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for ALPHA TELCOM, INC.; AMERICAN  
TELECOMMUNICATIONS COMPANY, INC.;  
STRATEGIC PARTNERSHIP ALLIANCE, LLC;  
and SPA MARKETING, LLC

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

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. CV01-1283 PA

**REPLY BRIEF IN SUPPORT OF  
INTERIM APPLICATIONS OF  
RECEIVER AND HIS PROFESSIONALS  
FOR PAYMENT OF FEES AND  
REIMBURSEMENT OF EXPENSES**

Receiver Thomas F. Lennon (the "Receiver") hereby submits this reply to the responses submitted to the fee applications of the Receiver and his Professionals (the "Fee Applications").

## I. INTRODUCTION

This was, without a doubt, a case of tragic economic consequences for the thousands of people who invested in Alpha Telcom Inc. ("Alpha"). Unbeknownst to the investors, the payphone program was doomed to fail from the start, with isolated payphones scattered across the country, rendering management and upkeep of the phones an impossibly expensive and unprofitable task. While the owners, operators and marketers of the scheme expressed unbounded optimism regarding Alpha's profitability, in reality Alpha was in dire financial straits, every day sinking further into debt. As this Court knows, when the Receiver was appointed, Alpha owed over \$130 million to investors and creditors, but had no money.

The Receiver was appointed to marshal Alpha's assets in the hope more value could be created. But Alpha was a losing operation. So for the last four years, the Receiver and his Professionals worked tirelessly to wind up Alpha's affairs and pursue the tasks outlined in this Court's orders appointing him. In the process, they kept this Court and the investors fully informed about their work and major activities, and sought Court approval to pursue all major actions. In other words, all services rendered were court-ordered and/or authorized.

As with other significant events in this case, the Receiver provided notice to the over 15,000 investors and creditors in order to provide them with an opportunity to respond to the Fee Applications. In this instance, in addition to providing notice and an opportunity to receive the entire Fee Applications, the Court proposed to use a form for investors and creditors to use in responding to the Fee Applications. Not surprisingly, most of those who filled out the forms, expressed their belief that the Receiver and his Professionals should not be paid before they are.<sup>1</sup>

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<sup>1</sup> Of the 15,790 Notice and Comment Forms that were sent out, 2,490 were not delivered. (See Johnston Declaration ("Johnston Decl."), ¶ 3). Of the 13,300 that reached the investors or creditors, 1480 responses were received. (Id.) Of the 1480 non-duplicate responses received, 94 of them were from people who were not even investors or creditors of Alpha. (Id.) In addition, the Receiver believes another portion of the responses received were falsified, because some investors' names were on more than one response (the details are explained further, below). (Id., & ¶ 5). Accordingly, the Receiver estimates that there was a less than 10% return on the responses. (Id., ¶ 3).

Of the less than 10% of the investors and creditors who responded to this Court's Comment Form regarding

The responses reflect the investors' frustration and ire at their plight, and the understandable request that they want their money back.

The Receiver asserts that the vast majority of investors and creditors' responses are not relevant to the factors that the Court is to consider in approving the Fee Applications. It is important to note that only three (3) investors or creditors actually asked for copies of the Fee Applications. Instead, some investors were goaded by Ernest Bustos, a sales agents who sent a letter to investors making untrue accusations about the Receiver, the SEC, and the Court, and suggesting what investors write on their Comment Forms. Others appear to have simply ignored the relevant factors, and simply asserted that they should be paid before the Receiver or his Professionals are paid.

Federal equity receiverships are a vital aid to the enforcement of the federal securities laws. The primary purpose of the remedy is to help prevent further dissipation of defrauded investors' assets. SEC v. Wencke, 783 F.2d 829, 836 n.3 (9th Cir. 1986). Interim fee awards are an acknowledged and essential mechanism for ensuring that competent professionals are willing to serve as receivers, attorneys and accountants for receivers. Accordingly, as court-appointed officers who have faithfully, loyally and successfully discharged their duties, the Receiver and his Professionals respectfully request this Court grant their Fee Applications in their entirety, so they can be compensated for their time and costs.<sup>2</sup>

## **II. ARGUMENT**

### **A. The Fee Applications Should Be Approved In Their Entirety**

#### **1. The Governing Legal Standards**

As is the case with most areas of receivership law, the legal standard courts apply to fee applications arises out of case law, and therefore courts vary in how they articulate it. See, e.g., In re Pittsburgh, 75 F.Supp. 292, 297 (W.D. Pa. 1947) (noting "[t]here are no hard and rigid rules for

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the Receiver and his Professionals' fees, 63.4% of them believe that the Receiver and his Professionals should not be compensated at all for their work, 29.3% believe the Receiver and his Professionals should receive some compensation, and 7.2% believe the Receiver and his Professionals' Fee Applications should be granted in their entirety. (Id., ¶4).

