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Attorneys for Receiver
THOMAS F. LENNON, as Court Appointed Receiver 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

RECEIVER'S SUPPLEMENTAL BRIEF
REGARDING DUE PROCESS
IMPLICATIONS OF RECEIVER'S
PROPOSED PLAN FOR DISTRIBUTION

Thomas F. Lennon, the Court-appointed Receiver (the "Receiver") for Alpha Telcom, Inc., American Telecommunications Company, Inc., Strategic Partnership Alliance, LLC, SPA Marketing, LLC, and their respective subsidiaries and affiliates (collectively, "Alpha Telcom") in the above-captioned case hereby submits this Supplemental Brief Regarding Due Process Implications of Receiver's Proposed Plan For Distribution, in response to the Court's December 12, 2008 inquiry regarding the Receiver's efforts to provide Alpha Telcom investors with copies of the Court's Notice and Comment Form, issued November 3, 2008.

I. RELEVANT BACKGROUND.

On or about October 15, 2008, the Receiver filed his Motion to Approve Plan for Distribution of Assets, Payment of Professionals, Closure of the Receivership, and Discharge the Receiver, along with a Proposed Plan for Distribution of Alpha Telcom assets to investors (the "Plan for Distribution"), and the respective Final Fee Applications of the Receiver, his attorneys, and his forensic accountants.

On October 16, 2008, the Court entered a preliminary Order and Notice and Comment Form, which was subsequently withdrawn on October 21, 2008. On October 23, 2008, the Receiver's counsel wrote to the Court to provide an estimate of the cost of mailing the Court's preliminary Notice and Comment form to Alpha Telcom investors, which was estimated at approximately \$14,980.00. The purpose of this correspondence was two-fold: to provide the Court with information regarding the cost of notice, and to obtain guidance from the Court given that the estimated cost of mailing the Court's preliminary Notice and Comment Form exceeded that of mailing the Receiver's proposed notice.

On November 3, 2008, apparently in response to the Receiver's October 23, 2008 correspondence, the Court entered a revised Order and Notice and Comment Form (the "November Notice"). The language in the Court's Order stated that the Receiver was to post the Notice and Comment Form on his website. As stated in previous correspondence to the Court, the Receiver understood this to mean that the Receiver should not mail the Notice and Comment form to investors, but instead to post it to his website.

Nonetheless, and in an attempt to ensure that the Receiver had correctly interpreted the Court's November 3, 2008 Order, his counsel sent a second letter to the Court, requesting a clarification of its Order, and noting that, in the absence of further notice from the Court, the Receiver would provide notice to investors by promptly posting the November Notice, along with the remainder of the above-referenced documents, to his website. No response was received from the Court, and the aforementioned materials were promptly posted to the Receiver's website.

The Receiver has therefore not mailed the November Notice to each individual investor. It appeared from the Court's November 3, 2008 Order that such a course of action was unnecessary, and that the Receiver was in compliance with the Court's Order by posting the November Notice to his website. Moreover, as addressed below, the due process rights of the Alpha Telcom investors are not implicated in connection with the Plan for Distribution or its accompanying documents.

II. ARGUMENT.

A. No Due Process Rights Are Implicated By The Receiver's Plan for Distribution.

As a preliminary matter, the Receiver notes that there is no applicable statute or local rule calling for notice to be given to investors as to fee applications or distribution plans in receivership cases. Likewise, the Court's administrative decisions as to how to distribute funds disgorged to the Receiver in the context of the above-referenced case, pursuant to a judgment in favor of the Securities and Exchange Commission (the "Commission") do not implicate the due process rights of investors.

More importantly, as noted in recent correspondence to the Court, the funds disgorged in this matter pursuant to a judgment in favor of the Commission are not the property of Alpha Telcom's investors. Thus, distribution of the proceeds from the disgorgement judgment does not implicate the investors' due process rights. Indeed, as a general rule, the funds disgorged in connection with an enforcement action by the Commission are not primarily intended to compensate defrauded investors. To the contrary, "[d]isgorgement plays a central role in the enforcement of the securities laws ... The deterrent effect of [a Commission] enforcement action

would be greatly undermined if securities law violators were not required to disgorge illicit profits ... Although the Commission may at times use the disgorged proceeds to compensate injured victims, this does not detract from the public nature of Commission enforcement actions," and thus, until the Commission – in this case through the Receiver – completes a distribution, the disgorged funds are not the property of investors. SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993).

