Court should deny the Lift Stay Motion.

The Balance of Harms Justifies
Keeping the Automatic Stay in Place

51. In addition to the foregoing, the application of the "balance of harms" test supports denial of the Lift Stay Motion.

52. First, as set forth above, the Debtors have treated Daleen as a "critical vendor" in these chapter 11 cases. In that regard, the Debtors paid 87% of Daleen's prepetition claims. Second, since the Commencement Date, the Debtors have been current on their obligations under the Billing Agreement and intend to continue to pay Daleen for all services rendered postpetition. Accordingly, Daleen is not at any risk of non-payment for services to be provided to the Debtors in the future and, as a result, its interest under the Billing Agreement is adequately protected.

53. Third, it is without dispute that Daleen's relationship with the Debtors under the Billing Agreement is critical to Daleen's business operations. As set forth in detail above, on more than one occasion, Daleen has filed public statements with the SEC stating that termination of Daleen's relationship with the Debtors may have a material adverse effect on Daleen's ability to continue to operate as a going concern. By Daleen's own definition, the Debtors are Daleen's "largest outsourcing service customer" and its "largest customer in 2003." See May 21 8K, Item 5 and November 12 10Q. As a result, by obtaining the relief requested in the Lift Stay Motion, Daleen's business operations maybe materially and adversely impacted.

54. Fourth and most important, the Billing Agreement is vital to the Debtors' businesses and its termination would have a materially adverse impact on the Debtors' businesses and restructuring efforts. As noted above, approximately 50% of Debtors' retail revenue is billed utilizing the Software and Daleen's services. Therefore, the termination of the Billing Agreement would impair the Debtors' ability to ***bill and collect*** such revenue. As Daleen

admits, Daleen "provides services that are critical to the operations of [the Debtors]." See May 21 8K, Item 5. Accordingly, if Daleen were to terminate the Billing Agreement, the Debtors' business operations would be severely disrupted causing financial losses to the Debtors' estates. Moreover, this would occur at a time when the Debtors are at the final stage of selecting a "stalking horse bidder" to sell substantially all of the Debtors' businesses. As a result, the termination of the Billing Agreement would place the Debtors' sale and restructuring process at a substantial risk.

55. Fifth, the denial of the Lift Stay Motion benefits both Daleen and the Debtors. Specifically, by maintaining the *status quo* with respect to the Billing Agreement, (a) Daleen will continue to be paid for the services it provides to the Debtors, (b) the Debtors will continue to be able to collect their retail revenues and operate their businesses without disruption and (c) the Debtors will be able to concentrate their efforts on the sale and restructuring of their businesses. On the other hand, as noted above, lifting the automatic stay would impose significant burdens and risks on both the Debtors and Daleen and could have a material adverse effect on their businesses. Importantly, the lifting of the automatic stay would jeopardize the Debtors' ability to successfully emerge from chapter 11.

56. In that regard, based on the foregoing, it is clear that the balance of the harms weighs heavily in favor of denying the Lift Stay Motion. The approval of the Lift Stay Motion would harm both the Debtors and Daleen. The denial of the Lift Stay Motion, on the other hand, would benefit Daleen, the Debtors and the Debtors' estates. In that regard, the Debtors submit that the automatic stay should not be lifted. Accordingly, the Lift Stay Motion should be denied with prejudice.

57. Because there are no novel issues of law presented herein, the Debtors respectfully request that the Court waive the requirement that the Debtors file a memorandum of law in support of this Objection pursuant to rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York.

WHEREFORE, the Debtors respectfully request that the Court (a) hold that Daleen has violated the automatic stay by sending the Non-Renewal Notice and that the Non-Renewal Notice is void *ab initio*; (b) deny the relief sought in the Lift Stay Motion, with prejudice, and (c) grant the Debtors such other and further relief as is just.

Dated: New York, New York
November 14, 2003

Respectfully submitted,

/s/ Jonathan S. Henes

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