<sup>2</sup> A summary of the amounts of fees and costs applied for was included in the Notice of Interim Fee Applications (the "Notice"). A copy of the Notice is attached to the Johnston Decl. as **Exhibit A**.

determining the compensation of equity Receivers..."). However, the general principles that emanate from the cases are the same. When evaluating fee applications, courts consider the particular circumstances of each case, including:

- The complexity of the problems faced;
- The benefit to the receivership estate;
- The quality of the work performed;
- The time records presented, including the reasonableness of the hourly rates charged in light of the usual fees for similar services; and
- Whether the SEC acquiesces to the fees.

SEC v. Fifth Avenue Coach Lines, 364 F.Supp. 1220, 1222 (S.D.N.Y. 1973) (granting counsel's fee applications in receivership action in full; the fees were eminently fair and reasonable, based on meticulous time records and the firm's usual hourly billing rates, and the firm rendered valuable services in a variety of complex matters, all of which demanded the time, competence and diverse resources of a firm of its caliber); see also, e.g., Donovan v. Robbins, 588 F.Supp 1268, 1272 (N.D. Ill. 1984) (summarizing varying approaches to evaluating fee applications); SEC v. Moody, 374 F.Supp. 465, 480-87 (S.D. Tex. 1974) (discussing factors to be considered in affixing receivers' compensation). The factors are all relevant, and all should be weighed.

Unlike in bankruptcy proceedings, when evaluating a fee application in a federal securities law receivership, the "preservation of assets for creditors is not a prime concern." Fifth Avenue Coach Lines, 364 F.Supp. at 1222. Rather, the Court should consider whether the receiver diligently and successfully discharged the responsibilities the Court gave him. See Donovan, 588 F.Supp. at 1273 (although receiver may not have increased the value of the property, he diligently and successfully discharged his court-ordered responsibilities and was entitled to reasonable compensation for his work). "Even though a receiver may not have increased, or prevented a decrease in, the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation." Gaskill v. Gordon, F.3d 248, 253 (7th Cir. 1994) (citing SEC v. Elliot, 953 F.2d 1560, 1577 (11th Cir. 1992); Donovan, 588 F.Supp. at 1273).

The federal equity receiver is, after all, a court-appointed officer. E.g., Gaskill, 27 F.3d at 251 ("the receiver is an officer of the court entrusted with administration of the property".) Each

court dictates each particular receiver's role, and when a receiver discharges his duties successfully, the receiver and his professionals are supposed to be paid. In fact, district courts are supposed to protect the receiver's right to be compensated for his services and reimbursed for his costs. See Elliot, 953 F.2d at 1576.

**B. Application Of The Legal Standard Shows The Fee Applications Should Be Approved**

As detailed in the Fee Applications, a thorough application of the legal standard shows the Fee Applications should be approved in their entirety. The investor responses do not set forth any legitimate reason why the Fee Applications should not be granted in full. The Receiver and his Professionals have done everything, step-by-step, as they were ordered by this Court to do. They have discharged their responsibilities loyally, efficiently and successfully, especially in light of the complexities faced in this receivership. The attorneys even discounted their fees by writing off over \$100,000, thereby ameliorating any discrepancy between the rates for local counsel.

