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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

_____	X	
In re	:	
	:	Chapter 11 Case No.
Allegiance Telecom, Inc., <u>et al.</u> ,	:	03-13057 (RDD)
	:	
Debtors.	:	Jointly Administered
_____	X	

**MOTION OF THE DEBTORS FOR
ENTRY OF AN ORDER, PURSUANT TO
SECTION 107(b) OF THE BANKRUPTCY CODE AND
RULE 9018 OF THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE, AUTHORIZING THE DEBTORS TO FILE A REDACTED VERSION
OF THE SETTLEMENT AGREEMENT IN CONNECTION WITH THE DEBTORS’
MOTION FOR AN ORDER PURSUANT TO (A) RULE
9019 OF THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE, APPROVING THE CONFIDENTIAL SETTLEMENT
AGREEMENT AND MUTUAL RELEASE, DATED FEBRUARY 27,
2004, AMONG LEVEL 3 COMMUNICATIONS, LLC, THE DEBTORS
AND XO COMMUNICATIONS, INC.; (B) SECTION 363 OF
THE BANKRUPTCY CODE AUTHORIZING THE TRANSFER OF
CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND
ENCUMBRANCES, AND (C) SECTION 365 OF THE BANKRUPTCY
CODE, APPROVING AND AUTHORIZING THE ASSUMPTION AND
ASSIGNMENT OF AN EXECUTORY CONTRACT**

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, “Allegiance” or the “Debtors”), respectfully represent:

Introduction

1. On May 14, 2003 (the “Commencement Date”), each of the Debtors commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors are authorized to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

2. No trustee or examiner has been appointed in these chapter 11 cases. On May 28, 2003, pursuant to sections 1102 of the Bankruptcy Code, the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed a statutory committee of unsecured creditors (the “Creditors Committee”) in these chapter 11 cases.

Jurisdiction

3. This Court has subject matter jurisdiction to consider and determine this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

An Overview of Allegiance’s Business

4. Allegiance is a facilities-based national local exchange carrier that provides integrated telecommunications products and services to small and medium-sized business customers, large businesses (*i.e.*, national customers with multiple locations), governmental entities, wholesale customers and other institutional users. Allegiance offers its customers a variety of services, including:

- local and long distance voice services, including basic telephone services and advanced calling features;

- broadband and other Internet and data services, including high-speed Internet access, wide area network interconnection, domain name registration, web hosting, email and collocation services;
- integrated local long distance/Internet access offerings, which provide customers with integrated voice and Internet access over a single broadband line;
- wholesale services to other regional and national service providers, including equipment collocation, managed modem ports and Internet protocol traffic aggregation; and
- customer premise equipment sales and maintenance services.

5. As of the Commencement Date, the Debtors served more than 100,000 business customers in major markets throughout the United States. As of December 31, 2003, the Debtors employed approximately 2,893 people, of which approximately 66 employees are covered by collective bargaining agreements.

6. As of December 31, 2003, the Debtors had approximately \$284.2 million of unrestricted cash on hand. As of December 31, 2003, the Debtors' consolidated books and records reflected assets totaling approximately \$1.136 billion and liabilities totaling approximately \$1.449 billion. For the 12 months ending December 31, 2003, the Debtors, on a consolidated basis, reported revenues of approximately \$776.9 and net losses of approximately \$360.0 million.

7. On February 20, 2004, this Court entered an Order (I) Approving The Sale Free And Clear Of All Liens, Claims And Encumbrances To The Successful Bidder, (II) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases, And (III) Granting Related Relief (the "XO Sale Order"), which, among other things, approved the sale to XO Communications, Inc. or its designee ("XO" or the "Buyer"), pursuant to and in accordance with a certain asset purchase agreement (the "XO APA") dated February 18, 2004, by and among certain of the Debtors and Buyer, of substantially all of the assets of

Allegiance and ATCW and all of the stock of the direct and indirect reorganized subsidiaries of ATCW, excluding the stock of Shared Technologies Allegiance, Inc., one of the Debtors¹.

The Redaction of Certain Confidential Information in the Settlement Agreement

8. Allegiance Telecom Company Worldwide (“ATCW”), one of the Debtors in these chapter 11 cases, and Level 3 Communications LLC (“Level 3”) are currently parties to an Integrated Network Solution Purchase Agreement, which was entered into on or about July 24, 2000 (as amended, the “INSPA”).² The INSPA was originally executed by ATCW and Level 3’s predecessor-in-interest, Genuity Solutions, Inc. (“Genuity”). In 2003, in connection with a sale of substantially all of its assets, Genuity assigned to Level 3, and Level 3 assumed from Genuity, the INSPA.

