PAUL HASTINGS JANOFSKY & WALKER, LLP
1055 Washington Boulevard
Stamford, Connecticut 06901
(203) 961-7400
Leslie A. Plaskon (LP 1851)

and

600 Peachtree Street, Suite 2400
Atlanta, Georgia 30308
(404) 815-2161
Jesse H. Austin, III
Kristine M. Shryock
Counsel for General Electric Capital Corporation, as Agent

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	Chapter 11 Case No.
Allegiance Telecom, Inc., et al.,	:	03-13057 (RDD)
	:	
Debtors.	:	Jointly Administered
	:	
	:	Hearing Date: July 15, 2003 at 10:00 a.m.
	X	Objection Deadline: July 12, 2003 at 4:00 p.m.

GENERAL ELECTRIC CAPITAL CORPORATION'S OBJECTION TO APPLICATION OF THE DEBTORS FOR ENTRY OF AN ORDER AUTHORIZING THE EMPLOYMENT AND RETENTION OF GREENHILL & CO., LLC AS FINANCIAL ADVISOR AND INVESTMENT BANKER

COMES NOW, General Electric Capital Corporation as Agent for itself and certain other lenders (the "Agent") and files this objection (the "Objection") to the Application of the Debtors for Entry of an Order Authorizing the Employment and Retention of Greenhill & Co., LLC as Financial Advisor and Investment Banker (the "Application"). In support of the Objection, the Agent represents as follows:

I.

INTRODUCTION

1. Debtors entered into that certain Credit and Guaranty Agreement dated as of February 15, 2000, (as amended, restated, supplemented or otherwise modified from time to time the "Prepetition Credit Agreement") and related loan documents thereto (the "Prepetition Loan Documents"), between and among Allegiance Telecom Company Worldwide (the "Borrower"), Allegiance Telecom, Inc. (the "Company", and other Debtor subsidiaries of the Company (together with the Company, the "Guarantors"), the Agent and Lenders party thereto from time to time (the "Lenders").

2. Pursuant to the Prepetition Credit Agreement and Prepetition Loan Documents, the Agent, on behalf of the Lenders, asserts a first priority security interest in substantially all of the Debtors' assets.

3. The Debtors filed voluntary petitions for relief on May 14, 2003 (the "Petition Date").

4. As of the Petition Date, the Borrower and Guarantors were indebted to the Lenders under the Prepetition Loan Agreement in the principal amount of $465,300,000, plus interest and various other charges, including costs, expenses and attorney fees.

5. The Debtors obtained the use of the Lenders' cash collateral on a final basis pursuant to the Final Order Authorizing the Use of Cash Collateral by Consent entered on June 23, 2003[1] (the "Final Order").

[1] An Amended Final Order Authorizing the Use of Cash Collateral by Consent was subsequently entered by the Court on June 26, 2003 to correct a typographical error in the Final Order.

6. On May 14, 2003, the Debtors filed the Application and an Interim Order Authorizing the Employment and Retention of Greenhill & Co., LLC as Financial Advisor and Investment Banker was entered on May 15, 2003.

7. The Retention Agreement[2] details the services to be provided by Greenhill to the Debtors as follows:

General Financial Advisory Services. Upon the Debtors' request, Greenhill shall:

(i) review and analyze the business, operations, properties, financial condition and prospects of the Debtors;

(ii) evaluate the Debtors' debt capacity in the light of their projected cash flows;

(iii) assist in the determination of an appropriate capital structure for the Debtors;

(iv) determine a range of values for the Debtors on a going concern basis and on a liquidation basis; and

(v) advise and attend meetings of the Debtors' Board of Directors and their Committees.

Recapitalization Services. If the Debtors pursue a Recapitalization, Greenhill shall, in each case if requested by the Debtors:

(i) provide financial advice and assistance to the Debtors in developing and seeking approval of a chapter 11 plan (as the same may be modified form time to time, the "Plan");

(ii) provide financial advice and assistance to the Debtors in structuring any new securities, other consideration or other inducements to be offered and/or issued under the Plan;

[2] Capitalized terms not otherwise defined herein, shall have the meaning ascribed to them in the Application.

