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**
	:	

AFFIDAVIT IN SUPPORT OF MOTION BY DEBTORS FOR APPROVAL OF SERVICES AGREEMENT WITH IMPALA PARTNERS, LLC AND IN RESPONSE TO OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

PAUL A. STREET, being duly sworn, deposes and says:

1. I am one of the four members of Impala Partners, LLC ("Impala") and am fully familiar with the facts set forth herein. I respectfully submit this affidavit in support of Debtors' motion to approve the amendment to Impala's engagement letter, including the Success Fee contained in such amendment, and in opposition to the Objection filed on October 3 by the Official Committee of Unsecured Creditors (the "Unsecured Creditors").

2. On October 1, 2003, both I, on behalf of Impala, and Mark B. Tresnowski, Executive Vice President and General Counsel of Allegiance Telecom, Inc. ("Allegiance"), were deposed at length by Akin Gump Strauss Hauer & Feld ("Akin Gump"), attorneys for the Unsecured Creditors.

3. The transcripts of those depositions are being filed with the Court in connection with the October 8 hearing on this motion scheduled for October 8, 2003, and are annexed hereto collectively as Exhibit A, together with an errata sheet to my deposition.[1]

4. The Unsecured Creditors object to the instant motion on two grounds: first, because "Impala received an unauthorized post-petition transform from the Debtors" and second, because "the proposed Success Fee is not tied to any success criteria" (Unsecured Creditors' Objection, para. 1). I will deal with the latter objection (which was the subject of my and Mr. Tresnowski's depositions) first.[2]

The Success Fee Agreed to Between Impala and the Debtors is Entirely Appropriate

5. As demonstrated by the October 1 deposition testimony, there is no good faith reason for the Unsecured Creditors to object to Impala's Success Fee on the ground it is not tied to any success criteria (and hence not appropriate):

(a) The diligent, hard work of two of Impala's four partners and one of its three non-partner professionals (almost half our company), on a virtually full-time basis commencing in mid-June and continuing to the present (Tresnowski Dep. 62, 96-97) (Street Dep., p. 71-73), 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) (Tresnowski Dep., p. 70-73, 76, 82, 92-94, 100-103) (Street Dep., p. 89-94) and (ii) creating a credible, detailed operating plan that all

[1] We are only supplying copies of the exhibits to the Street deposition because all the exhibits to the Tresnowski deposition are included in the Street exhibits.

[2] I would note that the secured creditors fully support approval of the Success Fee.

constituents have signed onto so that Debtors are in a position to confirm a plan or sell substantially all their assets (Tresnowski Dep., p. 63-64; 80-83; 97-100) (Street Dep., p. 73-75).

(b) The Success Fee ultimately agreed to was originally predicated on various performance measurements and then heavily negotiated and reduced to a flat fee, at Debtors' request, that was approximately one-third of what Impala would have been entitled to if the performance-based metrics had been adopted. Further, both in engaging Impala and in negotiating the Success Fee, Impala and the Debtors considered the compensation arrangements in other chief restructuring officer engagements. (See sections of Tresnowski and Street depositions cited infra.)

6. Rather than offer any evidence of its own in support of its assertion that the Success Fee is not appropriate, counsel for the Unsecured Creditors resorts to selective, out of context quotations from my and Mr. Tresnowski's depositions to seek to validate the Unsecured Creditors' contention. That tactic is belied by any fair reading of the complete (and uncontroverted) testimony.

7. The July 11, 2003 engagement letter approved by the Bankruptcy Court provided that in addition to the monthly fee, there would be a Success Fee to be mutually agreed upon by Impala and the Debtors. In early July, Impala proposed a $5 to $10 million Success Fee based on the following metrics: $1 million for every $20 million of cost reductions effectuated and $5 million (reduced by $500,000 per month for each month's delay) if an operating plan could be completed and signed onto by all constituents such that a

plan in reorganization could be filed by October, 2003. (Street Dep., p. 56-57). A copy of Impala's proposal is annexed hereto as Exhibit B.[3]

8. By the time the Debtors finished examining comparables and receiving input from various people (Tresnowski Dep., p. 48; 54-60) and then deciding on how to respond to the metric based Success Fee that Impala had proposed, Impala had already earned the requested Success Fee in that substantial cost reductions had been effectuated and the operating plan was basically completed. (Tresnowski Dep., p. 42-45; 48-52; 98-101) (Street Dep., p. 70-71). Accordingly, the metrics became meaningless. (Tresnowski Dep., p. 51-52; 98-101) (Street Dep., p. 54-56).

