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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

**HEARING DATE: 1/15/04**  
**AT: 10:00 A.M.**

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In re: : Chapter 11  
: Case No. 03-13057 (RDD)  
ALLEGIANCE TELECOM, INC., ET AL., : (Jointly Administered)  
: Debtors. :  
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**REPLY TO VERIZON'S OBJECTION TO DEBTORS' MOTION FOR  
AN ORDER AUTHORIZING THE ABANDONMENT OF PERSONAL  
PROPERTY LOCATED AT CERTAIN COLLOCATION SITES**

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"), by their co-bankruptcy counsel, Togut, Segal & Segal LLP, submit this reply to the objection (the "Objection") of Verizon Communications Inc. and its operating telephone company subsidiaries (collectively, "Verizon") to the Debtors' motion dated December 24, 2003 (the "Motion") for an order authorizing the Debtors to abandon Personal Property located at certain Collocation Sites,<sup>1</sup> and respectfully state that:

<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to such terms in the Motion.

## PRELIMINARY STATEMENT

1. In the Objection, Verizon argues that the Debtors should not be authorized to abandon the Personal Property unless (a) the Debtors comply with any obligations they may have under certain non-bankruptcy laws and regulations; (b) the Debtors agree to reimburse Verizon for the cost of removing such property; and (c) the Debtors obtain a release from any third parties that may have an interest in the Personal Property.

2. Verizon's Objection should be overruled. The Bankruptcy Code provides a debtor or trustee with an expansive right to abandon property that is burdensome to the estate or of inconsequential value. Courts may limit or condition this right only when the proposed abandonment will contravene a law or regulation that was enacted to protect the public health or safety from imminent and identifiable harm. Verizon has not challenged the Debtors' determination that the Personal Property is burdensome and of inconsequential value to the Debtors' estates, and none of the laws, rules or regulations that Verizon alleges will be violated were enacted to protect the public health or safety from imminent and identifiable harm. To the extent that Verizon incurs any costs in removing the Personal Property from its Collocation Sites, Verizon can file a claim against the Debtors without prejudice to the Debtors' right to object to same at a later date. Moreover, the Debtors do not know of any third party that may have an interest in the Personal Property and the Debtors' prepetition senior secured lenders have agreed to release any interest they may have in the Personal Property. Accordingly, the Debtors respectfully request that the Court overrule the Objection and authorize the abandonment of the Personal Property.

## REPLY

**A. The Debtors Have Satisfied The Requirements Of Section 554(a) And The Abandonment Would Not Contravene Any Law Designed to Protect Public Health Or Safety From Imminent and Identifiable Harm**

3. Section 554(a) reads:

After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

11 U.S.C. § 554(a).

4. Section 554(a) authorizes a debtor to abandon property of the estate upon a showing that the property is burdensome to the estate or of inconsequential value. See In re Unidigital, Inc., 262 B.R. 283, 286 (Bankr. D. Del. 2001). The relief afforded a debtor or trustee pursuant to section 554(a) is broadly construed. The only exception to abandonment under section 554(a) of the Bankruptcy Code was articulated by the Supreme Court of the United States in Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 507 (1986). In Midlantic, the debtor processed waste oil at two facilities that had violated a specific prohibition in the debtor's operating permit by accepting more than 400,000 gallons of oil contaminated with PCBs. After filing for bankruptcy, the debtor accepted and stored over 70,000 gallons of toxic, PCB-contaminated oil. The trustee sought to abandon the contaminated properties pursuant to section 554(a) of the Bankruptcy Code. The Supreme Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." Midlantic, 474 U.S. at 507. The Court added that "[t]his exception to the abandonment power ... is a *narrow one*," id. at fn.9 (emphasis added), and that the laws and regulations to which it applies must be "reasonably calculated to protect the public

health or safety from imminent and identifiable harm." Id. In Midlantic, this "identified hazard" was a processed waste oil facility that had accepted oil contaminated with PCBs and leaking containers.

5. Unlike Midlantic, Verizon has not, nor can it, identify any specific "identifiable hazards" that might endanger "public health and safety" if the Debtors were authorized to abandon the Personal Property located at the Collocation Sites. Verizon alleges that the removal of the property could violate the Telecommunications Act of 1996, various applicable tariffs and state trespass laws.

6. The Debtors deny that any of these laws are being violated. Even assuming, arguendo, that the abandonment could possibly contravene these laws, none of these laws, rules or regulations were designed to protect the public health or safety from identifiable or imminent harm. The Telecom Act and the applicable tariffs were enacted to produce consumer benefits by increasing competition across the communications industry. See Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996) (codified at 47 U.S.C. § 151 et seq.) ("An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."). Verizon has not specified any instance where a violation of these laws or regulations could possibly cause immediate harm to public health or safety. The only potential harm articulated by Verizon would be the costs it may incur in removing the Personal Property.<sup>2</sup> There is no imminent, or even the potential for, harm to the public at large.

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<sup>2</sup> To the extent Verizon incurs costs in removing the Personal Property, it can assert a claim against the Debtors.

