

HEARING DATE: June 7, 2004 at 10:00 a.m.
OBJECTION DEADLINE: June 7, 2004 at 10:00 a.m.

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE 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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**To The Honorable Robert D. Drain
United States Bankruptcy Judge**

**EMERGENCY MOTION OF MELLON HBV ALTERNATIVE
STRATEGIES LLC, *ET AL.* FOR APPROVAL OF AMENDMENT OF TIMELY FILED
BALLOT FOR VOTING IN FAVOR OF CONFIRMATION OF THE PLAN AND
ELECTION OF TRUST INTERESTS IN LIEU OF CASH RECOVERY**

Mellon HBV Alternative Strategies LLC (“Mellon”) and Mellon HBV Master Multi-Strategy Fund LP, Mellon HBV Master Leveraged Multi-Strategy Fund LP, Mellon HBV Master Rediscovered Opportunities Fund LP, Lyxor/Mellon HBV Rediscovered Opportunities Fund Limited, Axis-RDO Limited, Distressed Recovery Master Fund, Ltd., and HFR DS Performance Master Trust (collectively, the “Mellon Funds”), by their undersigned counsel, hereby move the

Court for entry of an Order recognizing the Mellon Funds's timely filed Amended Master Ballot filed by the Mellon Funds's agent and nominee, Goldman Sachs & Co. ("Goldman Sachs"), as a timely and valid election to receive under the Plan ATLT "A" Trust Interests and ATLT "B" Trust Interests, in lieu of the Cash Recovery, on the following grounds:

Background

1. The Mellon Funds hold claims for the 11 3/4 % Senior Discount Notes, due February 15, 2008 (the "Notes"), in the aggregate face amount of \$26,164,000. The Mellon Funds's nominee and agent for these Notes is Goldman Sachs.

2. The Debtors, Allegiance Telecom, Inc., *et al.* (collectively, the "Debtors"), have filed a Chapter 11 plan (the "Plan") that is scheduled to be the subject of a hearing on confirmation to begin on Monday, June 7, 2004 at 10:00 a.m. In connection with confirmation proceedings, the Debtors obtained Court approval of a disclosure statement and solicitation procedures, which among other things set June 1, 2004 at 5:00 p.m. (the "Voting Deadline") as the deadline for all ballots to be received by the Voting Agent, in order for the votes to be counted.

3. The Plan provides alternative distribution schemes for holders of Class 5 claims, of which the Mellon Funds are members. Specifically, Class 5 creditors, including the Mellon Funds, have an option of receiving (i) the Cash Recovery, (ii) the "ATLT 'A' Trust Interests", (iii) the "ATLT 'B' Trust Interests", or a combination of these options. As part of the solicitation process, the Voting Agent sent Master Ballot forms to brokers, banks and other nominees for their beneficial owners.

4. As part of the solicitation process, the Debtors sent solicitation packages to Goldman Sachs, not Mellon or the Mellon Funds. Goldman Sachs did not forward solicitation packages to Mellon or the Mellon Funds.

5. Instead, Goldman Sachs provided information on its website summarizing the options for voting and electing alternative distributions under the Debtors' Plan. This process required Mellon, as agent and advisor for the Mellon Funds, to advise Goldman Sachs electronically how the Mellon Funds wished to vote with respect to confirmation of the Plan, and what distribution scheme the Mellon Funds wanted to receive under the Plan. In the absence of any response by Goldman Sachs's customers within the time required for Goldman Sachs to file timely Master Ballots, Goldman Sachs voted to accept the Plan and did not elect any of the Trust Interests in lieu of a Cash Recovery. In other words, absent timely electronic instructions from Mellon and other customers, Goldman Sachs voted on behalf of the beneficial owners of the Notes to accept the Plan and, by not selecting the alternatives, the Cash Recovery.

6. Based on information currently available, it appears that Mellon did not provide Goldman Sachs with affirmative voting instructions prior to the time Goldman Sachs submitted a Master Ballot. As a result, prior to the Voting Deadline, Goldman Sachs properly filed a timely Master Ballot (the "Original Master Ballot") listing each of the Mellon Funds as voting to accept the Plan and not electing to receive interests in the ATLT Trusts in lieu of the Cash Recovery.

7. The Original Master Ballot did not, and does not, reflect the Mellon Funds's actual intention. In fact, Mellon intended to elect the ATLT "A" Trust Interests and the ATLT "B" Trust Interests in lieu of the Cash Recovery (the "Non-Cash Election") and so advised Goldman Sachs prior to the Voting Deadline.