(iii) assist the Debtors and/or participate in negotiations with entities or groups affected by the Plan; and

(iv) assist the Debtors in preparing documentation within Greenhill's area of expertise required in connection with the Plan.

8. Based upon these specified services, the Debtors agreed to a Monthly Advisory Fee in the amount of $175,000 and a $6,500,000 Recapitalization Transaction Fee. As of the Petition Date, Debtors had paid Greenhill $1,225,000, plus expenses for these services.

9. The Debtors have recently engaged Impala Partners, LLC ("Impala") to serve as the chief restructuring officer ("CRO") of the Debtors[3]. The engagement of a CRO was a condition to the Lenders consenting to the use of cash collateral as embodied in the Final Order. Impala will receive $250,000 per month for its services to the Debtors and a success fee to be negotiated. As CRO, 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" established within the Debtors; and (d) developing the Debtors' long-term business strategy[4].

10. As stated on the record at the May 14, 2003 hearing and June 23, 2003 hearing, the Agent and Lenders support the Debtors' retention of a CRO, and required that a CRO be retained to allow the use of cash collateral on a final basis.

---

[3] The Motion of the Debtors Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of Services Agreement with Impala Partners, LLC was filed on July 11, 2003 (the "Impala Motion").

[4] The specific terms and conditions of Impala's services are attached to the Impala Motion as Exhibit A.

II.

OBJECTION

11. The Agent vigorously opposes the retention of Greenhill as follows:

- To date, the Agent and Lenders have seen no value added by the Debtors retention of Greenhill – continued employment of Greenhill is not in the best interests of Debtors' creditors.

- Greenhill's services will be duplicative of Impala's services to be performed for the Debtors.

- In light of Greenhill's performance to date, the Monthly Advisory Fee is excessive in connection with the services to be provided by Greenhill in the Debtors' chapter 11 cases.

- Greenhill is not entitled to a Recapitalization Transaction Fee as they have not provided services to enable the Debtors to propose any acceptable plan to the Debtors' creditor constituents.

- Greenhill should not be entitled to a Recapitalization Transaction Fee as Impala's engagement is to advise on the operational restructuring of the Debtors and to assist in developing the Debtors' long-term business strategy. Therefore, if the Debtors successfully reorganize, it is likely to be due to the efforts of Impala.

- Even if this Court allows a modified Recapitalization Transaction Fee or a reduced Monthly Advisory Fee, any award should be subject to further Court review under sections 327(a) and 330(a) of the Bankruptcy Code.

III.

BACKGROUND

12. Greenhill was engaged by the Debtors on or about October 20, 2002 to, among other things, assist the Debtors in an out of court restructure of their balance sheets or preparation for a prepackaged plan of reorganization in a bankruptcy proceeding.

13. At the time Greenhill was engaged, the Agent and Lenders supported the Company's engagement of an advisor to facilitate the out of court restructure or prepackaged plan. However, based upon Greenhill's performance over the course of the past nine months, the Agent now objects to the Debtors' continued engagement of Greenhill in light of Greenhill's inability to further the Debtors' restructuring efforts.

14. The Debtors and Greenhill began working on proposals for restructuring the Debtors' balance sheet and on November 27, 2002, the Debtors, Agent and Lenders entered into an amendment of the Prepetition Credit Agreement (the "Amendment") to provide the Debtors with additional time through April 30, 2003 to reduce the Debtors' debt structure.

15. Thereafter in early 2003, certain of the Debtors' public bondholders formed an ad hoc committee (the "Ad hoc Committee") for the purpose of discussing possible restructure options with the Debtors.

