

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	§	
	§	
ALLEGIANCE TELECOM, INC., <u>et al.</u> ,	§	Chapter 11 Case. No.
	§	03-13057 (RDD)
	§	
Debtors.	§	Jointly Administered
	§	

**SECOND INTERIM FEE APPLICATION OF IMPALA PARTNERS LLC
FOR COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF
EXPENSES AS CHIEF RESTRUCTURING OFFICER TO THE DEBTOR FOR THE
PERIOD OCTOBER 1, 2003 THROUGH FEBRUARY 29, 2004**

Name of Applicant:	<u>Impala Partners LLC</u>
Authorized to Provide Professional Services to:	<u>Allegiance Telecom, Inc. et al, "Debtor"</u>
Role:	<u>Chief Restructuring Officer to the Debtor</u>
Date of Retention:	<u>July 29, 2003</u> Effective June 16, 2003
Period for which compensation and reimbursement is sought:	<u>October 1, 2003 to February 29, 2004</u>
Amount of Compensation requested:	\$375,000.00
Amount of Expense Reimbursement requested:	\$141,055.99

Hearing Date: May 20, 2004 at 10:00 a.m.
Objection Deadline: May 10, 2004

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Impala Partners LLC, (hereinafter referred to as “Impala” or the “Applicant”) moves pursuant to Sections 328(a), 330 and 331 of Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”), Rule 2016 of the Federal Rules of Bankruptcy Procedure, and the Court’s Administrative Order Establishing Procedures for Allowance and Payment of Interim Compensation and Reimbursement of Expenses of Professionals dated June 13, 2003 (the “Administrative Order”), for the allowance of interim compensation for professional services rendered as Chief Restructuring Officer to Allegiance Telecom, Inc. et al. (hereinafter referred to as the “Debtors” or the “Company”) for the period of October 1, 2003 through February 29, 2004 (the “Compensation Period”), and for reimbursement for actual and necessary expenses incurred in connection with such services. In support of this application, the Applicant represents as follows:

JURISDICTION

1. This Court has jurisdiction over this Application pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is properly before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are Sections 328(a), 330 and 331 of the Bankruptcy Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). Pursuant to General Order M-151, Amended Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases (the “Local Guidelines”), a certification regarding compliance with the Local Guidelines is attached hereto as **Exhibit A**.

BACKGROUND

2. On May 14, 2003 (the “Petition Date”), the Debtors each filed with this Court a voluntary case under the Bankruptcy Code. The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Debtors’ Chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b).

4. No trustee or examiner has been appointed in these Chapter 11 cases. On May 28, 2003, pursuant to section 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 “Committee”) in these Chapter 11 cases.

IMPALA’S RETENTION AS CHIEF RESTRUCTURING OFFICER

5. Impala initially agreed to act as Chief Restructuring Officer to the Company pursuant to the terms of a letter agreement dated June 20, 2003 (the “Initial Engagement Letter”), a copy of which is attached hereto as **Exhibit B**. The Initial Engagement Letter specified the

services that Impala would provide and the compensation that Impala would receive for those services.

6. The agreed compensation as set forth in the Initial Engagement Letter included a monthly fee of \$250,000 payable in advance (the “Monthly Fee”), the reimbursement of reasonable out of pocket expenses incurred by Impala, and a success fee, the terms of which were, as of the execution of the Initial Engagement Letter, to be negotiated.

7. The Initial Engagement Letter was superseded by a new engagement letter dated July 11, 2003 (the “Subsequent Engagement Letter”). A copy of the Subsequent Engagement Letter is attached hereto as **Exhibit C**. The Monthly Fee under the Subsequent Engagement Letter remained at \$250,000.

8. The Subsequent Engagement Letter was submitted to the Court with the Motion of the Debtors Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of Services Agreement with Impala Partners, LLC [Docket No. 222] (the “Impala Retention Application”), and approved by the Court on an interim basis pursuant to the Interim Order Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of Services Agreement with Impala Partners, LLC [Docket No. 275] (the “Interim Retention Order”), and then on final basis pursuant to this Court’s Order Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of Services Agreement with Impala Partners, LLC, *nunc pro tunc* to June 16, 2003 [Docket No. 501] (the “Final Retention Order”). The Interim Retention Order and Final Retention Order are attached hereto as **Exhibits D** and **E**, respectively.