9. Pursuant to the INSPA, Allegiance provides an integrated network solution to the Level 3 dial-up modem service business. By way of example, if an Internet subscriber wants to connect with an Internet service provider such as America Online (“AOL”), the subscriber will dial a local telephone number and the call will connect to a bank of modems owned by a local exchange carrier, such as Allegiance. The call is then transferred by an operator of a data network, such as Level 3, to the Internet service provider’s network. Accordingly, for Level 3 to service its Internet service provider customers, it relies on Allegiance to provide local exchange access to Level 3’s customer subscribers in accordance with the INSPA. In addition, in

¹ ATCW’s managed modem business, and the INSPA, as defined below, are excluded from the sale to XO.

² Capitalized terms used in this section, but not otherwise defined in this section shall have the meanings set forth in the INSPA. The INSPA contains confidential, proprietary and commercially sensitive information. In that regard, the INSPA contains a comprehensive confidentiality provision prohibiting Allegiance and Level 3 from disclosing the INSPA or its contents to the public. On February 10, 2004, this Court entered an Order Pursuant to Section 107(b) Of The Bankruptcy Code And Rule 9018 Of the Federal Rules of Bankruptcy Procedure (A) Authorizing Level 3 Communications, LLC To File Certain Exhibits To the Motion for Recoupment And Relief From the Automatic Stay Under Seal, and (B) Scheduling An In Camera Hearing On The Motion (as subsequently modified and partially vacated, the “INSPA Seal Order”. See Docket No. 919). The INSPA Seal Order authorized Level 3 to file a redacted form of the INSPA in connection with the Credit Motion and to file Exhibits B and F to the Credit Motion under Seal. The INSPA Seal Motion was modified and partially vacated

providing local exchange services to Level under the INSPA, Allegiance subcontracts a portion of such services from KMC Telecom XI, LLC (including, without limitation, subsidiaries and affiliates thereof, "KMC"), pursuant to the Primary Rate Interface Services Agreement, dated as of February 11, 2002 (as amended, the "KMC Agreement"), between Allegiance and KMC.

10. Based on the nature of the services provided by Allegiance, the INSPA contains a variety of performance standards and payment obligations. In connection therewith, a number of disputes have arisen between Allegiance and Level 3 concerning the performance of their respective obligations under the INSPA. On February 4, 2004, Level 3 filed a motion (the "Credit Motion"), in part under seal, which claims that Level 3 is entitled to recoup \$25 million in credits against certain payments it would otherwise owe to Allegiance due to alleged breaches of the INSPA related to performance warranties. On February 8, 2004, Level 3 commenced an adversary proceeding against Allegiance (the "Termination Complaint"), which seeks a declaratory judgment that Allegiance is in continuing material breach of the INSPA, and, as a result, Level 3 should be entitled to terminate the INSPA. Allegiance disputes the allegations contained in the Credit Motion and the Termination Complaint.

11. The issues related to the Credit Motion and the Termination Complaint are highly technical and complex and would require testimony of experts on, among other things, the performance of transfers of calls from one network to another, "call blocking" performance and other performance issues. As a result, Allegiance, together with its attorneys, have commenced the process of developing a litigation strategy, which would include significant witness preparation and extensive depositions of Level 3's management team and employees, to address the claims of Level 3. At the same time, Allegiance, in consultation with the Creditors

by a stipulation entered into by Allegiance, Level 3 and KMC Telecom XI LLC, which was approved by this Court on February 24, 2004 (see Docket No. 1004).

Committee, has been in negotiations to attempt to reach an amicable resolution to its dispute with Level 3.

Confidential Settlement Agreement and Mutual Release

12. As noted directly above, the Debtors and Level 3, in consultation with the Creditors Committee, have been engaged in settlement discussions relating to the disputes under the INSPA. Based on these negotiations, the Debtors and Level 3 have agreed to amicably resolve, compromise and settle any and all claims or demands with respect to the INSPA, provide for the structured termination of the INSPA, and provide for the orderly migration of services delivered under the INSPA to the Level 3 network. Accordingly, subject to this Court's approval, ATCW, Level 3 and XO Communications³ have entered into that certain Confidential Settlement Agreement and Mutual Release dated as of February 27, 2004 (the "Settlement Agreement"). Due to the confidential nature of certain terms and conditions set forth in the Settlement Agreement, the Debtors have annexed hereto a redacted version of the Settlement Agreement.

13. Notably and relevant to this Motion, the Settlement Agreement contains certain confidential, proprietary, and commercially sensitive information regarding the rates of the services provided by the Debtors to Level 3, the performance standards required of ATCW under the INSPA, and certain other obligations of each of the parties, as well as other confidential commercial information.