9. It was in that context that Allegiance came back to Impala and proposed a flat Success Fee of $2.5 million without any metrics *per se*. (Tresnowski Dep., p. 48-56; 100-103). Because of Impala's own professionalism and devotion to its duties, Impala had a much weakened negotiating position than it had in early July, when it made its Success Fee proposal. It was with some serious misgivings and extreme reluctance that Impala agreed to the reduced $2.5 million flat Success Fee. (Street Dep., p. 64-65).

10. As stated by Mr. Tresnowski in his testimony, it was the Company's reasonable judgment, after consulting with a number of people and examining other chief restructuring officer engagements, that a Success Fee of $2.5 million was warranted and fully earned by Impala. (Tresnowski Dep., p. 42-45; 48-56; 98-103).[4]

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[3] Had those performance based measurements been used, Impala's earned Success Fee would be $8 million.

[4] The Debtor had also looked at information on other chief restructuring officer engagements in regard to the monthly fee agreed to and the decision to retain Impala. (Tresnowski Dep., p. 27-31; 33-34; 38-40).

11. Specifically, as regards "success fee" comparables, Mr. Tresnowski testified, in relevant part, as follows:

> Q: Did the company look at comparable success fees in other cases?
>
> A: We did. We certainly did do that … we had a number of things … the banks have put together a summary and they had shared it with us, Kirkland had put together a summary, and I think there was a consolidated summary …
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> But the other thing that we had was from Paul; he had sent us engagement letters that they had in other engagements … I guess here's the point I'm trying to make: We looked at comparables in other situations, but we also looked at what Impala did in other engagements. (Tresnowski Dep., p. 54-55) (emphasis added)
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> * * *
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> [W]e looked at the comparables . . . the decision-making process on our end was very much what are these particular folks [Impala] worth in this particular situation, but certainly not without regard to market comparables, because those are relevant. (Tresnowski Dep., p. 56-57, emphasis added)[5]

12. As to whether a "success" has occurred as a result of Impala's services, Mr. Tresnowski testified, in pertinent part:

> Q: And why is the business plan so important?
>
> A: [I]t's really the foundation for a reorganization or, if it turns out, . . . a sale of the company . . . It was the essential piece of the puzzle, as far as we were concerned . . . [Impala] had largely completed that plan, you know, at the end of August . . .
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> Q: If the bankruptcy court in these cases confirms a plan or enters an order authorizing the sale of substantially all of

[5] The Debtors "were also getting input from the creditors." (Tresnowski Dep., p. 48)

the debtors' assets, would you deem that to be a success?

A: Yes.

Q: And because Impala's preparation of the plan is critical for that, would it be fair to say that if a plan is confirmed or a sale is approved by the court, that Impala was successful in these cases?

A: Yes, I would agree with that conclusion.

Q: In terms of the success fee, there was a lot of testimony that there's no metrics in it currently. By the time the fee was negotiated, where was Impala in terms of the cost-cutting initiatives and the preparation of the plan?

A: Well, they were, again, they were essentially complete . . . I'm certainly well aware that there are metrics in these types of engagements, in some of them . . . So, okay, what would the metric be? Well, it would be that they would complete the plan.

Everyone talked about that and they said, okay, we'll put that in, they got to complete the plan. I said, that's kind of silly, they've already done that . . . So, this had been going on for weeks, and we just said, look, we're making this too complicated. They have done most of what they're supposed to do . . .

And besides that, you know, again, I thought it was a reasonable deal . . . I think we did a pretty good job and we were down to $2.5 million. (Tresnowski Dep., p. 98-101; emphasis added)

13. Further, as I testified at my deposition:

(a) Impala has never accepted any assignment, either in or out of a bankruptcy court proceeding, without a success fee (Street Dep., p. 115), and

(b) the $2.5 million reduced fee we agreed to is more than reasonable in my knowledge of the marketplace and other chief restructuring officer engagements. (Street Dep., p. 27-29; 115-118).