9. The Subsequent Engagement Letter was further modified by letter dated August 28, 2003, wherein the Monthly Fee was adjusted and the agreed upon success fee disclosed (the “August 28 Modification”). The terms of the August 28 Modification were filed together with a

Notice of Hearing on Motion of the Debtors Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of Services Agreement with Impala Partners, LLC [Docket No. 410] (the “Notice of Final Hearing”). A copy of the Notice of Final Hearing is attached hereto as **Exhibit F**.

10. The Subsequent Engagement Letter was further modified by letter dated October 31, 2003, wherein the Monthly Fee was adjusted for the period November 15, 2003 through January 15, 2004. The October 31, 2003 modification reduced our monthly fee to \$100,000 for the November 16 through December 15, 2003 and December 16 through January 15, 2004 periods.

11. The Final Retention Order provides that

all compensation and reimbursement due to, and other rights of, Impala in accordance with the [Subsequent Engagement Letter] Agreement and the Notice [of Final Hearing], including, without limitation indemnification obligations, shall be treated as administrative expenses under section 503 of the Bankruptcy Code, and shall be paid in accordance with the terms and provisions of the Agreement and the Notice; provided, however, that all compensation and reimbursement of expenses to be paid to Impala shall be subject to prior approval of this Court in accordance with the requirements of sections 330 and 331 of the Bankruptcy Code and the order of this Court establishing procedures for monthly compensation and reimbursement of expenses for professionals, dated June 13, 2003;

COMPENSATION REQUESTED

12. Pursuant to this Application, Impala requests the interim allowance of the Monthly Fee for each month during the Compensation Period (totaling \$375,000¹), and the reimbursement of expenses incurred in connection with the rendition of services in the amount of

¹As set forth in the August 28 Modification, the Monthly Fee has been reduced for the period commencing October 16, 2003, from \$200,000 to \$175,000. The Monthly Fee for the other two months during the Compensation Period was reduced from \$175,000 to \$100,000 per month per October 31, 2003 modification.

\$141,055.99. A breakdown of the fees and expenses requested is set forth on the Summary of Fees and Expenses – October 1, 2003 to January 15, 2004 attached hereto as **Exhibit G**.

13. Pursuant to the Administrative Order, Impala submits monthly fee statements to the Debtors seeking interim compensation and reimbursement of expenses. During the Second Interim Compensation Period, Impala served the following fee statements:

A. On October 3, 2003, Impala served its fifth fee statement, pursuant to the Compensation Order dated June 13, 2003, for the period from October 16, 2003 through and including November 15, 2003 (the “Fifth Fee Statement”). The Fifth Fee Statement sought an allowance of \$175,000.00 as compensation for services rendered and reimbursement of \$19,839.29 in expenses for the period from September 12, 2003 through and including October 3, 2003.

B. On November 3, 2003, Impala served its sixth fee statement, pursuant to the Compensation Order dated June 13, 2003, for the period from November 16, 2003 through and including December 15, 2003 (the “Sixth Fee Statement”). The Sixth Fee Statement sought an allowance of \$100,000.00 as compensation for services rendered and the reimbursement of \$64,446.64 in expenses for the period from October 4, 2003 through and including October 31, 2003.

C. On December 8, 2003 Impala served its seventh fee statement, pursuant to the Compensation Order dated June 13, 2003, for the period from December 16, 2003 through and including January 15, 2003 (the “Seventh Fee Statement”). The Seventh Fee Statement sought an allowance of \$100,000.00 as compensation for services rendered and the reimbursement of \$27,363.88 in expenses for the period from November 1, 2003 through and including November 30, 2003.

D. On January 21, 2004, Impala served its eighth fee statement, (the “Eighth Fee Statement”) pursuant to the Compensation Order dated June 13, 2003. The Eighth Fee Statement sought the reimbursement of \$29,406.18 in expenses for the period from December 1, 2003 through and including January 15, 2004.