As this Court knows, when the Receiver was appointed, Alpha was more than \$130 million in debt, the receivership entities had filed for bankruptcy, the operations were spread over 42 states, the owner of Alpha was denying liability and continuing to assert the legitimacy of the enterprise, and thousands of investors, scattered across the country, were wondering what happened to their investments. By any measure, the business affairs of Alpha were in a state of disarray. Nevertheless, the Receiver and his Professionals organized and liquidated Alpha's business operations. They analyzed Alpha's books and records, and managed the daily operations of the receivership entities while marshaling and liquidating the assets. Once judgments were entered against the defendants in the underlying SEC case, they promptly moved to sell the assets, stem the operating losses and pursue claims against sales agents and others who participated in the fundraising process. In the meantime, they communicated with the Court and the thousands of investors to keep them informed, all while dealing with the complex legal problems that arose daily. See In re Pittsburgh, 75 F. Supp. at 298-99.

These accomplishments were made possible by the Receiver's experience, gained over twenty years in more than fourteen SEC proceedings (in which well over a billion dollars in

investor funds were involved) and numerous state court receivership cases, and his Professionals' aptitude, commitment and tireless hard work. The whole receivership team demonstrated exceptional business acumen and perseverance in their attempts to create value from a valueless receivership estate, and, as detailed in the Fee Applications, their work and accomplishments were numerous. They copiously-kept meticulous time-records, detailing, activity-by-activity, day-by-day, and category-by-category, the work that was done over the past four years. Their fees and costs are extraordinarily reasonable, given the work that was accomplished. The SEC's acquiescence to the fees is just more evidence the Fee Applications should be approved in their entirety. There is not one valid reason to deprive the Receiver and his Professionals' of any compensation for their work.

**C. The Investor Responses Reflect Frustration And Grief Over A Bad Investment, But Do Not Bear Upon The Applicable Standards For The Allowance Of Fees**

**1. Statistically, The Responses Do Not Reflect A Significant Portion Of Investors**

Pursuant to this Court's instructions, the Receiver sent this Court's Notice and Comment Form to 15,790 investors and creditors, giving them an opportunity to comment on the Fee Applications. (See Johnston Decl., ¶ 3 and Exh. A). Approximately 2,490 of them were not delivered. (Id.) But still only 1480, non-duplicate responses were received. (See Johnston Decl., ¶ 4 and Exh. B). Of the 1480 responses, approximately 94, or 7%, were submitted by people who were not even investors or creditors of Alpha. (See Johnston Decl., ¶ 5). The Receiver believes another portion of the Comment Forms were falsified. (See Johnston Decl., ¶ 3). Ultimately, the Receiver estimates that less than 10% of the investors and creditors who received the Notice and Comment Forms responded to them. (Id.)

**2. Some Of The Responses Are Of Suspicious Origin And Must Be Disregarded**

A number of responses must be disregarded because they were filed by people who were not even investors in Alpha. Apparently, someone named Frank G. Hooper sent out a copy of the Notice and Comment Form to non-Alpha investors or creditors, and some of those people actually filled out the forms, expressing their strong distaste for the Receiver and his Professionals' Fee

Applications. (See Johnston Decl., ¶ 5). The absurdity of this, and the non-relevancy of these responses, goes without saying.

Another portion of responses appear to have been sent by one of the sales agents, located at 9105 Pkwy E., B'Ham, AL, 35206, who had various investors' names. (See Johnston Decl., ¶ 6 and Exh. F). Some of those investors also filed other Comment Forms, indicating that some type of falsification occurred. Ironically, one of the investors alleges the sales agent from whose office the Comment Forms were sent, forged her signature on something. (Id.).

Many of the remaining responses are uncannily similar to each other. In fact, the comments fall neatly into a few general categories, described more fully below. The substance of the comments is factually inaccurate and legally irrelevant, yet significant numbers of people state the exact same things. This is easily explained. Ernest Bustos, no stranger to this Court, sent a letter dated December 5, 2005 from the "Payphone Owners Legal Fund," railing on the Receiver, the SEC and the Court, perpetuating factual inaccuracies about Alpha, and suggesting what investors write in their responses. (See Johnston Decl., ¶ 7 and Exh. G). Some investors and creditors, unsurprisingly enraged by the inaccuracies Mr. Bustos articulated, regurgitated Mr. Bustos' contentions in their Comment Forms. (Id.; See also Id., ¶ 8 and Exh. I). Yet not only are the comments factually untrue, but they also have nothing to do with the Fee Applications or the legal standard to be applied by the Court in reviewing receivership fee applications.

