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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTION 107(b) OF THE BANKRUPTCY CODE AND RULE 9018 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE PERMITTING THE FILING OF: (I) A REDACTED VERSION OF THE LIMITED OBJECTION OF KMC TELECOM XI LLC TO 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 AND THE DEBTORS; (B) SECTION 363 OF THE BANKRUPTCY CODE AUTHORIZING THE TRANSFER, AS A PART OF SUCH A SETTLEMENT, OF CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES, AND (C) SECTION 365 OF THE BANKRUPTCY CODE, APPROVING AND AUTHORIZING, AS A PART OF SUCH SETTLEMENT, THE ASSUMPTION AND ASSIGNMENT OF AN EXECUTORY CONTRACT; AND (II) AN EXHIBIT TO SUCH LIMITED OBJECTION UNDER SEAL

KMC Telecom XI LLC (“KMC”), party-in-interest in the above-captioned chapter 11 cases, by and through its undersigned attorneys, hereby files its motion (the

“Motion”) seeking permission to file: (i) a slightly redacted version of its limited objection (the “Limited Objection”) to the 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 and the Debtors; (B) Section 363 of the Bankruptcy Code Authorizing the Transfer, as a Part of Such a Settlement, of Certain Assets Free and Clear of Liens, Claims and Encumbrances, and (C) Section 365 of the Bankruptcy Code, Approving and Authorizing, as a Part of Such Settlement, the Assumption and Assignment of an Executory Contract (the “Settlement Motion”);¹ and (ii) an exhibit in support of such Limited Objection under seal. In support of this Motion, KMC respectfully states as follows:

INTRODUCTION

1. 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)(5). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are section 107(b) of Title 11 of the United States Code (the “Bankruptcy Code”) and Rule 9018 of the Rule Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

3. On March 5, 2004, the above-captioned Debtors filed the Settlement Motion, Docket No. 1018, which seeks this Court’s approval pursuant to Bankruptcy Rule 9019 of a resolution of litigation between the Debtors and Level 3 Communications, LLC (“Level 3”)

¹ Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Settlement Motion.

embodied in a tripartite Confidential Settlement Agreement and Mutual Release among the Debtors, Level 3 and XO Communications, Inc. (the “Settlement Agreement”).

4. As part of the Settlement Motion, and as required under the Settlement Agreement, the Debtors seek an order of this Court permitting them to assume and assign to Level 3 the Primary Rate Interface Services Agreement dated as of February 11, 2002, as amended from time to time (the “KMC Agreement”) between KMC and Allegiance Telecom Company Worldwide (“Allegiance”). Pursuant to the KMC Agreement, KMC provides Allegiance a large percentage of the circuits in connection with Allegiance’s dial-up modem business that Allegiance, in turn, utilizes to service its contract with Level 3.

RELIEF REQUESTED

5. KMC intends to file a Limited Objection to the Settlement Motion principally on the basis that neither the Debtors nor Level 3 have provided adequate assurance of Level 3’s future performance under the KMC Agreement, as required pursuant to sections 365(b)(1) and 365(f)(2) of the Bankruptcy Code. Particularly as it concerns adequate assurance of future performance, in order to fully apprise this Court of the issues, facts and circumstances that give rise to KMC’s Limited Objection, KMC will be required to address various provisions of the KMC Agreement, and to attach that agreement as Exhibit 1 to the Affidavit of Constance Loosemore in support of the Limited Objection (itself Exhibit A to the Limited Objection).

6. Although KMC expects to be able to make virtually all of the points in its Limited Objection without violating any confidentiality restrictions associated with the KMC Agreement, the Agreement itself contains a confidentiality provision that prohibits the disclosure of its terms.

7. Accordingly, by this Motion, KMC respectfully seeks an order of this Court pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018 authorizing KMC to file (i) a slightly redacted version of the Limited Objection and (ii) a copy of the KMC Agreement under seal. The only confidential material that KMC seeks to redact from the Limited Objection is the monthly amount due under the KMC Agreement, which is commercially sensitive pricing information, and constitutes no more than three numbers on pages 20 to 21 of the Limited Objection. Other than the KMC Agreement itself, KMC proposes to file all other exhibits to the Limited Objections on an unredacted basis. Because Allegiance is a party to the KMC Agreement, and because Level 3 is already in possession of the KMC Agreement pursuant to separate confidentiality agreement with KMC, neither of them will be prejudiced by KMC's filing of the KMC Agreement under seal.