7. A debtor's right to abandon property was addressed by the Court in In re Unidigital, Inc., 262 B.R. 283 (Bankr. D. Del. 2001). In Unidigital, the debtors sought to abandon a twenty-foot long computer printer located on premises leased by the debtors. The landlord objected to the abandonment and, in the alternative, requested an administrative expense claim for the cost of removal. In addition to dismantling the unit, removal of the printer required the landlord to hire a licensed plumber, licensed electrician, and a crane so that it could be removed through a window. The landlord also claimed that the removal required the disposal of chemicals used in the printing process. The Court overruled the objection and authorized the abandonment, stating that since the Midlantic decision, "the majority of courts have read the exception to abandonment narrowly by disallowing abandonment only where there is an imminent and identifiable harm to the public health or safety." Id. at 286 (citations omitted). The alleged violation of the New York environmental conservation law was insufficient to deny the proposed abandonment. Similarly here, the alleged violation of the Telecom Act and the applicable tariffs does not create an imminent harm to public health or safety and, accordingly, the Objection should be overruled.

8. Verizon also asserts that the abandonment would violate New York trespass law. The elements of a trespass under New York law require a finding of intentional, substantial and unreasonable interference with another's right to use real property. Copart Indus. v. Consol. Edison Co., 41 N.Y.2d 564, 570 (N.Y. 1977); Jennings v. Fisher, 684 N.Y.S.2d 680 (N.Y. App. Div. 1999). It is axiomatic that trespass laws are not designed to protect the public at large, rather, they are enacted to protect the individual property owner. Accordingly, the Midlantic exception would not apply. In addition, abandonment of the Personal Property, which can occur only after entry of an

order of this Court, is not intentional and would not cause an unreasonable interference with Verizon's use of its property. See Onderdonk v. New York, 648 N.Y.S.2d 214, 218 (N.Y. Ct. of Claims 1996) ("It has generally been held that entry pursuant to a facially valid court order is not actionable in trespass."). Finally, Verizon's argument that violation of New York trespass law should serve to prevent the abandonment should also be rejected under The Supremacy Clause. Under The Supremacy Clause of Article VI of the United States Constitution, when enforcement of a state law or regulation would undermine or stand as an obstacle to the accomplishment of the full purposes and objectives of Congress in enacting a federal statute, the conflict must be resolved in favor of the federal law. Borden, Inc. v. Wells Fargo Bus. Credit (In re Smith-Douglas, Inc.), 856 F.2d 12, 15 (4th Cir. 1988) (citing Hines v. Davidowitz, 312 U.S. 52, 66- 67 (1941)).

**B. Abandonment Should Not Be Conditioned On The Payment Of Verizon's Costs, If Any, Incurred In Removing the Equipment**

9. Verizon's request to condition the proposed abandonment in return for immediate payment of costs incurred or an administrative expense claim for such costs should be denied. First, Verizon has not incurred any costs to remove the Personal Property and there is no evidence to indicate that it will incur any costs. To the extent Verizon incurs any costs in removing the personal property from its premises, Verizon can file a proof of claim and assert such claim against the Debtors' estates, without prejudice to the Debtors' right to object at a later date. The Debtors have revised the proposed order (the "Proposed Order") granting the Motion so that it will expressly provide Verizon with the right to file a claim.

10. It should be noted that the Court in Unidigital denied the landlord's request for an administrative expense claim for the costs incurred in removing the computer printer. Unidigital, 262 B.R. at 289-90. The Court noted that the landlord was unable to introduce any evidence suggesting that the removal of the printer or cleaning the property could confer a substantial benefit on the debtor's estate. Id. at 288; see also In re Allen Care Ctrs, Inc., 163 B.R. 180 (Bankr. D. Or. 1994) (holding that state's costs incurred in closing nursing home were not entitled to administrative expense priority). The Court in Unidigital stated:

While it may seem inequitable to "saddle" [the landlord] with the cost of cleaning up the Debtors' mess, absent a benefit to the estate, no priority claim is allowable. Like the services rendered in Allen Care, the cost of cleaning the landlord's premises does not benefit the estate here. Rather, it only benefits [the landlord].

Id. at 289.

11. Similarly here, the costs incurred by Verizon, if any, in removing the personal property would not confer any benefit on the Debtors' estates. As in Unidigital, those costs (if any) would only inure to the benefit of Verizon. Accordingly, to the extent Verizon seeks to condition abandonment on the Debtors' agreement to pay the costs of removal of the Personal Property, its request should be denied. To the extent Verizon incurs costs in removing the Personal Property and seeks an administrative expense claim for such costs, the determination of the validity of such claim can be made at the time Verizon makes such request.

**C. The Debtors Have No Knowledge Of Any Third Party Interest In the Personal Property And The Prepetition Lenders Have Agreed to Release Any Interest They May Have In The Personal Property**

12. Verizon also objects to the abandonment on the ground that certain third parties may have an interest in the Personal Property. Except for their prepetition senior secured lenders, the Debtors do not have knowledge of any third party who may have an interest in the Personal Property. The Debtors' prepetition senior secured lenders have agreed to release any interest they may have in the Personal Property as is provided in the Proposed Order. Accordingly, Verizon's Objection should be overruled.

WHEREFORE, the Debtors respectfully request that the Court overrule Verizon's Objection, enter an order approving the abandonment and grant such other and further relief as is just and proper.

Dated: New York, New York  
January 14, 2004

ALLEGIANCE TELECOM, INC., et al.,  
Debtors and Debtors-in-Possession,  
By their Co-Bankruptcy Attorneys,  
TOGUT, SEGAL & SEGAL LLP,  
By:

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