UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PROOF OF CLAIM

s4105

In re
Allegiance Telecom ~~of Pennsylvania~~, Inc

Case Number
03-~~13093~~ 13057

YOUR CLAIM IS SCHEDULED AS

UNDETERMINED UNSECURED CONTINGENT DISPUTED UNLIQUIDATED

FILED
SOUTHERN DISTRICT OF NEW YORK
ALLEGIANCE TELECOM, INC
03-13057 (RRD)

1304

NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case A 'request' for payment of an administrative expense may be filed pursuant to 11 U S C §

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim Attach copy of statement giving

☐ Check box if you have never received any notices from the bankruptcy court in this case

☑ Check box if this address differs from the address on the envelope sent to you by the court

The amounts and nature of the claim reflected above constitute your claim as scheduled by the Debtor If you agree with the amounts set forth herein and have no other claim against the Debtor you do not need to file this proof of claim EXCEPT as stated below

If the amounts shown above are listed as Contingent Unliquidated or Disputed, a proof of claim must be filed
If you have already properly filed a proof of claim with the Bankruptcy Court, you do not need to file again

Name of Creditor and Address

03805888077301
ONE STOP REALTOUR PLACE
C/O DAVID A SCHOLL
~~200 EAST STATE STREET SUITE 309 MEDIA~~
~~PENNSYLVANIA PA 19063~~
6 ST ALBANS AVE, NEWTOWN SQUARE, PA. 19073

Creditor Telephone Number (610) 353-7543

CREDITOR TAX I D #	ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR	Check here if this claim ☐ replaces or ☐ amends a previously filed claim dated _____
23-2943881	1701093O8	

1 BASIS FOR CLAIM

☐ Goods sold ☐ Personal injury/wrongful death ☐ Retiree benefits as defined in 11 U S C § 1114(a
☐ Services performed ☐ Taxes ☐ Wages salaries and compensation (Fill out below)
☐ Money loaned ☑ Other (describe briefly below)

WRONGFUL TERMINATION OF PHONE SERVICE
DESTROYED REAL ESTATE BUSINESS

Your social security number _____
Unpaid compensation for services performed from _____ (date) to _____ (date)

2 DATE DEBT WAS INCURRED 2/18/00 TO 11/3/00

3 IF COURT JUDGMENT, DATE OBTAINED LIABILITY FOUND 10/17/01

4 TOTAL AMOUNT OF CLAIM AT TIME CASE FILED

$ 1,000,000 (unsecured)	$ _____ (secured)	$ _____ (unsecured priority)	$ 1,000,000 (total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim Attach itemized statement of all interest or additional charges

5 SECURED CLAIM

☐ Check this box if your claim is secured by collateral (including a right of setoff)

Brief description of collateral

☐ Real Estate
☐ Motor Vehicle
☐ Other _____

Value of collateral $ _____

Amount of arrearage and other charges at time case filed included in secured claim above if any $_____

6 UNSECURED PRIORITY CLAIM

RECD NOV 11 2003

☐ Check this box if you have an unsecured priority claim

Specify the priority of the claim

☐ Wages salaries or commissions (up to $4 650*) earned within 90 days before filing of the bankruptcy petition or cessation of the Debtor's business whichever is earlier 11 U S C § 507(a)(3)
☐ Contributions to an employee benefit plan 11 U S C § 507(a)(4)
☐ Up to $2 100* of deposits toward purchase lease or rental of property or services for personal family or household use 11 U S C § 507(a)(6)
☐ Al mony maintenance or support owed to a spouse former spouse or child 11 U S C § 507(a)(7)
☐ Taxes or penalties owed to governmental units 11 U S C § 507(a)(8)
☐ Other Specify applicable paragraph of 11 U S C § 507(a) _____

Amounts are subject to adjustment on 4/1/01 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment

7 CREDITS The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim

8 SUPPORTING DOCUMENTS *Attach copies of supporting document* such as promissory notes purchase orders invoices itemized statements of running accounts contracts court judgments mortgages security agreements and evidence of perfection of lien DO NOT SEND ORIGINAL DOCUMENTS If the documents are not available explain If the documents are voluminous attach a summary

9 DATE-STAMPED COPY To receive an acknowledgment of your claim, please enclose a self-addressed st additional copy of this proof of claim

Allegiance Claim
01362

The original of this completed proof of claim form must be sent by mail or hand delivered (FAXES NOT ACCEPTED) so that it is received on or before 5 00 p m November 26 2003 Prevailing Eastern Time