14. During the Compensation Period, Impala received a total of \$300,000 in fees and \$141,055.99 for out of pocket expenses incurred in connection therewith. In accordance with the Administrative Order, such payments represent 80% of Impala’s fees and 100% of its’ out of pocket expenses incurred during the Compensation Period.

15. As of the filing of this Application, Impala has not received payment in the amount of \$35,000 for the period October 16, 2003 through and including November 15, 2003, \$20,000 for the period November 16, 2003 through and including December 15, 2003, \$20,000 for the period December 16, 2003 through and including January 15, 2004, reflecting the 20% holdback of fees in accordance with the Administrative Order. In addition, a holdback of \$105,000 remains outstanding with respect to the First Interim Fee Application.

16. Impala seeks approval of the sum of \$375,000 for services rendered to the Debtors during the Compensation Period, and \$141,055.99 for out of pocket expenses incurred in connection with rendition of such services, for a total award of \$516,055.99. Pursuant to the Administrative Order, Impala has already received payment of \$300,000, representing 80% of Impala’s fees during the Compensation Period, and reimbursement of \$141,055.99, which represents 100% of Impala’s expenses incurred in connection with the rendition of services during the Compensation Period. Therefore, Impala seeks payment of \$75,000 pursuant to this Application, which amount represents the portion of the Monthly Fee for each respective month during the Compensation period comprising not already paid pursuant to Administrative Order.

17. Impala rendered to the Debtors and their estates all services for which compensation is sought in connection with these Chapter 11 cases.

18. There is no agreement or understanding between Impala and any other person, other than the members of Impala, for the sharing of compensation to be received for services rendered in these cases.

SUMMARY OF PROFESSIONAL SERVICES RENDERED

19. As set forth in the Retention Application as well as the respective Engagement Letters, Impala was retained to serve as the Debtors' Chief Restructuring Officer and to provide advice and information to the Debtors in connection with its restructuring efforts in these Chapter 11 cases. Impala's primary responsibility is to advise on the operational restructuring of the Debtors, including but not limited to (a) the reduction of costs and increase in efficiencies; (b) the improvement in sales productivity and profitability; (c) management of the "operational bankruptcy task forces"; and (iv) developing the Debtors' long-term business strategy. During the Compensation Period, Impala diligently performed its role for which it was retained.

20. The diligent, hard work of two of Impala's four partners (on a part-time basis) and one of its three non-partner professionals (on a full-time basis) during the Compensation Period has been a major contributing factor in (i) substantially increasing the value of the Debtors (including achieving durable cost reductions of \$70 to \$80 million per annum) and (ii) creating a credible, detailed operating plan that all constituents have signed onto so that Debtors are in a position to confirm a plan or sell substantially all their assets.

21. The most significant professional services rendered Impala during the Compensation Period can be broken into six (6) major subcategories. Those subcategories include:

- (a) identify and implement on costs savings;
- (b) management of the internal operational task forces;
- (c) continued development of the Company's long-term financial plan;
- (d) meetings/conference calls with various stakeholders;
- (e) meeting/discussion with various strategic partners; and
- (f) case administration and various other matters.

22. The following is a summary of the services rendered by Impala during the Compensation Period² within each of these subcategories:

Identify and Implement on Costs Savings

23. Impala continued to worked with the Chief Operating Officer and various department heads in identifying various costs cuts including but not limited to: headcount reductions, reduction in real estate expenses, network expense reductions including the decommissioning and grooming of low performing collocations, reducing special access and long distance costs. Impala actively participated in reducing the monthly charges for its Dark Fiber leases.

24. Impala actively participated in ensuring that all identified costs savings were implemented upon and that the savings materialized.

Management of the Internal Operational Task Forces

25. Impala participated in all internal operational task forces including but not limited to: Network Expense, Executory Contracts, Real Estate, Revenue, SG&A and external communications. Impala attended all convened meeting to ensure that each of the task forces

²As disclosed in the respective Engagement Letters, Impala does not maintain time records for its restructuring engagements. Since Impala is not being compensated on an hourly basis, the Administrative Order and the Final Retention Order excuse Impala from any obligation under the Local Guidelines to include such information in support of this Application.

focused on the potential impact of each decision, the timing of those decisions and the savings and costs of each decision.

