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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

IMPALA PARTNERS, LLC'S MEMORANDUM OF LAW IN SUPPORT OF THE DEBTOR'S MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 105 AND 363 SEEKING APPROVAL OF A SERVICES AGREEMENT WITH IMPALA PARTNERS AND IN REPLY TO THE OBJECTION OF THE OFFICIAL CREDITORS' COMMITTEE'S OPPOSITION THERETO

TO: THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:

Impala Partners, LLC ("Impala"), by its undersigned counsel, hereby submits its memorandum of law in support of the motion (the "Motion") by Allegiance Telecom, Inc. et al. (collectively the "Debtors") seeking final approval of the Services Agreement, dated July 11, 2003, as amended by letter dated August 28, 2003 (the "Services Agreement"), and in reply to the Creditors' Committee's opposition thereto, and states as follows:

Preliminary Statement

In a transparent attempt to improperly pressure Impala to reduce the terms of its already reduced success fee[1] the Committee first argues that Impala should not receive final approval of its retention because it is not disinterested and further that it should not be compensated for services prior to or subsequent to this Court's July 29, 2003 Interim Order approving Impala's retention. The Committee alleges that Impala's receipt after the entry of the Interim Order, of payment for services rendered for the 25 day period from June 15, 2003 through July 10, 2003 is in violation of Bankruptcy Code Section 549 and renders Impala not disinterested.

The Committee's arguments are completely disenguous. The Committee was well aware and even interacted directly and had its professionals interact with Impala immediately after the initial meeting on June 12, 2003 (Street Aff. para 19). As the Debtors' papers make clear, the Committee worked side by side with Impala, even while Impala continued to negotiate the terms of its retention with both the Debtors and the Committee. Now, rather than compliment Impala on its rapid engagement in assisting the Debtors in dealing with pressing business matters (rather then wasting precious time negotiating its retention and then waiting days for approval pursuant to Local Bankruptcy Rule 9074-1(b)), the Committee seeks to take advantage of a purely ministerial billing error (Street Aff. paras. 20-21). Given the Committee's knowledge of and request that Impala begin work immediately, it should be estopped from now raising this argument. Furthermore, the Committee fails to explain what prejudice it or the Debtor's estate has suffered. That is because there has been no prejudice. Quite the contrary, the estate has benefited from Impala's work.

Regardless of the circumstances of the payment, Impala can easily meet the standards for approval of its retention nunc pro tunc to June 15, 2003. While such an application is not presently before the Court, such nunc pro tunc retention will moot the Committee's argument.

The approval of a flat fee is appropriate in this case. Such fees have already been approved in this case to Greenhill & Co., LLC. Nevertheless, one wonders what possesses the Committee in pressing its argument that the Impala success fee should be based upon metrics. As set forth in the Debtors' papers and the Street Aff. (paras. 7, 8 and footnote 3), Impala has already achieved the metrics initially discussed with the Debtor and the Committee. If those metrics were employed Impala's success fee would be over $8 million, far greater than the $2.5 million sought. In any event, the confirmation of a plan or the successful sale of the Debtors will in large part be due to Impala's achievement of cost reductions of $70 million to $80 million and preparing the financial plan needed to file a plan of reorganization. Thus, Impala will have achieved "success" irrespective of any metrics.

ARGUMENT

I. Impala Meets the Standards For Nunc Pro Tunc Retention

There is no question that Impala commenced work for the Debtors on June 15, 2003 and that the Committee at all times was well aware of this fact[2]. As set forth in the Street Affidavit, Impala's initial action was to get down to business to assist the Debtors and their

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[1] For a complete history of the negotiation of the success fee, the Court is directed to the accompanying affidavit of Paul Street (hereinafter referred to as the "Street Aff."). In a nutshell, Impala has agreed to reduce its success fee from a proposed $5 to $10 million based on metrics which it has already achieved, to $2.5 million. Impala has also agreed to reduce its monthly fee in connection with the approval of its success fee.

[2] As the Debtor argues, the Committee should be estopped from arguing that Impala is not disinterested because it was well aware that Impala had commenced work in this case.

estates. There is no question that the Debtors benefited by Impala's quick action since substantial cost reductions have been effectuated and a financial plan has been prepared and agreed to by all constituencies (Street Aff. paras. 8). It would not have served the Debtors well if rather then immediately commencing work, Impala stood idly by waiting for its retention to be approved. The Committee -- in retaliation for Impala's refusal to further reduce its success fee as the Committee requested -- now seeks to punish Impala for Impala's laudatory conduct.

This Circuit recognizes nunc pro tunc retention is appropriate in circumstances like the one at bar. In re Hasset, Ltd., 283 B.R. 376 (Bankr. E.D.N.Y. 2002); In re Hutter, 215 B.R. 308 (Bankr. D. Conn. 1997); aff'd, 40 Fed. Appx. 640 (2d Cir. 2002).