BY MAIL TO	United States Bankruptcy Court Southern District of New York Allegiance Claims Docketing Center Bowling Green Station P O Box 95 New York NY 10274-0095	**BY HAND OR OVERNIGHT DELIVERY TO**	United States Bankruptcy Court Southern District of New York Allegiance Claims Docketing Center One Bowling Green Room 534 New York NY 10004-1408

RECEIVED
NOV - 5 2003
CLAIMS PROCESSING CENTER

DATE SIGNED	SIGN and print the name and title if any of the creditor or other person authorized to file this claim (attach copy of power of attorney if any)
10-27-03	DAVID A SCHOLL, ATTORNEY FOR CLT

Penalty for presenting fraudulent claim is a fine of up to $500 000 or imprisonment for up to 5 years or both 18 U S C §§ 152 AND 3571

See Other Side For Instructions

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE

ONE STOP REALTOUR PLACE, INC — Chapter 7
Debtor — BANKR No 00-32344

ONE STOP REALTOUR PLACE, INC ,
Plaintiff

v.

ALLEGIANCE TELECOM, INC and
ALLEGIANCE TELECOM OF PA. — ADV. NO 00-0825
Defendants

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A FINDINGS OF FACT

1 The Plaintiff in this proceeding ("the Proceeding"), filed on November 1, 2000, is ONE STOP REALTOUR PLACE, INC , ("the Debtor"), which filed the underlying voluntary corporate Chapter 11 bankruptcy case filed in this court pro se on October 2, 2000 ("the Debtor"), which was converted to a Chapter 7 case on February 21, 2001 (In re One Stop Realtour Place, Inc , 268 B R 430, 431, 434 (Bankr E D Pa 2001) ("Opinion I"), Dockets of main case ("DMC") and Proceeding)

2 The Debtor filed a motion for a preliminary injunction against the original defendant in the Proceeding, ALLEGIANCE TELECOM, INC ("ATC") on the date of the filing of the Complaint, whereupon ATC agreed to restore telephone service to the Debtor, effective November 3, 2001 (Opinion I, 268 B R at 434, DP) The other defendant, ALLEGIANCE TELECOM OF PENNSYLVANIA, INC ("ATP") (collectively, ATC and ATP are referred to as

"the Defendants"), was added by agreement at the commencement of trial of the liability phase of the Proceeding on May 17, 2001 (Opinion I, 268 B R at 432n 1)

3 On May 17, 2001, this court also decided that it would hear evidence on only the liability phase of the Proceeding (id at n 2), and it proceeded to determine that the Defendants violated 11 U S C section 366 (Id at 435-40) The trial on the damage phase of the Proceeding was ultimately tried on September 18 and 19, 2002 (Transcript of Trial, September 18, 2002 ("T1") and September 19, 2002 ("T2")

4 The Debtor was formed by its principal, Alfreda Bradford ("Bradford"), in late 1997 (T1 at 50) At the time of its organization, the Debtor was supported by basketball star Lionel Simmons and was conceived as the initial unit of a franchise of businesses offering real estate sales, mortgages, and insurance services under the same umbrella (T1 at 50-51)

5 The Debtor opened its business in a small Center City office, but by 1998 had moved to a three-office suite in suburban Elkins Park, PA , and, by Spring, 2000, had expanded into a suite containing about 10 offices and large conference rooms wherein it employed ten persons (T1 at 53)

6 In early 2000 the Debtor invested approximately $265,000 into a venture with the late Sam Redding, a consultant to the Debtor, which was unsuccessful and resulted in the loss of all of the sums invested (T1 at 54-55, 147-53) While the investment venture was not directly related to the Debtor's business, it did result in losses to customers of the business whose funds were invested in this venture and which Bradford was able to reimburse only in part (T1 at 55, 197-99, T2 at 7-10, 13-15)

7 Despite the above investment loss, the Debtor came "highly recommended" to Rev

Vince Enoch as a resource to locate a building for him in connection with the establishment of a health-care program pursuant to which he needed to acquire real estate which would have resulted in his organization's receiving start-up funds for this venture (T1 at 26-27, 30-32) To this end, Rev Enoch signed a Real Estate Broker Employment Contract of September 12, 2000, under which the Debtor was commissioned to locate a building in the price range of $10 million within one year, although Rev Enoch explained that the deadline for filing applications under the program at issue terminated each year on December 15, and he was therefore desirous of obtaining the building by December 15, 2000 (T1 at 31-32, Plaintiff's Exhibit ("PX")-2) If successful in finding an appropriate building, the Debtor was to receive a 10 percent commission, or at least $1 million (T1 at 29-30, 34, PX-2)