16. After execution of the Amendment, the Debtors and Greenhill purportedly spent the next four months creating a business plan. In March 2003, the Debtors finally provided the Lenders with a business plan – however the Lenders were subsequently told that Greenhill did not support the proposed business plan and had significant changes to the basic assumptions. Therefore, the restructuring process was again paralyzed while the Lenders waited for the Debtors and Greenhill to present a revamped business plan which reconciled the Debtors' and Greenhill's assumptions.

17. Despite the Agent and Lenders participating in numerous meetings with the Debtors and Greenhill and the Ad hoc Committee's willingness to discuss treatment

of their claims, the Debtors and Greenhill were unable to propose viable restructuring options with market based terms consistent with the Debtors' own business plans or provide adequate financial data to support future business plans.

18. As a last resort, on April 29, 2003, the Debtors and Lenders entered into a forbearance agreement to allow the Debtors and Greenhill additional time to produce a restructuring proposal.

19. Even with the additional time, the Debtors and Greenhill again produced a completely unacceptable term sheet with non-market terms that were not supported by any business plan or projections. For example, each of the Debtors' proposals insisted on new equity allocations to old equity, notwithstanding the Debtors' own admission of insolvency which violates the absolute priority rule. In contrast, the Lenders and the Ad hoc Committee separately proposed viable restructuring term sheets to the Debtors which conformed to the Debtors' revised financial projections.

IV.

ARGUMENT AND CITATION OF AUTHORITIES

20. The Agent objects to the retention of Greenhill in the first instance. As has already been admitted before this Court, the Debtors are insolvent in that there is no anticipated recovery or any significant recovery for the Debtors' public equity holders. As a result, the Debtors, management, and their advisors are effectively working for the Debtors' creditors, namely the Lenders and the unsecured creditors including the bondholders. The restructuring proposals allegedly developed by Greenhill, on behalf of the Debtors, are not only considerably off market with their concepts of restructuring the

Debtors, but also inconsistent with the Debtors' own proposed business plans and projections, and other advisors separate analyses of the Debtors' financials. The fact that Greenhill has been unable to assist the Debtors in proposing even a viable term sheet in the seven months leading to the bankruptcy filing causes the Agent serious doubts that Greenhill will be able to effectively advise the Debtors postpetition.

21. The Debtors, with Greenhill serving as an advisor, continue to stubbornly present and discuss with the creditor constituencies restructuring plans which on their face are off market and not even justified by the Debtors' own projected financial performance. Conversely, Greenhill and the Debtors have elected to virtually ignore proposals by the Agent, on behalf of the Lenders, which have been based on the Debtors' own business plans and financial projections.

22. The Debtors exclusive time period to propose a plan is quickly evaporating[5] and yet the senior secured lenders have not seen a proposal which is remotely within the realm of a confirmable plan. Although slow progress this stage of a chapter 11 case may not be unusual, it is inconsistent with the Debtors' stated intentions over seven months ago, when Greenhill was first retained, of completing a restructure of the Debtors by the end of summer in 2003.

23. While the Debtors have the right to select their own advisors without creditor approval, this Court retains discretion to disapprove of the proposed applicant based upon the facts and circumstances of the case. ***See In re Harold & Williams Dev.***

[5] Pursuant to section 1121 of the Bankruptcy Code, the exclusive time period for the Debtors to file a plan will expire on September 11, 2003. The Agent, on behalf of the Lenders, is seriously considering seeking a termination of exclusivity and opposing any requests for extension of exclusivity.

Co., 977 F.2d 906, 910 (4th Cir. 1992) ("[T]he discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interest of the bankruptcy estate and its creditors, and the efficient, expeditious and economical resolution of the bankruptcy proceeding.") and ***Bank Brussels Lambert v. Coan (In re AroChem Corp.)***, 176 F.3d 610, 621 (2nd Cir. 1999).

24. The fact that the Debtors and Greenhill had over seven months to negotiate with creditor constituents and were unable to come close to a confirmable plan before filing a chapter 11 case should be further evidence that the continued retention of this advisor is not in the best interest of the estate. This estate can not afford for the Debtors to remain in bankruptcy another seven months without significant progress.