The Amended Master Ballot

8. On June 1, 2004, Mellon discovered that the Original Master Ballot did not reflect Mellon's and the Mellon Funds's intent to elect the Non-Cash Election, and Mellon communicated with Goldman Sachs to correct this error. Pursuant to Mellon's request, on June 1, 2004, Goldman Sachs sent to the Voting Agent, to the attention of Rich Reilly, by

facsimile, an amended Master Ballot (the “Amended Master Ballot”) listing the Mellon Funds and their votes to accept the Plan and in favor of the Non-Cash Election. A copy of the Amended Master Ballot dated June 1, 2004 is attached hereto as Exhibit A. Because the Voting Agent is located on the West Coast, facsimile transmission was then the only means of filing the Amended Master Ballot that would have reached the Voting Agent prior to the Voting Deadline.

9. According to the date and time stamp on the cover sheet, the Amended Master Ballot was sent on June 1, 2004, at 4:46 p.m.; when the Voting Agent received it is not known. A representative of Goldman Sachs has just today advised Mellon that the time clock for Goldman Sachs’s facsimile transmissions on June 1, 2004 may have been incorrect. Mellon has no information about this, other than the fact that Mellon’s telephone communications with Goldman Sachs were prior to the Voting Deadline.

10. Subsequently, the Voting Agent advised Mellon that the Amended Master Ballot might be treated as untimely, and in that event the Mellon Funds would be deemed to have elected receipt of the Cash Recovery under the Plan. Since learning of that possibility, Mellon has attempted, through informal communications with or to representatives of the Debtors and the Official Committee of Unsecured Creditors (the “Creditors’ Committee”), to confirm that the principal parties have no objection to the Amended Master Ballot and to the recognition of Mellon’s Non-Cash Election in the Amended Master Ballot.

11. Mellon believed that the Amended Master Ballot was received by Voting Agent prior to the Voting Deadline. If it was not, the Voting Agent in any event received the Amended Master Ballot shortly after the Voting Deadline. If any party argues against counting the Amended Master Ballot as a valid and effective Non-Cash Election because it was sent by facsimile and not by mail or courier, then it should be noted that the solicitation procedures do

not expressly prohibit use of facsimile to change a creditor's election for distributions under the Plan. Instead, the solicitation procedures simply provide the Debtors with the right not to count ballots sent by facsimile "for any purpose in determining whether the Plan has been accepted or rejected." See Order Approving the Disclosure Statement, etc. ¶6. This Emergency Motion asks not that the Amended Master Ballot be counted for determining whether the Plan has been accepted, as in both the Original Master Ballot and Amended Master Ballot the Mellon Funds voted to accept the Plan. Accordingly, the relief requested herein - - counting the Amended Master Ballot as a timely and valid election of the Non-Cash Election - - is not contrary to the solicitation procedures governing these proceedings.

12. As of the filing of this Emergency Motion, Mellon was not able to confirm this understanding of the treatment of the Amended Master Ballot. In these circumstances, Mellon has filed this Emergency Motion to ask this Court for what should be noncontroversial relief, namely recognizing the Amended Master Ballot as a valid exercise of Mellon's election for the Non-Cash Election.

Grounds for the Relief Requested

13. There are multiple grounds for granting the relief requested in this Emergency Motion. First, as is commonplace in large Chapter 11 cases like this one, the solicitation procedures provide the Debtors with broad discretion to waive any alleged defects in any Ballot or Master Ballot at any time, whether before or after the Voting Deadline, and without notice. Whereas in this case the solicitation process is complicated by the multiple steps made necessary because the Debtors send the ballots to a broker or nominee and not directly to the beneficial holders of the Notes, it would be a very reasonable exercise of the Debtors' discretion to agree that the Amended Master Ballot will be counted as timely and valid elections of the Non-Cash

Election. If the Debtors confirm this before or during the confirmation hearing, then that alone is sufficient for the Court to enter the proposed Order accompanying this Motion.

14. In addition, Rule 3018(a) of the Federal Rules of Bankruptcy Procedure provides:

For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change ... an acceptance or rejection.

Mellon submits that the circumstances described in this Motion, and the accompanying Affidavit of Robert Beers in Support of Emergency Motion of Mellon HBV Alternative Strategies LLC, *et al.* for Approval of Amendment of Timely Filed Ballot for Voting in Favor of Confirmation of the Plan and Election of Trust Interests in Lieu of Cash Recovery (the “Beers Affidavit”) constitute cause within the meaning of Rule 3018(a) to permit Mellon to change their ballot to include the Non-Cash Election.