8 On or about September 18, 2000, the Defendants suspended the Debtor's telephone service for non-payment of approximately $4250 even though the Debtor had paid it over $2000 on September 6, 2000, and had notified them of its bankruptcy filing almost immediately thereafter on October 2, 2000 (Opinion I, 268 B R at 433-34 & n 8)

9 As the Defendants' own telecommunications expert, Gordon Hutchins, was forced to ultimately concede, it was critical for the Debtor to obtain service from the Defendants because an alternative supplier, such as Verizon, would have insisted on a security deposit as a condition for providing services and the Defendants, although they wrongfully refused to recognize their obligation to do so, were obliged to initially provide service without making a demand for any such deposit (T2 at 244-46) Ultimately, Hutchins was forced to concede that all of the steps which the Debtor took to restore service—filing bankruptcy, demanding restoration, consultation of counsel when the Defendants refused to restore service, and filing this litigation

when they still did not do so—were reasonable and all that was available to it under the circumstances (T2 at 231, 239-40, 243-45)

10 In the period from September 18, 2000, and from October 2, 2000, through November 3, 2000, the Debtor, per Bradford, attempted to work on the Rev Enoch contract and on other buyer-agency contracts, listing contracts, sales contracts, and mortgage refinancing contracts which the Debtor had pending (T1 at 64-66, 155-64, 72-74) However, due to the loss of phone service for this long and critical period was fatal to the Debtor's business and it was never able to successfully resume (T1 at 45-46, 78-81)

11 Patricia Steiert, a realtor for over 20 years, testified that telephone service to a realtor's office was "vital" and that such a business "can't function" without it, due to the need to remain in constant contact with the parties to a real estate transaction (T1 at 11-13)

12 As a direct result of the Defendants' actions in wrongfully terminating and refusing to restore the Debtor's telephone service, the business from which Bradford had earned $60,000 to $65,000 annually was totally destroyed T1 at 80-81)

13 George Miller, an eminently qualified certified public accountant, insolvency and reorganization advisor, and fraud examiner, based on the fact that the Debtor's business never successfully resumed, measured the Debtor's damages at its value of $247,000 as of September 20, 2000, and $241,000 as of October 2, 2000 (T1 at 210-11, T2 at 88-90) In making his calculations, Mr Miller did not separately add anything to this figure based on the Debtor's inability to perform its contract with Rev Enoch, which could have resulted in commissions of at least $1 million to the Debtor

14 While Mr Miller conceded that the records of the Debtor at his disposal were

not perfect, he also stated that he frequently is required to provide expert testimony regarding the financial status of businesses where the records were less complete and consistent than those of the Debtor and that, with his ability to question and consult the Debtor's principal, he concluded that his results, ascertained by applying the income approach to valuation and review of the records of the Debtor throughout the entire period of its existence, were reasonably reliable (T1 at 213, 215-17, T2 at 81-84)

15 In attempted rebuttal to Mr Miller's testimony, the Defendants called two accountants, each with considerably less experience in this jurisdiction than Mr Miller (see T at 212-13, 269-70), and neither of which made any inquiries of Bradford, and in fact neither of which was even present for most of her testimony, Ann Bryan and Candace Peterson (T2 at 216, 273)

16 Ms Bryan conceded that she made no attempt to value the Debtor, but instead, almost exclusively through the use of records from one of the Debtor's bank accounts (T 2 at 195-202, 216-17), attempted to come up with a "damage calculation" (T at 213-14) In so doing, Bryan failed to consider that Bradford testified that half of the Debtor's business was cash and much of its income was deposited into her personal accounts (T1 at 89-91) Not surprisingly, Bryan's chosen data resulted in her conclusion that she was "unable to compute any lost damages [sic]" (T2 at 208) and that the Debtor suffered no damages whatsoever as a result of the Defendants' illegal actions (T2 at 208-11)

17 Ms Peterson purported to present her opinion as that of her corporation, Financial Market Analysts, LLC (T2 at 92-94, 269-71), without the presence of one Cynthia Jones, who had worked on all facets of her report with her (T2 at 270) While she conceded that

the income approach used by Mr Miller was generally more appropriate than the asset approach in the valuation of a closely-held service business such as the Debtor (T2 at 253-54), Ms Peterson nevertheless utilized the asset approach in valuing the Debtor and, not surprisingly, since such businesses have few sellable assets no matter how prosperous they are, concluded that "the liabilities were overwhelming the assets" (T2 at 260), and that the Debtor had no value (T2 at 259-60)