Where a court, exercising its discretion, finds the existence of extraordinary circumstances, nunc pro tunc retention is appropriate. Among those factors are:

> "whether the applicant or some other person bore responsibility for applying for approval; whether the applicant was under the time pressure to begin service without approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant factors.
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> In re F/S Airlease, 844 F.2d at 105-06 (citing In re Arkansas, 798 F.2d 645, 650 (3d Cir. 1986)). In re Jarvis, 53 F. 3d at 421."

In re Keren Limited Partnership, 225 B.R. 303, 306-307 (S.D.N.Y 1998)

Impala has met these factors. First, Impala was under extreme time pressure to commence work. See In re Drexel Burnham Lambert Group, Inc., 112 B.R. 584, 586 n.1 (Bankr. S.D.N.Y. 1990).

> "[t]he Bankruptcy courts in this district often grant *nunc pro tunc* approval relating back for a short period of time if the failure to secure prior approval was not the fault of the attorney because the attorney first turned to pressing matters in the interest of the estate…").

Second, less than two months have passed since Impala's interim retention and such a nunc pro tunc application by the Debtor certainly would be timely.[3] Third, the Committee has failed to show nor can it show how it or the estate would be harmed if Impala was retained and paid as of June 15, 2003.

Fourth, the Committee was well aware that Impala had commenced work on June 15, 2003 and no one can deny that Impala's services have been valuable to the estate. After all Impala has rapidly completed the financial plan (in 3 ½ moths time) allowing the Debtors to file a plan of reorganization or sell their assets and has achieved $70-$80 million in durable cost reductions. See, In re Hasset, 283 B.R. 376, 379 (Bankr. E.D.N.Y. 2002). (Because, all parties in interest, including the Debtor, were aware that Scupp was servicing as its counsel and because certain of the services performed by Scupp were of "value" to the estate, the Court believes that nunc pro tunc approval of Scupp's retention should be granted.)

Finally, it must be emphasized that Impala's retention has already been approved by this Court. Thus, this Court has already had the ability to scrutinize Impala's qualifications for this engagement and whether or not Impala meets the standards for retention contained in Bankruptcy Code Section 327.

II. The Flat Success Fee Is Appropriate

Success fees are normal both in the bankruptcy and non-bankruptcy contexts. Indeed, this Court has approved a success fee of $6.5 million in this case (i.e., the "Recapitalization Fee") to the Debtor's financial advisors, Greenhill & Co., LLC, that is based

[3] The facts in the case at bar are significantly different from those in In re Keren Limited Partnership, 225 B.R. 303 (S.D.N.Y. 1998); aff'd, 189 F. 3d 86 (2d Cir. 1999). In Keren a real estate broker withdrew a motion to have its pre-petition agreement assumed by the debtor and then waited seven months before it sought nunc pro tunc retention. See also In re F/S Airlease II, Inc., 844 F. 2d 99 (3rd Cir. 1988). (Broker waited ten months after commencing work and seven months after lease approval before seeking retention).

only on a "recapitalization" of the company (as defined in the retention agreement) or a sale of substantially all of the Debtor's assets. [See Docket Nos. 8, 38, 428]. Courts have noted that when determining the reasonableness of a "success fee", an examination of specific metrics is not necessarily relevant. See, e.g., In re Intelogic Trace, Inc., 188 B.R. 557, 559 (Bankr. W.D. Tex. 1995) (indicating certain considerations, such as "time spent" or rates charged" need not be considered when passing on appropriateness of success fee).

> That the services might have been beneficial or necessary is of course highly relevant, however, as is whether the compensation approximates the practice outside bankruptcy. If the services for which compensation is sought were *not* likely to benefit the estate or necessary to its administration, by the same token, the court is not permitted to award compensation.

Id. (emphasis in original)

"The Court is not limited to a mechanistic . . . evaluation", as such a formula based approach may offer "little assistance in the context of success fees for business consultants." Id. Of course, the "professional must . . . sufficiently detail both what the professional intended to accomplish at the front end and whether the professional in fact reached that goal at the back end." Intelogic, 188 B.R. at 560-61. Rather than requiring that a success fee be based upon some formulaic criteria, courts have held that the fee simply ought to bear a reasonable relationship to the ultimate benefit conferred, as explained by Judge Clark in Intelogic:

> The obvious point here is that the professional ought not be rewarded, at the estate's expense, for serendipity, or for results more correctly attributable to the efforts of others. This is one of the ways in which bankruptcy differs from ordinary personal injury litigation and lotteries. "Hitting the big one" ought not to be an operative concept in bankruptcy.

Id. at 561.

Thus, even were the Committee's statement true that the success fee sought is not properly tied to any success criteria (which is, of course, untrue), Impala is not required to demonstrate that the proposed success fee is based upon any formulaic approach.

Conclusion

For the foregoing reasons, Impala Partners respectfully requests that the Court overrule the Committee's objection, and grant the Debtor's Motion Pursuant to Sections 105 and 363 of the Bankruptcy Code for Approval of Services Agreement with Impala Partners LLC, *nunc pro tunc* to June 11, 2003, and such other and further relief as the Court may deem just and proper under the circumstances.

Dated: New York, New York
October 7, 2003

Respectfully submitted,

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