The Payment for Pre-July 11
Services Was Received in Honest Error

14. After protracted negotiations with the Debtors (in consultation with certain of the creditors) resulted in Impala's Success Fee being substantially reduced from what Impala had sought, the Unsecured Creditors sought yet further reduction. Impala, already unhappy, refused to further reduce its Success Fee and Akin Gump advised that the Unsecured Creditors would probably object to the Success Fee. On September 25, Akin Gump requested depositions of Impala and the Debtors in connection with such possible objection.

15. When the requested depositions demonstrated that the $2.5 million "flat" Success Fee had been derived by taking into account other engagements and by considering performance based metrics (but eliminating those metrics, at the Debtors' request, in exchange for a flat fee of approximately 1/3 of the performance based fee Impala had sought), Akin Gump decided on another tactic, not even hinted at by them at the depositions.

16. On Thursday, October 2, Akin Gump called Impala's attorneys (recently hired to represent Impala with respect to the Unsecured Creditors) and accused Impala of "serious improprieties" in obtaining payment for the services rendered by Impala in the three and one-half week period prior to July 11, 2003. (The July 29 Bankruptcy Court order approving Impala's engagement permitted payments from the July 11 date of the engagement letter.) Akin Gump threatened it would move to disqualify Impala from all compensation by reason of this payment, unless Impala would agree to reduce its Success Fee (in which case, Impala could also keep the payments received for the pre-July 11 period).

17. When Impala rejected this proposal, the instant objection was filed. Realizing the lack of substance to any objection to the reduced Success Fee as a "flat" fee, Akin Gump instead has made as its first argument that Impala be denied all compensation because of the

payment Impala received for pre-July 11 services. (This objection was never the subject of even a single question at the October 1 depositions.)

18. It is true that this Court's July 29 interim order does not provide for nunc pro tunc payments for the three and one-half weeks of full-time services that Impala provided to the Debtors prior to the July 11 date of the engagement letter. Obviously, this was an error in the engagement letter itself (both because Impala used a form not applicable to when it begins work prior to the approval of the Bankruptcy Court and because the original executed engagement letter was dated June 20, 2003)[6] and in Debtors' moving papers and proposed order, which neither Impala, Debtors nor Debtors' counsel realized.

19. At the time the motion was made and interim order entered, all parties, including the Unsecured Creditors and its counsel, knew that Impala had commenced full-time work, at the Debtors' request, in mid-June and Impala was going to be compensated for such work if its engagement were approved by the Court. Indeed, Impala commenced work prior to the approval of its engagement at the request of the Debtor, the senior lenders and the Unsecured Creditors and worked closely with not only the Debtors but also the senior lenders and Unsecured Creditors during this pre-July 11 period.

20. On July 29, after the interim order was entered, Impala requested payment, and the Debtors then paid for the work done in the one-month period June 16 through July 15, 2003, neither Impala nor Debtors realizing the technical problem as to work done prior to July 11.

[6] A copy of the June 20, 2003 engagement letter is annexed hereto as Exhibit C.

21. It is this ministerial error (which is intended to be corrected by application to the Court) that Akin Gump now has seized upon and proffers as a reason to deny Impala all compensation for Impala's indisputably valuable services, citing cases that are totally inapplicable to the circumstances here. Despite all constituencies having benefited from Impala's services and the Court having authorized Impala's engagement, Akin Gump wants this Court to order that Impala has worked from July 11 for free (not even that Impala must return the payment for the pre-July 11 period) because of this non-intentional, technical mistake. I am surprised at Akin Gump's position and hope that it will be summarily rejected by the Court.

22. For all the reasons discussed above, I respectfully request that this Court approve the Success Fee here requested, grant the instant motion in its entirety and modify the earlier order to permit Impala to receive payment for its services rendered from June 16 through July 10.

\s\ Paul A. Street
PAUL A. STREET

Sworn and subscribed to before me
this 7th day of October, 2003.

Stephen M. Rathkopf
Notary Public

[NOTARY STAMP]