ARGUMENT AND AUTHORITIES

8. As this Court undoubtedly is aware based on numerous pleadings filed in these cases,² there is a high degree of interrelatedness between the Allegiance/Level 3 INSPA, as

² See, e.g., Objection of Level 3 Communications, LLC to Debtors' Preliminary Relief Sought in Respect of Motion for Orders Pursuant to Sections 105(a), 363, 365 and 1146(c) of the Bankruptcy Code: (A) (I) Fixing the Time, Date, and Place for the Bidding Procedures Hearing and (II) Approving the No-Shop Provisions Set Forth in the Asset Purchase Agreement with Qwest Communications International Inc.; and (B) (I) Establishing Bidding Procedures and Bid Protections in Connection with the Sale of Substantially All of the Assets of the Debtors, (II) Approving the Form and Manner of Notices, (III) Approving the Asset Purchase Agreement Subject to Higher and Better Offers and (IV) Setting a Sale Approval Hearing Date and Granting Related Relief, Docket No. 823, dated January 6, 2004, at ¶¶ 7, 10-11 (objecting to the lack of disclosure with the post-sale performance of "two executory contracts of substantial complexity" – the INSPA and the KMC Agreement, alleging that the Debtors' future plans in connection with post-sale performance of these contracts "might very well place the INSPA (or the KMC Agreement) in irremediable breach"); Motion of KMC Telecom XI LLC Pursuant to Bankruptcy Rule 9018, Section 105(a) of the Bankruptcy Code Rule 60(b) of the Federal Rules of Civil Procedure to Vacate 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 All Exhibits to the Motion for Recoupment and Relief from the Automatic Stay Under Seal,

to which the Settlement Agreement purports to resolve outstanding disputes, and the KMC Agreement. This Court previously has recognized the confidential nature of the agreements among the parties involved herein.³ Indeed, this Court has granted similar motions by Level 3 seeking to file redacted versions of pleadings involved in litigation between Level 3 and Allegiance relating to the INSPA. Moreover, this Court recently granted a motion by the Debtors to file a redacted version of the Settlement Agreement, which involves both the INSPA and the KMC Agreement.

9. Section 107(b) of the Bankruptcy Code permits bankruptcy courts to restrict access to nonpublic information to protect entities from the consequences of disclosure:

(b) 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

and (B) Scheduling an In Camera Hearing on the Motion, Docket No. 931, dated February 13, 2004 (the "Motion to Vacate") (discussing interrelatedness of the Allegiance/Level 3 INSPA and the KMC Agreement and the potential impact of the Allegiance/Level 3 dispute on KMC).

³ See 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 All Exhibits to the Motion for Recoupment and Relief from the Automatic Stay Under Seal, and (B) Scheduling an In Camera Hearing on the Motion, entered by this Court at Docket No. 919 on February 10, 2004; Order Pursuant to Section 107(b) of the Bankruptcy Code and Rule 9018 of the Federal Rules of Bankruptcy Procedure Authorizing Level 3 Communications, LLC to File its Complaint and the Exhibit Thereto Under Seal, entered by this Court in Adv. Pro. No. 04-2325 (RDD), Docket No. 3, on February 11, 2004; 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 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 and the Debtors; (B) Section 363 of the Bankruptcy Code Authorizing the Transfer, as a Part of Such a Settlement, of Certain Assets Free and Clear of Liens, Claims and Encumbrances, and (C) Section 365 of the Bankruptcy Code, Approving and Authorizing, as a Part of Such Settlement, the Assumption and Assignment of an Executory Contract, entered by this Court at Docket No. 1019 on March 5, 2004.

11 U.S.C. § 107(b). Similarly, Bankruptcy Rule 9018 provides that:

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

Fed. R. Bankr. P. 9018.

10. On its face, section 107(b) of the Bankruptcy Code does not require that the party seeking relief show cause in order to be entitled to the protection of the statute. See Video Software Dealers Ass'n v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 27 (2d Cir. 1994) (“[C]ongress ... imposed no requirement to show ‘good cause’ as a condition to sealing confidential commercial information. This omission is particularly significant because FRCP 26(c), from which the language of § 107(b) appears to have been drawn, expressly required ‘good cause’ to be established before a discovery protective order could be granted...”). On the contrary, so long as “the information fits any of the specified categories, the court is *required* to protect a requesting interested party and has no discretion to deny the application.” Id. (citing 2 COLLIER ON BANKRUPTCY ¶ 107.01, at 107-2 (15th ed. 1993)).

11. The KMC Agreement expressly demands confidentiality precisely because it contains commercial information deserving of the protections of section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018. Commercial information has been defined as information that would cause “an unfair advantage to competitors by providing them information as to the commercial operations” of the party seeking protection. Orion, 21 F.3d at 27 (quoting Ad Hoc Protective Comm. for 10 1/2% Debenture Holders v. Intel Corp. (In re Intel Corp.), 17 B.R. 942, 944 (9th Cir. BAP 1982)). The confidential commercial information contained in the KMC Agreement – pricing, detailed performance standards termination provisions and the like – is of a similar nature to the information encompassed within the INSPA and the Settlement

Agreement, as to which this Court on three prior occasions⁴ recognized the applicability of section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018.

