

11 U.S.C. § 1112(b)
28 U.S.C. § 754
28 U.S.C. § 1692
receivership
dismissal

Alpha Tel-Com, Inc., Case No. 301-40109

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unpublished

The bankruptcy court granted debtors' motion to dismiss this chapter 11 case and denied an interested party's motion to convert the case to chapter 7. The court held that it was in the best interest of creditors and the estate to dismiss so that proceedings could continue in federal district court, where there was a pending receivership involving debtors. The court considered various factors, including that it would be more costly to administer the case in bankruptcy while the case was also being administered under the federal court receivership, and that there were summary procedures available in the receivership court that might be less costly than the procedures available in bankruptcy court to accomplish the same thing. Further, if the case were to continue in bankruptcy, it would have to be converted to chapter 7, which would cause delay and additional cost while the chapter 7 trustee and the trustee's professionals became educated about the case. The federal receiver was already in place.

The court did not find it a significant factor that the bankruptcy court would have nationwide jurisdiction to adjudicate

claims for recovery of commission payments made to brokers, while the receivership court might not. The court held that the other factors had greater weight. To the extent the district court's ability to obtain personal jurisdiction was a factor, the bankruptcy court concluded that, under 28 U.S.C. §§ 754 and 1692, the receivership court has nationwide jurisdiction over actions to recover receivership property. There is no need to meet the minimum contacts requirements of International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), because the receivership court is not exercising diversity jurisdiction.

Thus, the court concluded that dismissal rather than conversion was warranted.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 301-40109-elp11 (Lead Case)
ALPHA TEL-COM, INC.)
FLORIDA PAY PHONE SYSTEMS, INC.) Substantively Consolidated With
PACIFIC TELCOM, INC.) 301-40108-elp11
NEW YORK PAY PHONE SYSTEMS, INC.) 301-40111-elp11
) 301-40112-elp11
)
Debtors-In-Possession.) MEMORANDUM OPINION

The purpose of this Memorandum is to rule on the pending Debtors' Motion to Dismiss the bankruptcy chapter 11 cases of Alpha Tel-Com, Inc. ("Alpha"), Florida Pay Phone Systems, Inc., Pacific Telecom, Inc. and New York Pay Phone Systems, Inc. (collectively "Alpha entities" or "debtors") and Earnest Bustos's Motion to Convert the cases of the same entities to chapter 7. For reasons explained below, the Motion to Dismiss will be granted and the Motion to Convert will be denied.

1 Factual Background¹

2 The Alpha entities and three other related entities that are
3 not in bankruptcy, American Telecommunications Company, Inc.
4 ("ATC"), SPA Marketing LLC ("SPA"), and Strategic Partnership
5 Alliance LLC (collectively "ATC entities"), ran a Ponzi scheme that
6 raised millions from investors/purchasers of payphones.² Claims
7 totaling approximately \$418 million have been filed in these
8 bankruptcy cases. The Alpha and ATC entities are the subject of a
9 Securities and Exchange Commission ("SEC") initiated receivership
10 pending in the United States District Court for the District of
11 Oregon ("District Court"). Granting the pending Motion to Dismiss
12 will result in the liquidation and distribution of the assets of the
13 Alpha entities being completed through the receivership in the
14 District Court. The District Court receiver has been in control of
15 the Alpha entities during these bankruptcy cases.

16 The parties agree that continuation of the chapter 11 cases
17 is not appropriate, because reorganization is not possible. There
18 also is no dispute among the parties regarding what is left to do to
19 complete administration of the estates of the Alpha entities. There
20 needs to be a judicial determination of what rights, if any, the
21 approximately 8,000 individuals and entities who entered into

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23 ¹ Much of the factual information is derived from the
24 Declaration of Receiver Thomas F. Lennon in Support of Debtors'
25 Motion to Dismiss Bankruptcy Case Pursuant to Section 1112(b) of the
26 Bankruptcy Code ("Receiver's Declaration") (document #788).

² There is a dispute regarding whether the people and
entities that entered into payphone agreements purchased securities
rather than the specific asset.