Development of the Company's Long-Term Financial Plan

26. Operating/Business Plan Review: Impala engaged all levels of management and respective business units to review the underlying assumptions. Impala worked with the Company's planning staff members in developing an Operating Plan for the FY 2003 through FY 2007 period. During the entire plan development process, Impala ensured the participation of all business leaders in the adaptation of the plan assumptions and projected results. The Plan also included a detailed analysis of the Capital Expenditure budget and resulting cash flow requirements. Impala monitored the plan versus actual monthly results, worked with ALGX staff to estimate the effect of actual results (sales, productivity, and net installs) on the model for the entire project period.

Meetings/Conference Calls with Various Stakeholders

27. Impala prepared for and participated in various formal and informal meetings and teleconferences with the secured lenders, the Committee, financial advisors to the secured lender and the Committee, financial advisors to the Debtors, the Company's special restructuring committee and management to discuss a variety of often times complex case issues. Issues discussed included reviewing the Operating Plan and its assumptions, working capital, financial and operating results, Key Employee Retention Plan, 2003 bonus issues, and other matters of concern to the Debtor/Lenders.

28. At these meetings and phone conferences, Impala presented the Committee and other constituencies with presentations reflecting the results of the Debtor analysis.

Meeting/Discussion with Various Strategic Partners

29. Impala prepared for and participated in various formal and informal meetings/discussions with various parties performing due diligence on the ALGX assets. Issues discussed included review of all cost savings initiatives, savings achieved to date, and a detailed review of the operating plan.

Case Administration and Various Other Matters

30. Administrative tasks include, but are not limited to, attendance at and preparation for case status meetings to assist the Committee and other interested parties in managing critical tasks and key milestones.

REASONABLE AND NECESSARY SERVICES RENDERED BY IMPALA

31. Impala's services in these Chapter 11 cases has required a high degree of professional competence and expertise so that numerous issues requiring evaluation and determination by the Debtors and their professionals could be addressed with skill and dispatch and have, therefore, required the expenditure of substantial time and effort. Indeed, Impala has provided substantial, ongoing services during the course of these Chapter 11 cases and those services have been integral to substantially increasing the value of the Debtors and putting the Debtors in a position to confirm a plan or sell substantially all their assets.

32. Impala has a preeminent practice specializing in working with companies and creditors in out-of-court workouts and Chapter 11 cases. Impala has served as interim managers and financial advisors in financially complex bankruptcies and workouts involving billions of dollars in debt. In that regard, Impala has gained expertise in operating a business through distressed situations and analyzing businesses to determine strategies for both increasing revenue and reducing costs. Representative telecommunication clients include Winstar Communications Inc., Velocita, ICG Communications, Metromedia Fiber Network Services, Inc., and KMC

Telecom, Inc. As a consequence, Impala brings to these Chapter 11 cases a particularly high level of expertise, which inured to the benefit of the Debtors, their estates, and all parties in interest.

33. Accordingly, the professional services rendered by Impala on behalf of the Debtors during the Compensation Period (as summarized above) were reasonable, necessary and appropriate to the administration of the Debtors' Chapter 11 cases and related matters. The professional services rendered by Impala were in the best interest of the Debtors and their estates, the Committee, and other constituencies and parties in interest. Compensation for the foregoing services as requested is commensurate with the complexity, importance, magnitude, deadlines and nature of problems, issues or tasks involved.

ACTUAL AND NECESSARY EXPENSES INCURRED BY IMPALA

34. In accordance with the respective Engagement Letters, Impala also seeks allowance of the reimbursement of its disbursements and other expenses Impala has incurred on behalf of the Debtors during the Compensation Period in the aggregate sum of \$141,055.99. Those charges are identified on Exhibit G attached hereto. Impala has made every effort to minimize its disbursements in these cases. For instance, Impala has not sought reimbursement for charges related to internal copying or faxing, and has not charged for telephone calls from its offices. However, due to the location of the Debtors' businesses, creditors and other parties in interest, substantial travel related expenses were incurred. It is these expenses that comprise a vast majority of the expenses for which Impala seeks reimbursement.

