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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

**SECURITIES AND EXCHANGE  
COMMISSION,**

Plaintiff

v.

**ALPHA TELCOM, INC.,** an Oregon Corporation;  
**AMERICAN TELECOMMUNICATIONS  
COMPANY, INC.,** a Nevada Corporation;  
**STRATEGIC PARTNERSHIP ALLIANCE,  
LLC,** a Nevada Limited Liability Company; **SPA  
MARKETING, LLC,** a Nevada Limited Liability  
Company; **PAUL S. RUBERA; ROBERT A.  
MCDONALD; ROSS S. RAMBACH;** and **MARK  
E. KENNISON,**

Defendants.

Civil Action No.  
CV 01-1283 PA

**MEMORANDUM BY  
PLAINTIFF SECURITIES  
AND EXCHANGE  
COMMISSION IN SUPPORT  
OF RECEIVER'S PLAN FOR  
DISTRIBUTION AND FINAL  
FEE APPLICATIONS BY  
RECEIVER AND HIS  
PROFESSIONALS**

## **I. INTRODUCTION**

The Receiver, Thomas F. Lennon, has moved for approval by the Court of final applications for payment of his own fees and those of his professionals, and distribution of the remainder of funds in the receivership estate to investors in equal shares of approximately \$68.10.

As more fully explained in the fee applications, this receivership required operation and management for several months by the Receiver of the defendants' complex business, including supervising 164 Alpha Telecom employees, 241 vehicles, and approximately 4,000 payphone site location contracts. The Receiver was responsible for selling payphone routes, personal property, vehicles, real estate and payphone licenses. Unfortunately, at the time plaintiff Securities and Exchange Commission ("Commission") filed this action, the defendants' \$130 million Ponzi-like scheme was collapsing. During the course of the receivership, the receiver discovered that not only were the defendants operating a Ponzi scheme, but the defendants had paid more for pay telephones than they were actually worth. Additionally, notwithstanding that the defendants had represented to investors that they owned particular pay telephones, the defendants had in fact rendered individual ownership of the pay telephones impossible by, among other things, assigning the same payphones to multiple investors.

Receiver's counsel also faced unique challenges in this case. Both the Commission and the Receiver desired to return as much money to defrauded investors as possible. The pay telephones themselves were largely worthless; the Receiver sold those pay telephone routes he could for as much as possible. Nevertheless, expenses of operating the business prior to judgment being entered by the Court substantially exceeded the revenues the Receiver obtained in operating the business, and resulted in significant additional losses. It thus appeared that the best potential source of recovery was sales agents who, in the aggregate, had received approximately twenty percent of the

funds raised. However, because of the lack of funds in the receivership estate with which to pursue third parties, Receiver's counsel on behalf of the Receiver, together with the Commission, determined that the most reasonable approach to recover funds from the sales agents was to file a motion for disgorgement against the 158 sales agents who made the most money. The motion was timely filed on December 23, 2003, two weeks after the Ninth Circuit affirmed this Court's judgment following trial. This Court found that the motion for disgorgement was meritorious after careful consideration of the memoranda filed by the Receiver, the Commission, and certain sales agents, and granted the motion on August 18, 2004. Unfortunately, however, after a protracted period the Ninth Circuit reversed that ruling on October 15, 2007. Because of the lapse of time, and the large amount of resources that would be required to sue and collect from enough individual sales agents to obtain meaningful recovery, the Commission concurs with the Receiver's recommendation to make a distribution to investors and to close the receivership.

The Commission also supports the final fee applications as presented to the Court. It should be noted that, notwithstanding the substantial efforts to recover funds by the Receiver, because the ultimate results were not as hoped for, and because it is desirable to have some distribution for investors, the Commission requested that the Receiver and his counsel discount their fees. They have done so; the final fee applications reflect a 20% discount of fees by Allen Matkins Leck Gamble Mallory & Natsis LLP ("Allen Matkins"), the Receiver's principal counsel, and a 10% discount of fees by the Receiver. It should also be noted that not only have the Receiver and his counsel not received any payment of fees since the Court issued an order on October 27, 2006, but that at that time the Court held back payment of 50% of the fees requested by the Receiver and 60% of the fees requested by Allen Matkins.