18 The report and testimony of Mr Miller, the only one of the experts to value the Debtor under the admittedly proper approach and utilizing data which he testified was sufficiently reliable, must be accepted by the court as the most accurate valuation of the Debtor, i e , not less than $241,000 at the time of its destruction

B CONCLUSIONS OF LAW

1 The damages caused by the Defendants to the Debtor, as this court found in Opinion I, 268 B R at 438-40, were willful, and wanton as well As such, the limitations on liability set forth section 2 1 5 12 of the applicable tariffs have no application here See Valhal Corp v Sullivan Associates, Inc , 44 F 3d 195, 201 (3d Cir 1993), citing Behrend v Bell Telephone Co , 242 Pa Super 47, 75, 363 A 2d 1152, 1166 (1976), vacated on other grounds, 473 Pa 20, 374 A 2d 536 (1977), and Bellotti v Duquesne Light Co , 44 D & C 3d 425, 428-30 (Allegheny Co C P 1987)

2 Since the fact that at least some damages were caused to the Debtor by the Defendants' actions is certain, and only the amount of those damages are claimed to be uncertain, to deny relief to the Debtor "would be a perversion of fundamental principles of justice " Anderson v Mt Clemens Pottery Co , 328 U S 680, 688 (1946), and Story Parchment Co v Paterson Parchment Co , 282 U S 555, 563 (1931) "Compensatory damages, are mandatory, once liability is found " Smith v Wade, 461 U S 30, 52 (1983) The Debtor is therefore entitled to significant monetary damages, even were it not able, as it is, to quantify those damages

3 The burden was upon the Debtor to "furnish only a reasonable quantity of information from which the fact-finder may estimate the amount of damages [and] require that the wrongdoer bear the risk of uncertainty which his own wrong has created " Delahanty v First Pennsylvania Bank, N A , 318 Pa Super 90, 118, 464 A 2d 1243, 1257 (1983)

4 Since the Debtor was foreseeably destroyed entirely as a functioning, income-earning entity as a result of the Defendants' wrongful termination and refusal to restore the Debtor's telephone service, the Defendants are liable to the Debtor for compensatory damages in an amount equal to its value of not less than $241,000, plus the loss of at least $1 million which the Debtor reasonably expected to receive through the Enoch contract

5 The Debtor has furnished the only evidence which attempts to value the Debtor by the use of what both "value experts" agrees was the generally-acceptable method—valuing the income of the Debtor from the pen and mouth of the most skillful and widely-used expert in this district

6 "A CPA firm cannot testify, only an individual CPA The opposing party has the right to cross-examine the expert under oath Obviously, a CPA firm cannot be cross-examined,

only a member of that firm can be cross-examined " P Frank & M Wagner, AICPA CONSULTING SERVICES PRACTICE AID 93-4, para 70/135 65, at 70/100-26 (1993) (front and pertinent text pages attached as Appendix "A") Therefore, it was improper for Ms Peterson to present her report and testimony as that of a corporation, Financial Market Analysts, LLC, and, as a result, her report and testimony should not be considered or considered only in the light that it was improperly rendered

7 Thus, the Debtor has clearly met its burden of proving that the damages due to it for its total destruction were not less than its value of $241,000, not even considering the commissions in the amount of at least $1 million which would have been recoverable if the Debtor had been able to perform under the Enoch contract

8 The Defendants were bound to bear the risks for their wrongful conduct and the damages due from them should be measured accordingly This measure should not be a compromise between the reliable calculation of $241,000 by Mr Miller, which did not even consider the additional prospect of the recovery under the Enoch contract, and the predictable but unjustified value of the Debtor's damages at zero Rather, the measurement should recognize that the Defendants' experts have provided no basis for denying the Debtor what it is due, i e , at least its full reasonable value as measured by Mr Miller

9 Mr Miller's calculations related only to the compensatory damages due to the Debtor as a result of the Defendants' wrongful actions, without considering the Enoch contract separately at all They did not purport to measure the punitive damages due to the Debtor

10 Since the conduct of the Defendants put the Debtor into a position that it was necessary that it incur expenses, including attorneys' fees, to remedy the legal wrong to it, the

Debtor is entitled to an award of attorneys' fees as an element of its compensatory damages in this case See In re Pennsylvania Footwear Corp , 204 B R 165, 180-81 (Bankr E D Pa 1997) The Debtor should be permitted to file a motion requesting such fees, as well as its costs