Due process rights are implicated only where an action will deprive an individual of a significant property interest. See SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992). Here, as described above, Alpha Telcom's investors have no property interest in the funds disgorged pursuant to the Commission's judgment, which funds are proposed to be used to pay the Receiver and his professionals, and to be distributed to investors. Thus, due process considerations do not attach to the distribution. Thus, while the investors may expect to receive a distribution as a result of the Receiver's efforts, their expectation likewise does not give rise to a right of due process. See Perry v. Sindermann, 408 U.S. 593, 603 (1972) (A mere, subjective "expectancy" is not in interest in property protected by procedural due process); Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 860 (1977) (An "expectancy" is not property protected by the Due Process Clause); Paciulan v. George, 229 F.3d 1226, 1230 (9th Cir. 2000) (To allege a due process violation, a claimant must initially demonstrate a protectable property interest).

Here, the funds addressed by the Receiver's Plan for Distribution (and the Final Fee Applications) – funds disgorged to the Receiver pursuant to a judgment in favor of the Commission – are not the property of the Alpha Telcom investors. Rind, 991 F.2d at 1491. As a consequence, the investor's due process rights are not implicated. Elliott, 953 F.2d at 1566. While the investors might believe that they would receive a distribution from the Receiver, this belief is an expectancy, and not a true property interest protected by due process. Perry, 408 U.S. at 603. Thus, while individualized notice mailed to investors may represent a convenience, such a course of action is not required by under the law. As such, the Receiver's decision to save \$14,980.00 in mailing costs (which actually inures to the benefit of Alpha Telcom investors) does not implicate – or violate – the investors' due process rights.

B. Even If Alpha Telcom Investors Had A Right Analogous To Due Process, Posting The November Notice To The Receiver's Website Is Sufficient.

Due Process is a flexible standard, and the requirements of due process vary with the rights at issue. Matthews v. Eldridge, 424 U.S. 319, 334 (1976) (Due process is a "flexible" standard that "calls for such procedural protections as the particular situation demands"). Here, as noted above, the Alpha Telcom investors do not have a property interest in the funds addressed by the Plan for Distribution, and their expectancy does not give rise to a right of due process. Perry, 408 U.S. at 603.

Nonetheless, to the extent that the Court seeks to impute an analogous right to the Alpha Telcom investors, the Receiver urges the adoption of the "flexible" standard articulated by the Matthews court; that is, notice should be tailored to the particular demands of the situation.

Here, the cost of individually noticing each investor of the Receiver's Plan for Distribution would reduce the amount of funds available for distribution to investors. Moreover, the Receiver is aware that many Alpha Telcom investors have followed the developments in the above-captioned case (and those in the related bankruptcy cases) with great interest, and would like to remain apprised of recent developments. As a result, where individualized notice is not required, broader notice – via the Receiver's website – should be sufficient.

Since the inception of the above-captioned case, the Receiver has encouraged Alpha Telcom investors to monitor developments on his website. And many have. Indeed, there is undeniably a significant group of interested investors (including Mr. Bustos) who have remained current on recent developments via the Receiver's website – as reflected in the numerous comments on the Receiver's Plan for Distribution forwarded to the Court since the November Notice was posted.

III. CONCLUSION.

For the foregoing reasons, the Receiver respectfully submits that his Plan for Distribution, along with the aforementioned other documents, do not implicate the due process rights of the Alpha Telcom investors. To the extent that the Court seeks to impute an analogous right to

investors, the Receiver respectfully requests that the Court recognize the flexible nature of due process, and deem the Receiver's conduct in posting the Plan for Distribution, along with the other aforementioned documents, to his website, as sufficient to provide notice.

Dated: December 19, 2008

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By: /s/ David R. Zaro

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