

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff-Appellee,

v.

Case No. 01-10107-DD

ETS PAYPHONES, INC.,

Defendant,

and

CHARLES E. EDWARDS,

Defendant-Appellee
_____ /

**On Appeal From The United States District Court
For The Northern District of Georgia**

**MOTION OF PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE
PETITION IN SUPPORT OF THE SECURITIES
AND EXCHANGE COMMISSION'S PETITION FOR
REHEARING AND REHEARING EN BANC**

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SEC v. ETS Payphones, Inc., No. 01-10107-DD

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Amicus curiae, through its undersigned counsel, hereby certifies that the following list contains the names of those persons and entities who, to counsel's knowledge, must be identified pursuant to Eleventh Circuit Rule of Appellate Procedure 26.1-1:

Americom, Inc.

Axis Graphics, Inc.

Catherine A. Broderick, Esq.

Honorable Jack T. Camp, United States District Court for the
Northern District of Georgia

City Public Phones, Inc.

Ethan H. Cohen, Esq.

Charles E. Edwards

Meyer Eisenberg, Esq.

ETS Management Services, LLC

ETS Payphones, Inc.

ETS Payphones of California, Inc.

ETS Vending, Inc.

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SEC v. ETS Payphones, Inc., No. 01-10107-DD

IAQ Duct Doctor, Inc.

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Kutak Rock LLP

Legends Communications, Inc.

Liberty Motor Sports LLC

Susan S. McDonald, Esq.

Merritt Island LLC

MSC National, Inc.

Payphone Systems Acquisitions, Inc.

Phoenix Telecom of Puerto Rico, Inc.

Pleasant Hill Properties I, LLC

Powell, Goldstein, Frazer & Murphy LLP

Giovanni P. Prezioso, Esq.

Public Investors Arbitration Bar Association

S and R Telecommunications Consultants, Inc.

W. Scott Sorrels, Esq.

Jacob H. Stillman, Esq.

Edward G. Sullivan, Esq.

TPL, Inc.

TSC Payphone Corp.

Twinleaf, Inc.

SEC v. ETS Payphones, Inc., No. 01-10107-DD

Twinleaf Media, Inc.

U.S. Securities and Exchange Commission

Michael K. Wolensky, Esq.

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
PETITION IN SUPPORT OF PETITION FOR
REHEARING AND REHEARING EN BANC**

The Public Investors Arbitration Bar Association, through its undersigned counsel, hereby respectfully files this Motion for Leave to File Amicus Curiae Petition in Support of the Securities and Exchange Commission’s Petition for Rehearing and Rehearing En Banc, pursuant to Federal Rule of Appellate Procedure 29, and as grounds states as follows:

1. The Public Investors Arbitration Bar Association (“PIABA”) is a not-for-profit corporation, with more than 500 members from more than 45 states, districts, and territories, all of whom devote a significant portion of their practice to the arbitration of securities disputes, and all of whom represent public investors in arbitration. Collectively, PIABA members have represented or currently are representing tens of thousands of public investors in securities arbitrations around the country.

2. The official mission of PIABA is to promote the interests of public investors in securities arbitration by:

- a) protecting public investors from abuses prevalent in the arbitration process;
- b) making securities arbitration just and fair; and
- c) creating a level playing field for public investors in securities arbitration.

3. PIABA seeks to advance the rights of public investors through a variety of activities, including the submission of briefs as amicus curiae. The United States Supreme Court and federal Circuit Courts of Appeal have permitted PIABA to appear as amicus curiae in cases relating to securities arbitrations. PIABA publishes books and reports on securities arbitrations, conducts annual CLE programs for its members, and communicates with governmental and quasi-governmental agencies, such as the Securities and Exchange Commission (“SEC”), stock exchanges, and self-regulatory organizations, on issues of interest to PIABA and public investors.

4. The present case involves whether pay telephone investments offered by ETS Payphones, Inc. (“ETS”), are securities. In the decision under review, this Court determined that the ETS investments were not securities. Securities and Exchange Comm’n v. ETS Payphones, Inc., 300 F.3d 1281 (11th Cir. 2002). The SEC has now filed a Petition for Rehearing and Petition for Rehearing En Banc.

5. PIABA members represent hundreds of investors who purchased millions of dollars of ETS investments on the recommendation of registered representatives of brokerage firms. PIABA members have alleged on behalf of their clients in securities arbitrations sponsored by the National Association of Securities Dealers, Inc., that the ETS investments are securities. This Court’s decision for which rehearing is sought will thus have an impact on numerous arbitrations. This Court should permit PIABA to appear on behalf of these investors, who do not presently have any direct representation in this matter.

6. The decision of this Court for which rehearing is sought will have implications far beyond ETS, if it continues to be the law in this Circuit. In this decision, this Court has provided unscrupulous promoters with a bright line blueprint for fraud which will allow them to deprive investors of the protection of the federal securities registration laws and to evade with impunity the regulatory apparatus which Congress has instituted to protect investors. This Court held that investment contracts are not securities if they offer a fixed rate of return. A fixed rate of return, however, is the feature of an investment most likely to appeal to the safety-conscious elderly investors whom PIABA members commonly represent. The decision under review, if it remains the law, will therefore significantly increase the incidence of investment fraud in Florida, Georgia, and Alabama. Before countenancing this result, the Panel should reconsider its ruling, and the full Court should review the decision in the event that the Panel declines to do so.

7. The SEC has energetically and ably presented the case for finding that the ETS investments were securities. PIABA strongly supports the SEC's effort but asks for leave to provide an additional perspective from the ordinary investors' point of view. In addition, PIABA has reviewed the briefs of the parties and believes that other cases and arguments support the SEC's position. PIABA therefore asks for leave to file an amicus petition to present these points and authorities on behalf of ordinary investors in this Circuit.

8. This Court has previously allowed the submission of amicus petitions in support of a petition for rehearing or rehearing en banc. See Messer v. E.F. Hutton

& Co., 847 F.2d 673, 674 (11th Cir. 1988) (“Upon publication of the panel’s opinion, the Commodity Futures Trading Commission (CFTC) moved this Court for leave to file a brief as amicus curiae in support of rehearing. The panel granted the motion”); Newton v. Capital Assurance Co., 245 F.3d 1306, 1307 (11th Cir. 2001) (The “Petition for Rehearing, which the United States has supported as amicus curiae, is GRANTED. We agree with the United States”); Clover v. Total System Services, Inc., 176 F.3d 1346, 1352 (11th Cir. 1999) (discussing EEOC’s argument raised in an amicus brief filed with a petition for rehearing); Eastland v. Tennessee Valley Authority, 714 F.2d 1066, 1067 (11th Cir. 1983) (discussing “amicus brief filed by the NAACP Legal Defense and Educational Fund, Inc., in support of the petition for rehearing/rehearing en banc”).

WHEREFORE, PIABA respectfully requests this Court to grant this Motion.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to **Michael H. Wolensky, Esq.**, Kutak Rock, LLP, 225 Peachtree Street, N.E., Suite 2100, Atlanta, Georgia 30303, and **Catherine A. Broderick, Esq.**, Securities and Exchange Commission, Office of the General Counsel, 450 Fifth Street, N.W., Washington, D.C. 20549-0606 via U.S. Mail, on this * day of September, 2002.

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

By: _____

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