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2 achievement of a performance target?

3 A. Yes.

4 MR. ADAMS: Great. Thank you. I will
5 have copies of this made and delivered to
6 you.

7 THE WITNESS: Can I talk to my counsel
8 for a second?

9 MR. ADAMS: Absolutely.

10 (Pause.)

11 BY MR. ADAMS:

12 Q. Now, we discussed your court approved
13 engagement history. Has Impala been involved in
14 any out-of-court restructuring engagements?

15 A. Several.

16 Q. Can you tell me how many?

17 A. I really -- I can't. I'm not going to
18 guess. I'm just not going to guess.

19 Q. But we can say it's more than one?

20 A. You can say it's definitely more than
21 one.

22 Q. Okay. As of today, as of right now,
23 how many engagements does Impala currently have?

24 In this question I'm asking you both
25 for court approved retentions as well as

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2 out-of-court restructuring retentions.

3 A. Three.

4 Q. Three. Can you tell me which three?

5 A. Allegiance, Horizon PCS, an M & A
6 transaction of a confidential nature.

7 Q. In Horizon have you been retained
8 pursuant to court order?

9 A. Not yet. The motion has either been
10 filed -- the motion has either been filed or
11 will be filed this week.

12 Q. What services is Impala going to be
13 providing in that retention?

14 A. Impala is acting as CRO.

15 Q. So would you describe those service as
16 being similar to the ones being provided in
17 Allegiance?

18 A. Broadly speaking.

19 Q. What's the compensation arrangement
20 for Impala in the Horizon engagement?

21 A. There's a monthly fee, as I recall, I
22 think it's 150 or 175,000, and there's success
23 fee of a million dollars.

24 Q. How does Impala earn the success fee?

25 A. Any outcome other than a conversion to

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2 a Chapter 7.

3 Q. So there is no performance-based
4 component to that success fee?

5 A. Depends what you call performance,
6 but, you know, sort of a husbanding this company
7 through the Chapter 11 process, helping them
8 with things we work on, and seeking to find a
9 resolution, we get paid a million dollars.

10 Q. Okay. Let's talk a little bit more
11 about Impala's compensation generally. What
12 are, generally, the terms of Impala's
13 compensation when acting in the capacity of
14 restructuring advisor, CRO?

15 A. We charge a monthly fee and a success
16 fee.

17 Q. How does Impala determine what to
18 charge its clients? And I would like you to
19 divide your answer between both the monthly fee
20 and the success fee, if you could.

21 A. How much time, Impala time, it will
22 take; the resources from our firm required; time
23 in terms of duration and duration; intensivity
24 and the likely value that we're going to be able
25 to provide; and then, finally, you know, what

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2 the competitive marketplace looks like.

3 Q. And that would apply to the monthly
4 fee, that analysis?

5 A. To the monthly and the success fee.

6 Q. What's the internal decision-making
7 process concerning the compensation that you
8 seek? And by that I mean, specifically, is
9 there a committee that has to approve the
10 compensation package in a retention?

11 A. In Impala?

12 Q. Yes.

13 A. No.

14 Q. The decisions are made by individual
15 members?

16 A. No.

17 Q. How are the decisions made?

18 A. The four partners of Impala discuss
19 various opportunities, whether they're
20 attractive to us, and how much we -- what the
21 duration is expected to be, what the effort is
22 expected to be, and how much we should charge.

23 Q. To the best of your knowledge, does
24 anyone at Impala look at comparable fees charged
25 in other CRO retentions?

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2 A. I do.

3 Q. What do you do to look at those
4 comparable fees?

5 A. When, particularly on cases -- I
6 really focus on cases where we are in the
7 running for the assignment and then don't get
8 it. I try to find out what the successful firm
9 was paid.

10 Q. And you look at both the monthly fee
11 and the success fee component?

12 A. Yes.

13 Q. Does Impala have an official -- do you
14 have some sort of official record keeping to
15 keep track of the comparables? Do you manage a
16 database?