1 payphone purchase contracts with Alpha have to the approximately
2 \$400,000 in proceeds from the sale of the payphones during these
3 bankruptcy cases. The receiver has claims against the brokers who
4 sold the payphones for approximately \$39 million³ in commissions
5 paid as compensation for the payphone sales. Finally, a court needs
6 to determine the allowed amount of the professional compensation to
7 be paid in connection with the administration of the Alpha entities
8 and ATC entities cases,⁴ and there needs to be a court determination
9 regarding proper final distribution.

10 The Parties' Arguments

11 Debtors (through the receiver) argue that dismissal rather
12 than conversion is in the best interests of creditors and the
13 estate, because the more flexible summary procedures available in
14 the receivership will allow more efficient and cost-effective
15 determination of who is entitled to the payphone proceeds and
16 whether the receiver is entitled to recover the \$39 million in
17 commissions, or some part thereof. In addition, debtors argue that,
18 if these bankruptcy cases are converted rather than dismissed, there

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20 ³ The Receiver's Declaration uses two amounts for the
21 commission payments: \$30 million, Receiver's Declaration at 3:21,
22 and \$39 million, id. at 5:25. Because Debtors' Motion to Dismiss
23 Bankruptcy Case and Memorandum of Points and Authorities in Support
(document #787) uses the \$39 million figure, Motion to Dismiss at
24 12:2, I will use that figure in this Memorandum. It makes no
25 difference to the analysis whether the amount is \$30 million or \$39
26 million.

27 ⁴ Concurrently with issuance of this memorandum, the
28 undersigned has entered an order allowing professional compensation
29 in the Alpha entities bankruptcy cases. The District Court will
30 determine professional compensation allowable in the Alpha and ATC
31 entities receivership.

1 will be two parallel liquidation proceedings, which will increase
2 administrative expenses. Simply put, debtors argue that there is no
3 further benefit to any bankruptcy administration. Everything that
4 could be accomplished in bankruptcy can be accomplished more
5 efficiently and at less expense in the receivership.

6 Bustos disagrees that the receivership will be more
7 litigation-efficient than chapter 7 bankruptcies. He asserts that
8 the payphone purchasers are entitled to more than summary
9 adjudication of their rights to the payphone proceeds. They are
10 entitled to the type of notice and process that will be provided in
11 bankruptcy adversary proceedings. In addition, he argues that the
12 District Court does not have personal jurisdiction over the brokers
13 who received the \$39 million in commissions, because
14 the District Court has federal receivership jurisdiction only in
15 judicial districts where property of the receivership is located and
16 the receiver timely filed a copy of the receivership complaint and
17 order appointing the receiver. According to Bustos, all of the
18 receivership property is located in Oregon. The brokers who
19 received the commissions were located in 40 states. Receiver's
20 Declaration at 5:26. Bustos asserts that, in the District Court
21 receivership, the receiver will have to either sue the brokers where
22 they reside or establish that they have minimum contacts with Oregon
23 under the standard established in International Shoe Co. v. State of
24 Washington, 326 U.S. 310 (1945). Bustos contends that this problem
25 is eliminated if the brokers are sued through the bankruptcy
26 process, because there is nationwide personal jurisdiction in

1 bankruptcy cases and proceedings.

2 Issue

3 Whether dismissal or conversion of the Alpha cases is in the
4 best interests of creditors and the estate.

5 Analysis

6 The bankruptcy court

7 may convert a case under . . . chapter [11] to a case under
8 chapter 7 . . . or may dismiss a case under . . . chapter
9 [11], whichever is in the best interest of creditors and the
estate, for cause

10 11 U.S.C. § 1112(b).

11 As the parties recognize, the interests of creditors and
12 payphone investors/purchasers are best served by the course that
13 will cost the least to administer and will take the least amount of
14 time to accomplish. Every dollar spent on administrative expense is
15 a dollar that is not available for the creditors and investors. I
16 agree with debtors that dismissal rather than conversion will be
17 most cost-effective, because one court, rather than two, will
18 oversee the process, and because the procedures available in
19 district court receiverships may be less costly (and, in any event,
20 are no more burdensome) than those available in bankruptcy.