³ In order to consummate certain of the transactions under the Settlement Agreement (as defined herein), Allegiance and Level 3 require the cooperation of XO. In that regard, XO, after reviewing the terms of the Settlement Agreement and engaging in discussions with Allegiance, agrees to cooperate and is a signatory to the Settlement Agreement.

14. This Court previously took notice of the commercial sensitivities attached to the INSPA when it entered the INSPA Seal Order on February 10, 2004, which authorized Level 3 to file a redacted form of the INSPA in connection with the Credit Motion.

15. The Debtors are now prepared to file a Motion Of The Debtors For An Order, Pursuant To (A) Rule 9019 Of The Federal Rules Of Bankruptcy Procedure, Approving The Confidential Settlement Agreement And Mutual Release, Dated February 27, 2004, Among Level 3 Communications, LLC, The Debtors And XO Communications, Inc.; (B) Section 363 Of The Bankruptcy Code Authorizing The Transfer Of Certain Assets Free And Clear Of Liens, Claims And Encumbrances, And (C) Section 365 Of The Bankruptcy Code, Approving And Authorizing The Assumption And Assignment Of An Executory Contract (the “Settlement Motion”), which must necessarily include as an exhibit the Settlement Agreement. Because of the proprietary, confidential and commercially sensitive nature of certain of the information set forth in the Settlement Agreement, the Debtors are seeking authority to file a redacted version of the Settlement Agreement.

Relief Requested

16. By this Motion, the Debtors request entry of an order, pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, for authorization to file a redacted version of the Settlement Agreement in order to protect the proprietary, confidential and commercially sensitive information contained therein. In that regard, the Debtors respectfully request that the Court (a) grant them leave to file a redacted version of the Settlement Agreement, (b) order that the redacted information in the Settlement Agreement remain confidential and (c) order that the unredacted version of the Settlement Agreement be served on and made available only to the Court, the U.S. Trustee, attorneys for the Creditors Committee

and attorneys for the Debtors' prepetition lenders; but provided further that the Settlement Agreement may be provided to certain persons, at the discretion of the Debtors, who are subject to confidentiality obligation to the Debtors; and provided further that any such person receiving an unredacted version of the Settlement Agreement pursuant shall also be bound by this Order to maintain the confidentiality of the Settlement Agreement.

Basis For Relief

17. Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the power to issue orders that will protect entities from potential harm:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may -

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information

11 U.S.C. § 107(b).

18. Bankruptcy Rule 9018 defines the procedure by which a party may move for relief under section 107(b) of the Bankruptcy Code:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information

Fed. R. Bankr. P. 9018.

19. Based upon these provisions, courts have limited access to filed documents where parties have demonstrated good cause. See, e.g., In re Epic Assoc. V, 54 B.R. 445, 450 (Bankr. E.D. Va. 1985); In re Nunn, 49 B.R. 963, 964-65 (Bankr. E.D. Va. 1985). "In limited circumstances, courts must deny access to judicial documents - generally where open inspection may be used as a vehicle for improper purpose." Video Software Dealers Assoc. v.

Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (citing Nixon v. Warner Comm'n, Inc., 435 U.S. 589, 597 (1978)). Once it is established that the information sought to be protected fits in any of the categories in section 107(b) of the Bankruptcy Code, “the court is required to protect a requesting interested party and has no discretion to deny the application.” Id. Commercial information need not rise to the level of confidentiality of a trade secret to be protected under section 107(b) of the Bankruptcy Code. Id. at 28.

Cause Exists to File a Redacted Version of the Settlement Agreement

20. The Debtors submit that good cause exists for the Court to grant them leave to file a redacted version of the Settlement Agreement. As noted above, the Settlement Agreement contains highly sensitive and confidential information about, among other things, the rates charged by the Debtors to Level 3 for certain services under the INSPA, together with the commercial terms relating to the provision of such services. As a result, the Settlement Agreement specifically states that the terms set forth therein are confidential and must not be disclosed to third parties. Based on extensive discussions between the Debtors and Level 3, and in an effort to provide the Debtors’ parties in interest with sufficient information to make a reasoned determination with respect to the settlement, the Debtors and Level 3 have agreed to, subject to approval of this Motion, file a redacted version of the Settlement Agreement (as opposed to seeking to file the Settlement Agreement under seal). Accordingly, the Debtors submit that the filing of a redacted version of the Settlement Agreement is appropriate under the circumstances.

Waiver of Memorandum of Law

21. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtors respectfully submit that

such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in support of this Motion pursuant to Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York.

Notice

22. Pursuant to Bankruptcy Rule 9018, the Debtors submit that no notice need be provided.

No Prior Request

23. No prior Motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein and granting such other and further relief as may be just and proper.

Dated: New York, New York
March 5, 2004

Respectfully submitted,

/s/ Jonathan S. Henes (JH-1979)

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