

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

In the Matter

of

Case No.

03-13057

ALLEGIANCE TELECOM, INC., et al.,

Debtors.

-----x

September 4, 2003

United States Custom House

One Bowling Green

New York, New York 10004

Mtn for relief from stay by BP Commerce, LLC; Order  
authorizing key employee retention program; mtn  
authorizing Debtors to reject certain executory  
contracts and unexpired leases.

B E F O R E:

HON. ROBERT D. DRAIN,

Bankruptcy Judge.

1 ALLEGIANCE TELECOM, INC., et al.

2 A P P E A R A N C E S :

3 KIRLAND & ELLIS, ESQS.

4 Attorneys for Debtors  
153 East 53rd Street  
New York, New York

5

6 BY: MATTHEW A. CANTOR, ESQ., of Counsel  
-and-

7 BY: ROB COHEN, ESQ., of Counsel  
-and-

8 BY: LUDMILA CHUPLYGINA, ESQ., of Counsel

9

10 AKIN GUMP STRAUSS HAUER & FELD LLP  
Attorneys for Creditors' Committee  
590 Madison Avenue  
New York, New York

11

12 BY: PHILIP C. DUBLIN, ESQ., of Counsel  
-and-

13 BY: IRA DIZENGOFF, ESQ., of Counsel

14

15 PAUL, HASTINGS, JANOFSKY & WALKER LLP  
Attorneys for GE Capital  
600 Peachtree Street, NE  
Atlanta, Georgia

16

17 BY: JESSE H. AUSTIN, III, ESQ., of Counsel

18

19 CAROLE A. FAULKNER, ESQ.  
Attorney for CI Host  
1851 Central Drive  
Bedford, Texas

20

21

22

23

24

25

1 ALLEGIANCE TELECOM, INC., et al.

2 P R O C E E D I N G S

3 THE COURT: I would like to deal  
4 with everything other than the pretrial conference  
5 first.

6 MR. CANTOR: Good morning, Judge.  
7 Matthew Cantor of Kirkland & Ellis behalf of the  
8 Debtors.

9 We have three motions on for today.  
10 No objections have been made on any the first  
11 motions, objection to a number of service Orders.  
12 The motion was filed and served on August 22. It  
13 was served on the master service list, the counter  
14 parties to the contract. And we received no  
15 objections.

16 Basically, these are service Orders  
17 that the Debtors placed to get the use of service  
18 for the various local exchange carriers by the  
19 Debtors. Rejection of the contract resulted in  
20 approximately \$240,000 monthly savings, total  
21 savings of \$2,900,000. The Debtors submits this  
22 is in the company's best interests to be  
23 authorized to reject these contracts.

24 THE COURT: Okay. For the reasons  
25 stated in the motion, I will grant that motion.

1 ALLEGIANCE TELECOM, INC., et al.

2 MR. CANTOR: Thank you, Judge.

3 The next motion is a motion to reject  
4 certain leases and contracts. This is mostly for  
5 personal property leases, like postage meters that  
6 were in locations. We already rejected the  
7 underlying Grant leases and want to reject the  
8 personal property leases for some computer  
9 equipment and some postage meters accompanied with  
10 substantial savings and be authorized to get out  
11 of these contracts and served on the most earliest  
12 all the current parties, and we received no  
13 objections. We will be asking for authority to  
14 reject these contracts as of the commencement  
15 date, nunc pro tunc, and have received no  
16 objections to that request. I want to tell Your  
17 Honor about that.

18 THE COURT: In light of there being  
19 no objections to that request, I will approve it.

20 MR. CANTOR: Thank you, Judge. We  
21 will hand up Orders at the end.

22 The last motion on is a motion, the  
23 Debtors' motion for approval of a key employee  
24 retention plan. On August 19 Your Honor heard  
25 part of this motion, which was to approve the KERP

1 ALLEGIANCE TELECOM, INC., et al.  
2 as it related to the rank and file employees, and  
3 that was approved on August 19, with no objection  
4 from our Bank Steering Committee and our  
5 Creditors' Committee.