## II. ARGUMENT

### A. The Fee Applications Should Be Approved

The Receiver seeks approval of his final fee application and the fee applications of his principal counsel, Allen Matkins; his local counsel, Foster Pepper LLP; and his accountants, Mack/Barclay, Inc. and its successor entity, LECG, LLC. The Commission has carefully reviewed the final fee applications prior to their submission to the Court, and previously reviewed the interim fee applications. After the Commission reviewed the draft fee applications, it requested that the Receiver and his principal counsel, Allen Matkins, significantly discount their fees. Although the Commission believes that the Receiver and Allen Matkins did excellent work in this case under very difficult circumstances, it requested the fee discounts for two reasons. First, the Commission wanted to ensure that a distribution would be made to investors. Second, although it is not the fault of the Receiver or Allen Matkins, the end result in this case of a minimal distribution to investors is not a desirable one. Following discussions with the Commission, Allen Matkins agreed to reduce their fees, including the previous interim fees applied for, by 20%, and the Receiver agreed to reduce his fees, including the previous interim fees applied for, by 10%. The Commission is satisfied that these reductions take into account the quality of the result in this case, without unduly penalizing the Receiver and his counsel. Moreover, even if further reductions were made, the amount distributed to investors would not meaningfully be increased.<sup>1</sup>

The District Court's award of a receiver's compensation is firmly within its discretion. *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994); *SEC v. First Securities*

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<sup>1</sup> Even if the Court denied the Receiver's and his professionals' present requests for \$1.3 million in fees and costs in their entirety, distribution of that \$1.3 million to each of the over 7,000 investors would result in only an additional \$185.72 distribution to each, for a total per investor distribution of \$253.82 per investor. Each investor invested a minimum of \$5,000.

*Co. of Chicago*, 528 F.2d 449, 451 (7th Cir. 1976). Although awarding of fees is entrusted to the sound discretion of the trial court, in receiverships in enforcement actions brought by the Commission, the Commission's position with regard to awarding of fees will be given great weight. *See SEC v. First Securities Co. of Chicago*, 528 F.2d at 451. *See also SEC v. Fifth Avenue Coach Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973).<sup>2</sup> Accordingly, as in this case, the Commission is normally cautious in stating a position regarding whether interim fees sought by a receiver and the receiver's professionals are fair or reasonable. This is so because reasonableness depends on various factors that the Court usually cannot consider until the conclusion of the receivership, including the hours expended, the hourly rate of compensation, the difficulty and quality of the work performed by the attorney and the final results obtained. *See In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1410 (9<sup>th</sup> Cir. 1992) (upholding district court's determination of fees in Commission receivership based on factors used to determine attorneys' fees in civil rights action, noting use of similar factors in bankruptcy proceedings); *In re Equity Funding Corp. of America Securities Litigation*, 438 F. Supp. 1303, 1326-27 (C.D. Cal. 1977). *See also SEC v. Fifth Avenue*

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<sup>2</sup> There are several logical bases for giving the Commission's views great weight in deciding whether to grant fee applications in a receivership instituted as a result of an enforcement action brought by the Commission. First, the Commission brings its enforcement actions to further its public policy mission of protecting investors and safeguarding the integrity of the markets. *See SEC v. Rind*, 991 F.2d 1486, 1491 (9<sup>th</sup> Cir. 1993). It accordingly has an interest in ensuring that receivers appointed at its request exercise their duties appropriately, and are properly but not excessively compensated therefor. Second, the Commission, unlike the investors, creditors or others, has an intimate knowledge of the facts underlying the action it has brought, the efforts by the Receiver to recover funds, the difficulties faced by the Receiver, and whether the Receiver's fees are reasonable in light of his efforts, the difficulties he faces in achieving the goal of the receivership to maximize distribution to defrauded investors, and the results of the Receiver's efforts. In this case, as in others, the Commission takes very seriously its duty to monitor the Receiver's actions, to carefully review the applications of the Receiver and his professionals for fees, and to ensure that the Receiver discounts his fees when appropriate.

*Coach Lines, Inc.*, 364 F. Supp. at 1222 (court will consider complexity of problems faced, benefit to receivership estate, quality of work performed, and time records presented). Results are always relevant to the determination of appropriate fees. *United States v. Code Products Corp.*, 362 F.2d 669, 673 (3d Cir. 1966); *SEC v. W.L. Moody & Co.*, 374 F. Supp. 465, 480 (S.D. Tex. 1974), *aff'd* 519 F.2d 1087 (5th Cir. 1975). In addition, the size of the estate and its ability to afford the expenses and fees must be given considerable weight. *SEC v. W.L. Moody & Co.*, 374 F. Supp. at 481.

Because the above factors are so often difficult to evaluate until the close of the receivership, the Commission took the position earlier in this action that it supported the award of interim fees at a level well below any final allowance. *See In re McGann Manufacturing Co.*, 188 F.2d 110, 112 (3d Cir. 1951). The Court, however, held back significantly greater amounts of interim fees than even the Commission recommended.