17 A. No.

18 Q. Do you have any notes or memorandum
19 that you might have prepared on comparable fees,
20 fee studies?

21 A. No.

22 Q. Other than in cases where you have bid
23 for the engagement and not been successful, do
24 you keep track generally of compensation?

25 A. No.

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2 Q. For other CROs?

3 A. No.

4 Q. Do you keep track generally of the
5 retention agreements for other CROs in your
6 marketplace?

7 A. No.

8 Q. In any of the previous engagements
9 that we have discussed or any additional ones
10 that you can think of now, has Impala's
11 compensation for the success fee component ever
12 been based on performance metrics or performance
13 targets?

14 MR. RATHKOPF: Object to the form.
15 In whole or in part? That's two
16 different questions.

17 MR. ADAMS: Let me rephrase it.

18 Q. In previous engagements that we've
19 discussed, or ones that you may recall now, has
20 Impala's success fee ever been based in part on
21 the achievement of performance metrics,
22 performance goals?

23 A. Yes.

24 Q. Can you tell me what ones?

25 A. Thank you for reminding me about

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2 Winstar, but that was an example of one.

3 Q. Are there any others?

4 A. I'd have to look at them, you know.

5 We do -- you know, they're just different. Each
6 one is negotiated intensively. We don't have a
7 patent and we do not have a template.

8 Q. Of any of your previous engagements,
9 or ones that you may recall now, has the success
10 fee component of Impala's compensation ever been
11 based in total on the achievement of performance
12 targets, performance metrics?

13 A. Well, thank you, but I believe that,
14 now that you've reminded me about Winstar, that
15 was the case there. Now that you showed me that
16 sheet, they were all performance targets and
17 performance metrics, except you could argue that
18 the sale of the company wasn't except insofar as
19 the company's value would be enhanced by if it's
20 to reduce costs.

21 So you can't separate even there.
22 Although we weren't the M & A advisor in their
23 case, the value of the enterprise would be
24 increased as a result of our efforts. And so
25 even that, I mean, under your sort of

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2 formulation, would be performance-related, I
3 think.

4 But so, the answer is: There's some
5 where it's all, there's some where it's not.

6 Q. In the cases where it's all based on
7 the achievement of performance targets, why do
8 you choose that type of compensation over a flat
9 success fee?

10 A. It's always a result of a negotiation
11 and our good faith attempt to accommodate what
12 the company is most comfortable with.

13 Q. Can you tell me, either in Winstar or
14 any of the other cases that you may recall, what
15 the performance metrics were that you had agreed
16 to?

17 A. Well, I can certainly tell you Winstar
18 because you gave me that sheet. If you give it
19 back to me, I'll read it back to you.

20 Q. I think we already discussed the
21 EBITDA and the --

22 A. But there were other components that
23 we didn't discuss.

24 Q. Okay. I'll give it back to you then.
25 I'm going to hand you back Street Exhibit 1.

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2 A. Thank you.

3 Q. And you're looking at page 6.

4 A. Well, as I see here, there were a
5 number of others. There was 17(a), which was a
6 percentage of realized proceeds under a certain
7 amount, and then (b) is a percentage of proceeds
8 considerably higher over a realized certain
9 amount.

10 Q. Now let's stop there. How was that
11 metric created?

12 A. Through a negotiation.

13 Q. And who would have done the
14 negotiation?

15 A. Myself, probably, from Impala and the
16 company; to a certain extent, the creditors of
17 the company, who have input on these things; the
18 senior and the unsecureds typically sort of have
19 some input.

20 Q. If you recall --

21 A. I don't recall the specifics of who it
22 was, but I'm certain that it was -- it included
23 myself and the chief executive of the company,
24 amongst others, and I have some vague
25 recollection that counsel to the bondholders and

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2 to the senior -- the DIP lenders and the senior
3 lenders, two separate counsel. Because I
4 remember the individuals being involved in that,
5 you know, I could name them if you like. And
6 then --

7 Q. If you recall, who suggested that that
8 performance target should be included in your
9 success fee? Was it Impala? Was it Winstar?