11 Punitive damages such as were prayed for in the Complaint are appropriate when, as here, a wrongdoer which "creates actual damages also imports insult or outrage, and [the wrongful act] is committed with a view to oppress or is done in contempt of the plaintiffs' rights " Delahanty, supra, 318 Pa Super at 129, 464 A 2d at 1263 See also Smith v Wade, supra, 461 U S at 38-51, Keenan v City of Philadelphia, 983 F 2d 459, 469-70 (3d Cir 1993), and G J D v Johnson, 552 Pa 169, 172, 713 A 2d 1127, 1129 (1998)

12 The Defendants here insultingly and outrageously ignored and oppressed the Debtor and acted in contempt of its clear rights under controlling Third Circuit precedent presented to by not only the Debtor but also its counsel until it was brought before this court in the Proceeding There can be little doubt that the Defendants should receive no measure of vindication for these deeds and be subject to a sufficient award of punitive damages to be completely dissuaded from any similar conduct in the future

13 As to the amount of such damages, the Debtor notes that the Delahanty plaintiffs were allowed an award of punitive damages which were eleven times the amount of compensatory damages A like proportion would not be inappropriate here

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PRACTICE AID 93-4

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Providing Litigation Services

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Michael S Wagner, CPA JD

Management Consulting Services Division

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

APPENDIX "A"

calculating damages cost-effectively Financial modeling languages, once available only through expensive time-sharing services, are now also available for microcomputers

.59 Spreadsheet software is extremely useful in damages-claim modeling The ability to change assumptions and recalculate the model quickly and inexpensively is a tremendous advantage over manually created models The sensitivity of the damages to changes in assumptions can be easily tested, along with the reasonableness of the assumptions, given the end result (Of course, the opposing party may rightfully query the CPA about each run or analysis prepared for the study)

60 A spreadsheet program s logic must be understood in order to understand the model it generates The logic consists of the mathematical relationships among the data that are put into the cells of the spreadsheet Therefore, the defendant needs to obtain the program's logic description during discovery

Expert Opinion

61 To testify at trial an expert witness must be *qualified* as an expert in the particular field that will be the subject of testimony Qualification consists of establishing the witness s expertise in a particular field To qualify a witness, the attorney who has called the expert asks a series of questions about such matters as academic degrees, academic honors professional licenses, positions held, publications, speeches, membership and positions in professional societies, previous experience, and other cases in which the witness provided testimony

.62 CPAs are commonly used as experts in proving damages [3] A CPA may be an expert in a particular industry based on the types of clients served The CPA may also be an expert in the application of certain accounting, financial, statistical, or econometric techniques relevant to issues in a case

.63 The opposing side may challenge the expertise of a particular witness In such a case, the opposing attorney may ask to examine the witness under *voir dire* at the outset of direct testimony to determine expertise or lack of it After completing the questioning, the opposing attorney may move to have the witness designated as not qualified to express an expert opinion If the opposing attorney succeeds, the judge will not permit the potential expert to testify However, if the CPA presenting damages testimony has practiced for several years and has done professional work, it would be extremely unusual for such testimony to be excluded based on the CPA's lack of expertise

64 Under federal rules of evidence, an expert can testify about the *ultimate issues* of a case, which are issues on which the trier of fact must make a decision Guilt or innocence, the cause of damages, and the amount of damages are all ultimate issues Although it is the responsibility

[3] For citations of legal cases that have so held, see Robert L Dunn *Recovery of Damages for Lost Profits* 3d ed (Tiburon Calif Lawpress Corp , 1987) p 343

of the trier of fact to make the decisions on these issues an expert witness can give an opinion on them This means a credible expert witness may have a major impact on the outcome of the litigation

65 Expert opinion is the opinion of the individual testifying A CPA firm cannot testify, only an individual CPA The opposing party has the right to cross-examine the expert under oath Obviously, a CPA firm cannot be cross-examined, only a member of the firm can be cross-examined

Use of Staff

.66 A CPA who testifies from a report needs to supervise and control the preparation of the report Preparation includes accumulating and analyzing the data, and drafting the report This supervision is important because unless the work is performed under the CPA's direction and control, there may be a challenge to the admissibility of the report If the CPA does not oversee the work, someone else may have to testify about the methods and data sources used in order for the evidence to survive a hearsay objection

Presentation of Results

67 **Oral Testimony by Expert Witnesses.** In most litigation services engagements, experts present results to the trier of fact as testimony covering findings, conclusions and opinions Most commonly, testimony is oral and consists of answers to questions asked by the attorney who retained the CPA These questions and answers are known as direct examination, which is slow and deliberate and normally takes many pages of a transcript to complete