6 We had the opportunity to provide  
7 information to the Creditors' Committee and the  
8 Bank Steering Committee as relates now to the  
9 second part of the motion, this is the middle  
10 level managers. What we have here are three  
11 different types of retention plans. We have about  
12 40 mid-level key employees where these are time  
13 based retention payments. They have received  
14 approximately fifty percent of this program  
15 prepetition. The remaining fifty percent is due  
16 to be paid. Based on upon an agreement we reached  
17 with the Creditors' Committee and the bank, we are  
18 going to modify the timing of these payments so  
19 that twenty-five percent, meaning one quarter of  
20 the remaining amounts due be paid on September 8,  
21 and the reminder would be paid on December 31. As  
22 I related, those employees would need to remain  
23 with the company through the confirmation of a  
24 Chapter 11 plan in this case in order to receive  
25 or retain those payments.

1 ALLEGIANCE TELECOM, INC., et al.

2 THE COURT: So with the September  
3 ones they will have to give them back if they  
4 leave?

5 MR. CANTOR: Yes, Your Honor. And  
6 the cost here for those 40 employees is  
7 approximately \$671,000, for that remaining fifty  
8 percent, about \$850,000 had been paid prepetition.  
9 And again, I will let the committee and the bank  
10 speak for themselves. But this is based on our  
11 agreement with them.

12 THE COURT: Do they have to give  
13 back the prepetition also if they leave or will  
14 they keep that?

15 MR. CANTOR: They have to give the  
16 entire payment of the amount paid back.

17 With respect to the second group of  
18 these mid-level managers, there are approximately  
19 45 sales representatives or sales executives.  
20 These are performance based payments, which is  
21 based upon a metric which we had gone through with  
22 the banks and Creditors' Committee, based on churn  
23 sales and cancel rate and lines of jeopardy,  
24 different metrics to see how the sales reps are  
25 doing. The total cost here would be \$2.7 million

1 ALLEGIANCE TELECOM, INC., et al.  
2 in the postpetition period. About \$364,000 have  
3 been paid in the prepetition period. These  
4 employees would get paid on December 31 of this  
5 year if they meet the metrics and will be obliged  
6 to stay with the company through the confirmation  
7 date of a Plan of Reorganization in order to  
8 receive or retain, as the case may be, the amounts  
9 paid.

10 The last group of just three key  
11 executives of the hosting business, hosting dot  
12 com. The total cost here for the postpetition  
13 period is \$29,000. These are payments that would  
14 be made on September 30 if the employee remains  
15 with the company through September 30. This is  
16 obviously the smallest part of the mid-level  
17 package.

18 Again, we received no objections to  
19 this second part of the KERP program. We have on  
20 for hearing on September 25 the remaining part,  
21 which is the top ten executives of the company,  
22 and I guess it was the vice president of business  
23 planning, he is in that group that will be on for  
24 hearing on September 25.

25 THE COURT: Okay.

1 ALLEGIANCE TELECOM, INC., et al.

2 MR. CANTOR: The company believes  
3 it's absolutely critical to retain these employees  
4 in order to get the plan approved. This was a  
5 program that was vetted by Watson & Merry, the  
6 compensation consulting firm, the Compensation  
7 Committee also approved this and submits that in  
8 its best business judgment to continue under this  
9 plan.

10 THE COURT: Are all these provisions  
11 laid out clearly and been reviewed by the  
12 committee and the lenders?

13 MR. CANTOR: Yes. I will let them  
14 speak for themselves. We have gone through this  
15 pretty thoroughly with them.

16 THE COURT: It's going to be somehow  
17 attached to your Order?

18 MR. CANTOR: Yes, the modifications  
19 will be attached to the Order.

20 We did get some feedback from the  
21 rank and file of the last a change, and they will  
22 be required to stay with the company through the  
23 confirmation rather than December 31. But the  
24 company is currently managing that process.