10 A. I don't recall.

11 Q. Okay. If you could go on and tell me
12 about the other metrics.

13 A. Then we discussed (c) and (d)
14 previously. (e), there was an additional -- an
15 augmentation of our fee of a further amount for
16 achieving positive cash flow in the month of
17 December. You'll recall in (d) there was an
18 amount for the month of November and there was
19 an additional amount.

20 Then there's a complicated formula
21 that I would have to figure out, but it's a
22 further amount payable in the event of a sale of
23 the company, and, yes, then there's some
24 formulas here that I would have to sit and
25 figure out how they sort of cross-reference.

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2 But I think those are the essential components
3 of this case.

4 Q. Okay. Thank you. Other than in the
5 Winstar case, can you think of any other similar
6 type performance metrics goals that Impala has
7 agreed to as a component of its success fee in
8 other cases?

9 A. Yes.

10 Q. Can you describe some of them for me?

11 MR. RATHKOPF: Can I just have the
12 question read back, please?

13 (Record read.)

14 A. Yes, I recall one case, which was not
15 a bankruptcy-related case, where an insurance
16 company paid us an amount of money to have
17 their, A.M. Best, claims paying rating restored
18 to A-, which they had been down-rated from.
19 There was a payment for achieving a specific
20 target level of cost reductions, and that's
21 fairly frequent.

22 Q. Do you recall which case or cases --

23 A. This is a non-bankruptcy matter --

24 Q. Okay.

25 A. -- that I'm referring to now.

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2 In that case, there was a component
3 for assisting the company in arranging the
4 refinancing of a major subsidiary, and there
5 were other components in that.

6 So, yes, it's all over the lot.
7 Whatever -- I mean, we say the parties will
8 negotiate in good faith, and then we sit down
9 with a client as we get to know them and say,
10 what are the things that are really important to
11 you? Let's see how we factor them in. And in
12 cases where we can't, we just agree to a lump
13 sum.

14 Q. Has your success fee or a -- sorry.
15 Let me rephrase that. Has a component of your
16 success fee in a bankruptcy case ever been based
17 on cost-cutting achievement?

18 A. Well, in Winstar, clearly.

19 Q. Any others you can think of?

20 A. You know, I would have to go back. I,
21 really, I don't sort of spend a lot of time
22 memorizing our retention agreements. I, you
23 know, if you hadn't reminded me about that
24 element of Winstar, I wouldn't have remembered
25 about that.

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2 Q. Has a component of your success fee in
3 a Chapter 11 bankruptcy retention ever been
4 based on improvements in efficiencies?

5 A. I don't know how you would measure
6 that. What does that mean? I'm sorry. Could
7 you explain to me what the question means?

8 Q. What would you take the term
9 "efficiency improvements" to mean as a CRO?

10 A. To me, it, you know, it's not a term
11 of art, but if somebody said, "Help me improve
12 my efficiency," I would assume they were asking
13 me to help them reduce their costs and enhance
14 their revenue, although I wouldn't -- I would
15 say that was probably not the correct
16 characterization of the term, but that's how I
17 would interpret it.

18 Q. Has a component of Impala's success
19 fee in a Chapter 11 case ever been based on the
20 enhancement of revenue?

21 A. Per se, no, I don't recall ever having
22 done that. Although, it is important to note
23 that frequently what we call cost cuts actually
24 amount to revenue enhancements, and in fact, in
25 the case of Allegiance, there are examples of

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2 that. It has the same effect.

3 Q. Has anyone ever objected to Impala's
4 retention in a bankruptcy case?

5 A. I can't think of one. I mean, it may
6 have happened. I can't recall that.

7 Q. So no one's ever objected to the
8 financial terms of your retention in connection
9 with a bankruptcy proceeding?

10 MR. RATHKOPF: Just for the record,
11 that's a different question than the one you
12 asked, but that's okay.

13 A. Has anyone ever objected to the
14 financial terms of our retention?

15 MR. RATHKOPF: Prior to Allegiance, I
16 presume.

17 MR. ADAMS: I don't think anyone's
18 objected here.

19 MR. RATHKOPF: You're taking a
20 deposition in connection with objections
21 that you may file or may not file on Friday.
22 So, in order that we not have any tricky
23 questions, I don't think any ever us are
24 looking for anything other than the truth.