12. Notwithstanding the fact that KMC is not required to make any showing as to cause in order to be afforded the protections of section 107(b), good cause exists to grant KMC leave to file the KMC Agreement under seal. The KMC Agreement is a significant asset to KMC in the operation of its business, and KMC believes that it is important to protect its interests in the KMC Agreement – the very reason that KMC is undertaking to file its Limited Objection. KMC is also required, under penalty of breach, to maintain confidentiality with respect to the terms of the KMC Agreement, such that even while acting to protect its interests by interposing its Limited Objection to the Settlement Motion, KMC does not want to either jeopardize its interest, or violate the legitimate interests of the Debtors or Level 3, by disclosing the KMC Agreement in violation of the express prohibition against doing so. Moreover, as discussed above, the monthly pricing information that is to be redacted from the Limited Objection, should the Court grant this Motion, is proprietary and commercially sensitive both to KMC and the Debtors, and should not be exposed to the public domain.

13. For the foregoing reasons, KMC respectfully requests that the Court consider this Motion on an expedited, *ex parte* basis, and submits that the filing of the KMC Agreement under seal, and the slight redaction of the Limited Objection, is necessary and appropriate under the circumstances, and should be approved.

14. Because this Motion does not present any novel or difficult issues of law, KMC respectfully requests that the Court waive the requirement of submission of a memorandum of law pursuant to Local Bankruptcy Rule 9013.

⁴ See *supra* n.5 and accompanying text.

15. No previous request for the relief requested herein has been made to this or any other Court.

NOTICE

16. Pursuant to Bankruptcy Rule 9018, quoted supra at ¶ 9, KMC respectfully submits that no notice is required.

WHEREFORE, KMC respectfully requests that this Court enter an order substantially in the form annexed hereto granting the Motion, and granting KMC such other and further relief as is just and proper under the circumstances.

Dated: New York, New York
March 22, 2004

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Counsel to KMC Telecom XI LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re : Chapter 11
ALLEGIANCE TELECOM, INC., et al., : Case No. 03-13057 (RDD)
Debtors. : (Jointly Administered)
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ORDER PURSUANT TO SECTION 107(b) OF THE BANKRUPTCY CODE AND RULE 9018 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE PERMITTING THE FILING OF: (I) A REDACTED VERSION OF THE LIMITED OBJECTION OF KMC TELECOM XI LLC TO 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 AND THE DEBTORS; (B) SECTION 363 OF THE BANKRUPTCY CODE AUTHORIZING THE TRANSFER, AS A PART OF SUCH A SETTLEMENT, OF CERTAIN ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES, AND (C) SECTION 365 OF THE BANKRUPTCY CODE, APPROVING AND AUTHORIZING, AS A PART OF SUCH SETTLEMENT, THE ASSUMPTION AND ASSIGNMENT OF AN EXECUTORY CONTRACT; AND (II) AN EXHIBIT TO SUCH LIMITED OBJECTION UNDER SEAL

Upon the motion dated March 22, 2004 (the “Motion”) of KMC Telecom XI LLC (“KMC”) for seeking permission to file: (i) KMC’s limited objection (the “Limited Objection”) to the 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 and the Debtors; (B) Section 363 of the Bankruptcy Code Authorizing the Transfer, as a Part of Such a Settlement, of Certain Assets Free and Clear of Liens, Claims and Encumbrances, and (C) Section 365 of the Bankruptcy Code, Approving and Authorizing, as a Part of Such Settlement, the Assumption and

Assignment of an Executory Contract (the “Settlement Motion”);¹ and (ii) an exhibit in support of such Limited Objection under seal; and no notice being required pursuant to Bankruptcy Rule 9018; and a memorandum of law pursuant to Local Bankruptcy Rule 9013 not being required under the circumstances; and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED, that the Motion is granted; and it is further

ORDERED, pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, that KMC be, and it hereby is, authorized to file and serve a redacted version of the Limited Objection; and it is further

ORDERED, pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, that KMC be, and it hereby is, authorized file under seal and unredacted copy of the Limited Objection and the copy of the KMC Agreement which is designated as Exhibit 1 to the Affidavit of Constance Loosemore being filed in support of the Limited Objection; and it is further

ORDERED, that the redacted information in the Limited Objection and the KMC Agreement shall remain confidential; and it is further

ORDERED, that KMC shall serve upon, and make copies of the unredacted Limited Objection and the KMC Agreement, as filed with the Court, available only to, this Court, the Debtors and Level 3; and it is further

¹ Capitalized terms used but not defined herein shall have the meaning ascribed to such terms in the Motion.

ORDERED, that the requirement of a separate accompanying memorandum of law be dispensed with and waived.

Dated: New York, New York
_____, 2004

Honorable Robert D. Drain
United States Bankruptcy Judge