68 After the conclusion of direct examination, an attorney representing the other party examines the CPA by asking questions that must be answered This is known as cross-examination The next phase, redirect, follows cross-examination The attorney who offered the CPA as an expert has the right to ask more questions limited to issues raised during cross examination Finally, in the phase known as re-cross, the opposing party s attorney has the right to ask questions limited to issues raised during redirect The expert is under oath during all these phases

69 The expert witness may introduce exhibits to support or illustrate the opinion during testimony The expert witness also gives opinions about facts or hypotheses Neither the oral testimony nor the exhibits need to be documented in the form of a formal written report

.70 **Written Reports by Expert Witnesses.** Testimony especially that of experts, may be written at times as a result of stipulation by the parties or a judge's request for trial efficiency Under these circumstances, the CPA may render testimony as a written report, which can vary from only a written statement of the expert's opinion to an extensive report with detailed assumptions and supporting schedules showing all computations For example the sample lost-profits damages study in appendix 70/B could be an exhibit supporting the expert s opinion, or it could be submitted without testimony as the expert's conclusions

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE

ONE STOP REALTOUR PLACE, INC
Debtor

Chapter 7
BANKR No 00-32344

ONE STOP REALTOUR PLACE, INC ,
Plaintiff

v

ALLEGIANCE TELECOM, INC and
ALLEGIANCE TELECOM OF PA ,
Defendants

ADV NO 00-0825

PLAINTIFF'S REPLY TO DEFENDANTS' PROPOSED FINDINGS OF FACT(DAMAGES PHASE) AND POST-TRIAL MEMEORANDUM OF LAW

Since the instant proceeding ("the Proceeding") has been litigated in two phases over a period of over two years and was the subject of two trials which were 16 months apart, the Plaintiff would have assumed that all of the defenses to the claims set forth in the Proceeding would have been clearly identified before the time that briefing on the second phase is submitted and that there would be few surprises, at least as to what the issues are However, the Plaintiff nevertheless finds itself confronted with post-trial submissions of the Defendants which discuss at length two issues which were never pleaded nor mentioned in the Joint Pre-trial Statement (Damages Phase) ("the Statement") submitted by the parties on May 24, 2002, and which were neither mentioned nor tried in either phase of the Proceeding The Plaintiff vigorously objects to the Defendants' attempt to inject these new issues into the Proceeding at this stage

The first new issue is judicial estoppel. This issue arises because the Defendants apparently discovered for the first time, two years after same was filed on September 12, 2000,

that Alfreda Bradford valued her stock in the Debtor at $1 00 in her individual bankruptcy Schedules, which the Defendants apparently now contend should estop the Debtor from asserting that its value is at least $247,000, per the valuation established by George Miller in connection with his Expert Report filed in January, 2002 This issue is never mentioned in the Statement Nor was it pleaded Nor was it mentioned prior to or even during the trial There is little question that judicial estoppel is an affirmative defense, which must be pleaded as such Federal Rule of Bankruptcy Procedure (FRBP") 7008(a), incorporating Federal Rule of Civil Procedure ("FRCP") 8(c) It is true that the Defendant's "Answer and Grounds of Defense" ("the Answer"), never amended after its filing on November 15, 2000, recites, among its affirmative defenses, the general statement that the Debtor's "relief requested is barred by the equitable doctrine of laches, estoppel and unclean hands " However, this pleading, to the extent that it invokes "estoppel" as a ground of defense apart from "laches" and "unclean hands" at all, obviously refers to "equitable estoppel," which is a legal theory quite distinct from "judicial estoppel " See Ryan Operations, G P v Santium-Midwest Lumber Co , 81 F 3d 355, 360-61 (3d Cir 1996) (pointing out that "equitable estoppel" focuses on inconsistent statements which the party charged makes to the party invoking equitable estoppel (and noting that the Defendants were not a parties to Ms Bradford's individual bankruptcy case), while "judicial estoppel" focuses on the integrity of the judicial system and is not limited to statements made to the party invoking same) In any event, the omission of any mention of "estoppel" from the "Defendant's Legal Issues" in the Statement is more critical, because the purpose of the Statement is to alert opposing parties of the issues which will be addressed at trial The Plaintiff had no reason to expect that this issue would be raised, and no evidence was prepared to rebut any claim based on this issue Had the Plaintiff

known that "judicial estoppel" arising from Ms Bradford's individual bankruptcy case was at issue, it could have called her prior counsel or the case Trustee in that case to explain the circumstances of the preparation of Ms Bradford's Schedules and the (in)significance to the administration of that case if a higher value had been cited