15. Compelling grounds in support of this Motion also are found in Rule 9006(b), which provides in relevant part:

when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion ... (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

16. The leading case articulating the application of this excusable neglect standard is Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993). In Pioneer, the Supreme Court gave this standard a flexible interpretation, holding that the term “neglect” encompassed not only circumstances beyond the movant’s control but also simple, faultless omissions to act, and more commonly, omissions caused by carelessness. Pioneer, 507 U.S. at 387-388. The Court reasoned:

Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by

inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of affected parties, guided by the overriding goal of ensuring the success of the reorganization.

Id. at 381.

17. The Court's decision under Rule 9006 and Pioneer to permit a late filing is an equitable one, which may take into account all of the relevant circumstances surrounding the party's failure to file timely. Id. at 395. These factors include, but are not limited to:

1. the adequacy of the notice;
2. the danger of prejudice to the debtor;
3. the length of the delay and its potential impact on judicial proceedings;
4. the reason for the delay, including whether it was within the reasonable control of the movant and taking into account the movant's sophistication; and
5. whether the movant acted in good faith.

Id. at 385; In re Hills Stores Co., 167 B.R. 348, 351 (Bankr. S.D.N.Y. 1994) (citations omitted).

18. In the present case, the relevant factors, taken together, weigh heavily in favor of granting this Motion and permitting the Amended Master Ballot to be deemed timely filed and effective. With respect to the first factor, Mellon and the Mellon Funds, based on currently available information, did not receive notice or the solicitation package from the Debtors. It received only electronic notification, in a summary way, from Goldman Sachs. Although Mellon is a sophisticated party, the cumbersome nature of the voting process, through a nominee like Goldman Sachs, coupled with the complexity of the ballot, creates fertile ground for confusion and error even by a sophisticated party

19. With respect to the second Pioneer factor, accepting the Amended Master Ballot as valid with respect to the Non-Cash Election will not prejudice the Debtors in any way. Indeed, Mellon is in favor of confirmation and its Non-Cash Election, if recognized, will require

the Debtors to pay less cash under the Plan, which should be advantageous to the Debtors.

Third, there was no real delay here. The Master Ballot, which was amended by the Amended Master Ballot, was timely filed before the Voting Deadline, and this Motion is being filed prior to confirmation, so that granting the relief requested herein will cause no delay in these proceedings. The alleged defect to be waived in this case concerns the Voting Agent's receipt of the Amended Master Ballot by facsimile. To the extent the Amended Master Ballot was not received by the Voting Agent until after the Voting Deadline, 5:00 p.m. Eastern Time, it was received less than one hour later. Accordingly, granting the relief requested will cause no delay in these proceedings.

20. As to the fourth Pioneer factor, the reason for the need to submit the Amended Master Ballot by facsimile was to avoid delay and to file it by the Voting Deadline. Regarding the last Pioneer factor, there should be no question that Mellon and the Mellon Funds have acted, and are acting, in good faith in seeking this relief.

21. It is noteworthy that Mellon and the Mellon Funds did properly file a timely ballot, through its nominee and agent, Goldman Sachs, and do not seek to change their votes in favor of confirmation. The modest relief requested herein, deeming the Amended Master Ballot to be a valid and timely election by the Mellon Funds of the Non-Cash Election, is of great significance to the Mellon Funds. The Mellon Funds are investment funds which are entrusted with the funds of a number of investors, largely comprised of pension funds, charitable endowments and tax-exempt institutions. Mellon believes that while the Non-Cash Election inherently presents greater risk to the Mellon Funds's recovery compared to the Cash Recovery, the recoveries under the Non-Cash Election are expected to be substantially larger than the Cash Recovery and the Mellon Funds wish to make this choice for the benefit of their investors.

22. In these circumstances, the Court should exercise its discretion under Rule 9006(b) and direct that the Amended Master Ballot be counted as a valid exercise by the Mellon Funds of the Non-Cash Election.

23. In further support of this Motion, Mellon has filed contemporaneously herewith the Beers Affidavit, a copy of which is attached hereto as Exhibit B.

WHEREFORE, Mellon and the Mellon Funds respectfully request this Court to grant this Emergency Motion to deem the Amended Master Ballot as a valid and effective election by each of the Mellon Funds for the Non-Cash Election under the Plan, and to grant such other and further relief as the nature of this cause may require.

Mellon HBV Alternative Strategies, LLC, for itself
and each of the Mellon Funds

/s/ John J. Jerome

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