21 Having a single court oversee the remaining administration
22 will avoid having two separate parallel proceedings for the Alpha
23 entities and the ATC entities, with two sets of professionals both
24 billing the estates. If the Alpha entities continue in bankruptcy,
25 the cases will have to be converted to chapter 7, because
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1 reorganization in chapter 11 is not possible. A chapter 7 trustee⁵
2 will be appointed and the trustee will need professionals,
3 particularly lawyers and accountants, to assist in accomplishing the
4 trustee's duties. These are complex cases and the professional fees
5 are likely to be substantial. The cost of educating the trustee and
6 new professionals, coupled with the delay that is likely to occur
7 while the trustee and professionals get educated, weighs against
8 conversion and in favor of dismissal.

9 "Receivership courts have the general power to use summary
10 procedure in allowing, disallowing, and subordinating the claims of
11 creditors." United States v. Arizona Fuels Corp., 739 F.2d 455, 458
12 (9th Cir. 1984). The receiver takes the position that summary
13 procedure can be used to determine the rights, if any, of the
14 payphone investors/purchasers to the \$400,000 in payphone proceeds.
15 This court has indicated that such an action in the bankruptcy court
16 is one to determine the extent and validity of ownership claims,
17 which will require an adversary proceeding. See Fed. R. Bankr. P.
18 7001.

19 The procedural differences between a summary proceeding and
20 an adversary proceeding that may impact cost and speed include the
21 type of notice required and the type of proof that may be
22 admissible. In an adversary proceeding in bankruptcy, the plaintiff
23 will have to either sue the 8,000 payphone investors/purchasers or,
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25 ⁵ A single trustee will be appointed if the Alpha entities
26 cases are converted, because the cases were substantively
consolidated by order entered on February 28, 2002.

1 possibly, use the class action process of Fed. R. Bankr. P. 7023.
2 If the 8,000 investors/purchasers are sued, service must comply with
3 Fed. R. Bankr. P. 7004, which may be difficult and complicated
4 because of the large number of defendants.

5 A summary proceeding is more flexible. While notice to the
6 parties affected must satisfy due process, it may be possible to use
7 the existing mailing list rather than figuring out if the addresses
8 on that list for each of the 8,000 investors/purchasers meets the
9 limited service options of Fed. R. Bankr. P. 7004. Evidence at the
10 trial of a bankruptcy adversary proceeding must comply with Fed. R.
11 Civ. P. 43(a). A receivership summary proceeding is similar to a
12 bankruptcy contested matter, in which evidence in the form of
13 affidavits and deposition transcripts may be more readily utilized.
14 See Fed. R. Bankr. P. 9017 and Fed. R. Civ. P. 43(e).

15 Although the District Court will ultimately have to determine
16 the merits of the receiver's position on the use of summary
17 procedure, the potential to use that procedure rather than a formal
18 adversary proceeding in resolving the rights to the \$400,000 weighs
19 in favor of dismissal. If the District Court ultimately decides
20 that the summary procedure is not available, the required plenary
21 process will be similar to a bankruptcy adversary proceeding and the
22 factor will at most be a neutral factor in the conversion/dismissal
23 decision.

24 Bustos argues that there is another legal issue that tips the
25 scale in favor of conversion rather dismissal. He argues that the
26 District Court will not have personal jurisdiction over the

1 recipients of the \$39 million in commission payments, while the
2 Bankruptcy Court would have personal jurisdiction.⁶ This argument
3 simply is not a significant factor in deciding whether to dismiss or
4 convert. The other factors discussed above have greater weight.
5 Furthermore, it is not clear what part of the commission recovery
6 claims are even property of the Alpha entities' bankruptcy estates.
7 ATC, SPA and Alpha paid the brokers' commissions. Receiver's
8 Declaration at 5:25-26. No accounting has been provided for how the
9 \$39 million is allocated among the three entities. ATC and SPA are
10 not debtors in bankruptcy; they are subject to the receivership.