The issue has no merit in any event First, the Defendants are trying to estop the Debtor because of a declaration made by Ms Bradford in her separate individual bankruptcy case The Debtor knows of no way that it can be "estopped" by the act of another party in another case Second, there is no evidence that Ms Bradford played "fast and loose" with the court in making this declaration on her Schedules, which is a fundamental prequisite for invocation of "judicial estoppel " Ryan, supra, 81 F 3d at 361 Ms Bradford testified that she did not understand the meaning of the question in her Schedules regarding the value of her interest in the Debtor (Transcript of Testimony, September 18, 2002 ("T1"), at 138-39) It is not clear that this question asks the value of the Debtor, and hence that it is not at all clear that the value of Ms Bradford's interest in the Debtor called for the same answer as a question regarding the value of the Debtor Further, there is no evidence that Ms Bradford had any means of valuing the Debtor at the time of this statement She certainly had no way of knowing that George Miller would value the Debtor at $247,000 16 months later The Enoch contract was signed the very day of September 12, 2000, and may have not come about until after this question was answered In sum, this issue has no substantive merit on this record, even though the Debtor had no notice that "judicial estoppel" was at issue such that it could have prepared a defense thereon

The second new issue is an argument that the terms of the Agreement between the Debtor and the Defendants effected a waiver of the claims made here The Answer never

mentions "waiver" among its affirmative defenses, even though it is, like judicial estoppel, required to be so pleaded pursuant to FRBP 7008(a) and FRCP 8(c) Again, as in the case of the issue of judicial estoppel, the Statement is silent on this issue Hence, again, the Debtor had no way of knowing that it was obliged to have prepared evidence on this issue at trial In fact, nothing came up at trial which suggested that waiver arising from the Agreement was an issue Had there been, testimony regarding the circumstances of the execution of the Agreement could have been elicited This court should therefore not consider either of these defenses

What is also surprising to the Debtor is the absence of any mention of the expert testimony submitted by the Defendants in the 59 pages of their post-trial submissions There is also little, if any, critical analysis of the testimony and opinions of George Miller The Debtor submits that an inference may be drawn from these omissions that the Defendants now recognize that the Miller Report and testimony far outweighs any contrary evidence presented by their so-called expert accountants at trial Also, as the Debtor pointed out in its much briefer but substantively more comprehensive initial submission, the testimony of Mr Hutchins supported the conclusion that the Debtor took all reasonable steps to restore its telephone service, only to be thwarted by actions of the Defendants which Mr Hutchins implicitly condemned

While it is perhaps not surprising is that the Defendants submit a barrage of personal attacks at Ms Bradford, most of which are not worthy of an answer, it is somewhat surprising to note their attempt to disparage Reverend Enoch and their repeated emphasis of what they contend is supportive to their position in the testimony of Ms Steiert Taking up the last point first, the Defendants state that Ms, Steiert "conceded" and "concluded" that loss of telephone services would normally not affect a realtor's ability to close existing contracts, allegedly based on her

testimony at T1 11-13, 19 In fact, at T1 11-13, Ms Steiert stated that a telephone is "vital" to a realtor, and that "We can't function" without it She emphasized that "constant communication with our buyers and sellers" was necessary because the process of a home sale takes 60 to 90 days Nothing on those pages supports the "factual finding" proposed by the Defendants Nothing at T1 19 supports this finding either, that page includes cross-examination in which Ms Steiert stated that she would try to keep up contacts with customers if her telephone service were temporarily disrupted and that new customers generally called her office These comments had did not in any sense qualify or diminish her earlier testimony that the loss of telephone service was critical to a realtor The defendants are thus left with emphasizing statements that they wished had been made by Ms Steiert, but were in fact not made by her