The volume and complexity of the work required is evident both from the filings made with the Court throughout the receivership and the billing records appended to the fee applications. Notwithstanding the difficulty of the work, it appears from the billing records and each of the prior and current fee applications that the Receiver, his counsel and his accountant attempted to staff matters as efficiently as possible, using lower level staff billing at a lower rate whenever appropriate, resulting in lower average billing rates to the receivership. The work performed by the Receiver in, among other things, operating the entities and marketing and selling the pay telephone routes and other property of the estate was nevertheless of uniformly high quality.

Similarly, the work of Allen Matkins in obtaining additional funds for the estate was also of high quality. Specifically, Allen Matkins was successful in recovering \$1.5 million in overpayments made by the entities to the IRS and state tax authorities, and \$330,000 through claims litigation in the MCI/Worldcom bankruptcy proceedings. Additionally, the work of Allen Matkins to obtain the disgorgement order from this Court

against the sales agents, although ultimately reversed by the Ninth Circuit, was significant and did result in recovery of about \$600,000 from various sales agents who either settled with the Receiver during the protracted appeal or did not join the appeal. The amount recovered by Allen Matkins a result of each of these three undertakings was significantly greater than the fees billed.

Finally, the work by the Receiver's accountants, one of whom, Christopher Barclay, testified at trial, was of high quality, resulting in a finding by the Court that monies were indeed raised from investors in a Ponzi-like scheme.

As the Court is aware, the Receiver's efforts to close down the defendants' unprofitable operations were significantly hampered at the beginning of this action by the defendants' insistence that the Receiver should not be made permanent and that Receiver's counsel did not represent Alpha Telcom for purposes of trying or settling this case. Although the Receiver recommended that Alpha Telcom's operations be terminated immediately, and the Commission agreed, this Court chose to proceed cautiously by instructing the Receiver to continue operating Alpha Telcom, but by expediting the trial in this action. The Receiver did his best to minimize losses from the continued operation of Alpha Telcom pending resolution of the case. Nevertheless, Alpha's continued operation resulted in millions of dollars of losses to the estate and, ultimately, a far smaller recovery for investors.

Similarly, Receiver's counsel's efforts to recover from the sales agents who received the most in investor funds were vigorously opposed, particularly by Ernest Bustos. Indeed, Mr. Bustos has done his best to mislead investors throughout this action that they are "owners" of particular pay telephones, that the Receiver has done a poor job, and that denial to the Receiver of fees he and his professionals have earned and costs he has legitimately incurred will result in significant additional recovery for the investors.<sup>3</sup>

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<sup>3</sup> Mr. Bustos has separately filed a "Letter in Opposition of [sic] Payment to Receiver, Thomas F. Lennon and Plan for Payment to Investors," purportedly in his MEMORANDUM BY PLAINTIFF SEC IN SUPPORT OF RECEIVER'S PLAN FOR DISTRIBUTION AND FINAL FEE APPLICATIONS BY RECEIVER AND HIS PROFESSIONALS  
Page 7 of 12

Most recently, Mr. Bustos' efforts have been manifest in the hundreds of form letters and survey forms that have been sent to this Court, which state that neither of the distribution alternatives the Court has presented to the investors is acceptable (\$68.10 per investor, or \$16.60 per phone purchased), and the Receiver should be paid nothing. Indeed, it does not appear that any of the investors who submitted survey forms were *not* instructed by Mr. Bustos regarding how to complete the form. Many investors, again apparently at the suggestion of Mr. Bustos, submitted a second letter and/or form to the Court. While the Court understandably is and should be interested in investors' views, form letters submitted by investors who have obviously ignored or are unaware of the Receiver's prior correspondence and website postings explaining the fraud and the Receiver's role as a Court-appointed agent are not informed views. They are thus of little utility in determining the appropriateness of the Receiver's fee requests in light of the factors that case law states this Court must weigh.

In contrast, as explained, the Commission is familiar with the operations of Alpha Telcom, the nature of the underlying Ponzi-like scheme, and the efforts by the Receiver and his professionals to marshal and liquidate assets and otherwise recover monies for the estate, including for distribution to defrauded investors. Although the fees sought by the Receiver, his counsel and his accountants are significant in dollar terms, the Commission believes that the tasks for which the fees were incurred were reasonable and necessary for

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capacity as "President of Payphone Owners Legal Fund, Inc. (Fund) and as attorney of [sic] fact for Fund members." Mr. Bustos is not an attorney. He has no right to claim to represent investors as an attorney "of fact" or otherwise. Rather, Mr. Bustos was a sales agent. Unfortunately, it appears from the letter Mr. Bustos filed that he has misled investors to pay him additional monies, which he has purportedly deposited into a "Legal Fund." Rather than using the monies deposited into the "Legal Fund" to retain counsel to seek to intervene to state investors' views on the proposed distribution plan and fee applications, Mr. Bustos has instead simply written a "letter" to the Court containing unsubstantiated (and largely incoherent) allegations of wrongdoing by the Receiver which are of no help to the Court in determining whether the fee applications should be granted or the distribution plan approved.

the Receiver to perform his duties of marshaling and liquidating assets of the estate, and ultimately to achieve any recovery for investors. The Commission further believes that the discounts taken balance the efforts by the Receiver and his professionals, which deserve compensation, and the results obtained. The Commission accordingly supports the final applications for fees and costs by the Receiver and his professionals.

