

NO. 01-10107-DD

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

ETS PAYPHONES, INC.,

Defendant,

and

CHARLES E. EDWARDS,

Defendant-Appellant.

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On Appeal From the United States District Court  
for the Northern District of Georgia

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MOTION OF *AMICUS CURIAE* NORTH AMERICAN SECURITIES ADMINISTRATORS  
ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF IN SUPPORT OF  
SECURITIES AND EXCHANGE COMMISSION'S PETITION FOR REHEARING AND  
REHEARING *EN BANC*

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

Pursuant to Fed. R. App. P. 26.1 and 29, and 11<sup>th</sup> Cir. R. 26.1 and 29-1, NASAA submits the following list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company that owns 10% or more of NASAA's stock, and other identifiable legal entities related to a party:

Alabama Securities Commission

Alaska Department of Community & Economic Development, Division  
of Banking, Securities & Corporations

Alberta Securities Commission

Arizona Corporation Commission, Securities Division

Arkansas Securities Department

British Columbia Securities Commission

Broderick, Catherine A.

California Department of Corporations

Camp, Honorable Jack T.

Cohen, Ethan H.

Colorado Division of Securities

Connecticut Department of Banking

Davis, Mark J.

Delaware Department of Justice

District of Columbia

Edwards, Charles E.

Eisenberg, Meyer

ETS Management Services

ETS Payphones, Inc.

ETS Payphones of California, Inc.

ETS Vending, Inc.

Florida Office of Comptroller, Department of Banking

Georgia Office of the Secretary of State, Division of Securities  
& Business Regulation

Griffin, Royce O.

Hall, Stephen W.

Hawaii Department of Commerce & Consumer Affairs

Idaho Department of Finance

Illinois Office of the Secretary of State, Securities Department

Indiana Office of the Secretary of State, Securities Division

Iowa Insurance Division, Securities Bureau

Kansas Office of the Securities Commissioner

Kentucky Department of Financial Institutions

Kutak Rock, LLP

Louisiana Securities Commission

Maine Office of Securities

Manitoba Securities Commission

Maryland Office of the Attorney General

Massachusetts Securities Division

McDonald, Susan S.

Mexico Comision Nacional Bancaria y de Valores

Michigan Office of Financial & Insurance Services

Minnesota Department of Commerce

Mississippi Office of the Secretary of State, Business  
Regulation & Enforcement Division

Missouri Office of the Secretary of State

Montana Office of the State Auditor, Securities Department

Nebraska Department of Banking & Finance, Bureau of Securities

Nevada Secretary of State, Securities Division

New Brunswick Department of Justice, Securities Administration  
Branch

Newfoundland Securities Commission

New Hampshire Bureau of Securities Regulation, Department of  
State

New Jersey Department of Law & Public Safety, Bureau of  
Securities

New Mexico Regulation & Licensing Department, Securities  
Division

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

New York Office of the Attorney General, Investment Protection  
Bureau

North Carolina Department of the Secretary of State, Securities  
Division

North Dakota Securities Commission

Northwest Territories Securities Registry, Department of Justice

Nova Scotia Securities Commission

Nunavut Department of Justice, Legal Registries Division

Ohio Division of Securities

Oklahoma Department of Securities

Ontario Securities Commission

Oregon Department of Consumer & Business Services, Division of  
Finance & Corporate Securities

Pennsylvania Securities Commission

Prezioso, Giovanni P.

Prince Edward Island Office of the Attorney General

Puerto Rico Commissioner of Financial Institutions

Quebec Commission des Valeurs Mobilieres

Rhode Island Department of Business Regulation

Saskatchewan Securities Commission

Sauriol, Laura J.

South Carolina Office of the Attorney General, Securities  
Division

South Dakota Division of Securities

Stillman, Jacob H.

Tennessee Department of Commerce & Insurance, Securities  
Division

Texas State Securities Board

U.S. Securities and Exchange Commission

Utah Department of Commerce, Division of Securities

Vermont Department of Banking, Insurance, Securities & Health  
Care Administration

Virginia State Corporation Commission, Division of Securities &  
Retail Franchising

Washington Department of Financial Institutions, Securities  
Division

West Virginia, Office of the State Auditor, Securities Division

Wisconsin Department of Financial Institutions, Division of  
Securities

Wolensky, Michael K.

Wyoming Secretary of State, Securities Division

Yukon Department of Justice

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

The North American Securities Administrators Association, Inc. ("NASAA") hereby moves this Court for leave to file an *amicus curiae* brief in support of the Petition of the Securities and Exchange Commission for Rehearing and Rehearing *En Banc*. The proposed brief is filed with this Motion. The grounds for this Motion are set forth below.

**I. Identity and Interest of Amicus Curiae**

The North American Securities Administrators Association, Inc. ("NASAA"), is a nonprofit association of the state, provincial, and territorial securities regulators in the United States and Canada, and of the Mexican national government. Formed in 1919, it is the oldest international organization devoted to the protection of investors in securities.

As state securities regulators, the members of NASAA are primarily concerned with protecting investors from fraud and abuse in the offer and sale of securities. The Panel's decision in this case, holding that ETS pay phone investments are not securities, undermines investor protection on three levels: (1) it strips away the protections of securities regulation from pay phone investment contracts, which are notorious vehicles for fraud and abuse; (2) it narrows the definition of "investment contract" under *SEC v. W. J. Howey Co.*, 328 U.S. 293 (1946), creating significant loopholes for unscrupulous promoters

selling other types of investments; and (3) it sets a precedent that will adversely affect the evolution of state securities law to the detriment of investors, insofar as many state courts look to federal decisions for guidance on issues common to state and federal securities law. For these reasons, NASAA and its members have an interest in the outcome of this case.

## **II. An Amicus Curiae Brief From NASAA Is Desirable and Relevant**

The *amicus curiae* brief from NASAA is desirable in this case for three reasons. First, NASAA is uniquely situated to address the deleterious impact of the Panel's decision on public investors - a matter of exceptional importance under Fed. R. App. P. 35. For almost a century, state securities regulators have been at the forefront of the fight to protect "Main Street" investors from fraudulent securities offerings. NASAA, informed by its members, is intimately familiar with the toll that such schemes exact and the importance of securities regulation as a deterrent and as a remedy.

Second, NASAA can speak with authority on the impact that federal decisions can have on state securities law - also a matter of exceptional importance under Fed. R. App. P. 35. State courts and administrative agencies often look to federal case law for guidance with respect to securities issues. The Panel's decision, if left uncorrected, will negatively influence



the evolution of state securities law and will undermine the cause of investor protection.

Third and finally, NASAA offers legal analysis of federal law that complements the SEC's arguments in support of the rehearing petition. In accordance with Fed. R. App. P. 35, the SEC argues persuasively that the Panel's decision conflicts with both Supreme Court and circuit court precedent. NASAA's brief adds to this analysis.

In summary, NASAA and its members have a demonstrable interest in the outcome of this case, the *amicus* brief will assist the Court and is therefore desirable, and all matters asserted in the brief are relevant to the disposition of the case under Fed. R. App. P. 35.

**CONCLUSION**

For the reasons set forth above, NASAA requests that the Court grant this motion for leave and accept the accompanying *amicus curiae* brief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the \_\_\_ day of September, 2002, the required number of copies of the foregoing motion for leave to file *amicus curiae* brief were served by next day delivery service, on the following persons at the following addresses:

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