**3. The Responses Are Not Based Upon A Review Of The Fee Applications Or The Applicable Legal Standard**

The comments contained in the Comment Forms are not even based upon a review of the Fee Applications. Only three investors actually asked for a copy of the Fee Applications. (See Johnston Decl., ¶ 3).

The remaining responses are not relevant to the legal standard this Court must apply when determining how much to compensate the Receiver and his Professionals for their work. For the most part, the responses reflect nothing other than a comparison of the amount of money investors lost and the amounts requested by the Receiver and his Professionals. They express the

understandable frustration and grief of the people who were taken advantage of by the defendants and their army of sales agents. Many of the investors who responded think they should be paid back before the Receiver and his Professionals are paid anything. And many of them express their opinion that the Receiver, the attorneys, the Court and the SEC are scoundrels.

Their sentiments are not surprising, but nor are they relevant. Were this a popularity contest, the Receiver, the attorneys, the SEC and the Court would lose. But the legal standard for approving fee applications does not include a popularity element. It would be an abuse of discretion for this Court to find that the investor and creditor responses serve as a basis for denying or limiting the fees of the Receiver and his Professionals.

One of the general complaints expressed in the Comment Forms is that the investors "owned" the payphones and the Receiver did not return them. See Johnston Decl., Exh. A. This is not only a totally irrelevant argument as to why the Fee Applications should not be approved in their entirety, but it is completely factually inaccurate. Mr. Bustos continues to perpetuate the misperception that investors bought the payphones themselves, and that they therefore should be entitled to take physical possession of them, or receive proceeds from their sale. See Johnston Decl., Exh. G. But in reality, the investors never bought the payphones, they bought securities.

Some of the Comment Forms argue the Receiver should not be paid because the Receiver "voluntarily" contacted the IRS to give it a list of investors so the IRS could bill them for taxes, interest and penalties. This is another absurd argument, factually inaccurate and totally irrelevant, planted by Ernest Bustos. Alpha perpetuated the illusion that the payphones were handicap-accessible and therefore available for tax credits. This was not true, and when the IRS found out, it charged some of the investors for their illegally-taken tax credits. This was very unfortunate but the Receiver does not control the IRS.

Another common theme in the Comment Forms is that the Receiver and his Professionals should not be paid before the investors. Many of the investors are elderly, and some contend they invested their entire lives' savings in Alpha, and were too naïve to know Alpha was a boondoggle. Some of them argue the Receiver and his Professionals' fees should be paid by the SEC or the

Court. Yet others argue the receivership remedy is a fraud, and the Receiver is actually a criminal who preys on investors and should be prosecuted. These concerns, in part, may arise from Mr. Bustos and his "Payphone Owners Legal Fund," through which he himself continues to prey on the investors. In part, they reflect the frustration of these investors. But again, their comments are completely unrelated to the legal standards this Court must apply here. The Receiver and his Professionals discharged their duties in this receivership loyally and successfully, with Court approval. In Fifth Avenue Coach Lines, where someone argued the Receiver's fees should be disapproved because the services rendered were wasteful or unproductive, the Court rejected the argument. 364 F. Supp. at 1222. All of the services to which the person pointed were "explicitly approved, after careful evaluation," by the judge. Id. Accordingly, the court held the allegations were without substance. Here, too, the Court approved the Receiver's actions. For his work, he should be paid, as a matter of law and equity.

Another hot-button theme in many of the Comment Forms is that the Receiver and his Professionals should not be paid because the Receiver did not cash-in the "insurance policies" on the payphones. However, as this Court knows, the insured buyback of the phones was a program that failed when the principals did not meet the required premium payment schedule after utilizing the reserve that had been established. SEC v. Alpha Telcom, Inc., 187 F. Supp 2d 1250 (D. Or. 2002), aff'd sub nom., SEC v. Rubera, 350 F.3d 1084 (9th Cir. 2003).

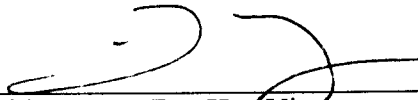
### III. CONCLUSION

As illustrated above, the responses received must be put in context – they are canned responses motivated by frustration over losses incurred in connection with a fraud and, in some cases, incited by Mr. Bustos and other sales agents. Accordingly, the Receiver and his professionals respectfully request this Court grant their Fee Applications in their entirety.

DATED this 30 day of January, 2006.

Respectfully submitted,

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