**B. The Proposed Distribution Plan Should Be Approved**

The proposed distribution results primarily from disgorgement by the entity defendant, Alpha Telcom, as well as disgorgement of less significant amounts by defendants Robert A. McDonald, Ross S. Rambach, and defendant Paul S. Rubera's bankruptcy estate. Disgorgement is not an award of damages; nor is it a form of restitution. Rather, disgorgement is a form of injunctive relief intended to prevent unjust enrichment. *See SEC v. Rind*, 991 F.2d 1486, 1493 (9<sup>th</sup> Cir. 1993). The Commission may nevertheless at times use the disgorged proceeds to compensate injured victims. *Id.* at 1491. Consistent with the Commission's usual policy of using disgorged proceeds to compensate injured victims, the Receiver has recommended that the remaining monies in the receivership estate be distributed to investors. Specifically, the Receiver recommends that the remaining monies be distributed to the approximately 7,000 investors on an equal share basis. As a result, each investor would receive approximately \$68.10.

This Court has broad discretion in its supervision of the receivership. *SEC v. Capital Consultants, LLC*, 397 F.3d 733 (9<sup>th</sup> Cir. 2005). "[R]easonable procedures instituted by the district court that serve the purpose" of orderly and efficient administration of the receivership for the benefit of creditors will generally be upheld. *See CFTC v. Topworth International, Ltd.*, 205 F.3d 1107, 1115 (9<sup>th</sup> Cir. 1999), *citing SEC v. Hardy*, 803 F.2d 1034, 1037-38 (9<sup>th</sup> Cir. 1986) (approving *pro rata* distribution plan over investor's objections). To the extent that monies are going to be distributed in this case, the Court must ensure that investors are treated equitably. *See SEC v. Capital*

*Consultants, LLC*, 397 F.3d at 739. In most cases, it is appropriate to distribute monies to investors based on their *pro rata* interest in the funds, although in some cases it is appropriate to employ offsets in order to ensure equal treatment among investors, as when some, but not all, investors obtain partial returns of their losses from their suits against third parties. *See id.*

In contrast, the recommendation that the investors in this case each receive an equal share rather than a *pro rata* share is appropriate, reasonable and equitable because there are only nominal funds to distribute and the costs of determining each investor's *pro rata* share would be prohibitive, as explained by the Receiver. The Commission believes that conducting a proof of claims process and analysis would likely exhaust the remaining funds in the estate, leaving no monies to be distributed to investors. For these reasons, the Commission concurs in the Receiver's recommendation to distribute the remaining funds in equal shares to investors.<sup>4</sup>

### **III. CONCLUSION**

For the reasons stated, the Commission supports the granting of the fee applications by the Receiver and his professionals. Additionally, the Commission supports the Receiver's proposed plan to distribute the remaining funds in the receivership estate in equal shares to each investor, and to close the receivership.

Date: December 21, 2008

Respectfully submitted,

/s/ Karen Matteson

Karen Matteson

Attorney for Plaintiff

Securities and Exchange Commission

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<sup>4</sup> Regardless of whether the investors have true "due process" rights to be heard regarding the proposed distribution plan, the Court properly sought the investors' views as to the appropriateness of the proposed distribution plan in order to ensure equitable treatment. Unfortunately, as explained above, the forms returned by investors to the Court uniformly rejected the two alternative plans suggested by the Receiver, but offered no other proposal for consideration.

**CERTIFICATE OF SERVICE**

I, Karen Matteson, am over the age of eighteen years, am not a party to this action, and am a citizen of the United States. My business address is 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California, 90036. I caused to be served the **MEMORANDUM BY PLAINTIFF SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF RECEIVER'S PLAN FOR DISTRIBUTION AND FINAL FEE APPLICATIONS BY RECEIVER AND HIS PROFESSIONALS** by causing to be mailed true and correct copies thereof on December 22, 2008, in sealed envelopes, postage prepaid, addressed to:

Thomas F. Lennon  
7777 Alvarado Road, Suite 712  
La Mesa, CA 91941  
*Receiver for Defendants Alpha Telecom, Inc., American Telecommunications Company, Inc., Strategic Partnership Alliance, LLC, and SPA Marketing, LLC*

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 21, 2008

/s/Karen Matteson  
Karen Matteson