25 THE COURT: Okay.

1 ALLEGIANCE TELECOM, INC., et al.

2 MR. DUBLIN: Philip Dublin on behalf  
3 of the committee.

4 Mr. Cantor is correct. We reviewed  
5 the KERP and have no objection. We commented on  
6 the Order and are satisfied with the Order.

7 I would like to mention in connection  
8 with the September 25 hearing on the 11 executives  
9 that Mr. Cantor mentioned, the Debtors, the  
10 Committee and the banks are working on trying to  
11 get up a finalizing deposition schedule for five  
12 people where we had been unable to confirm certain  
13 dates. To the extent we are unable to get those  
14 depositions completed in sufficient period of  
15 time, we may be required to come back to you to  
16 seek an adjournment with respect to those  
17 remaining 11 people. I would also like to make a  
18 exclusivity issue, but Mr. Austin doesn't have any  
19 issues with the KERP. But we don't want to start  
20 making issues.

21 THE COURT: Okay.

22 MR. AUSTIN: Jesse Austin for GE  
23 Capital, as the agent for the bank group.

24 Mr. Cantor's representations are  
25 accurate. We can resolve our differences as to

1 ALLEGIANCE TELECOM, INC., et al.  
2 the KERP program that is before the Court today.  
3 It is our understanding, in answer to one of the  
4 Court's questions, that there is likely to be  
5 modifications to individual employment agreements  
6 to the extent any of these individuals are under  
7 agreements to reflect these terms and conditions.

8 THE COURT: Okay. But the employees  
9 who are aware of that are on notice of this  
10 hearing today and of these changes?

11 MR. CANTOR: I don't have personal  
12 knowledge. But I can ask the general counsel of  
13 the company.

14 (Speaking to counsel.)

15 A VOICE: They understand.

16 THE COURT: Okay. Obviously, these  
17 types of motions are, particularly in today's  
18 climate, quite sensitive and more so as you get  
19 higher up in the ranks of these Debtors. But I  
20 have reviewed it, and also note that it's been  
21 scrutinized also by the two creditor groups, so I  
22 will not second guess their judgment or the  
23 Debtors' judgment, and I will approve it.

24 MR. CANTOR: Thank you, Judge. We  
25 will submit an Order. Mr. Dublin has some comment

1 ALLEGIANCE TELECOM, INC., et al.

2 to make.

3 MR. DUBLIN: As Your Honor is aware,  
4 yesterday the committee and the bank agreed to a  
5 short four day extension of the exclusivity  
6 periods to September 15. It was the committee's  
7 agreement that adjournment was with the hope and  
8 understanding that we would receive at least a  
9 term sheet or some type of progress towards a plan  
10 in this case. To date, we still have not had much  
11 progress at all. To the extent we have not  
12 received a term sheet or received substantial  
13 progress between now and the 10th, which is our  
14 objection deadline, I would expect that to be  
15 highly confrontational.

16 THE COURT: You all are good lawyers  
17 and can make a lot of progress in 24 hours, which  
18 frankly, I guess, that was all you need.

19 MR. CANTOR: Just for the sake of the  
20 record, Judge, to the extent we are unable to get  
21 some understandings about an extension of the  
22 exclusive periods, we are likely to be in a  
23 position to file a plan prior to that time. It's  
24 a pretty simple case. Most of the company is  
25 going to the banks.

1 ALLEGIANCE TELECOM, INC., et al.

2 THE COURT: All right. Although,  
3 obviously, the more progress you make, the  
4 better --

5 MR. CANTOR: Absolutely, Judge.

6 THE COURT: If you do have a  
7 contested exclusivity hearing, I would like, among  
8 other things, to have an estimate of the monthly  
9 cost of the case, which I think that is an  
10 important factor for the record.