35. Each of these actual expenses incurred in connection with Impala's services were reasonable, necessary and justified under the circumstances to serve the needs of the Debtors in these cases.

STANDARD OF REVIEW

36. Section 328(a) of the Bankruptcy Code contemplates the approval of fees that are negotiated at arm's length and that are reasonable, at the time they are negotiated, in light of prevailing market terms. Impala submits that these same criteria should govern the consideration of Impala's requested fee herein. Furthermore, Impala submits that the same criteria are appropriate as a general matter under Sections 330 and 331 of the Bankruptcy Code in considering the reasonableness of a financial advisor's request for payment of its fee.

37. Market-based fees are payable pursuant to Sections 330 and 331 of the Bankruptcy Code. The Second Circuit has established that, in awarding compensation to professionals pursuant to Sections 330 and 331 of the Bankruptcy Code, courts should adopt a "market driven" approach in which the cost of comparable services is the most important factor in determining reasonableness of fees. *See In re Ames Department Stores, Inc.*, 76 F.3d 66, 71 (2d Cir. 1996) (explaining that by enacting section 330, Congress took "the position that 'compensation in bankruptcy matters be commensurate with the fees awarded for comparables services in non-bankruptcy cases.'"); *In re Bennett Funding Group, Inc.*, 213 B.R. 234, 250 (Bankr. N.D.N.Y. 1997) (courts should rely on the "'market' of comparable legal services to assist in determining the level of compensation to be awarded"). This is consistent with the general aim of Sections 328, 330 and 331, which is to provide professionals in bankruptcy cases with compensation that is comparable to the fees that prevail outside of bankruptcy cases. *See In re UNR Indus., Inc.*, 986 F.2d 207, 209 (7th Cir. 1993); *Collier on Bankruptcy* ¶ 330 (15th rev. ed. 1999).

38. Thus, in cases like this, certain "considerations drop away, such as the 'time spent' or the 'rates charged.'" *In re Intellogic Trace, Inc.*, 188 B.R. at 559. The most important

factors are whether the services were beneficial to the estates and whether the compensation approximates the practice outside of bankruptcy cases. *Id.*

39. In this case, Impala respectfully submits that the services for which it seeks compensation were, at the time rendered, believed to be necessary for an beneficial to the Debtors and their estates, and were rendered in order to protect and preserve the Debtors' estates during the pendency of these Chapter 11 cases. The fees are consistent with the practice outside of bankruptcy cases. Impala respectfully submits that the services rendered to the Debtors were performed economically, effectively and efficiently, and the results obtained to date have benefited not only the Debtors, but also the Debtors' estates and the creditor body as a whole. Impala further submits that the compensation requested herein is reasonable in light of the nature, extent and value of such services to the Debtors, their estates and all parties in interest.

40. In sum, the services rendered by Impala were necessary and beneficial to the Debtors and their estates, and were consistently performed in a timely manner commensurate with the complexity, importance, novelty and nature of the issues involved. Accordingly, approval of the compensation sought herein is warranted.

MEMORANDUM OF LAW

41. Impala respectfully submits that the relevant legal authorities are set forth herein and that this Application presents no novel issues of law. Thus, Impala respectfully submits that this Application satisfies the requirement set forth in the Southern District of New York Local Bankruptcy Rule 9013-1 that a separate memorandum of law be filed in support of the Application.

NOTICE

42. No trustee has been appointed in these Chapter 11 cases. Notice of this Application has been provided to: (a) the U.S. Trustee; (b) counsel to the Committee; and (c)

counsel to the Debtors' secured lenders. In light of the nature of the relief requested herein, Impala submits that no other or further notice is required.

CONCLUSION

WHEREFORE, Impala Partners LLC respectfully requests entry of an order allowing and awarding interim compensation for professional services rendered during the Compensation Period in the amount of \$375,000 and reimbursement of expenses incurred by Impala during the Compensation Period in the amount of \$141,055.99, and for such other relief as is just and proper.

Dated: April 6, 2004

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