25. Courts further have held that it is within the a court's discretion to disallow employment of a professional based upon an unreasonable rate of compensation. ***See In re Kurtzman***, 200 B.R. 538 (S.D.N.Y. 1998). In this case, the Greenhill flat monthly fee of $175,000 is unreasonable in comparison with the services to be provided – especially since Impala will be performing many of the same services. Greenhill received over a million dollars prior to the Petition Date, but Greenhill does not even support the Debtors' business plan and underlying assumptions and drivers which was distributed to the Lenders. Furthermore, as stated herein, the efforts of Greenhill have not advanced an acceptable plan of reorganization for the creditors and therefore a $6,500,000 Recapitalization Transaction Fee is unreasonable.

26. If this Court is inclined to allow the retention of Greenhill on some basis, the Agent opposes approval of the retention as presented. In light of the Debtors' engagement of a CRO, it is clear that the Monthly Advisory Fee should at a minimum be substantially reduced and that Greenhill's role and responsibilities should be significantly restricted. Further, there should not be any approval of the Recapitalization Transaction Fee at this time.

27. Greenhill's seeks to be retained as a professional to the Debtor under section 328(a) of the Bankruptcy Code. Section 328(a) states:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment *if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions. (emphasis added).*

Not only is Greenhill's employment a flat monthly fee, but it also has a Recapitalization Transaction Fee component. If this Court grants employment under section 328(a), as opposed to section 327(a), then the monthly fees and the Recapitalization Transaction Fee will be deemed allowed unless the standard that the "terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." can be proved. Section 328(a) of the Bankruptcy Code. Clearly, the fact that the Debtors are seeking another professional to perform similar services is known to the parties at the time of this Application, as is the

fact that the Debtors seek to reorganize in the chapter 11 cases. Therefore applying the Section 328(a) standard, Greenhill's flat monthly fee and Recapitalization Transaction Fee will not be subject to reduction based upon duplication of services or applying the reasonable standard for actual and necessary services that benefited the estate contained in section 330 of the Bankruptcy Code.

28. In ***In re Drexel Burnham Lambert Group, Inc.***, 133 B.R. 13 (Bankr. S.D.N.Y. 1991), the Court specifically examined the role and compensation of investment bankers and financial advisors in connection with chapter 11 cases. The Drexel court developed a set of criteria that must be disclosed in an application to enable the court to determine the reasonableness of the applicant's compensation as follows:

- a presentation of the scope and complexity of the assignment, its anticipated duration, expected results, required resources;
- a description of the extent to which highly specialized skills may be needed and the extent to which such professional has them or may be able to obtain them;
- a statement of the professional's projected salary, billing rate and prevailing fees for comparable services;
- a copy of the actual retention agreement between the investment banker or advisor must be attached to the retention application;
- a description by the party retaining the professional of the process by which the financial banker or advisor has been selected; and
- a statement in the application explaining how the investment banker or advisor will eliminate, or at least reduce, the duplication of effort among armies of professionals.

Id., 133 B.R. 13, 26. Although the Application and supporting affidavit attach a copy of the retention agreement, the Application lacks a presentation of the scope and duration of the assignment, does not describe the Debtors' selection process and does not state Greenhill's professionals' projected salary, billing rates and prevailing fees for

comparable services in other chapter 11 cases. Without this information, the Court should deny the Application or in the alternative allow employment of Greenhill under section 327(a) of the Bankruptcy Code to allow a reasonableness standard review of the services to be rendered to the estates.

29. Professionals are awarded compensation under section 330 of the Bankruptcy Code as:

> (A) reasonable compensation for the actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any such paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

However, for those professionals who are retained under section 328(a) of the Bankruptcy Code, the court may not modify the agreed compensation or subject the fees to the "reasonableness test" unless the terms were improvident in view of circumstances not capable of being anticipated. ***See*** section 328(a) of the Bankruptcy Code, ***In re Barron***, 225 F.3d 583 (5th Cir. 2000) and ***In re Reimers***, 972 F.2d 1127, 1128 (9th Cir.1992).