11 Before we get to the pretrial  
12 conference, I had the BP landlord's lift stay  
13 motion, which, just based on my records, was  
14 adjourned to today, although I know you had been  
15 in discussions with them. Has it been further  
16 adjourned?

17 MS. CHUPLYGINA: Good morning, Judge.  
18 This matter has been further adjourned until  
19 September 15, and we are going to submit a  
20 stipulation later today or tomorrow.

21 THE COURT: Okay. Does that cover  
22 everything except the pretrial?

23 MR. CANTOR: Yes, Judge.

24 THE COURT: Why don't we deal with  
25 the pretrial.

1 ALLEGIANCE TELECOM, INC., et al.

2 MR. COHEN: Good morning. Rob Cohen  
3 of Kirkland & Ellis representing the Plaintiffs.

4 MS. FAULKNER: Good morning, Your  
5 Honor. I am Carole Faulkner for CI Host.

6 THE COURT: Where do you stand on  
7 this? I know the injunctive aspect of this has  
8 been resolved by consensus, we did that last time  
9 you were all here. Are you actively pursuing this  
10 at this moment?

11 MR. COHEN: Your Honor, I will let  
12 Defendant's counsel speak for herself. But we did  
13 confer prior to today and the two sides are still  
14 actively pursuing it, but we would like to settle  
15 the case. There is the issue of attorneys' fees  
16 that, quite frankly, is outstanding. Allegiance  
17 and Host dot com incurred attorneys' fees in  
18 obtaining the stipulated Order for a Temporary  
19 Restraining Order and Preliminary Injunction, and  
20 that was the outstanding issue at this time.

21 THE COURT: Okay. So you are in  
22 discussions about resolving that issue?

23 MS. FAULKNER: Yes, Your Honor, we  
24 are.

25 THE COURT: Then it makes sense to

1 ALLEGIANCE TELECOM, INC., et al.

2 put this off for at least a month.

3 MR. COHEN: I would fully concur with  
4 that.

5 MS. FAULKNER: Yes, Your Honor, we  
6 agree.

7 THE COURT: Why don't we then put it  
8 off to the next Allegiance day, which, I guess, is  
9 in October, whatever that date is. We will  
10 schedule for that date. We have a regular date,  
11 one per month.

12 MR. COHEN: Your Honor, that should  
13 be fine.

14 THE COURT: Here it is. It's October  
15 21.

16 MR. COHEN: That is fine.

17 THE COURT: I think that would give  
18 you time to resolve it. I think that if it's  
19 probably not resolved by the end of September on a  
20 business level, then you ought to focus on some  
21 sort of discovery schedule so that you can present  
22 that for October 21.

23 MS. FAULKNER: I agree.

24 THE COURT: I think given you are not  
25 involved, it is probably better to resolve this

1 ALLEGIANCE TELECOM, INC., et al.  
2 than to pursue the both parties.

3 MR. COHEN: That was our hope, Your  
4 Honor.

5 THE COURT: Okay. If it's resolved  
6 or resolved on a business level, without having  
7 something filed with the Court, there is no need  
8 to come in, just inform my chambers.

9 MS. FAULKNER: Thank you.  
10 Your Honor, one other issue before  
11 the Court is the motion pro hac vice.

12 THE COURT: I signed that, I think,  
13 yesterday.

14 MS. FAULKNER: Thank you.

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

- - - - -

STATE OF NEW YORK            )  
                                          )   ss.:  
COUNTY OF NEW YORK         )

I, ROBERT PAYENSON, a Shorthand  
Reporter and Notary Public within  
and for the State of New York, do hereby  
certify:

I reported the proceedings in the  
within-entitled matter, and that the within  
transcript is a true record of such  
proceedings.

I further certify that I am not  
related, by blood or marriage, to any of  
the parties in this matter and that I am  
in no way interested in the outcome of this  
matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this \_\_\_\_\_day of \_\_\_\_\_,  
2003.

-----  
ROBERT PAYENSON