11 To the extent the District Court's ability to obtain personal
12 jurisdiction over the brokers is a factor, I am not persuaded by
13 Bustos's argument that the District Court will not be able to obtain
14 personal jurisdiction.

15 Debtors argue that, assuming compliance with 28 U.S.C.
16 § 754,⁷ the receivership court has jurisdiction over all the

18 ⁶ The parties disagree regarding whether the claims for
19 recovery of the commissions can be pursued in a summary action.
20 Debtors argue that a summary proceeding can be used; Bustos disputes
21 that assertion. If debtors are correct, that potentially weighs in
22 favor of dismissal. If a plenary proceeding is necessary, it is at
most a neutral factor, because a bankruptcy action to avoid a
transfer requires an adversary proceeding. Fed. R. Bankr. P.
7001(1).

23 ⁷ 28 U.S.C. § 754 provides:

24 Receivers of property in different districts.

25 A receiver appointed in any civil action or proceeding
26 involving property, real, personal or mixed, situated in
different districts shall, upon giving bond as required by the
court, be vested with complete jurisdiction and control of all

1 receivership entity's assets of all types in the United States,
2 including real, personal, tangible and intangible assets, and has
3 nationwide personal jurisdiction.⁸ Bustos argues that § 754 only
4 establishes jurisdiction over tangible assets and does not apply to
5 the commission recovery claims, which are choses in action. Bustos
6 asserts that choses in action are located in the court where the
7 receiver-plaintiff is appointed, i.e. Oregon, and that the District
8 Court only has personal jurisdiction over defendants with minimum
9 contacts with Oregon.

10 I find debtors' argument more persuasive. As explained fully
11 in Haile v Henderson Nat'l Bank, 657 F.2d 816 (6th Cir. 1981), the
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13 such property with the right to take possession thereof.
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16 Such receiver shall, within ten days after the entry of his
17 order of appointment, file copies of the complaint and such
18 order of appointment in the district court for each district in
19 which property is located. Failure to file such copies in any
20 district shall divest the receiver of jurisdiction and control
21 over all such property in that district.

22 ⁸ Section 754 is augmented by 28 U.S.C. § 1692, which allows
23 service of process beyond the territorial limits of the district
24 court appointing the receiver. It provides:

25 In proceedings in a district court where a receiver is
26 appointed for property, real, personal, or mixed, situated in
different districts, process may issue and be executed in any
such district as if the property lay wholly within one
district, but orders affecting the property shall be entered of
record in each of such districts.

This statute is supplemented by the provisions of Fed. R. Civ. P. 4,
which provide for service of process in any judicial district.

1 action creating the receivership is the primary action, and suits
2 brought thereafter by the receiver to recover assets are ancillary
3 to the primary action. Id. at 822. As does the bankruptcy court,
4 the receivership court has nationwide jurisdiction in actions
5 seeking to recover receivership property.⁹ Once a receiver is
6 appointed and complies with the filing requirements of § 754, "state
7 or federal courts located in other districts may not exercise any
8 control over defendant's property within their territorial
9 jurisdiction" 12 Charles Alan Wright, Arthur R. Miller, and
10 Richard L. Marcus, Federal Practice and Procedure § 2985, p. 45
11 (1997). Thus, contrary to Bustos's argument, receivership property
12 must include intangible as well as tangible property. Otherwise, a
13 receivership could never administer intangible property, which would
14 seriously undermine the effectiveness of the receivership remedy.
15 The state minimum contacts prerequisite to personal jurisdiction
16 required by International Shoe and its progeny is simply not
17 applicable when dealing with a federal court not exercising
18 diversity jurisdiction. Haile, 657 F.2d at 822-823.

19 Conclusion

20 For the foregoing reasons, debtors' Motion to Dismiss is
21 granted and Bostos's Motion to Convert is denied. The court clerk
22 will prepare the dismissal order.

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25 ⁹ This court expresses no opinion as to whether the claims
26 for recovery of commissions paid are choses in action or money, and
depending on the answer to that question, where the claims are
located for purposes of jurisdiction.

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ELIZABETH L. PERRIS
Bankruptcy Judge

cc: David R. Zaro
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