25 Q. We're not talking about the Allegiance

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2 matter.

3 A. Thank you for that clarification.

4 I don't recall. There may have been.
5 I frankly don't recall.

6 Q. Okay. Let's move on to Impala's
7 retention in the Allegiance case, so now we're
8 going to be talking about Allegiance Telecom.

9 When did the relationship between
10 Allegiance and Impala begin?

11 A. Early to mid June.

12 Q. Who initiated the contact?

13 A. My understanding was that there were
14 two simultaneous efforts. There was a former
15 client of ours called to ask us whether we would
16 be interested in the assignment because he had
17 been asked to recommend somebody, and another
18 client that we were representing at the time,
19 not in a bankruptcy matter, simultaneously
20 reported that he was close to a number of senior
21 people in the company and they had asked him for
22 advice.

23 Now, I don't know whether they had
24 asked him or whether he had offered it or
25 whatever, but we were recommended to the company

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2 by two separate groups, two separate companies,
3 unrelated to us and unrelated to each other, and
4 at their recommendation we contacted the chief
5 executive, who was Royce Holland.

6 Q. Can you just tell me who the former
7 clients were that you referenced in your
8 previous answer?

9 A. The one case is a bankruptcy matter.
10 So we do not talk about clients where our
11 representation is not on public record. But the
12 one was Kirby Pickle, the chief executive of
13 Velocita.

14 If it's really important, I could ask
15 my other clients for a release to disclose the
16 fact that we work for them.

17 Q. Okay. So your first contact was with
18 Royce Holland?

19 A. Correct.

20 Q. What did you discuss during that
21 initial contact?

22 Let me go back. Was the initial
23 contact between yourself and Royce Holland?

24 A. You know, I'm not sure whether it was
25 my partner, Peter Keenoy, Peter C. Keenoy, or

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2 myself. Because as I recall, Peter had a closer
3 relationship with Mr. Pickle than I did,
4 although, you know, we both worked with him, and
5 Mr. Pickle may have initiated it with Peter
6 before he did with me. But as we have adjoining
7 offices, you know, there's only four partners,
8 we've been personal friends for much longer than
9 we've been partners, I really can't remember and
10 we don't keep score.

11 Q. So in your initial contact with Royce
12 Holland --

13 A. We were asked to send some materials
14 to the company, which we did, a fairly standard
15 package of materials. We then had an telephone
16 call with, I believe, Royce Holland and Dan
17 Yost, the president and chief operating officer,
18 and I'm reasonably confident that both Peter and
19 I took that call. They then said they would get
20 back to us, as they were interviewing
21 candidates.

22 Very soon thereafter, possibly the --
23 I believe that was a Friday. I think the
24 following Monday we got a call from one or the
25 other of those two, asking if we could be in

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2 Dallas the following day or the day after, on
3 very, very short notice, and I went on my own.

4 Q. Let's go back to the materials, the
5 package that you sent to the company. Can you
6 tell me if you recall what materials those were,
7 what those materials said?

8 A. Essentially it's a description of
9 Impala and it emphasizes our personal
10 biographies more than anything else.

11 Q. Does it discuss compensation issues?

12 A. Absolutely not.

13 Q. So you went to Dallas for a formal
14 interview with Allegiance?

15 A. Correct.

16 Q. Who was present from Impala?

17 A. Me.

18 Q. Anyone else?

19 A. No.

20 Q. Who was present from Allegiance?

21 A. I had a number of interviews with
22 different people there. They also requested
23 that I meet with a senior lender, which I did,
24 prior to meeting with them. As I recall, I met
25 with Royce Holland -- this is not in sequence,