30. If the Application is not denied, then it is clear that Greenhill's services will result in either duplication of services with Impala or an overlap of services and thus the Monthly Advisory Fee must be reduced and subject to the reasonableness standard under section 330 of the Bankruptcy Code. If Greenhill's application is approved under section 328(a), the creditors, trustee and court will be unable to reduce the proposed compensation during the case unless new and unforeseen events develop.

31. Furthermore, in light of the Debtors filing their chapter 11 cases and employment of Impala, the Recapitalization Transaction Fee should not be approved by this Court. The Debtors paid Greenhill over a million dollars prepetition to assist in the restructure of the Debtors' balance sheet. During the seven months of employment, Greenhill was not successful producing any meaningful proposal or plan which was acceptable by the Lenders or the Ad hoc Committee. The inability of Greenhill to produce a plan in the seven month time period makes it questionable that the Court should approve a Recapitalization Transaction Fee at this time which is not subject to a further more stringent review under sections 327(a) and 330(a) of the Bankruptcy Code. The fact that Impala will be spearheading the Debtors' cost saving and long term business strategies will make it impossible to determine whether Greenhill has actually earned the predetermined Recapitalization Transaction Fee.

32. The Recapitalization Transaction Fee is a flat fee in the amount of $6,500,000 payable upon a Recapitalization. The Application defines a Recapitalization as:

> any recapitalization or restructuring (including, without limitation, through any refinancing, repurchase, exchange, conversion, cancellation, forgiveness, retirement and/or a material modification or amendment to the terms, conditions or covenants thereof) of the Company's equity and/or debt securities and/or other indebtedness, obligations or liabilities (including, without limitation, preferred stock, partnership interests, lease obligations, trade credit facilities and other contract or tort obligations), or a sale of substantially al of the Company's assets, including pursuant to an exchange transaction, a Plan or a solicitation of consents, waivers, acceptances or authorizations, an acquisition related transaction, or any other change of control transactions.

As the Debtors have filed their chapter 11 cases, it is a forgone conclusion that the Debtors' will be reorganizing their debt structure in some manner, whether it be by a plan proposed by the Debtors or a competing plan proposed by the creditor constituents. Greenhill should not be awarded a Recapitalization Transaction Fee of $6,500,000 today based upon the overly broad definition of Recapitalization since it has yet to be proven the Greenhill's services will result in a confirmable reorganization plan. Furthermore, Greenhill's prepetition efforts to propose an out of court restructuring or prepackaged plan clearly were unsuccessful and therefore, this Court should not award any Recapitalization Transaction Fee which is only subject to the section 328(a) standard of unforeseeable circumstances.

IV.

WAIVER OF MEMORANDUM OF LAW

33. This Objection includes citations to applicable authorities, and does not raise any novel issues of law. Accordingly, the Agent respectfully requests that this Court waive the requirement contained in Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York that a separate memorandum of law be submitted.

34. No application for the relief requested herein has been presented to this or any other court.

V.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the Agent requests that this Court (i) deny the Application based upon its current terms and conditions, and (ii) grant the Agent such other and further relief as is just and proper.

Dated: New York, New York
July 12, 2003

Respectfully submitted,

PAUL HASTINGS JANOFSKY &
WALKER LLP

By: /S

Leslie A. Plaskon (LP 1851)
Paul Hastings Janofsky & Walker LLP
1055 Washington Boulevard
Ninth Floor
Stamford, Connecticut 06901
Telephone: (203) 961-7424
Facsimile: (203) 359-3031

Jesse H. Austin, III
Kristine M. Shryock
600 Peachtree Street
Suite 2400
Atlanta, Georgia 30308
(404) 815-2400
(404) 815-2424
Appearing *pro hac vice*

ATTORNEYS FOR GENERAL
ELECTRIC CAPITAL CORPORATION,
AS AGENT