Reverend Ralph Enoch twice took time from his busy international schedule to appear in support of the Debtor, despite his lack of any interest or particular close connection with the case, and candidly explained his program and dealings with the Debtor Nevertheless, the Defendants believed it necessary to contend, contrary to all of his testimony (T1 at 26, 35-37), that Rev Enoch's program "appeared to originate in Lagos, Nigeria," based on Exhibit D-55 As Ms Bradford explained (T2 at 166-67), Exhibit 55 had nothing to do with Rev Enoch or his program, but was merely included in her Rev Enoch file, although it related to an attempt by a party unrelated to Rev Enoch who was seeking funds for his program The Defendants appeared to question whether the Rev Enoch's program was legitimate, whether the Debtor had a realistic expectation of receiving compensation on this contract, and whether the loss of telephone service caused the Debtor to be unable to perform this contract at a critical time The testimony of Rev Enoch that his program was legitimate and that the time-period ending December 15, 2000, was

critical to his needs for that year was not contradicted by any evidence The documents produced at trial indicated that Ms Bradford did all that she could to perform the services at issue without telephone service, but it is clear that loss of her office phone impeded communications with Rev Enoch at a critical time

The Defendants contend that the Debtor's failed investment with the late Samuel Redding caused the Debtor's destruction, not its interruption and refusal to timely restore the Debtor's telephone service However, the losses from the investment through Mr Redding were a one-time event in the past, unrelated to the Debtor's day-to-day business operations, from which the Debtor may well have emerged had it retained its telephone services The Debtor concedes that these financial losses weakened it and made it more vulnerable to destruction than it would have been otherwise However, the Defendants are forced to take the Debtor in the weakened state that they found it They should therefore not escape liability for their destruction of the Debtor by their wrongful actions on the ground that these prior investment losses weakened the Debtor In this regard, the Debtor notes that Mr Miller's evidence of its valuation took into account the Debtor's losses from the failed investment The value of the Debtor and the damages would obviously have been greater had the Debtor been a perfectly healthy operation in September, 2000

In addition to devoting considerable attention to issues not pleaded or presented for trial in the Statement, the Defendants also address two other more familiar issues in their Memorandum (1) that 11 U S C section 366 does not support any claim for damages, and (2) the Defendants' damages are limited by Section 2 1 5 12 of the applicable tariff Regarding the first point, as this court noted in its first Opinion, 268 B R 430, 441, the binding decision in In re

Whittaker, 882 F 2d 791, 796-97 (3d Cir 1989), settled the issue of the availability of damages for a 366 violation by affirming a modest compensatory damage award in favor of the named plaintiff in that case The Defendants' arguments relating to the applicability of the tariff limitations continue to ignore the principle that the tariff does not limit the Defendants' liability in a circumstance where, as here, the conduct of the utility amounted to a wanton and willful disregard of fundamental bankruptcy law, as opposed to a mistake or simple negligence This distinction appears in the case cited by the Defendants at trial and here, Southwestern Bell Telephone Co v Rucker, 537 S W 2d 326, 330-31 (Tex Civ App 1976), as well as the more pertinent Pennsylvania cases previously cited by the Debtor in Proposed Conclusion of Law 1 Contrary to the Defendants' arguments, this court's findings that the Defendants flaunted the teaching of Whittaker in not restoring the Debtor's phone service immediately upon its notification of the Debtor's bankruptcy filing, persisting after pre-litigation contacts by the Debtor's counsel, 268 B R at 438-40, was a finding of a willful and wanton refusal to adhere to the dictates of the Bankruptcy Code

For all of the reasons stated in the Plaintiff's Proposed Findings of Fact and Conclusions of Law, the Debtor continues to request that this court will award it compensatory damages in an amount not less than $247,000 and punitive damages in addition as this court deems in its discretion to be appropriate

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Attorney for Plaintiff

David A. Scholl
Counselors at law

Sent by Certified Mail

October 27, 2003

United States Bankruptcy Court
Re Allegiance Telecom, Inc , et al
P O Box 95, Bowling Green Station
New York, NY 10274

Re Allegiance Telecom, Inc , Bankr No 03-13057
Allegiance Telecom of Pennsylvania, Inc , Bankr No 03-13093

Dear Sirs and/or Mesdames

Enclosed for filing are copies of the Proof of Claim of One Stop Realtour Place, Inc in both of the above bankruptcy cases, as both Debtors were co-Defendants in the Adversary Proceeding in the Bankruptcy Case of my client, which was stayed by the above filings Attached are copiues of the Plaintiff's Proposed Findings of Fact and Conclusions of Law and Reply to the Defendants' Proposed Findings of Fact and Memorandum of Law filed by me on behalf of the claimant, which I believe articulates the nature of the claim Please let me know if you have any questions regarding these submissions Thank you

Sincerely,

DAVID A SCHOLL

Cc Mr George Miller, Suite 950, 1628 J F Kennedy Blvd ,Philadelphia, PA 19103
Ms Alfreda Bradford, P O Box 461, Glenside, PA 19038
(Ccs without enclosures)

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